Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 8, 2019

TO: Honorable Council President Pro Tem, Barbara Bry

FROM: City Attorney

SUBJECT: Potential Application of the Ralph M. Brown Act and Public Records Act to the Activities of the NTC Foundation

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INTRODUCTION

In June 2018, various media articles reported on complaints from artist tenants regarding the Naval Training Center Foundation's management of the Civic Arts and Cultural Center (CACC) within the master-planned development of the former Naval Training Center San Diego (NTC), now known as Liberty Station.[1] According to these media articles, certain tenants were unhappy about rent increases and sought more transparency from the NTC Foundation (Foundation), including the opportunity to attend meetings of the Foundation's board of directors (Foundation Board).

After receiving a Fraud Hotline Complaint regarding the perceived lack of transparency in the Foundation's operations, the Office of the City Auditor asked this Office to determine whether the Foundation is legally obligated to comply with California's open meetings law (the Ralph M. Brown Act, or Brown Act).

You have also asked our Office a series of questions, including whether the Foundation Board is legally obligated to comply with the Brown Act and the California Public Records Act (Public Records Act).[2]

QUESTIONS PRESENTED

1. Is the Foundation Board obligated to comply with the Brown Act?

2. Is the Foundation obligated to comply with the Public Records Act?

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[1] Since past questions related to the North Chapel located in NTC have been interwoven with the CACC, it should be noted that the North Chapel is not within the CACC and not managed by the Foundation.

[2] This Office previouslyaddressed your other questions in memorandum entitled "Leasing of the North Chapel and the NTC Foundation." City Att'y MS-2019-2 (January 18, 2019).

SHORT ANSWERS

1. The City Council did not create the Foundation in order to exercise governmental authority delegated by the City Council to the Foundation, which means it is not a legislative body subject to the Brown Act.

2. The Foundation's Board is not a legislative body of a local agency and is therefore not required to comply with the Public Records Act.

BACKGROUND

The NTC was commissioned in 1923 to provide training for members of the United States Navy and United States Naval Reserve. After the United States Navy announced its intention to close NTC in July 1993, the United States Department of Defense recognized the City of San Diego (City) as the "Local Redevelopment Authority" responsible for redeveloping NTC under the Defense Base Closure and Realignment Act of 1990.

In May 1997, the City Council adopted the NTC Redevelopment Plan, as required by former California Health and Safety Code section 33351, designating NTC as a redevelopment project area and authorizing the Redevelopment Agency of the City of San Diego (RDA) to undertake the redevelopment of NTC. The NTC Redevelopment Plan authorized the RDA to rehabilitate any buildings or structures, as well as to sell, lease, transfer, or otherwise dispose of any interest in real property in the project area.

In October 1998, the City Council adopted the NTC Reuse Plan (Reuse Plan) setting forth an overall conceptual program for reuse and redevelopment of NTC. The Reuse Plan contemplated that a private master development partner would implement the Reuse Plan and advance the necessary funding to ensure timely development. Reuse Plan, Implementation, p. 3. The City Council later approved the NTC Precise Plan (Precise Plan), which describes the anticipated development, design program, and implementation approach for the redevelopment of NTC in greater detail than the Reuse Plan.

On June 26, 2000, the RDA and McMillin-NTC LLC (McMillin) entered into a Disposition and Development Agreement (DDA) for McMillin to act as the master developer of NTC.[3] The DDA outlined how the RDA would sell or ground lease, or sell and lease, certain property in the NTC Redevelopment Project to McMillin and its assignees. In a joint public hearing, the RDA and the City Council approved the DDA pursuant to RDA Resolution R-03175 and San Diego Resolution R-293410. Although the City was not a party to the DDA, Community

[3] On May 30, 2000, the federal government, through the Navy, transferred the land to the City by quitclaim deed. On April 30, 2002, the City quitclaimed the land to the RDA to redevelop the property in accordance with the terms of the NTC Redevelopment Plan, the Reuse Plan, and the DDA. After the dissolution of redevelopment, the property was conveyed to the City as Successor Agency by operation of law. Cal. Health & Safety Code §§ 34175(b), 34177. In September 2016, the Successor Agency conveyed the property to the City in accordance with the Amended and Restated Long Range Property Management Plan.

Redevelopment Law in effect at the time required the City Council to approve certain provisions of the DDA. Former Cal. Health and Safety Code § 33433. This law required the City Council to hold a public hearing and adopt a resolution approving the RDA's sale or lease of any property. The purpose was to ensure that the property was sold or leased at no less than fair reuse value and that the DDA transaction would assist in the elimination of blight and be consistent with the RDA's implementation plan.

The DDA required McMillin to establish the Foundation as a nonprofit public benefit corporation to administer the CACC; to submit the Foundation's articles of incorporation, bylaws, and other formation documents; to ensure that the Foundation hired appropriate staff to manage the CACC; and to provide $2 million of initial funding for the Foundation.[4] McMillin was also required to guarantee the Foundation's performance of certain rehabilitation work on sites within the CACC. DDA, Part 8. The Foundation was specifically intended to be "a community-based organization . . . independent of governmental and private interests," with a Board composed of local civic leaders representing the cultural diversity, age and gender balance, and interests of the San Diego region. DDA, Attachment 19.

The DDA contemplated that the Foundation would submit to the RDA for approval an implementation plan for properties within the CACC. Once certain conditions were satisfied pursuant to section 1.8(g)(3) of the DDA, the Foundation and the RDA would enter into 55-year ground leases for these properties.[5] *See* Attachment DDA, Attachment 20, Form NTC Ground Lease between RDA and Foundation. Section 2.16 of these ground leases stated that during the term of the lease, all buildings, structures, fixtures, additions, and improvements located on the leased property were considered to be owned in fee by the Foundation and that the RDA quitclaimed its right, title, and interest to such property. Upon expiration or termination of the lease, the property, including any additions or improvements, would revert to the RDA.

In conjunction with the DDA, the City and the RDA entered into a Cooperation Agreement for the NTC Redevelopment Project. In addition to both agencies pledging assistance to each other to implement the Redevelopment Plan, the Reuse Plan, and the DDA, the City and RDA acknowledged the private nature of the project upon conveyance of the title by the RDA to McMillin or its assignees. Cooperation Agreement, § 4.2.1 (June 26, 2000).

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[4] The Foundation's articles of incorporation state that the non-profit was formed for the following specific purposes: (1) to acquire, renovate and preserve the land and the facilities of NTC, specifically related to the CACC; (2) to operate the CACC as a civic, arts, and cultural center; and (3) to enter into agreements as are reasonably required by the terms and conditions of the DDA. Section 3.19(g) of the Foundation's bylaws authorizes the Foundation Board to create an advisory committee to advise on general issues of concern to the Foundation Board.

[5] The Foundation created a number of different entities such as NTCF LibertyStation 1, LLC, NTC Liberty Station II, LLC, and NTC Liberty 19 Owner, LP, for the purpose of rehabilitating different properties within the CACC. Properties within the CACC that are not yet held under a ground lease by the Foundation or one of its directly controlled entities are managed by McMillin pursuant to the NTC Interim Lease By and Between the City of San Diego and NTC Property Management, LLC. *See* Attachment B to Amended and Restated Long-Range Property Management Plan.

Upon conveyance of title by the RDA to McMillin or its assignees, which included the Foundation, the buildings and improvements to be constructed and rehabilitated pursuant to the DDA were to be privately owned, including those buildings and improvements that are situated on property owned in fee by the RDA and ground leased to McMillin or its assignee. *Id*. The Cooperation Agreement further stated that the City and RDA would have no interest or responsibilities for, or duty to, third parties concerning any of the construction or improvement work to be performed pursuant to the DDA; rather, McMillin or its assignees would have full power over and exclusive use of the site subject to any applicable ground lease in which the RDA is the landlord. *Id.*

Additionally, the Cooperation Agreement expressly stated that McMillin was not an agent of the RDA or City. Furthermore, the City and RDA agreed that, to the extent a particular application of any rule or regulation depended on whether a building or improvement was publicly or privately owned, it was the express intention of the City and RDA that the buildings and improvements to be constructed and rehabilitated by Master Developer or its assignees on the NTC Redevelopment Project pursuant to the DDA were to be deemed privately owned for all purposes. *Id.*

During a City Council meeting on May 6, 2003, related to the approval of an application to obtain United States Department of Housing and Urban Development (HUD) loan funding for rehabilitation for certain property within the CACC, the question of whether the Foundation Board was required to comply with the Brown Act arose. At that meeting, an Assistant City Attorney stated that the Foundation Board was not subject to the Brown Act. Nevertheless, Foundation representatives agreed to meet with City staff to discuss what could be done to make the Foundation's operations more transparent.

Ultimately, the Foundation agreed to host "Civic Communication Forums" pursuant to the terms of various Rehabilitation Grant Agreements between the RDA and the Foundation (Grant Agreements). Specifically, Section 4.6 of the Grant Agreements stated that "[t]he Foundation shall institute and provide, on an on-going basis, civic communication forums, to provide information to and obtain input from interested community groups and individuals regarding the Civic Arts and Cultural Center."[6]

[6] Section 4.6 also says that the forums were to comply with the format described in Attachment No. 10, which stated that one of the purposes of the forum meetings was to "[r]espond to City Council's request to be more open with NTC Foundation activities and progress with the public and provide the opportunity to provide input." Pursuant to the original Grant Agreement, the meetings were to be held on the third Tuesday of each month before the regularly scheduled Foundation Board meeting and the Foundation Executive Director and two Board members were required to be in attendance. The meeting notices and forum agenda were to be posted on the NTC Foundation's website as well as sent to community groups and individuals at their request. The meeting notices were also to be sent to local community newspapers for weekly listing of such meetings. The archive records were to be kept on the Foundation's website as well as be available in the NTC Foundation's business office. According to City staff, all rehabilitation work under the Grant Agreements has been completed, and on that basis, the Foundation is no longer holding the civic communication forums.

ANALYSIS

I. THE FOUNDATION BOARD IS NOT REQUIRED TO COMPLY WITH THE BROWN ACT

The Brown Act requires that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency . . . ." Cal. Gov't Code § 54953(a).

A private nonprofit corporation's board of directors is deemed a "legislative body of a local agency" for Brown Act purposes in either of two scenarios. Cal. Gov't Code § 54952. First, the board of directors could be a legislative body of a local agency for Brown Act purposes if the non-profit receives funds from a local public agency and if its board includes a member of the legislative body of that local public agency appointed as a full voting member. *Id.* § 54952(c)(1)(B). Here, the Foundation does not receive funds from the City, and no City Councilmember is appointed to the Foundation Board. Therefore, the Foundation Board is not a legislative body of a local agency under this first scenario.

Second, a non-profit's board of directors could be a legislative body of a local agency for Brown Act purposes if the non-profit was (1) created by an *elected* legislative body; (2) to exercise authority that may lawfully[7] be delegated by that *elected* legislative body. Cal. Gov't Code § 54952(c)(1)(A). We conclude that the Foundation Board is not a legislative body of a local agency under this second scenario, as discussed in detail below.

A. The City Council Did Not Create the NTC Foundation

In order for the board of a private entity to be subject to the Brown Act, it must have been "created" by an *elected* legislative body. Cal. Gov't Code § 54952(c)(1)(A). In the present case, the obligation to create the Foundation is contained in the DDA. DDA § 1.8.g.(2)(a). The only parties to the DDA at the time the Foundation was created were the RDA and McMillin; the obligation to create the Foundation ran solely from the RDA to McMillin. *Id.*

Unlike the City Council, the now-defunct RDA is an appointed legislative body, not an elected one. Although elected City Councilmembers acted as the RDA board, none of the Councilmembers were elected to serve on the RDA board; rather, the City Council appointed itself as the RDA in accordance with Community Redevelopment Law. Cal. Health & Safety Code § 33200(a); Council Resolution No. 147378 (May 6, 1958). While the City Councilmembers comprised the RDA, the RDA is a separate legal entity[8] and the City Council possessed no veto authority over the RDA. Cal. Health & Safety Code §§ 33100, and 33125.

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[7] This memorandum does not address the issue of whether a delegation of authority was lawfulbecause there was no delegation of governmental authority as discussed in Section I.B, *infra*.

[8] There was in each community a public body, corporate and politic, known as the redevelopment agency of the community. Cal. Health & Safety Code § 33100. An agency had the following general powers: (1) it could sue and be sued; (2) it could have a seal; (3) it could make and execute contracts and other instruments necessary or

Consequently, when the RDA approved the DDA, City Councilmembers were acting solely as the RDA governing body, and not in their City-elected official capacity. *Pacific States Enterprises, Inc. v. City of Coachella*, 13 Cal. App. 4th 1414, 1424 (1993) ("When a dual capacity legislative body acts as the governing board of a redevelopment agency, it is the redevelopment agency which is acting by and through that legislative body"). Therefore, the RDA's actions could not be construed as tantamount to actions of the City Council.

California courts broadly interpret the term "created by" under the Brown Act. Courts have held that an elected legislative body must be involved in bringing the entity into existence or otherwise played a role in doing so. *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.*, 69 Cal. App. 4th 287, 295-96 (1999). Because the issue is the creation of the Foundation, the circumstances surrounding the Foundation's creation must be examined. *Epstein v. Hollywood Entertainment District II Business Improvement District*, 87 Cal. App. 4th 862, 864 (2001).

In *International Longshoremen*, thirty-four private companies and the City of Los Angeles Harbor Department (Harbor Department) entered into an agreement to form a private corporation named "Los Angeles Export Terminal" (LAXT) to design, construct, and operate a dry bulk handling facility for the export of coal on land leased from the Harbor Department. 69 Cal. App. 4th at 290. The Harbor Department was a 15 percent shareholder in LAXT, obligated to contribute $18 million to capitalize the corporation, and entitled to nominate three of the nineteen LAXT board members. *Id.* at 290-91. A City of Los Angeles deputy city attorney filed articles of incorporation with the California Secretary of State. *Id.* at 291. Further, the agreement was conditioned on the parties unanimously approving the terms of a 35-year lease between LAXT and the Harbor Department through its Board of Harbor Commissioners.

The court found that LAXT was subject to the Brown Act because the Los Angeles City Council approved the agreement creating LAXT and the lease between LAXT and the Harbor Department. *Id.* at 297. The court further found that, even without Los Angeles City Council approval of the agreement and the lease, the Los Angeles City Council played a role in the creation of LAXT because the City of Los Angeles Charter gave the Los Angeles City Council authority to review and overturn any decision by the Board of Harbor Commissioners within 21 days after the decision. *Id.* at 296-97.

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convenient to the exercise of its powers; and (4) it could make, amend, and repeal bylaws and regulations not inconsistent with, and to carry into effect, the powers and purposes of the Community Redevelopment Law. Former Cal. Health & Safety Code § 33125.

The court attached particular significance to a provision of the City of Los Angeles Charter expressly authorizing the City Council to review any matter originally considered by the Board of Harbor Commissioners, effectively usurping the Board of Harbor Commissioners' role. *Id*. at 296.

The creation of the Foundation is factually distinguishable from the creation of LAXT in *International Longshoremen* in at least two key respects. The first distinction pertains to the legislative body's plenary authority. Although the City Council had limited authority to disapprove the DDA under California Health and Safety Code section 33433, the City Council did not have plenary authority to review and completely usurp the authority of the RDA regarding redevelopment of NTC.

While the San Diego City Council did approve the DDA,[9] its legal role in doing so was limited to confirming that the sale or lease of real property would assist in the elimination of blight or provide housing to low- or moderate-income persons, that it would be consistent with the implementation plan for the redevelopment project area, and that the consideration for the sale or lease was not less than the fair reuse value of the property. Cal. Health & Safety Code § 33433(b).

The second distinction pertains to the legislative body's involvement in financing and governing the newly established entity. In *International Longshoremen*, the Harbor Department contributed $18 million in equity financing to LAXT, retained a 15 percent ownership stake in LAXT, and had the right to appoint three members to the LAXT board of directors. In contrast, the DDA required McMillin, not the City or the RDA, to create the Foundation and provide substantial initial funding to support its operations. The City Council's approval of the DDA did not involve the City contributing any equity financing to the Foundation, receiving any ownership interest in the Foundation, or exercising any voting control over the Foundation. In this way, the City's approval of the DDA was not fundamentally required for creation of the Foundation, unlike the creation of LAXT in *International Longshoremen*.

As the court indicated in *International Longshoremen*, the factual circumstances of each case must be examined in their totality to determine when a legislative body has played a role in creating a private entity. Considering all of the circumstances surrounding the creation of the Foundation, the City Council did not bring the Foundation into existence under the reasoning in *International Longshoremen*, negating the argument that the Foundation is required to comply with the Brown Act.

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[9] Pursuant to the City Council resolution, the City Council approved "[t]he sale and/or lease of the real property and the Agreement [DDA] and Related Agreements which establish the terms and conditions for the sale and/or lease and development of the real property . . . ." San Diego Resolution R-293410 (June 26, 2000).

B. The City Did Not Delegate Governmental Authority to the Foundation

Even if we assume that the City Council played a legally sufficient role in the creation the Foundation, the Brown Act does not apply unless City Council created the Foundation *in order to* exercise authority that may be delegated by the City Council to the Foundation. Cal. Gov't Code § 54952(c)(1)(A).

1. The Foundation Was Not a Delegate or Agent of the City

In order to determine if the Foundation is a delegate of the City, we must look to the event surrounding its creation. *See* 2012 City Att'y Op. 2. Delegation means "[t]he act of entrusting another with authority or empowering another to act as an agent or representative." City Att'y MOL 2015-7 at 10, n. 5 (Apr. 23, 2015) (citing Black's Law Dictionary (9th ed. 2009)). Furthermore, a delegate is "[o]ne who represents or acts for another person or a group." *Id*.

The DDA is the only agreement involving the Foundation approved by the City Council. Since the City was not a party to the DDA, it could not delegate authority to anyone, including the Foundation, the RDA, or McMillin.

Furthermore, the DDA was not intended to have any entity act as an agent or representative of the City or the RDA, but to turn over complete control of the NTC Redevelopment Project to McMillin and its assignees, subject to some conditions in leases and the DDA. *See* DDA, § 1.1. The Cooperation Agreement specifically stated that McMillin was not an agent of the RDA or the City. Cooperation Agreement § 4.2.1. Likewise, as an assignee of McMillin, the Foundation was also not an agent of the RDA or the City.[10]

Finally, the DDA expressly stated that nothing in the agreement was to be deemed or construed to create any other relationship between the RDA and McMillin, including its assignee, the Foundation, "other than purchaser and seller and landlord and tenant." DDA, § 10.10. In fact, the ground leases between the RDA and the Foundation, which were all 55 years in duration, each contained a provision that stated that all buildings, structures, fixtures, additions, and improvements on the property during the term of the lease, were owned in fee by the Foundation and that the RDA quitclaimed any right, title and interest to such items except for a reversionary interest[11] at the end of the term. DDA, Attachment 20, § 2.16.

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[10] As required by the DDA, McMillin was required to assign its interests under the DDA involving CACC property to the Foundation. *See* DDA, § 1.8.g(3) and Attachment 16-B, Form of Naval Training Center DDA Assignment and Assumption Agreement. Like McMillin, the Foundation was subject to the DDA pursuant to ground leases executed with the RDA and the DDA incorporated the Cooperation Agreement by reference. *See* DDA, Attachment 20, Form of NTC Ground Lease by and between RDA and NTC Foundation §1.10; DDA §1.10.

[11] A reversionary interest means that the right, title, and interest to the buildings, structures, fixtures, additions, and improvements on the property would revert from the Foundation to the RDA at the end of the term of the ground lease.

Thus, even if it could be argued that the City Council played a legally sufficient role in creating the Foundation, it did not create the Foundation in order to exercise authority delegated by the City Council.

2. No Governmental Authority From the City Was Delegated to the Foundation

Assuming for discussion purposes that the City Council created the Foundation in order to exercise authority that may be delegated to the Foundation, the City Council did not create the Foundation to delegate *governmental* authority. Courts have interpreted the term "authority" in connection with the Brown Act to be limited to the exercise of "governmental authority." *Epstein,* 87 Cal. App. 4th at 869-70; *International Longshoremen's*, 69 Cal. App. 4th at 297.

A municipal corporation such as the City exercises dual authority and functions--one that is governmental and the other that is proprietary. *Davie v. Board of Regents, Univ. of Cal.*, 66 Cal. App. 693, 697-98 (1924). In its governmental role, a municipal corporation exercises its delegated powers--regulatory or statutory—imposed by law for the public good. *Id.* at 697; *Chafor v. City of Long Beach*, 174 Cal. 478, 480, 486-87 (1917). In its proprietary role, a municipal corporation engages in activities and conduct in a capacity much as a private party could or would. *Id.*; *Sherman v. City of Pasadena*, 367 F. Supp. 1115, 1117 (C.D. Cal.1973). The California Supreme Court described the dual role of a municipal corporation as follows:

> "A corporation, both by the civil and common law, is a person, an artificial person; and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person."

Chafor, 174 Cal. at 486-87 (citation omitted).

For example, making and enforcing police regulations, preventing crime, preserving public health, preventing fires, caring for the poor, and educating youth are all governmental functions because these have been considered delegated functions of sovereignty. *Davie,* 66 Cal. App. at 699. On the other hand, operation of a community theater and a municipal auditorium, and the selection of tenants, are proprietary activities. *Rhodes v. City of Palo Alto*, 100 Cal. App. 2d 336, 338 (1950); *Telford v. Clackamas County Housing Authority*, 710 F.2d 567, 571 (9th Cir. 1983).[12]

[12] *See* also City Att'y MOL-2015-7, p. 7 (April 23, 2015) (analyzing the dual roles of local agencies in relation to Civic San Diego).

Moreover, in order for an entity to exercise a governmental function, such an entity generally must have been created by some statutory or regulatory authority or have been delegated such authority. *Davie*, 66 Cal. App. at 697; *Chafor*, 174 Cal. at 480, 486-87. For example, the Board of Trustees of the California State University and Colleges could act in a governmental capacity because it was created to govern a public university system pursuant to the California Education Code. *See Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d 45, 51-52 (1975). However, it acted in a proprietary capacity when it leased its property for shows, fairs, exhibitions, swap meets, and circuses, because these activities had no relation to the governmental function of the university. *Id*. at 50.[13]

Unlike the California State University Board of Trustees, the Foundation did not exercise governmental authority as a result of being created pursuant to any statutory or regulatory authority. The Foundation was created pursuant to a contract-- the DDA between the RDA and McMillin-- to acquire, renovate, preserve, and operate the CACC.

The issue then, is whether the Foundation's contractual duties constituted a governmental or proprietary function. The *Telford* case is instructive. In *Telford*, the Clackamas County Housing Authority employed Telford to act as its Housing Manager to carry out, not to set or advise on, policies set by Housing Commissioners. *Telford*, 710 F.2d at 571. The court determined that the contract with Telford benefitted the public good by providing housing to low-income persons, but that did not mean that it constituted a governmental function. *Id.* In fact, the court found that Telford's broad contractual duties, which included paying bills, collecting rents, maintaining records, and selecting tenants, were identical to those that would be provided by a private corporation or a private landlord and thus determined them to be proprietary functions. *Id*.

Similarly, if anything, the Foundation acted in a proprietary, not governmental, capacity in performing a role like a private landlord in acquiring, renovating, preserving, and operating the CACC. The Foundation was not delegated any governmental statutory or regulatory authority from the City to exercise, such as the authority to issue land use permits. The Foundation was also not setting policy, as it was already determined in the DDA that the CACC was to be a cultural arts and civic center.

The City did not exercise or delegate any governmental authority to the Foundation; nor was there intent to do so. Accordingly, the Foundation is not subject to the Brown Act.

II. THE FOUNDATION IS NOT SUBJECT TO THE PUBLIC RECORDS ACT

The Public Records Act applies only to records related "to the conduct of the public's business" and "prepared, owned, used or retained by" a local agency. *Regents of the University of*

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[13] *But see Bame*, 86 Cal. App. 4th at 1357 (where a district agricultural association that was created under state law for the express purpose of holding fairs, expositions, and exhibitions, leases its property for such purposes, the leasing of such property was a governmental function). Here, there is no statutory or regulatory authority requiring the City to operate the CACC so the leasing and administration of the CACC handled by the Foundation would not be considered a governmental function of the City.

California v. Superior Court, 222 Cal. App. 4th 383, 399 (2013). For the Foundation to be subject to the Public Records Act, it must be considered a "local agency" as defined in California Government Code section 6252(a). The only way that the Foundation could be a "local agency" is if the Foundation Board is a "legislative body" under section 54952(c) and (d) of the Brown Act. Cal. Gov't Code § 6252(a); 85 Op. Cal. Att'y Gen. 55 (2002) (Public Records Act applies to private nonprofit corporation that is legislative body under the Brown Act). As analyzed in Section I of this Memorandum, the Foundation Board is not a legislative body of a local agency under the Brown Act and therefore, would not be subject to the Public Records Act.[14]

CONCLUSION

The Foundation was created by the RDA, which is not an elected legislative body, and was not created by the City Council. Furthermore, the City Council did not delegate governmental authority to the Foundation. Therefore, the Foundation Board is not a legislative body subject to the Brown Act or the Public Records Act.[15] Nevertheless, nothing prohibits the Foundation from voluntarily agreeing to having open meetings in accordance with the Brown Act or providing access to certain records to the public.

MARA W. ELLIOTT, CITY ATTORNEY

By/s/ *Ken So*
Ken So
Deputy City Attorney

KRS:als
MS-2019-13
Doc. No.: 1944082_7
cc. Honorable Mayor, Kevin L. Faulconer
Honorable City Councilmembers
Interim City Auditor, Kyle Elser

[14] To the extent that the City retains any written information provided by the Foundation and the information relates to the conduct of the public's business, that information may be disclosable in response to a Public Records Act request, subject to applicable statutory exemptions from disclosure. Cal. Gov't Code §§ 6250-6276.48.
[15] Additional facts could change the analysis and conclusions reached in this memorandum.