



**MILLER STARR
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July 18, 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: O'Brien Land Company, LLC's July 9, 2019 Public Records Act Request

Dear Rob:

In reflecting on our call yesterday I wanted to follow up regarding the City's potential response to O'Brien Land Company, LLC's July 9, 2019 Public Records Act (Govt. Code §§ 6250-6270.7)¹ request wherein our client asked for but a single, narrow category of public records:

- Any document prepared, owned, used, retained, created, received, or exchanged by the City, on or prior to July 5, 2011, that pertains to objective, identified written public health or safety standards, policies, or conditions.

As I understand it, however, the City contends that O'Brien's request is "very broad" and will require the production of voluminous records, including some or all of the Lafayette General Plan, zoning ordinance, and building code. At the same time, the City understands correctly that it does not have to create records that do not exist.

Consistent with the detailed 21 page letter that contained its Public Records Act request, addressing certain issues arising under the Housing Accountability Act (Govt. Code section 65589.5 *et seq.*) ("HAA") and California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.* and 14 Cal. Code Regs. § 15000 *et seq.*) ("CEQA"), O'Brien's request only seeks all records within the limited category of writings referenced in one subsection—65589.5(d)(2)—of the HAA. In other words, we have asked for "[a]ny document prepared, owned, used, retained, created, received, or exchanged by the City, on or prior to July 5, 2011, that the City has identified [in any writing] at any time as containing, constituting or pertaining to "objective, identified

¹ All statutory references are to the California Government Code.

written public health or safety standards, policies, or conditions” as those quoted terms are used in section 65589.5(d)(2).

We are certain that the City knows precisely the only category of records O’Brien seeks, and it should take little time for the City to identify and provide any such records, if they exist. The public interest in disclosing these documents is substantial, particularly given that they are requested in the context of a discreet, high-profile housing development project protected by the HAA. See, e.g., § 6255. O’Brien has a right to know, and the public has a right to know, whether the City has any of the limited types of documents that could be the prerequisite to a lawful disapproval of the Terraces of Lafayette affordable apartment project (“**Project**”) under the HAA.

The fact that the City is “not prepared” to determine which records fit within the category of our request is surprising given that the Project application was deemed complete eight years ago and has faced relentless public opposition ever since, but it is not a lawful basis to “delay or obstruct the inspection or copying of public records.” § 6253(d).

O’Brien’s limited request is plainly not seeking a document dump because the City refuses to go to the trouble of reasonably responding to its request at this point in time. As a matter of law, the City has a duty to provide records that are *responsive* to O’Brien’s request (§ 6253.1(a)(1) and must provide a reasonable response to its request (§ 6255). See *Fredericks v. Superior Court*, 233 Cal.App.4th 209, 228 (explaining that the purposes of the Public Records Act “should be honored through a reasonableness standard”); see also *State Bd. of Equalization v. Superior Court*, 10 Cal.App.4th 1177, 1188 (1992) (addressing the requirements of section 6255). The burden of showing O’Brien’s request is somehow too onerous lies with the City. § 6255. The overriding issue is “whether the disclosure would contribute significantly to public understanding of government activities.” *Fredericks v. Superior Court, supra*, 233 Cal.App.4th at 234. Clearly, disclosing documents the City believes fall within the category of documents described in the HAA would contribute significantly to O’Brien’s and the public’s understanding of the City’s handling of the Project over the past eight years.

As I explained in our call, we believe it is highly unlikely that the City has any records within the scope of O’Brien’s intentionally narrow request, for various reasons (some of which we already identified in our July 9 letter to the City), and we expect the City to provide any such records promptly. § 6253(c). The City certainly has no duty to create records that do not exist, as you correctly stated, but that is not what O’Brien requested. Thus, if the City has no records that fit the category of records O’Brien requested, then it must tell us so. A response that there are no responsive records is a perfectly fine answer,² and it likely is the answer.

² We recently received just such an answer from the City and County of San Francisco in response to a Public Records Act request filed earlier this year. (See [Attachments 1](#) and [2](#)).

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If the City is somehow still uncertain about the narrow scope of the records O'Brien requested, then it has an affirmative statutory duty to: (1) assist us to identify responsive records; (2) describe the technology and location of the records; and (3) help us overcome any practical basis for denial of the request. § 6253.1; *see also Community Youth Athletic Center v. City of National City, supra*, 220 Cal.App.4th at 1427. Thus, if the City has any questions regarding the scope of O'Brien's request, please contact me immediately so I can provide further guidance.

Please ensure the City timely provides any records responsive to O'Brien's narrow request promptly or let O'Brien know that there are no responsive records.

Sincerely,

MILLER STARR REGALIA



Bryan W. Wenter, AICP

BWW:kli

- Attachment 1: May 31, 2019 email from City and County of San Francisco to Miller Starr Regalia.
Attachment 2: May 15, 2019 Public Records Act request from Miller Starr regalia to City and County of San Francisco.

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.

Attachment 1

Bryan Wenter

From: Ruiz-Esquide, Andrea (CAT) <Andrea.Ruiz-Esquide@sfcityatty.org>
Sent: Friday, May 31, 2019 2:18 PM
To: Bryan Wenter; Ng, Wilson (BOS)
Cc: Calvillo, Angela (BOS); Givner, Jon (CAT); Art Coon; Karen Wigylus; Jensen, Kristen (CAT); Emery, Jim (CAT)
Subject: RE: May 15, 2019 San Francisco SRO Hotel Coalition Public Records Act Request and Public Comment Letter [IWOV-iManage.FID751067]

Bryan,

The City has conducted a reasonable inquiry for the documents you requested in your May 15, 2019 public records request, and has not identified any responsive non-privileged documents. The search included any departments that were reasonably likely to have responsive documents, based on the substance of your request. Based on the substance of your request, the Board of Supervisors was the only department that was reasonably likely to have responsive documents, and as Mr. Ng reported to you, the Board of Supervisors has no responsive non-privileged documents. You are correct that the City's search would have captured any responsive documents on any personal devices used for official business. The City's response to your May 15, 2019 request is complete.

Please let us know if you have any questions. Also, please note that I will be out of the office June 3-14, so kindly direct any correspondence about this case to my colleagues, Kristen Jensen and Jim Emery.



Thanks,

Andrea

Andrea Ruiz-Esquide
Deputy City Attorney
Office of City Attorney Dennis Herrera
(415) 554-4618 Direct
www.sfcityattorney.org
Find us on: [Facebook](#) [Twitter](#) [Instagram](#)

From: Bryan Wenter <bryan.wenter@msrlegal.com>
Sent: Wednesday, May 29, 2019 1:07 PM
To: Ng, Wilson (BOS) <wilson.l.ng@sfgov.org>
Cc: Ruiz-Esquide, Andrea (CAT) <Andrea.Ruiz-Esquide@sfcityatty.org>; Calvillo, Angela (BOS) <angela.calvillo@sfgov.org>; Givner, Jon (CAT) <Jon.Givner@sfcityatty.org>; Art Coon <arthur.coon@msrlegal.com>; Karen Wigylus <karen.wigylus@msrlegal.com>
Subject: RE: May 15, 2019 San Francisco SRO Hotel Coalition Public Records Act Request and Public Comment Letter [IWOV-iManage.FID751067]

Thanks, Wilson.

I assume your response is only on behalf of the Board and that it includes our request for any records whether on publicly-owned or privately-owned devices and accounts. I also assume our request was directed to all relevant parts of the City and that Ms. Esquide is running point on the balance of the City's response, which at this point is 4 days late.

Please let me know as soon as possible if I am mistaken regarding any of the above.

Thanks.

Bryan

From: Ng, Wilson (BOS) [<mailto:wilson.l.ng@sfgov.org>]

Sent: Tuesday, May 28, 2019 3:51 PM

To: Bryan Wenter

Cc: RUIZ-ESQUIDE, ANDREA (CAT); Calvillo, Angela (BOS); GIVNER, JON (CAT)

Subject: RE: May 15, 2019 San Francisco SRO Hotel Coalition Public Records Act Request and Public Comment Letter [IWOV-iManage.FID751067]

Dear Bryan Wenter (Miller Starr Regalia),

On behalf of the Office of the Clerk of the Board, I am confirming receipt of your request attached.

Our office was not able to identify any records responsive to your request.

Sincerely,

—
Wilson L. Ng

Records and Project Manager

San Francisco Board of Supervisors

1 Dr. Carlton B. Goodlett Place, Room 244

San Francisco, CA 94102

Phone: (415) 554-7725

Web: www.sfbos.org

Please note that I will be out of the office on leave from May 30, 2019 through June 9, 2019.



Click [here](#) to complete a Board of Supervisors Customer Service Satisfaction form

Disclosures: Personal information that is provided in communications to the Clerk of the Board of Supervisors is subject to disclosure under the California Public Records Act and the San Francisco Sunshine Ordinance. Personal information provided will not be redacted. Members of the public are not required to provide personal identifying information when they communicate with the Board of Supervisors and its committees. All written or oral communications that members of the public submit to the Clerk's Office regarding pending legislation or hearings will be made available to all members of the public for inspection and copying. The Clerk's Office does not redact any information from these submissions. This means that personal information—including names, phone numbers, addresses and similar information that a member of the public elects to submit to the Board and its committees—may appear on the Board of Supervisors website or in other public documents that members of the public may inspect or copy.

[...]

From: Karen Irias <karen.iriass@msrlegal.com>

Sent: Wednesday, May 15, 2019 4:32 PM

To: RUIZ-ESQUIDE, ANDREA (CAT) <Andrea.Ruiz-Esquide@sfcityattyy.org>; Ng, Wilson (BOS) <wilson.l.ng@sfgov.org>

Cc: 'risten.jensen@sfgov.org' <risten.jensen@sfgov.org>; Board of Supervisors, (BOS) <board.of.supervisors@sfgov.org>;

'az@zfplaw.com' <az@zfplaw.com>; Art Coon <arthur.coon@msrlegal.com>; Bryan Wenter <bryan.wenter@msrlegal.com>

Subject: May 15, 2019 San Francisco SRO Hotel Coalition Public Records Act Request and Public Comment Letter [IWOV-iManage.FID751067]

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

*This email is sent on behalf of Bryan W. Wenter, AICP.
Replies may be directed to Mr. Wenter at Bryan.Wenter@msrlegal.com. Thank you.*

Karen Irias | Miller Starr Regalia

Assistant to Bryan W. Wenter, AICP

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**MILLER STARR
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Attachment 2



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May 15, 2019

VIA EMAIL AND U.S. MAIL

Andrea Ruiz-Esquide
Deputy City Attorney
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Email: andrea.ruiz-esquide@sfgov.org

Wilson L. Ng
Records and Project Manager
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102
Email: wilson.l.ng@sfgov.org

**Re: Public Records Act Request and Public Comment Letter;
Hotel Conversion Ordinance;
File Number 190049; Introduced 1/15/2019**

Dear Ms. Ruiz-Esquide and Mr. Ng:

This law firm represents the San Francisco SRO Hotel Coalition, whose members object to the City's proposed 2019 amendments to the Hotel Conversion Ordinance ("HCO") for the reasons set forth in the administrative record for File No. 190049, introduced January 15, 2019.¹ The proposed 2019 HCO amendments would purport to change the minimum term of the rental of residential single room occupancy units ("SROs") to at least 30 days rather than the minimum 32 days ostensibly established in the City's 2017 amendments to the HCO (File No. 161291). Importantly, the 2017 amendments sought to change the minimum rental term from 7 to 32 days, at which point protections under the City's rent control ordinance arise.

As you know, our clients also objected to the City's 2017 amendments to the HCO and ultimately sued the City on various grounds in *San Francisco SRO Hotel Coalition v. City and County of San Francisco*, Case No. CPF-17-515656. Among

¹ "Administrative Code - Definition of Tourist or Transient Use Under the Hotel Conversion Ordinance," File #190049, available at <https://sfgov.legistar.com/LegislationDetail.aspx?ID=3839608&GUID=A17C5DC1-B9B6-4D99-9188-258F8B7B5F57&Options=ID|Text|&Search=190049>.

other things, our clients sought to invalidate the 2017 amendments as an unlawful taking, under article 1, section 19 of the California Constitution, and as violative of constitutional due process protections, to the extent those amendments purported—without providing for any compensation or a reasonable amortization period—to preclude rentals for 7 days to 31 days, which had been allowed for decades under the previous HCO. In essence, our clients argued that by prohibiting the rental of residential units for “tourist or transient use,” and by defining “tourist or transient use” to mean any rental to someone other than a “permanent resident,” i.e., a person who occupies a room for *at least 32 days*, the 2017 amendments impermissibly eliminated their hotel business of renting residential units for periods between 7 and 31 days, as they had been allowed to do for decades under the previous version of the HCO, and required them to go into a different business by becoming apartment landlords. Our clients also argued that because, among other things, 32-day rentals or occupancies are subject to the City’s rent control ordinance, the 2017 amendments would change the nature of their business in significant and detrimental ways.

The trial court denied our clients’ requested preliminary injunction. In an opinion filed October 15, 2018², however, the First District Court of Appeal agreed with our clients that the 2017 amendments amounted to a “forced change in the nature of their business,” reversed the trial court’s decision, and reasoned that “[i]t appears the City has historically allowed the rental and offering of residential units for any period of seven days or longer, regardless of the reason for the rental, and has foregone the enforcement of San Francisco Administrative Code section 41.20(a)(3) to the extent that part of the HCO might be otherwise construed.”

The Court of Appeal thus concluded that the 2017 amendments “effected a substantial change” to the owners of SROs that required them “to forego more classically styled hotel rentals in favor of more traditional tenancies” and reasoned that the amendments “change[] the fundamental nature of their business, by making them landlords rather than hotel operators.” The Court also explained that the City’s power to eliminate an existing land use (i.e., hotels) through new regulations is limited and that a city seeking to eliminate such a lawful non-conforming use must either (1) pay just compensation or (2) require the elimination of the non-conforming use without compensation following a reasonable amortization period.

On January 16, 2019, Deputy City Attorney James M. Emery wrote a letter to the Honorable Cynthia Ming-mei Lee, the trial court judge in the ongoing lawsuit regarding the 2017 amendments to the HCO, asserting that in addition to the proposed 2019 HCO amendments (which amendments, we must note, appear to violate the stipulated agreement and injunction between the parties in which the City agreed that the HCO is inoperable and would not be enforced in any way pending final resolution of the lawsuit or further order of the court) “San Francisco is

² *San Francisco SRO Hotel Coalition v. City and County of San Francisco*, Case No. A151847, available at <https://www.courts.ca.gov/opinions/nonpub/A151847.PDF>.

considering legislation that would provide an amortization period before restoring a 32-day term.” The City has not provided our clients any other information regarding this potential amortization legislation, if it exists, and we can find no evidence of it on the City’s Legislative Research Center.

Accordingly, pursuant to the Public Records Act, as set forth in Government Code section 6250 *et seq.*, we hereby request copies of all of the following records that are within the City’s possession, custody, or control: all “writings” (as defined in California Evidence Code § 250) that comprise, constitute, or relate to all of the following:

- Any document pertaining to any amortization period or contemplated amortization period regarding the definition of “Tourist or Transient Use” in the HCO, created by, received by, or exchanged by any member of the San Francisco Board of Supervisors or any member of the City’s staff.
- Any document pertaining to any amortization period or contemplated amortization period regarding the HCO, created by, received by, or exchanged by any member of the San Francisco Board of Supervisors or any member of the City’s staff.

“City” should be broadly construed to include any council, board, commission, department, committee, official, officer, council member, commissioner, employee, agent, or representative of the City and County of San Francisco including but not limited to Supervisor Aaron Peskin and Legislative Aides Sunny Angulo, Lee Hepner, and Calvin Yan.

“Document” or “documents” shall be broadly construed to mean any kind of written matter, however produced or reproduced, of any kind of description, whether sent, received or neither, including originals, copies and drafts and both sides thereof, and including, but not limited to: papers, books, letters, electronic mail, photographs, objects, tangible things, correspondence, memoranda, notes, notations, work papers, minutes, recordings of telephone or other conversations, manuals, reports, studies, contracts, agreements, desk calendars, appointment books, computer printouts, data processing input and output, microfilms, all other records kept by electronic, photographic or mechanical means, and things similar to the foregoing however denominated.

“Pertain(s)” and “pertaining,” shall be broadly construed to include any writing which evidences, is about, relates to, constitutes, supports, repudiates, ratifies, memorializes, explains, addresses, comments upon, criticizes, or describes the particular topic or described subject matter.

“Records” shall be broadly construed to include any handwriting, typewriting, electronic mail, text message, voicemail, printing, photostatting, photography, and every other means of recording upon any form of communication or representation,

Andrea Ruiz-Esquide
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including letters, words, pictures, sounds or symbols or any combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

With regard to all of the requested documents, the public records we seek include all writings, regardless of physical form or characteristics, prepared, kept, owned, received, used, or provided to or by City, whether such records are on a publicly owned or privately owned computer, tablet, phone, or electronic device, and whether on a publicly owned and maintained or privately owned and maintained device, account, or server. See *City of San Jose v. Superior Court (Smith)*, 2 Cal.5th 608 (2017) (holding that a city employee's communications related to the conduct of public business are public records regardless of whether they were sent or received on a personal account or device).

This request reasonably describes identifiable public records or information to be produced from those public records. If the City contends it is unable to comply with this request because the City believes the request is not sufficiently focused, then pursuant to California Government Code section 6253.1(a), we request that the City (1) assist us in identifying the records and information that are responsive to our request and/or to the purpose of our request, (2) describe the information technology and physical location in which the records exist, and (3) provide us with suggestions for overcoming any practical basis for denying access to the records or information we are seeking.

Under Government Code section 6253(b), we ask that the City make the records promptly available for inspection and copying.

We do not believe any provision of law exempts the records from disclosure. However, if the City determines that a portion of the records we have requested is exempt from disclosure, Government Code section 6253(a) requires segregation and deletion of those materials so that the remainder of the records may be promptly released. Article I, § 3(b)(2) of the California Constitution requires a broad construction of any statute, court rule, or other authority intended to further the people's right of access and a narrow construction of any statute, court rule, or other authority if it limits the right of access. If the City determines that an express provision of law exempts from disclosure all or a portion of the records requested, Government Code section 6253(c) requires the City to promptly notify us of that determination and the reasons for it within 10 days from receipt of this request. In addition, Government Code section 6253(d) prohibits the use of the 10-day period or any other provision of the PRA to delay or obstruct the inspection or copying of public records.

For any responsive public record kept in electronic format, we request that an electronic copy of the document be produced in that format, pursuant to Government Code section 6253.9.

Andrea Ruiz-Esquide
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Please notify us by phone or email when any portion of the documents is ready, and we will arrange for its pick up by courier. Also, please notify us regarding the reasonable copying costs, and we will promptly send payment.

If documents are voluminous, then please indicate in your response the approximate volume of documents responsive to this request, and the location, dates, and times upon which inspection will be allowed. If you can provide documents in response to one or more of the above requests sooner than for others, please so indicate, and we will arrange for their pick up as such documents become available.

If you have any questions or concerns, or need additional information to comply with this request, please contact the undersigned at your earliest convenience. In addition, please ensure that this letter is included in the administrative record for the proposed 2019 amendments to the HCO. Thank you in advance for your prompt attention to this request.

Sincerely,

MILLER STARR REGALIA


Bryan W. Wenter, AICP

BWW:kli

cc: Kristen Jensen (via email)
Angela Calvilo, Clerk of the Board of Supervisors (via email)
Andrew M. Zacks (via email)
Arthur F. Coon (via email)
San Francisco SRO Hotel Coalition