

Item No. 22

“To Be Delivered” Material

For

City of Sacramento

City Council

Financing Authority

Housing Authority

Redevelopment Agency

Agenda Packet

Submitted: February 18, 2010

For the Meeting of: February 23, 2010

The attached materials were not available at the time the Agenda Packet was prepared.

Title: City Attorney’s Legal Opinion Policy and City Council’s Confidentiality Policy

Contact Information: Eileen Teichert, City Attorney
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2009 FEB 18 P 5: 25

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REPORT TO COUNCIL

City of Sacramento

915 I Street, Sacramento, CA 95814-2604
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Staff Report
February 23, 2010

**Honorable Mayor and
Members of the City Council**

Title: City Attorney's Legal Opinion Policy and City Council's Confidentiality Policy

Location/Council District: Citywide

Recommendation: Adopt 1) a **Resolution** approving the City Attorney's Legal Opinion Policy; and 2) a **Resolution** establishing a City Council Confidentiality Policy.

Contact: Eileen M. Teichert, City Attorney

Presenters: None

Department: City Attorney's Office

Division: N/A

Organization No: 03001011

Description/Analysis

Issue: Councilmember Rob Fong and Councilmember Sandy Sheedy have requested that the City Attorney report back on providing to the City Council certain City Attorney legal opinions that are prepared for the City Manager, other Charter Officers and their respective staffs, and that the Council does not receive on a regular basis. Greater City Council access to City Attorney opinions is expected to assist the Council in making more informed decisions. Additionally, certain legal opinions may be suitable for issuance for public viewing and would increase the transparency of City government. The attached City Attorney's Legal Opinion Policy sets out categories of opinions to be made available to the City Council and criteria for opinions to be made available to the public.

Councilmember Robbie Waters has requested that the City Attorney report back on a means for addressing unauthorized disclosure of confidential attorney-client privileged information. The City Attorney's Legal Opinion Policy provides for individualized, distinct marking of legal opinions, and the attached Confidentiality Policy defines what information is confidential and

sets out the remedy of censuring Councilmembers to address the unauthorized disclosure issue.

Policy Considerations: Informed decision-making, greater public access to information and deterrence of confidentiality breaches make for good government.

Environmental Considerations:

California Environmental Quality Act (CEQA): Adoption of this policy and remedy is not subject to the California Environmental Quality Act (CEQA) because it does not constitute a “project” as defined in section 15378 of the CEQA guidelines, and is otherwise exempt pursuant to section 15061(b)(3) (no significant effect on the environment) of the CEQA Guidelines.

Sustainability Considerations: None.

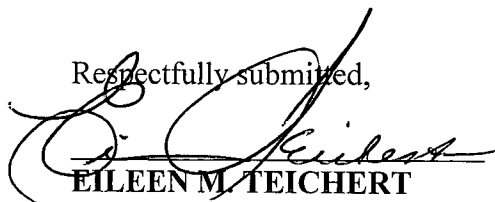
Commission/Committee Action: None.

Rationale for Recommendation: Providing salient legal opinions to the City Council is necessary to assist the City Council in making informed decisions and in intelligently discharging their duties. Making certain legal opinions available to the public provides greater transparency in City government to the public. Expressly stating remedies available to the Council for unauthorized disclosures of confidential information may deter such disclosures.

Financial Considerations: None.

Emerging Small Business Development (ESBD): Not Applicable.

Respectfully submitted,



EILEEN M. TEICHERT
City Attorney

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RESOLUTION NO.

Adopted by the Sacramento City Council

APPROVING CITY ATTORNEY'S LEGAL OPINION POLICY

BACKGROUND

- A. The City Charter sets out certain duties of the City Attorney, in particular to serve as legal counsel to the city government and all officers, departments, boards, commissions and agencies.
- B. A critical duty as legal counsel is the City Attorney's issuance legal opinions directly to the City Council, and issuance of innumerable other legal opinions—formal and informal, written and verbal--to the City's various officers, departments, boards, commissions, agencies and their respective staff members.
- C. In order to assist them in making more informed decisions as councilmembers, several City Councilmembers have expressed an interest in receiving certain of the formal written legal opinions issued by the City Attorney that they typically do not receive.
- D. The City Attorney has prepared the City Attorney's Legal Opinion Policy to define the types of legal opinions that the City Attorney will provide to the City Council and a process for distributing those legal opinions.
- E. The City Attorney's Legal Opinion Policy also establishes criteria and a process enabling the City Attorney to issue non-confidential, public legal opinions increasing transparency of City government.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

- Section 1. The City Attorney's Legal Opinion Policy is hereby approved.
- Section 2. Exhibit A is a part of this Resolution

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- Exhibit A City Attorney's Legal Opinion Policy

Exhibit A**City Attorney Legal Opinion Policy****February 23, 2010**

Purpose: To provide clear direction regarding the City Attorney's issuance of formal written legal opinions to the Sacramento City Council in order to facilitate more informed decision-making and discharge of duties by the City Council, and regarding the City Attorney's issuance of non-confidential, public legal opinions.

Scope: This policy addresses the criteria and methodologies for issuance of formal confidential written legal opinions to the Sacramento City Council and formal written non-confidential legal opinions intended for use by the public.

Applicability: This policy applies only to formal written legal opinions issued by or at the direction of the City Attorney.

Caveat: This policy is meant to augment, but not supplant the duties of the City Manager, and other City officers and employees to provide current, accurate and complete information about significant issues to the City Council.

Background: The City Council as a body is the holder of the attorney-client privilege for the City of Sacramento, even as to those attorney-client privileged legal opinions that the City Attorney originally issues to the City Manager, other City officers and employees. With limited exceptions, the City Council is entitled to see all City Attorney legal opinions.

The attorney-client privilege, and the City Attorney's duty to preserve that privilege exist to serve the purpose of encouraging the City Manager, other City officers and employees to seek legal assistance and to communicate fully and frankly with the City Attorney even as to embarrassing or legally damaging subject matter. The City Attorney requires this information to represent the City of Sacramento effectively and, if necessary, to advise the City to refrain from wrongful conduct.

Given the complex maze of laws and regulations applicable to the various City functions, it is essential that the City Council, officers and employees come to the City Attorney in order to determine what is deemed to be legal and correct. The City Attorney provides innumerable formal and informal written and verbal confidential legal opinions in response to such requests annually, covering a broad range of subjects for the benefit of the City of Sacramento. Some opinions are requested by the City Council, City Manager, other City officers and employees. Other opinions regarding important legal issues for the City are prepared by the City Attorney without any request, in order to fulfill the City Attorney's duties under the City Charter.

Written legal opinions vary in form, from formal memoranda to brief emails. Due to practical considerations, this policy does not encompass the verbal or informal written legal opinions given by the City Attorney's Office. This policy applies only to formal written legal opinions issued by the City Attorney's Office. Formal written opinions are only a portion of the innumerable legal opinions given each day.

For purposes of defining the appropriate distribution of formal written legal opinions, particularly those issued to the City Council, these opinions are categorized as follows and discussed more fully below:

- A. Public Legal Opinions
- B. City Council Legal Opinions
- C. Other Legal Opinions

A. Public

Certain formal written legal opinions may be determined to satisfy public opinion criteria, and thereby be eligible for public dissemination, either by the City Attorney or by the City Council. A typical example would be an opinion interpreting a particular section of the City Code. Before public issuance, a public legal opinion will bear a statement by and the signature of the City Attorney declaring that the City Attorney or the City Council, as the case may be, has determined the opinion satisfies all of the public opinion criteria, and the legal opinion is thereby made public.

Criteria

- Public interest high; and
- Minimal risk of litigation against or harm to City.

Distribution

- Electronic or paper copies of such opinions will be provided immediately to the City Council and Charter Officers.
- To the extent feasible these opinions will be published on the City Attorney's website at www.cityofsacramento.org/cityattorney.

B. City Council

Criteria

Formal written legal opinions that the City Attorney determines satisfy any of the following criteria shall be issued or provided to the City Council:

- The City Council or a City Councilmember has requested preparation of the opinion.

- The City Attorney prepared the opinion for the City Council without a request upon a determination the opinion is regarding a significant issue about which the City Council should be made aware.
- The City Attorney prepared the opinion for the City Manager, other officer or employee, but the City Attorney has determined the legal opinion pertains to a significant issue and should be provided to the City Council. These legal opinions may not have been deemed significant at the time they were prepared, but may be later deemed significant due to an incident or event, change in circumstances, or the City Attorney's acquisition of new facts.
- The City Attorney prepared the opinion for the City Manager, other officer or employee, but because the legal opinion relates to a subject being brought before the City Council or a subcommittee, the City Attorney has determined the legal opinion would assist the Council or subcommittee in its decision-making and should be provided to the City Council.

Distribution

- Paper or electronic copies of such opinions will be provided to all Council members, and other city officers and employees with a need to know.
- Copies provided to City Council members will be individually, distinctively marked.

C. Other

Criteria

Formal written legal opinions that otherwise satisfy the criteria for City Council opinions (See B. above), but that also satisfy any of the following criteria will *not* be issued to the City Council as a regular matter of course.

- Legal opinion regarding a City Code criminal prosecution over which the City Council has no jurisdiction;
- Legal opinions regarding litigation matters (Closed session briefings will provide the City Council with salient information with handouts where essential);
- Legal opinions regarding personnel matters as to specific individuals; or
- Legal opinions that cannot be shared with the City Council or an individual City Council member, due to a conflict of interest, the potential for compromising an on-going investigation, or a legal proscription.

Distribution

- Paper or electronic copies of such opinions will be provided to only such city officers and employees with a need to know.

RESOLUTION NO.

Adopted by the Sacramento City Council

APPROVING CITY COUNCIL CONFIDENTIALITY POLICY

BACKGROUND

- A. Over the past several years confidential information shared with the City Council in closed sessions or in attorney-client privileged legal opinions has been disclosed to unauthorized persons without the permission of the City Council.
- B. In order to deter future unauthorized disclosures of confidential information, Councilmembers have requested that the City Attorney define what information provided by the City Attorney may not be disclosed without approval of the Council, and what remedies are available in the event of an unauthorized disclosure by a Councilmember.
- C. The City Attorney has drafted a Confidential Information Policy addressing these issues for adoption by the City Council.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

Section 1. The City Council Confidentiality Policy is hereby approved.

Section 2. Exhibit A is a part of this Resolution

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Exhibit A City Council Confidentiality Policy

EXHIBIT A

CITY COUNCIL CONFIDENTIALITY POLICY

February 23, 2010

A. Background

The City Council as a body is the holder of the attorney-client privilege for the City of Sacramento, even as to those attorney-client privileged legal opinions that the City Attorney originally issues to the City Manager, other City Officers and Employees, but not to the City Council. While the City Council acting as a body may choose to waive the attorney-client privilege as to certain communications, individual members of the City Council may not waive the privilege.

The attorney-client privilege and the City Attorney's duty to preserve that privilege exist to serve the purpose of encouraging the City Manager, other City officers and employees to seek legal assistance and to communicate fully and frankly with the City Attorney even as to embarrassing or legally damaging subject matter. The City Attorney requires this information to represent the City of Sacramento effectively and, if necessary, to advise the City to refrain from wrongful conduct.

In order to keep the City Council fully informed about pertinent legal issues that may impact the City Council's decision-making the City Attorney issues confidential legal opinions or conducts closed sessions when authorized to do so by the Brown Act. Unauthorized disclosures of confidential information obtained from City Attorney legal opinions or from closed sessions harm the City. Harm to the City from such breaches of confidentiality ranges from diminution of City staff's willingness to communicate fully and frankly with the City Attorney to unwarranted litigation exposure and significant damages awards against the City.

City Council has requested that this policy be drafted defining what information received from the City Attorney is confidential and expressing what recourse the City Council has against members for unauthorized breaches.

B. Prohibitions Against Disclosure

1. No person in receipt of confidential information shall disclose or cause to be disclosed all or part of any confidential information to any unauthorized person.
2. Any Councilmember disclosing or causing to be disclosed confidential information to any unauthorized person may be subject to public censure by the City Council. Any censure

proceeding shall be conducted in accordance with a process established by City Council resolution and shall at a minimum provide that no public censure will occur unless the accused Councilmember has been provided with notice of the accusation and facts underlying such accusation, and an opportunity to be heard.

C. Definitions

1. "Cause to Be Disclosed" means failure to exercise due care in maintaining the confidentiality of the Confidential Information.
2. "City Attorney" means the person appointed city attorney under Charter section 72, and deputies appointed or legal counsel retained by the City Attorney.
3. "Confidential Information" means:
 - a. Any information within the scope of the closed session provided orally or in writing during a duly authorized closed session (See Gov't. Code Sec. 54963); or
 - b. Any oral or written communications by or from the City Attorney, containing the City Attorney's legal opinions, advice, thoughts, mental impressions or conclusions that are given on behalf of the City.
 - c. Confidential Information does not include information that is: required by law to be reported out of closed session; authorized by the City Council to be disclosed; or otherwise authorized to be disclosed under the law.
4. "Unauthorized person" means:
 - a. With respect to confidential information communicated during a closed session, any person, other than a Councilmember, not in attendance at the closed session; or
 - b. Any person to whom the oral or written confidential information is not directed or addressed; or
 - c. Any person who has a disqualifying conflict of interest in the subject matter of the confidential information.
 - d. Unauthorized person does not include district directors of City Councilmembers, the Mayor's Chief of Staff, Charter Officers and Department Heads and the staff of Charter Officers and Department Heads, only when such persons have a need to know the confidential information in order to discharge the duties of their positions for the benefit of the City.