

# Office of the City Solicitor

## Everett, Massachusetts

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August 14, 2013

Elizabeth Dello Russo, Executive Director  
Host Community Advisory Committee  
Boston City Hall, Room 615  
Boston, MA 02201

### **Re: Proposed Wynn Development and Freedom of Information Request for Public Records**

Dear Ms. Dello Russo:

The City of Everett is in receipt of your above-referenced request. Given the broad scope of the requests to the City, an exhaustive search of the offices of the Mayor and the City Solicitor will be necessary. The City expects that there are documents responsive to your requests, and will provide copies of such documents, subject to the payment of applicable fees under the Public Records Access Regulations, to the extent that such records exist and are subject to mandatory disclosure under the Public Records Law. G.L. c.66, §10. To the extent that responsive documents, or material contained therein, may be withheld under any of the exemptions to the Public Records Law, or pursuant to the attorney-client privilege, such documents will be withheld and/or material redacted, as appropriate. G.L. c.4, §7(26); Suffolk Construction. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-50 (2007). Although certain exemptions are asserted below, the citing of such exemptions is not meant to be exhaustive. The City expressly reserves the right to assert application of additional appropriate exemptions or the attorney-client privilege as the actual process of searching for and reviewing responsive records proceeds.

Be informed that a record holder's duty to respond to requests for information extends only to records that are in existence and in the record holder's custody. See G.L. c.4, §7(26); see also 950 CMR 32.03 (defining "custodian" as the public official who has routine access to or control of public records). Moreover, there is no obligation to create a record in response to a public records request. G.L. c.66, §10(a); 32 Op. Att'y Gen. 157, 165 (May 18, 1977). Therefore, to the extent that any of the records you have requested do not exist, or that your requests constitute questions for which there are no documents providing responsive information, the City has no obligation to, and will not, create the same.

Certain responsive records may be withheld pursuant to exemption (d). This exemption is intended to avoid release of materials related to recommendations on legal and policy matters

that could taint the deliberative process if prematurely disclosed. Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 237 n.8 (1988). In considering exemption (d), the court in General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 807 (1999) stated, "The purpose of exemption (d) is to foster independent discussions between those responsible for a governmental decision in order to secure the quality of the decision." Id. Thus, any records that relate to ongoing deliberative matters, including matters of a policy nature, will be withheld under exemption (d). Additionally, any records that may be responsive to your request but that constitute personal notes not maintained in the City's official files, and which have not been shared with any other person, will be withheld under exemption (e) of the Public Records Law.

Further, various records between the City and its attorneys reflecting advice requested or provided in regard thereto will likely be withheld under the attorney client privilege. In Suffolk Construction Co. v. Division of Capital Asset Management, 449 Mass. 444 (2007), the Supreme Judicial Court held that the attorney-client privilege is applicable to municipal clients and their attorneys. In withholding such records, the City will be prepared to demonstrate that such records reflect a confidential exchange between the municipal attorney and the client concerning legal advice sought by the client about which the privilege has not been waived. Such privilege would continue to apply even in the event that the underlying question to which the advice relates has been resolved.

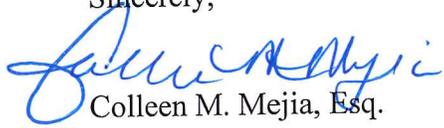
Whenever it is estimated that the cost for complying with a public records request will exceed \$10.00, a custodian must provide the requester with a good-faith written estimate prior to complying with the request. 950 CMR 32.06(2). It is estimated at this time that there are approximately 2,000 pages of responsive records, to be copied at \$.20 per page in accordance with the Public Records Access Fee Regulations for a total of \$400.00. It is estimated further that it will take 10 hours to locate, review, and where appropriate, redact responsive records. The average hourly rate of the lowest paid employee capable of performing such work is \$42.27, for a total of \$422.70. 950 CMR 32.06(1)(c); 950 CMR 32.03 (definitions of search and segregation time). It is further estimated that it will take two hours to copy responsive records, and that the lowest paid employee capable of such work is paid at the hourly rate of \$14.61, for a total of \$29.22. Thus, the initial total for the above-referenced request is \$851.92.

Upon receipt of payment in the specified amount, the City will undertake the work necessary to diligently locate, review and copy all public records, including creation of a log describing in appropriate detail the particular records withheld in whole or in part, and the exemption or exemptions applicable thereto. Once the actual process of locating, reviewing and copying responsive records begins, however, should the actual cost necessary to comply with this request result in additional expenses to the City, the City will provide you with a revised estimate of such costs and await payment of the same.

Of course, the size of the above estimate is directly related to the expansive scope of your request for records. Should you wish to narrow the scope of your request, with reference to subject matter or otherwise, the City will provide you with a revised estimate of the cost to comply with your request.

Pursuant to 950 CMR 32.08, you may appeal this response to the Supervisor of Public Records within 90 days.

Sincerely,



Colleen M. Mejia, Esq.  
City Solicitor