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KANSAS CITY
MISSOURI

QUINTON D. LUCAS
City Council
Third District At-Large

August 2, 2017

Mr. Galen Beaufort
Senior Associate City Attorney
City of Kansas City, Missouri
City Hall
414 East 12th Street
Kansas City, Missouri 64106

Re: Proposed KCI Terminal Modernization Plan Nondisclosure Agreements Sent to Members of the City Council

Dear Counsel:

I write regarding proposed nondisclosure agreements (NDA) sent by Mr. Beaufort to members of the City Council beginning the afternoon of Sunday, July 30, 2017. Along with several of my colleagues, I object to signing the agreements as written, believe them to be highly unusual and unlawful directives for elected public officials discharging their duties, and find a number of grossly problematic demands, like resignation, in the document itself. I ask that you withdraw any requests to Mayor and Council to sign NDAs.

General Concerns

In-house counsel has stated that it is a "standard practice" of the City to require councilmembers to sign nondisclosure agreements, but neither the relevant procurement nor confidentiality ordinances, other areas in the Code of Ordinances,[1] or even standard City practice supports that perspective. Further, NDAs are unnecessary and superfluous as councilmembers already are bound to certain standards of confidentiality.[2]

[1] *See, e.g.*, Code of Ordinances, Art. XV, Code of Ethics.
[2] *See* Code of Ordinances, Section 2-2050 (prohibiting disclosure of documentary information marked confidential or identified as confidential during a closed session, but not requiring any agreements to be signed acknowledging the already-existing legal prohibition).

Counsel previously has asserted that Municipal Code Section 3-31c[3] governs the design-build (finance) solicitation process under which the City is currently operating. Concerning contracts exceeding $6 million, the relevant section states nothing concerning required signing—for any party involved in the process—of nondisclosure agreements. Indeed, my search through the entirety of the Code of Ordinances for required nondisclosure agreements as to any City officials or employees yields no results.[4]

To the extent such standards have been promulgated by either the City Manager or the relevant department director, other sections of the Municipal Code of Ordinances note the Manager or department director has no authority to govern or constrain the conduct of councilmembers. In relevant part, the Municipal Code of Ethics provides that while the Manager may, as here, establish rules and regulations stricter than those found in the Code as to standards of confidentiality, disclosure, and conflicts, such rules apply only to employees or agents under his supervision.[5] The same standard applies for department directors, such as the Directors of Aviation and Procurement Services.[6]

Under Section 3-31c of the Code, Council committee chairs or their designees are a required presence on selection committees. Nothing in the City ordinances requires a councilmember or any other selection committee member's assent to non-disclosure agreements and the Manager or others have no authority under the Code of Ordinances to compel councilmembers to sign such documents.[7]

Further, even assuming arguendo that other councilmembers serving as observers become part of the selection committee process and are subject to the purported standard NDA practice, the Code provides that Council or Manager may waive any provisions of the Code or Manager-imposed procedures in procurement at any time at their discretion. Council accomplished just that by unanimously passing Resolution 170552 last Thursday. Although Law Department has construed the legislation narrowly in the days since passage, it compels the City Manager without qualification to facilitate attendance of *any* councilmembers so inclined to attend selection committee meetings, so long as a quorum of either the full Council or the relevant joint

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[3] *See also* Ordinance 130041.

[4] A search for "disclosure" offers more results, such as the above-referenced Municipal Ethics Section 2-2050, which does not provide for or direct NDAs as has been stated by counsel. In fact, an NDA appears superfluous when considering the impact of that section. The other results for disclosure largely center on City Finance Department tax rules, board rules, and other department specific, non-procurement rules.

[5] Code of Ordinances, Art. XV, Code of Ethics.

[6] *See* id.

[7] The plain language of Sections 2-2050 and 3-31c, lacking any reference to NDAs, casts doubt as to whether execution of nondisclosure agreements for other parties, such as legal counsel, consultants, or city staff is required or standard practice for such agents of the City.

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committee is not created. The legislation, and thus Council's instruction to the City Manager, did not place disclosure-based conditions on any councilperson's rights of attendance and inspection of documents. Directives now attempting to do so contravene Council's unequivocal direction to the City Manager and are without basis in law or past practice with Council.

A perfunctory review of past practice reveals no support for the contention that members of Council routinely, or ever, have been asked to sign nondisclosure agreements in connection with procurement processes. Councilmembers serving on selection committees as recently as July 2017 and on "dozens of selection processes" in the past report that they have never been asked to, nor have they ever signed nondisclosure agreements. During the recent Kemper (Mosaic) Arena RFQ/P, not only were certain councilmembers part of the selection committee process without signing an NDA, but also other councilmembers outside the committee (and the public) were sent information during the procurement process without entering into NDAs.[8] In addition, consultation with elected officials in other jurisdictions and attorneys familiar with practice in multiple jurisdictions provides that none are familiar with a jurisdiction requiring elected officials to sign nondisclosure agreements in the discharge of their duties as public servants, including service on procurement committees. Claims that this is a standard practice for elected officials in Kansas City or beyond are simply without merit.

Without a legal or precedential basis, I anticipate some may proffer arguments regarding the now existing procurement process and assert that through addenda the City perhaps has bound itself by representations to bidders that councilmembers would sign nondisclosure agreements. Such contentions also are flawed and do not alter the analysis.[9] As a threshold matter, a court reviewing Kansas City, Missouri's bidding practice in minority and women representation goals previously has emphasized that even if the City had changed rules after receiving bids, such purported change would not violate the rights of bidders as a constitutional matter under Missouri law.[10] Further, statements from the Director of Procurement Services or

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[8] *See* "Kemper RFP Schedule," Email, August 25, 2015, From Chris Hernandez, Director of City Communications, to City Council, City Manager Troy Schulte, Kerrie Tyndall, Director of Economic Development, Jeffrey Williams, Director of City Planning, Michael Grimaldi, Joni Wickham, Mayor's Office. I am not aware that Mr. Hernandez, Mr. Schulte, Ms. Tyndall, Mr. Williams, Mr. Grimaldi, or Ms. Wickham was asked or entered a nondisclosure agreement. Council was not asked, nor did we sign any nondisclosure agreements during the then-active procurement process. (attached to transmitting email).

[9] The same in true in the more general public disclosure conversation, but I will reserve that discussion for a later conversation or Thursday's closed session. I will note, here, however that the RFQ/P itself anticipates public disclosure except for scientific and proprietary information. *See* RFQ/P Section 17.

[10] *Garney Companies v. City of Kansas City*, No. 99-0761-CV-5, 1999 WL 1697616, at *2-3, (W.D.Mo. 1999); *citing Hanten v. Sch. Dist. of Riverview Gardens*, 183 F. 3d 799 (8th Cir. 1999) (applying Missouri law).

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the Manager through addenda that contravene city policy as to its elected officials do not modify the City Charter or the Code of Ordinances. The Manager cannot compel councilmembers to abide by rules issued to his employees.

To the extent the City has issued a flawed interpretation of its own rules to bidders (proposers), then the qualifying language in the RFQ/P also wisely limits liability for misstatements or modifications in process by the City. The RFQ/P stated that neither the RFQ/P nor its addenda grant contractual rights to proposers and that the City shall follow its regulations unless the City Council or Manager deems their waiver necessary and in the event of a process waiver, as could be asserted here, it applies any modifications fairly as to all parties for the public interest.[11] Here, City regulations through the City Charter and the Code of Ordinances list the organizational structure of government, providing that the Council appoints the City Manager to conduct affairs of the City and to craft rules and regulations for all employees. The governing documents of this City nowhere anticipate the Manager crafting rules that limit Council's right to discharge its public duties in the manner it sees fit. This understanding of roles of authority for local governments in a Council-Manager form of government is elementary and is understood by any bidders with familiarity with Kansas City, or any other local governments that require legislative action before final bid awards. Moreover, Council attendance of a selection committee or document inspection without an NDA is not arbitrary or capricious, as it is based in sound public policy favoring elected representatives in government reviewing documents as part of their role and the attendance policy is consistently applied as to all parties, just as the City requires in the RFQ/P and its addenda.

Finally, the NDA is wholly unnecessary given the fact that councilmembers already are required to avoid conflicts of interest, are barred against self-dealing in the Municipal Code of Ethics, and are bound to duties of confidentiality. In our oath of office, councilmembers are bound to uphold laws of Missouri and the United States that limit potential misconduct. The eight lawyers on Council are further bound to professional rules of ethics that govern certain facets of their conduct as public officials.[12]

To the extent there has been inconsistency in this procurement process, it is based on the set of restrictions on Council's—and the public's—access to information, the City's committed, yet legally specious arguments to support withholding of almost all information from Council

[11] *See* RFQ/P Sections 2, 10; 15-18. *See also Garney* (upholding Kansas City's waiver ordinance which permits Council to modify MBE and WBE requirements during the procurement process).

[12] *See, e.g.*, Am. Bar. Assn. Model Rules for Professional Conduct, 1.11 (providing that lawyer public servants owe professional duties both to the public body on which they serve and clients to avoid conflicts and to make honest representations).

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and public, and the now almost weekly back-and-forth between the City and its Council, which theoretically should not occur.[13]

I understand the City may wish to avoid disclosing information as directed by Council, but the City Council has directed otherwise and public policy in our city and state compel it. To the extent there is a balance to be struck between business efficiency and disclosure, courts in Missouri and beyond consistently favor the interests of public disclosure and the elected official's ability to discharge her duties in our system of representative government. In support of its position, however, the City has read broad and new meaning into its Code of Ordinances asserting NDA's to be a required part of the procurement process, has looked beyond other parts of the Code of Ordinances and the City Charter that provide Council with wide latitude to legislate on all matters for the City, has read the Sunshine Law to be an almost limitless bar to disclosure of information to even elected officials, has bestowed upon the City Manager and department directors authority to place rules upon City Council that they cannot, misread its own past standard practices as to councilmembers and others in connection with the procurement process, and has introduced arguments of enhanced litigation risk where little risk of meritorious legal challenge exists.

More troubling is that the NDAs would isolate and potentially coerce councilmembers into assent without any representation as to the risks inherent upon councilmembers entering such transactions.[14] In an effort to cure feared unethical actions (that already have sanctions), the City without adequate legal foundation has promulgated an NDA and broader nondisclosure process that has a significant risk of harming the public's confidence in City's procurement process. The solution to the public confidence is not more secrecy; it is better—and legally valid—process.

[13] *Cf. Eckersley v. Blunt*, 2008 WL 6085004 (Mo. Cir. 16, Jackson County, 2008) (Manners, J.) (reasoning that the people's interest in learning about the functioning of government is paramount and effectuated by encouraging public officials to advise as to matters of public concern).

[14] *Cf. Solutions to the City Attorneys Charter-Imposed Conflict of Interest Problem*, 66 Ohio St. L.J. 1075 (2005) ("[Where] the city manager appoints the city attorney the city attorney's client is arguably the entire council, because the city manager may be removed by the council").

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Concerns as to Form

Given the length of my memorandum at this point, I will keep my concerns in this section brief but note that my list of concerns herein is not exhaustive.

A. **Recitals**. The recitals section initially states that the City can choose to close certain documents pursuant to the Missouri Sunshine Law. In the following clause, however, the NDA states that City "chooses" or in essence already has chosen to close all relevant records. When was the choice to close almost all records made? On what basis has that choice been made, particularly considering the RFP/Q's Section 17, which appears to anticipate disclosure of all materials except scientific and proprietary information or confidential documents identified by bidders and relevant City Ordinance, which although oft forgotten provides the following general policy viewpoint concerning disclosure:

> It is the policy of Kansas City, Missouri that its meetings, records, votes, actions, and deliberations are open to the public unless otherwise provided by law. The provisions of the Sunshine Law as well as of this Administrative Regulation shall be liberally construed and any exceptions allowed by law *shall be strictly construed to promote this policy*.
>
> Code of Ordinances, 4-1.

I would request the recitals more closely relate to the policies espoused in municipal ordinances and reference the basis, if any, for the extra level of protection a nondisclosure agreement shall provide.[15]

B. **Section 2 – Confidential Information**. The definition of confidential information is overbroad and has no reasonable time limit. As written, confidential information includes all materials and plans, which might be inclusive of all information provided throughout the process. The lack of a reasonable time limit also suggests that the NDA lasts not just through selection committee work, but also through MOU negotiation (likely as the drafter anticipates) and even discussion of subsequent definitive agreements

[15] Although I write specifically in reference to councilmember NDAs, the argument is the same as to all signatories to any nondisclosure agreement with substantial similarities. I would encourage the City Attorney to consider rescinding all nondisclosure agreements that have been circulated and to review external rules of confidentiality and professional rules of any consultants or counsel before submitting new NDAs in this or any other procurement process.

between successful bidder, airlines, City, and any other parties with interest in the terminal modernization project. Given the broad definition of confidential information, the NDA suggests a councilmember or mayor may not, for example, discuss plans for a new terminal project proposed by the successful bidder during an election campaign on the new terminal issue. It also suggests any future Council meetings to discuss the new terminal project would be necessarily closed from public view because they could conceivably discuss items drawn from a successful bidder's materials or plans. This provision is unworkable in our representative government.

C. **Consideration**. The agreement seems to be void for lack of consideration in two aspects. First, the NDA purports to grant the city councilmember the right to inspect documents and obtain certain confidential information to which a councilmember is already entitled in the discharge of her duties. Second, the NDA retains the right of the City to withhold disclosure in any instance: "Nothing herein shall require City to disclose any of its information to Council observer." Section 2. Both aspects contain illusory promises; the first from the Council observer; the second by the City. As to the second situation, Council observer promises not only to withhold sharing of information but also under certain Section 10 and 11 provisions to withdraw from discharge of her official duties (without a limit as to scope) in exchange for the City's promise to offer perhaps some information? The City's illusory promise even goes so far as to assert that they City may not just deprive a councilmember of confidential information as it sees fit. The City may deprive a councilmember of "any of its information" in connection with the KCI terminal modernization project procurement for any reason whatsoever.

D. **Section 5**. Section 5 is not only unclear but purports to limit the councilmember signatory's ability to share or disclose information already in the public domain. How? The first clause is unobjectionable: No liability shall accrue for information already in the public domain. The rest of the section is where the confusion resides. Does the language after "provided" cover all previous provisions? I hope not. It would be bizarre to assert that a councilmember may be liable if she discloses information that is already publicly available. The 30-day provision appears to apply to a situation in which a party is compelled to disclose certain information for example by court order. If that is what that provision means then it is not really information in the public domain (yet) and should sit in its own section.

E. **Section 7**. As happens consistently here, Section 7, although technically accurate, suggests an overbroad view of the Sunshine Law. The City may waive its ability to withhold information under the Sunshine Law and create a public record. For example, by city ordinance documents not marked confidential *are* public records even though the Sunshine Law could exempt them from disclosure. Better drafting might note that

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information remains confidential until declared otherwise by the City, since the Sunshine Law itself actually does not withhold anything.

F. **Section 8 – Nondisclosure of the Nondisclosure and Any Other Discussions**. Like other sections of the NDA, this language appears not to have been written for councilpersons at all because it is wholly unworkable for a public servant. The sheer fact the document appears not to have been reviewed closely as applied to Council is great cause for concern and standing alone is reason not to sign to it at this point without further assistance of counsel.

As to this section, one fail to sees the legal (or business) merit in a provision that requires a public servant not only to abstain from public comment as to almost any portion of the airport conversation, but also then to withhold the reason for said public servant's nondisclosure. Any bidder would understand that a public servant has a duty to engage with the public and to the extent they do not do so, to explain to the public the reason the public official cannot. I am not aware of a situation outside of intelligence or public safety where a public official not only must abstain from disclosure, but also must place a gag order on themselves in all public statements and meetings. In fact, this actually exceeds a traditional gag order because in such circumstances the parties barred from disclosure can advise questioners the reason for any non-answers. The agreement also claims to bar discussion of any discussions, which as written would bar conversation publicly about any non-previously disclosed unofficial meeting of council or councilpersons and others to discuss the airport issue. This provision is incompatible with representative government and should be removed.

G. Section 10 – Conflicts. This section is superfluous as its limiting principle already appears in the Municipal Code of Ethics. For that reason alone it should be removed. The language also is impermissibly vague and provides little direction to a councilperson as to what is a conflict that would breach the NDA. Would for example receiving a contribution or gift in the future from the successful bidder during the existence of the NDA (which may be months or years) create a conflict issue?

H. **Section 11 – Remedy of Resignation**. The language in this provision lacks specificity and if read broadly would appear to undermine the right of the people of Kansas City to choose their elected officials, violating the US and Missouri constitutions.[16] Plainly (and what should be apparent to anyone), this private contract cannot overturn the result of elections and override the clear processes of removal of an elected official. That then

[16] *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (It is "the authority of the people" to "determine the qualifications of their most important elected officials . . . [i]t is an authority that lies at the heart of representative government.").

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begs the question of what would the "Council observer" resign from? If resignation is from the selection committee, then one might ask why the agreement remains in effect long after the selection committee's work is done? This provision as applied to a councilperson as written is either the result of careless review by the drafter (and others) or an absurd misreading of applicable law. It should be removed immediately.

Conclusion

While some worthy intent may exist in the promulgation of nondisclosure agreements as to councilmembers, any fair reading of applicable law and a review of the plethora of errant, unlawful, or poorly worded provisions in the NDA suggests that it should be withdrawn. Councilmembers are bound by numerous duties of ethical conduct and can be punished by colleagues, voters, or courts for any violations of duties of confidentiality. I would advise that the City trust the process that exists in its laws and avoid further detours into legally impermissible restraints on the rights of public servants to do their jobs.

Regards,

Quinton D. Lucas
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Kansas City, Missouri