RULES COMMITTEE: 04-11-07
ITEM: I3

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES COMMITTEE

FROM: Lee Price, MMC
City Clerk

SUBJECT: **RESPONSE TO PUBLIC RECORDS ACT-POTENTIAL SOCCER STADIUM**

DATE: March 28, 2007

RECOMMENDATION

On March 28, 2007 the Rules and Open Government Committee referred this communication from the City Attorney's Office to the Mercury News regarding a potential soccer stadium to be placed on the April 4, 2007 agenda of the Rules and Open Government Committee for discussion.

LEE PRICE, MMC
City Clerk

CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

March 28, 2007

BY EMAIL

Mr. Barry Witt
San José Mercury News

Re: **Response to Public Records Act — Potential Soccer Stadium**
Transmitted via electronic transmission on March 22, 2007

Dear Mr. Witt:

This is in response to your public records request described above in which you have requested documents "submitted by Lew Wolff's organization related to his attempts to secure a new stadium for a Major League Soccer team....which should include any records, whether electronic or otherwise, submitted by Lew Wolff or his representatives to the [C]ity in regard to rebuilding Spartan Stadium or paying for stadium construction through a general plan change elsewhere in the [C]ity."

As you noted in your electronic message, my Office (in coordination with the City Manager's Office) previously informed you last week, in response to your oral request for a copy of any such written proposal from Mr. Wolff's organization, that disclosure of this very preliminary, draft document is exempt from public disclosure under the provisions of the California Public Records Act (California Government Code sections 6250 *et. seq.*). You have asked the City to reconsider this position. After careful consideration of your request, we believe the public interest is better served at this time by not disclosing this very preliminary document while ongoing discussions regarding its concepts remain pending and that disclosure may properly await conclusion of such discussions.

This approach is recognized and supported by the provisions of the Public Records Act. Under Sections 6254(a) and 6255 of the Act, preliminary draft documents not retained by the City in the ordinary course of business may be withheld from disclosure if the public interest in withholding the document clearly outweighs the public interest in its disclosure. Dissemination of a very preliminary document at this early juncture would not serve the public interest inasmuch as City staff have not yet had an opportunity to meet in order to review or evaluate the document, any discussions and preliminary negotiations related to such matter remain currently pending, and disclosure at this early point may jeopardize or adversely impact those discussions as well as

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possibly disseminate misinformation or misperceptions about this matter to the public. Additionally, discouraging or hindering the ability of major sports teams, developers or other entrepreneurs from approaching the City staff privately to explore and discuss preliminary ideas, concepts or innovative proposals jeopardizes the ability of the City to investigate, research and ultimately obtain the best social and economic results for the City.

While I strongly support the public's interest in scrutinizing and commenting upon any proposal ultimately brought forward for City Council consideration, that review and those comments would be *most* effective: (a) after preliminary discussions are completed, so that a firmer proposal has an opportunity to crystallize, and (b) certainly well before any City Council action on a proposal so that the public has a meaningful opportunity to provide input.

Thank you again for your communication on this matter.

Very truly yours,

RICHARD DOYLE, City Attorney

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO:	**RULES AND OPEN GOVERNMENT COMMITTEE**	**FROM:**	RICHARD DOYLE City Attorney
SUBJECT:	**Disclosure of Preliminary Draft of Memorandum of Understanding Related to Potential New Soccer Stadium**	**DATE:**	April 4, 2007

BACKGROUND

On March 22, 2007, Mr. Barry Witt of the San José Mercury News ("Mercury News") submitted a public records request for materials "submitted by Lou Wolff or his representatives" to the City in connection with "rebuilding Spartan Stadium or paying for stadium construction through a general plan change elsewhere in the city." My office advised Mr. Witt that the public would certainly have an opportunity to review and comment upon any such proposals brought forward for consideration by the City Council prior to its submittal to the Council or a Council committee, but at this point in time: (a) the discussions and negotiations on this topic are very preliminary and currently pending, and (b) a proposal has not yet sufficiently crystallized for such review and examination. For these reasons, my Office declined to disclose the material requested at this time.

This memorandum sets forth the legal standards to be used in determining whether the document in question is exempt from disclosure under the California Public Records Act.

ANALYSIS

A. Preliminary Drafts. Under Section 6254(a) of the California Public Records Act (California Government Code Sections 6250 *et.seq.*), preliminary draft documents not retained by the City in the ordinary course of business may be withheld from disclosure if the public interest in withholding the document clearly outweighs the public interest in disclosure.

The draft document at issue is a first attempt at memorializing previous, complex discussions and ideas in order to provide an initial draft writing from which the parties could negotiate concepts further. The document reflects an evolving and iterative process that is just beginning and is likely to change as a result of pending discussions. It is anticipated that it will be brought forward to the public

and City Council for review, comment and consideration once a proposal has been developed.

B. The Catchall Balancing Test. In addition to the balancing test set forth in Section 6254(a) of the Act, Section 6255 provides a broader catchall exemption that permits non-disclosure of any record by "demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The California Supreme Court recently interpreted this Section in the context of a records request made for proposals (through an RFP process) while negotiations regarding those proposals remained ongoing. *See, Michaelis, Montanari & Johnson v. Superior Court (2006) 38 Cal.4th 1065.* The Supreme Court held that there was a clear overbalance in favor of protecting the confidentiality of proposals under the general catchall provision of the Act while negotiations with the City are pending.

The Court reasoned that premature disclosure of the proposals could affect the city's ability to obtain the most favorable result through the ongoing negotiations process. The Court also recognized that public input during the negotiations process "would add undesirable pressures, political and otherwise, to the process." *Id. at 1075.* The Court was convinced that public disclosure and scrutiny of proposals, as well as holding government agencies accountable for their actions, could properly await conclusion of the negotiations process and effectively occur prior to an agency's taking its action on a proposal.

Some of the reasons provided by the Supreme Court for its decision in this case are equally instructive in the situation currently pending before the City. Any proposal in this instance, once sufficiently developed, will be disclosed to the public prior to City Council consideration of the matter – and the Supreme Court has found such disclosure to be adequate, timely, and consistent with the purposes of the Act. Similarly, this pending negotiations process can more effectively and efficiently transpire without premature public and political pressures coming to bear upon it, as also recognized by the Supreme Court. Additionally, disclosure of such preliminary drafts of documents currently under negotiation can hinder the willingness of persons to approach the City with preliminary concepts or ideas, thwarting the City's ability to obtain the best social results for its citizens. Finally, there remains a public interest in not prematurely disseminating information that the City anticipates will surely change in the near future as the result of pending negotiations and ongoing discussions.

CONCLUSION

In summary, very recent court precedents support the City's rationale(s) for determining under the provisions of the California Public Records Act to withhold at this early stage and not prematurely disclose a very preliminary draft document currently under discussion and prepared for negotiation purposes that the City would first bring forward for public review, comment and scrutiny prior to City Council consideration and action.

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RICHARD DOYLE
City Attorney