



**MILLER STARR  
REGALIA**

1331 N. California Blvd.  
Fifth Floor  
Walnut Creek, CA 94596

T 925 935 9400  
F 925 933 4126  
www.mslegal.com

Bryan W. Wenter, AICP  
Direct Dial: 925 941 3268  
bryan.wenter@mslegal.com

August 16, 2019

**VIA EMAIL AND U.S. MAIL**

Robert B. Hodil  
Coblentz Patch Duffy & Bass LLP  
1 Montgomery Street, Suite 3000  
San Francisco, CA 94104  
Email: rhodil@coblentzlaw.com

**Re: Lafayette's Response to O'Brien Land Company, LLC's  
Public Records Act Request**

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Dear Rob:

This letter is written in response to your July 26, 2019 letter addressing O'Brien Land Company, LLC's July 9, 2019 Public Records Act request and its July 18, 2019 clarification thereto following the City's mischaracterization of O'Brien's clear and narrow July 9 request for records within the scope of Government Code section 65589.5(d)(2). This letter also addresses our conversations of August 1 and August 15, 2019, in which you claimed that the City would not have to provide the specific category of documents O'Brien requested because doing so would allegedly implicate the City's attorney-client, work product, and/or deliberative process privileges.

Contrary to your letter, O'Brien's July 18 letter does not seek a different category of responsive records. It seeks the *same* category of records O'Brien sought on July 9, and it was sent to the City only in response to the City's statement that O'Brien's request is "very broad." And while we are certain the City knows precisely the singular, narrow category of documents O'Brien requested, the fact it may still be unable to or is not ready to identify the only type of written document that could form the first prerequisite to lawfully disapprove the project more than eight years after the Terrace of Lafayette application for 315 apartments was deemed complete does not provide a lawful basis for the type of document dump, with rolling batches of documents, the City apparently plans to provide. As a matter of logic, law, and good faith there most certainly are not "large numbers of records to review" or eventually disclose.

Indeed, given that the conditions that would have a specific, adverse impact upon the public health and safety, as described in the Housing Accountability Act (Gov't Code § 65589.5 *et seq.* ("**HAA**"), "arise infrequently" (§ 65589.5(a)(3)), it is highly unlikely the

City has or ever will be able to identify even one document that could lead to “a specific, adverse impact” based on “objective, identified written public health or safety standards, policies, or conditions,” the only basis upon which the City could lawfully disapprove the project. If any such document exists it will be a non-exempt, disclosable public record, particularly if the City might ever hope to rely on such document for purposes of finally acting on the merits of the project pursuant to the HAA.

The City’s attempt to avoid providing the limited universe of documents that could possibly fit within the facially limited scope of O’Brien’s request, if any such document exists, is contrary to the Public Records Act (Gov’t Code § 6250 *et seq.*) (“PRA”), and it is unnecessarily and unwisely putting tremendous avoidable pressure on the City Council given the politics in Lafayette and in Sacramento. Moreover, that City staff may require legal input or analysis to help determine which, if any, non-privileged records fit within the narrow category of O’Brien’s request does not protect the City from disclosing responsive records pursuant to the PRA whenever they may be requested by anyone and for whatever reason. See, e.g., *Wilder v. Superior Court*, 66 Cal.App4th 77, 82-83 (1998) (holding that even members of the public that have filed a claim against or sued a local agency are entitled to use the Public Records Act to obtain documents that may be relevant to the claim or litigation; the mere fact that the person might also be able to obtain the documents in discovery is not a ground for rejecting the Public Records Act request).

The fallacy of the City’s apparent desire to avoid providing responsive records rather than a non-responsive document dump, or responding that no responsive records exist, is revealed by way of a simple hypothetical: if O’Brien had requested all documents constituting the record of proceedings for The Terraces of Lafayette Environmental Impact Report (SCH No. 2011072055) within the meaning of Public Resources Code section 21167.6(e), it is safe to assume that the staff responding to such a request, even though it is clear and limited, would likely ask for legal input or analysis before responding and that the City would promptly produce responsive records rather than attempt to shield them through invocation of a non-existent privilege for records that are not themselves privileged. Indeed, if the idea that the City could hide behind attorney-client, work product, or deliberative process privilege to avoid disclosing non-privileged records had any validity then the City could safely avoid providing responsive records to virtually any PRA request because any PRA request could require or benefit from legal input or analysis. In fact, when I was City Attorney for Walnut Creek we never once asserted that a Public Records Act request that required my input or analysis, as they almost always did, somehow allowed the city to do anything other than provide responsive records. The PRA would have little meaning if privilege could be invoked anytime legal input or analysis was sought before disclosure of responsive non-privileged records.

Furthermore, the legislature surely did not intend for local officials to have discretion, or even for legal advice to be needed, to determine what documents constitute “objective, identified written public health or safety standards, policies, or conditions as they

existed on the date the application was deemed complete” for the purposes of Government Code section 65589.5(d)(2). Indeed, by way of comparison we note that Government Code section 65913.4(a)(5), dealing with streamlined, ministerial approvals for certain affordable housing developments, explains that “ ‘objective zoning standards,’ ‘objective subdivision standards,’ and ‘objective design review standards’ mean standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal.” We presume the City would not contend either that the HAA’s focus on “objective” public health or safety standards somehow involves any personal or subjective judgment or that the HAA somehow sets a lower standard for objectivity than the streamlining provisions of Government Code section 65913.

It is thus merely pretext for the City to attempt to hide behind a non-existent attorney-client, work product, or deliberative process privilege in responding to O’Brien’s narrow request for the one category of records identified in its July 9 request. Although the City may find it inconvenient, untimely, or uncomfortable to respond to O’Brien’s request given the implications that likely flow from the required response, there is nothing in the law that allows the City to avoid providing the limited universe of responsive records that could possibly exist or letting O’Brien know that no responsive records exist. The City has a duty to interpret the Public Records Act in favor of disclosing the records O’Brien requested, if any such records exist, and to interpret any exceptions narrowly.

As well-summarized in “The People’s Business, A Guide to the Public Records Act,” revised 2017, published by the League of California Cities<sup>1</sup>:

“In November 2004, the voters approved Proposition 59, which amended the California Constitution to include the public’s right to access public records: “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” [citation omitted] As amended, the California Constitution provides each statute, court rule, and other authority “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” [citation omitted] The Proposition 59 amendments expressly retained and did not supersede or modify other existing constitutional, statutory, or regulatory provisions, including the rights of privacy, due process and equal protection, as well as any constitutional, statutory, or common-law exception to the right of access to public records in effect on the amendments’ effective date. That includes any statute protecting the confidentiality of law enforcement and prosecution records. [citation omitted]

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<sup>1</sup> See “The People’s Business, A Guide to the Public Records Act,” revised 2017, League of California Cities, available at <https://www.cacities.org/Resources/Open-Government/THE-PEOPLE%E2%80%99S-BUSINESS-A-Guide-to-the-California-Pu.aspx>.

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The courts and the California Attorney General have determined that the constitutional provisions added by Proposition 59 maintain the established principles that disclosure obligations under the PRA must be construed broadly, and exemptions construed narrowly. [citation omitted] By approving Proposition 59, the voters have incorporated into the California Constitution the PRA policy prioritizing government transparency and accountability, as well as the PRA's careful balancing of the public's right of access to government information with protections for the public interests in privacy and effective government. No case has yet held Proposition 59 substantively altered the balance struck in the PRA between government transparency, privacy protection, and government effectiveness."

Even though we contend that the City must respond to O'Brien's request, we are also mindful of the City's heavy workload. Because we desire to continue working productively with the City, and we are confident the project will ultimately be approved, as a courtesy to the City we hereby withdraw O'Brien's July 9 Public Records Act request, as clarified in our July 18 letter. Please note, however, that we reserve the right to restate O'Brien's request at any time.

Sincerely,

MILLER STARR REGALIA



Bryan W. Wenter, AICP

BWW:kli

cc: Honorable Mayor Mike Anderson  
City Councilmember Steve Bliss  
City Councilmember Cameron Burks  
City Councilmember Teresa Gerring  
Planning Commission  
Niroop Srivatsa, Interim City Manager  
Greg Wolff, Acting Planning Director  
Joanne Robbins, City Clerk  
Michele Rodriguez, Adjunct Planner  
Dennis O'Brien  
Caryn Kali  
Dave Baker  
Arthur F. Coon, Esq.  
Allan Moore, Esq.