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11 STATE OF CALIFORNIA

12 PUBLIC EMPLOYMENT RELATIONS BOARD

13 SAN DIEGO MUNICIPAL EMPLOYEES)
ASSOCIATION,)

14 Charging Party,)

15 v.)

16 CITY OF SAN DIEGO,)

17 Respondent.)

18 DEPUTY CITY ATTORNEYS)
ASSOCIATION,)

19 Charging Party,)

20 v.)

21 CITY OF SAN DIEGO,)

22 Respondent.)

23 AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
24 EMPLOYEES, AFL-CIO, LOCAL 127,)

25 Charging Party,)

26 v.)

27 CITY OF SAN DIEGO,)

28 Respondent.)

Case No. LA-CE-746-M

**MOTION BY RESPONDENT TO
REVOKE SUBPOENAS, OR IN THE
ALTERNATIVE, TO OBTAIN A
PROTECTIVE ORDER TO LIMIT THE
SCOPE OF TESTIMONY AND
DOCUMENT PRODUCTION**

Case No. LA-CE-752-M

Case No. LA-CE-755-M

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SAN DIEGO CITY FIREFIGHTERS
LOCAL 145,

Charging Party,

v.

CITY OF SAN DIEGO,

Respondent.

) Case No. LA-CE-758-M

1 TO: THE HONORABLE DONN GINOZA, ADMINISTRATIVE LAW JUDGE, AND
2 THE PARTIES AND COUNSEL TO THIS PROCEEDING:

3 The City of San Diego (City) hereby moves, pursuant to PERB Regulation 32150(d), to
4 revoke the subpoenas addressed to each and all of the witnesses on Exhibit W, attached hereto,
5 or in the alternative, obtain a protective order to limit the scope of testimony and document
6 production.

7 **ARGUMENT AND POINTS AND AUTHORITIES**
8 **IN SUPPORT OF MOTION TO REVOKE**

9 **I. The Testimony of Each of the Subpoenaed Witnesses is Irrelevant in That No Legal**
10 **Authority Attaches the Meet and Confer Requirements to a Citizens' Initiative,**
11 **Regardless of Public Official Support.**

12 At the heart of this matter is an initiative San Diego Charter (Charter) amendment, the
13 Comprehensive Pension Reform Initiative (CPRI), which 115,991 registered San Diego voters
14 petitioned to place on the ballot. The council, according to the mandate of the California
15 Constitution and Elections Code placed it on the June 5, 2012 ballot without change, and the
16 voters overwhelmingly approved it. Charging Parties seek a finding that, failing to meet and
17 confer with the employee unions, City violated the MMBA and an order granting an as yet
18 unspecified relief.

19 Charging Parties have alleged the participation in the CPRI of the City's Mayor, Jerry
20 Sanders and Council President Pro Tem Kevin Faulconer, and have subpoenaed all of the
21 persons listed on Exhibit W to support those allegations.

22 The allegations of public official support and, therefore, the testimony and document
23 production of the subpoenaed witnesses, are irrelevant because no law attaches a meet and confer
24 requirement to a citizens' initiative.

25 The California Constitution provides for only two ways to amend the City's Charter:

26 The governing body or charter commission of a county or city may
27 propose a charter revision. *Amendment or repeal may be proposed*
28 *by initiative or by the governing body.*

Cal. Cons. art. XI, § 3(b).

1 The law does not recognize a “third way” to propose a charter amendment. Charter
2 Parties, who do not allege that the CPRI was proposed by the San Diego City Council (City
3 Council), subpoenaed the witnesses in an attempt to show that involvement of the Mayor
4 rendered the CPRI a “City-sponsored” initiative. There is no such thing recognized by law.

5 It is undisputed that the CPRI qualified to be placed on the ballot, and the City Council
6 performed its duty under the California Constitution to declare a Special Election to place it on
7 the ballot and to combine the Special Election with the Statewide Primary Election on June 5,
8 2012.

9 Implementing the Constitutional right of citizens to amend the Charter by initiative,
10 California Elections Code (Elections Code) section 9255(b)(2) provides that an initiative petition
11 signed by 15 percent of the registered voters of a city *must* be submitted to the voters *without*
12 *change*. See *Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141,
13 149 (1993) (“A local government is not empowered to refuse to place a duly certified initiative
14 on the ballot.”).

15 Nothing that any of the subpoenaed witnesses could testify to, nor any documents, can
16 change this immutable law.

17 Charging Parties will argue that the case of *People ex rel. Seal Beach Police Officers*
18 *Ass’n. v. City of Seal Beach*, 36 Cal. 3d 591 (1984) governs. It does not.

19 The Supreme Court in *Seal Beach* identified the only issue as:

20 [W]hether the *city council* of a charter city must comply with the
21 Meyers-Milias-Brown Act’s (MMBA) “meet-and-confer”
22 requirement before *it* proposes an amendment to the city charter
concerning terms and conditions of public employment.

23 *Seal Beach*, 36 Cal. 3d at 594 (citations omitted; italics added).

24 The Court explained:

25 The simple question posed by this case is whether the
26 unchallenged constitutional power of a charter city’s *governing*
27 *body* to propose charter amendments may be used to circumvent
the legislatively designed methods of accomplishing the goals of
MMBA.

28 *Seal Beach*, 36 Cal. 3d at 597 (italics added).

1 The *Seal Beach* case involved three charter amendments approved by voters that “had
2 been put on the ballot by the city council pursuant to its constitutional power to propose charter
3 amendments.” *Id.* at 594-95 (citing Cal. Const. art. XI, § 3(b)). The Court concluded that the city
4 council was required to meet and confer before *it proposed* charter amendments which affect
5 matters within the scope of bargaining. *Id.* at 602. *The issue of a citizen initiative petition,*
6 *seeking to amend a city’s charter, was never before the Supreme Court in Seal Beach, nor has it*
7 *ever been before any court in California.*

8 Indeed, a footnote to the Supreme Court decision makes that clear: “**Needless to say, this**
9 **case does not involve the question whether the meet-and-confer requirement was intended**
10 **to apply to charter amendments proposed by initiative.**” 36 Cal. 3d at 599 n. 8.

11 With no legal authority to exercise any control whatsoever over the CPRI, PERB cannot
12 rule that the MMBA trumps the Constitutional right of citizens to present an initiative Charter
13 amendment and have it go to the ballot without change. Nothing the Mayor or Councilmembers
14 did can change the fact that the CPRI was a duly qualified initiative which was properly placed
15 on the ballot and approved by the voters. In such a circumstance, there was no way that the
16 MMBA could attach a meet and confer requirement beforehand.

17 City has elaborated on this argument in its Motion to Dismiss the Charging Party
18 Complaints which City incorporates herein by this reference.

19 As stated in PERB Regulation 32150: “The Board shall revoke the subpoena if the
20 evidence requested to be produced is not relevant to any matters under consideration in the
21 proceeding. . .”

22 **II. The Subpoenas Impinge on Associational and Related Political Rights Protected**
23 **by the First Amendment to the United States Constitution.**

24 The subpoenas seek documents and testimony as to communications “with any person ...
25 outside the City ... at any time since November 1, 2010, to the present, about a potential Charter
26 amendment related to pension issues.” They seek documents related to in-person meetings on the
27 same subject. Then, more specifically, they seek documents related to communications and in-
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1 person meetings, since April 1, 2011, “about the ballot initiative entitled ‘Proposition - Charter
2 Amendment – Comprehensive Pension Reform.’”

3 These documents and related testimony threaten to identify private citizens whose First
4 Amendment association rights have been protected since 1958 by *NAACP v. Alabama*, 357 U.S.
5 449 (1958). More recently, in *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009), a case
6 like *NAACP* involving discovery orders, the Court of Appeals stated that: “The First Amendment
7 privilege, however, has never been limited to the disclosure of identities of rank and file
8 members We have little difficulty concluding that disclosure of internal campaign
9 communications *can* have such an effect on the exercise of protected activities.” *Id.* at 1141.
10 Moreover, “the disclosure of [internal campaign communications] can have a deterrent effect on
11 participation in campaigns. *There is no question that participation in campaigns is a protected*
12 *activity.*” *Id.* (Italics added.)

13 Finally, the Court of Appeals in *Perry* stated that: “disclosure of internal campaign
14 materials can have a deterrent effect on the free flow of information within campaigns. Implicit
15 in the right to associate with others to advance one’s shared political belief is the right to
16 exchange ideas and formulate strategy and message, and to do so in private.” *Id.* at 1142.

17 **III. The Subpoenas Improperly Seek Communications Covered by Attorney-Client**
18 **Privilege or Communications Within Closed Sessions Under the Brown Act.**

19 The document requests included communications or meetings “with any person within or
20 outside the City of San Diego,” the dates for two requests begin November 1, 2010, and for the
21 rest April 4, 2011 [the date the proponents presented their intent to circulate petitions]. These
22 Requests would include attorney-client communications and, to the extent the subject initiative
23 became the subject of litigation, possible closed sessions with the City Council. As such, the
24 requests violate attorney-client privilege and the Brown Act’s requirement of confidentiality of
25 closed sessions within City Council.

26 City requests a protective order that excludes these privileged categories from the
27 document requests and testimony.

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1 **IV. The Subpoenas Present an Unreasonable Burden on City Operations.**

2 At the request of Charging Party MEA, the ALJ has issued subpoenas for nine persons,
3 all of whom will be required to travel to Glendale and remain available for four days. They
4 include Mayor Jerry Sanders, Chief Operating Officer Jay Goldstone, and four other members of
5 the Mayor’s staff, constituting all together virtually the entire Mayor’s office. The Party issuing
6 the subpoenas has not offered a schedule for when these witnesses are really needed. In the
7 second largest city in California, this is an extraordinary interference with the conduct of City
8 business.

9 **V. The Document Requests Are Otherwise Overbroad and Burdensome.**

10 **A. The Document Requests are Overbroad as to the Allegations in the Complaints.**

11 The Complaints of the Charging Parties allege: “From approximately April, 2011, to
12 date, Respondent, through its agents, including Chief Labor Negotiator San Diego City Mayor
13 Jerry Sanders, has co-authored, developed, sponsored, promoted, funded and implemented a
14 pension reform initiative, referred to as the ‘Comprehensive Pension Reform Initiative for San
15 Diego.’”

16 The subpoenas request documents going back to November 1, 2010. For example, the
17 Subpoena Duces Tecum issued to Council President Pro Tem Kevin Faulconer seeks in Request
18 No. 1: “DOCUMENTS RELATING to communications YOU had with any person within or
19 outside the City of San Diego at any time since November 1, 2010, to the present, about a
20 potential Charter amendment related to pension issues.” Request No. 2 requests the same for
21 “any in person meeting” for the same time period, and Request No. 3 relates to “any and all
22 activities you have engaged in” from November 1, 2010, “for the purposes of co-authoring,
23 developing, sponsoring, promoting, funding or implementing a potential Charter amendment
24 related to pension issues.”

25 Any and all documents (and any testimony) going back before April, 2012, and any
26 documents (or testimony) concerning events after June 5, 2012, the date of the election when the
27 voters overwhelmingly approved the initiative, are clearly irrelevant to the allegation of the
28 complaints, and are overbroad as to the allegations.

1 Those document requests, and any similar ones in the other subpoenas, should be
2 stricken, or an appropriate limiting protective order be issued.

3 **B. *The Document Requests Violate the MMBA Statute of Limitations.***

4 Government Code section 3514 states the board shall not “issue a complaint in respect to
5 any charge based upon an unfair practice occurring more than six months prior to the filing of
6 the charge.

7 The Unfair Practice Charges were filed as follows:

8 MEA 1/20/12

9 DCAA 2/15/12

10 Local 127 2/24/12

11 Local 145 3/02/12

12 To the extent that support of the subject initiative, without first meeting and conferring
13 with the unions allegedly violated the MMBA, then any such support activity which occurred
14 before July 20, 2011, cannot be the basis for the MEA unfair practice charge, with
15 correspondingly later cut-off dates for the other unions.

16 Thus, for an additional reason, all of the document requests are overbroad as to time and
17 should be stricken or an appropriate protective order issued.

18 **C. *The Document Requests to the Extent They Seek Emails Sent On or Accessed***
19 ***Through City Facilities are Improperly Broad Because Use of City Facilities***
is Irrelevant to any Issue in This Case.

20 In defining “Documents,” the subpoenas indicated emails “sent from or received at a
21 ‘sandiego.gov’ email address or a personal email address if accessed on City-owned equipment
22 or during your customary work hours.”

23 Use of City equipment is irrelevant. No case supports use of City-equipments makes an
24 initiative a City-sponsored proposal rather than a true citizens’ initiative. Indeed, the case law is
25 to the contrary.

26 In *League of Women Voters of California v. Countywide Criminal Justice Coordination*
27 *Comm.* (1988) 203 Cal. App. 3d 529, 547-548, the Court of Appeal explained that the Mayor and
28 individual Council members in that case had the authority to use direct democracy, to draft a

1 proposal initiative measure and to find “a sympathetic sponsor when other legislative avenues ...
2 [are] unavailing.” Expanding on this, the Court of Appeal stated:

3 [I]f the interests a local government entity seeks to serve are
4 legitimate but the Legislature has proven disinterested, there
5 appears to be no logical reason not to imply from the indisputable
6 power to draft proposed legislation the power to draft a proposed
7 initiative measure in the hope a sympathetic private supporter will
8 forward the cause and the public will prove more receptive.

9 In any event, requesting personal emails “accessed” through City-equipment presents an
10 electronic nightmare. Thus, a limiting order should issue that excludes this category of emails.

11 **D. Many of the Requested Documents Have Already Been Produced.**

12 As to all the requests pertaining to communications within the City, City has already
13 produced them to MEA in reply to a Public Records Act request of MEA. Producing them again
14 is burdensome. MEA used some of these documents, emanating from the Mayor’s office, to
15 support their unfair practice charge, and PERB quoted them in its Superior Court Complaint
16 against the City. This also shows that much of the live testimony is totally unnecessary and
17 burdensome to the City.

18 **CONCLUSION**

19 For all of the foregoing reasons, City requests that the subpoenas be revoked, or that
20 appropriate protective orders be issued.

21 Dated: July 6, 2012

22 JAN L. GOLDSMITH, City Attorney

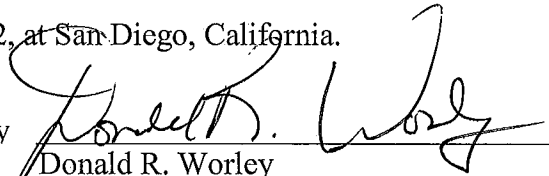
23 By 

24 Donald R. Worley
25 Assistant City Attorney

26 Attorneys for Respondent
27 CITY OF SAN DIEGO
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I, as agent and attorney for Respondent City of San Diego, declare under penalty of perjury that this Answer is true and complete to the best of my knowledge and belief, and this declaration was executed on July 6, 2012, at San Diego, California.

By 
Donald R. Worley
Assistant City Attorney

PROOF OF SERVICE

San Diego Municipal Employees' Association v. COSD
(PERB Case No. LA-CE-746-M)
Deputy City Attorneys Association of San Diego v. COSD
(PERB Case No. LA-CE-752-M)
AFSCME, AFL-CIO Local 127 v. COSD
(PERB Case No. LA-CE-755-M)
San Diego City Firefighters Local 145 v. COSD
(PERB Case No. LA-CE-758-M)

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of eighteen years and not a party to the below-entitled action. The name and address of my residence or business is Office of the City Attorney, Civil Division, 1200 Third Avenue, Suite 1620, San Diego, CA 92101.

On **Friday, July 6, 2012**, I served the **MOTION BY RESPONDENT TO REVOKE SUBPOENAS, OR IN THE ALTERNATIVE, TO OBTAIN A PROTECTIVE ORDER TO LIMIT THE SCOPE OF TESTIMONY AND DOCUMENT PRODUCTION** on the parties listed below:

- Placing a true copy of the above-named document in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;
- Personal delivery;
- Facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).
- Electronic transmission in accordance with the requirements of PERB Regulation 32135.

Donn Ginoza
Administrative Law Judge
Public Employment Relations Board
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Oakland, CA 94612-2514
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on **Friday, July 06, 2012**, at San Diego, California.



Print Name



Signature