

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: July 30, 2020

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney Mara W. Elliott

SUBJECT: Disclosure of Confidential Closed Session Materials Concerning 101 Ash Street

Late yesterday afternoon, NBC San Diego (NBC) informed my Office that it has in its possession materials presented in Closed Session on July 28, 2020. This includes copies of confidential reports prepared by the City's outside legal counsel titled (1) the "Preliminary Report on 101 Ash" prepared by the law firm of Hugo Parker; (2) the "Transaction Review: 101 Ash Street Lease-to-Own Agreement" prepared by the law firm of Burke Williams Sorensen; and (3) the "Insurance Report Summarizing Prospects for Insurance and Indemnification for the City of San Diego with Respect to the 101 West Ash Street Property" prepared by the Procopio law firm. The law firms marked their respective reports "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED" and my Office shared these reports with each Councilmember, the Mayor, and essential City staff assigned to the 101 Ash Street Project (Project). The email could only be opened by the person to whom the email was addressed. Similarly, the confidential Closed Session materials attached to the email were restricted: the recipient could not print, forward, or save the confidential materials, and the recipient lost access to these materials immediately following Closed Session.

The three law firms have demanded that NBC promptly return any hard copies of their respective confidential memoranda, delete all electronic copies they may possess, destroy any copies they may have made, retrieve any copies they may have disseminated, take down any posts on the internet of any of the contents of any confidential memoranda and any references to the contents of the memoranda, and make no use of any information it may have gleaned from those memoranda that is not referenced specifically in the Public Report, and that NBC instruct all others to do likewise. NBC refused, and the law firms are reviewing all legal options to enforce the conditions described above. At this point, however, we do not know if NBC or the original recipient has shared the confidential materials with additional unauthorized recipients.

The unauthorized release of these confidential materials deals a serious blow to the City's efforts to hold accountable contractors and other third parties who could be found responsible for Project conditions. In preparing their reports, the law firms were assisting in the City's efforts to develop strategies for monetary recovery from these parties. The unauthorized disclosure compromises the value of that work and ultimately harms San Diego taxpayers.

The City Attorney's Office takes very seriously our ethical responsibility to maintain the confidentiality of attorney-client communications and our work product. When a City official or City staff discloses confidential communications, it not only compromises the City's position, but also makes it difficult for our Office to provide thorough and candid advice.

While a legislative body may "waive" the attorney-client privilege by majority vote, individual City officials or staff members do not have authority to unilaterally waive the attorney-client privilege on behalf of a municipal corporation. At no time has the Council consented to the release of these confidential materials. Accordingly, their disclosure is prohibited by law.

The City of San Diego Ethics Ordinance at San Diego Municipal Code section 27.3564(e), addresses the disclosure of the City's confidential information. It states:

It is unlawful for any current or former *City Official* to use or disclose to any *person* any *confidential information* he or she acquired in the course of his or her official duties, except as authorized by law.

Information is "confidential" under the San Diego Municipal Code if any of the following circumstances exist:

- (a) At the time of the use or disclosure of the information, its disclosure is prohibited by a statute or regulation, or rule which applies to the *City*; or
- (b) the information is not general public knowledge and will have, or could reasonably be expected to have, a material financial effect on any source of income, investment, or interest in the real property of a *City Official*; or
- (c) the information pertains to pending contract, labor, or real property negotiations and disclosing the information could reasonably be expected to compromise the bargaining position of the *City*; or
- (d) the information pertains to pending or anticipated litigation and disclosing the information could reasonably be expected to compromise the ability of the *City* to successfully defend, prevail in, or resolve the litigation.

SDMC § 27.3503.

