

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - NORTH COUNTY DIVISION

DR. DONALD MCPHERSON,

PETITIONER,

VS.

CITY OF ENCINITAS, AND DOES 1-
10, INCLUSIVE,

RESPONDENT.

CASE No. 37-2019-
00018579-CU-WM-NC

DEPOSITION OF
TODD MIERAU
San Diego, California
Thursday, May 9, 2019

Reported By:
Karen Cosgrove
CSR No. 12425
NDS Job No. 214724

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SAN DIEGO
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5 DR. DONALD MCPHERSON,)
))
6 Petitioner,)
))
7 vs.) Case No. 37-2019-
) 00018579-CU-WM-NC
8 CITY OF ENCINITAS AND DOES 1-10,)
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9 INCLUSIVE,)
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10 Defendants.)
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16 San Diego, California
17 Thursday, May 9, 2019
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15 DEPOSITION OF TODD MIERAU, taken on
16 behalf of the Petitioner, beginning at 1:03 p.m.
17 and ending at 4:02 p.m., on Thursday, May 9, 2019,
18 at 225 Broadway, Suite 1900, San Diego, California,
19 before Karen Cosgrove, Certified Shorthand Reporter
20 No. 12425, for the State of California.
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13 EXHIBIT 4 Noise Impact Analysis 93
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1 TODD MIERAU,
 2 HAVING BEEN FIRST DULY SWORN, WAS
 3 EXAMINED AND TESTIFIED AS FOLLOWS:
 4
 5 EXAMINATION
 6 BY MR. TINKOV:
 7 Q Thank you. All right. Mr. Mierau, I am an
 8 attorney representing Dr. Donald McPherson, the
 9 petitioner in a lawsuit against the City of Encinitas.
 10 I'd like to ask you -- well, I'm going to provide you
 11 with some admonitions now, in preparation for questions
 12 I'm going to be asking.
 13 So the very first one I often ask is have you
 14 ever been a witness in a deposition previously.
 15 A Yes.
 16 Q Can you describe the number of depositions
 17 you've been in before?
 18 A The number? Probably two.
 19 Q Okay. And were these depositions related to
 20 your work for the City of Encinitas?
 21 A Correct.
 22 Q Okay. Can you give us some information on
 23 each of those depositions.
 24 A Is that --
 25 MR. LUSITANA: Can you be more specific?

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1 BY MR. TINKOV:
 2 Q Sure. Let's start with the oldest or least
 3 recent version or least recent deposition.
 4 Can you tell us what that case was about.
 5 A Related to a building permit. Set of plans,
 6 essentially.
 7 Q And do you remember the matter?
 8 A Yeah, I do.
 9 Q Can you please describe that for us.
 10 MR. LUSITANA: Describe or you want the name
 11 of the matter?
 12 MR. TINKOV: The name of the matter would be
 13 fine.
 14 THE WITNESS: Basically, it was a residence in
 15 Cardiff.
 16 MR. LUSITANA: Do you know plaintiff versus
 17 defendant? Like what their names are?
 18 THE WITNESS: I don't remember the exact
 19 name.
 20 BY MR. TINKOV:
 21 Q Oh. And, again, I'll give this to you in my
 22 admonitions. If you don't remember something, your best
 23 recollection is fine. If you can't remember, simply
 24 say, "I don't remember." That's fine.
 25 A Okay.

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1 Q Again, for the record, do you recall the name
 2 of the first case in which you were deposed?
 3 A I don't recall.
 4 Q Do you remember the name of the second case in
 5 which you were deposed?
 6 A I thought it was Scott vs. Matsui.
 7 Q All right. Perfect. In both of those
 8 depositions, again, for the record, you were acting in
 9 your position as a planner for the City of Encinitas; is
 10 that correct?
 11 A Correct.
 12 Q I'd like to make sure you understand that,
 13 even though this deposition is being taken in a rather
 14 informal setting in a law office, it has the same force
 15 and effect as if it were taken in a court of law.
 16 Do you understand that?
 17 A Sure.
 18 Q Do you understand that the oath you've just
 19 taken requires that you testify truthfully, under
 20 penalty of perjury?
 21 Do you understand that?
 22 A Sure.
 23 Q Okay. I'll ask that you -- when you answer a
 24 question, you answer audibly so the reporter can
 25 properly take notes of all of your responses. And I

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1 also ask that when you do answer, you don't do so by,
 2 say, pointing or making statements like "about this
 3 much." Of course, all of this is being recorded in
 4 text. So we do need a verbal response; is that clear?
 5 A Sure.
 6 Q Thank you. And the court reporter can only
 7 record the words of one speaker at a time. So I'm going
 8 to ask you not to begin to answer a question until I've
 9 completely finished the question. And, of course, if
 10 your counsel has anything to say, please allow him to
 11 speak first.
 12 Is that okay as well?
 13 A Sure.
 14 Q Thank you. And so, shortly, I'm going to be
 15 asking you some questions. I would like for you to
 16 answer these questions truthfully, accurately, and
 17 completely.
 18 Do you understand?
 19 A Uh-huh. Yes.
 20 Q Thank you. And I'm entitled to your best
 21 estimate or your best recollection in response to my
 22 questions. For example, if you don't remember the exact
 23 words of a conversation, I'm entitled to the gist of it
 24 or the substance, but I don't want you to guess or
 25 speculate. No need for that.

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1 Do you understand that as well?
 2 A Yes.
 3 Q Thank you. And if at any time during the
 4 deposition you feel ill or you need to go to the
 5 bathroom or you're -- or otherwise can't continue to
 6 testify accurately, please let me know immediately. We
 7 can take a break for however long we need.
 8 MR. TINKOV: Just so you all know, the
 9 bathroom is right around the corner here, if we need
 10 that.
 11 And I'll say, I'm hoping we do not have to
 12 take up the entire four hours we were given by the court
 13 for this deposition. How about we say on the hour,
 14 every hour -- 2:00 o'clock would be the next one then.
 15 At 3:00 we will take a five-minute break just so
 16 everybody can stretch their legs.
 17 BY MR. TINKOV:
 18 Q So let's see. Now I'm going to ask you a
 19 slightly personal question. I do not mean to make any
 20 slight in this way, but have you taken any substances
 21 within the past 24 hours which would affect your ability
 22 to testify accurately at this deposition?
 23 A No.
 24 Q Okay. Great. And that includes medications,
 25 drugs, alcohol -- anything like that?

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1 A No.
 2 Q Okay. Thank you. Also not meant as a slight,
 3 do you have any difficulty understanding or speaking
 4 English?
 5 A No.
 6 Q Great. Is there any other reason why at all
 7 today you might not testify truthfully?
 8 A No.
 9 Q Great. So, again, I will point out that
 10 everything we say here today will be taken down by the
 11 court reporter. After the deposition is over, the court
 12 reporter will transcribe what we said into a booklet.
 13 And if I ask you the same questions later at trial or we
 14 find evidence contrary to the answers you provide today,
 15 I'll be able to comment on those differences, and one of
 16 the reasons will be to question your truthfulness. So
 17 you can expect to be asked to explain the differences in
 18 your answer.
 19 A deposition is a court proceeding. You must
 20 treat it with the same candor and respect as if you were
 21 on the witness stand. If you were found to be lying
 22 during the course of this deposition, you may be
 23 prosecuted for perjury.
 24 Do you understand that?
 25 A Yes.

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1 Q Once the court reporter prepares the booklet,
 2 we will send it on to the City for your final review and
 3 for your execution to confirm that the answers that were
 4 given reflect what you were saying here in the course of
 5 this deposition.
 6 Do you understand that?
 7 A Yes.
 8 Q Great. And, finally, do you have any
 9 questions about anything I've just told you?
 10 A No.
 11 Q Excellent. All right. Let's proceed then
 12 with the deposition, unless you have anything else?
 13 MR. LUSITANA: No. We're fine.
 14 BY MR. TINKOV:
 15 Q Okay. So, Mr. Mierau, for the record, would
 16 you please announce and spell your full name.
 17 A Todd, T-o-d-d; Mierau, M-i-e-r-a-u.
 18 Q My apologies. I've been calling you Mierau.
 19 MR. LUSITANA: So have I. I apologize.
 20 MR. TINKOV: I will have to repeat it 20 times
 21 before I get it right.
 22 BY MR. TINKOV:
 23 Q Now, have you ever used any other names in the
 24 past?
 25 A No.

Page 11

1 Q Great. Can you describe your educational
 2 background for us.
 3 A Bachelor of Arts from San Diego State in
 4 Public Administration and City Planning.
 5 Q And can you describe any professional licenses
 6 that you hold?
 7 A Professional licenses?
 8 Q Uh-huh.
 9 A None.
 10 Q None. Okay. Thank you.
 11 Is the City of Encinitas your sole employer?
 12 A Yes.
 13 Q Okay. So you have no other jobs then?
 14 A No.
 15 Q Great. And do you have any other means of
 16 financial support, besides your job with the City of
 17 Encinitas?
 18 A No.
 19 Q Can you again speak up for the reporter?
 20 A Okay.
 21 Q Can you please describe your position with the
 22 City of Encinitas.
 23 A Associate planner.
 24 Q And can you tell us what the title "associate
 25 planner" means?

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1 A Well, that's kind of a vague question,
2 honestly.
3 MR. LUSITANA: Why don't you rephrase?
4 MR. TINKOV: Sure.
5 BY MR. TINKOV:
6 **Q Can you please describe your scope of work**
7 **with the City of Encinitas.**
8 A Okay. So City of Encinitas has varying levels
9 of associate planners: Some in advanced plans; some in
10 current planning; some operate as a counter function.
11 So I'm in the current planning segment. So there are
12 job descriptions. We actually have one out for recruit
13 right now.
14 So a clear description is there, if you wanted
15 to literally look at that description of what's -- what
16 they're looking for.
17 **Q Can you just describe it for us, generally?**
18 A Yeah. Project processing. So anything from
19 discretionary permits to building permit requests;
20 grading permit requests. Community outreach. So
21 there's a lot of different facets of development review.
22 **Q That's sufficient for my purposes.**
23 **How long have you worked with the City of**
24 **Encinitas?**
25 A 18 years.

Page 13

1 **Q 18 years. Okay.**
2 **And in all of that time, have you always been**
3 **an associate planner?**
4 A No.
5 **Q Can you please describe what you were before**
6 **you were an associate planner.**
7 A Okay. That would be a planner II,
8 essentially, and then associate planner is essentially a
9 planner IV so --
10 **Q Okay. And that was the only other job**
11 **position you'd had, prior to associate planner IV?**
12 A At the City. Correct.
13 **Q Yes. Did you work at another public agency**
14 **before?**
15 A Yeah. I've worked at a lot of public
16 agencies. So I worked for the City of San Clemente, in
17 park and recreation. I worked in the City of
18 Dana Point, also in parks and recreation. I worked in
19 the City of Laguna Niguel for planning and the City of
20 Palm Springs, also for planning.
21 **Q Okay. Now, Mr. Mierau, have you reviewed any**
22 **documents relating to this litigation, in preparation**
23 **for this deposition?**
24 A I mean, the record, I think, that I've
25 provided you. Right?

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1 MR. TINKOV: So for the record, I believe
2 Mr. Mierau is speaking with respect to the ten
3 responsive documents to the letter that I had sent to
4 City Attorney Glenn Sabine.
5 THE WITNESS: Correct.
6 MR. LUSITANA: Dated April 15.
7 THE WITNESS: Yeah. So there's ten specific
8 items you requested that I have for you. Yes.
9 BY MR. TINKOV:
10 **Q And have you reviewed any other documents?**
11 A As far as what?
12 **Q In preparation for this deposition.**
13 **MR. LUSITANA: He did provide you also with**
14 **the deposition notice.**
15 **THE WITNESS: Yeah. Yeah.**
16 BY MR. TINKOV:
17 **Q Deposition notice. Okay.**
18 A That's it.
19 **Q That would be it. Okay. Great.**
20 **And, Mr. Mierau, have you talked to anyone,**
21 **other than the city attorney, about this deposition?**
22 A No.
23 **Q Okay.**
24 A I mean, in what form? Obviously, my
25 supervisor knows I'm down here so --

Page 15

1 **Q So in that sense, is your supervisor the only**
2 **person you've spoken to?**
3 A Correct.
4 **Q Can you please tell us the name of your**
5 **supervisor?**
6 A Anna Yentile.
7 **Q Can you spell her name for us?**
8 A A-n-n-a, Y-e-n-t-i-l-e.
9 **Q And what is Ms. Yentile's position with the**
10 **City of Encinitas?**
11 A Principal planner.
12 **Q All right. Great. And, Mr. Mierau, have**
13 **you -- what, if anything, have you done in preparation**
14 **for this deposition, other than gather or review those**
15 **records that we just discussed?**
16 **MR. LUSITANA: Other than speaking with the**
17 **city attorney?**
18 BY MR. TINKOV:
19 **Q And other than speaking with the city**
20 **attorney.**
21 A Nothing.
22 **Q Okay. Fantastic. So now we'll get into**
23 **something more of the substantive aspects of this.**
24 **Mr. Mierau, can you tell us, are you familiar**
25 **with California Public Records Act?**

Page 16

1 A Yes.

2 **Q And for the record, can you please describe**

3 **your understanding of the California Public Records Act.**

4 A Basically, providing -- well, I mean, it's an

5 information request act. Depending on the request filed

6 and specifically what you're requesting, would be the

7 information provided by the agency.

8 **Q Okay. So let's -- let's go at it this way.**

9 **And I'm not asking for any sort of legal opinions. Just**

10 **kind of your general understanding.**

11 **In your opinion, does the California Public**

12 **Records Act require the City of Encinitas to produce**

13 **documents relating to proposed developments of**

14 **properties within its jurisdiction?**

15 **MR. LUSITANA: Objection, to the extent it**

16 **calls for a legal conclusion.**

17 **As you said, he's not an attorney. He doesn't**

18 **have a legal opinion. But if you want to hear his**

19 **general understanding, go ahead and try and answer.**

20 **BY MR. TINKOV:**

21 **Q Please do answer.**

22 A Yeah. I think it's a fairly general statement

23 but depending on the request. If it's very specific as

24 to the document -- right? -- then that would be the

25 document potentially that's provided. If it's very

Page 17

1 vague -- sometimes the requests could be vague.

2 I mean, in our realm, there's multiple

3 entities that would be catching the request. It's not

4 just the planner, per se. It could be the clerk, the

5 attorney -- all of those aspects physically going back

6 to the recipient that's requesting the information.

7 **Q Okay. Great. And in your own words, do you**

8 **know what -- what would happen if the City of Encinitas**

9 **is found to have failed to comply with the California**

10 **Public Records Act?**

11 **MR. LUSITANA: Same objection. Calls for a**

12 **legal conclusion.**

13 **BY MR. TINKOV:**

14 **Q And please answer.**

15 **MR. LUSITANA: If you know.**

16 **BY MR. TINKOV:**

17 **Q If you know.**

18 A I don't know.

19 **Q Okay. Great. Now, I'm going to ask you**

20 **about specifically about the January 29, 2019,**

21 **California Public Records Act request I submitted to the**

22 **Encinitas.**

23 **Are you familiar with that request?**

24 A Not offhand.

25 **Q Okay. Do you need a copy of it to refresh**

Page 18

1 **your recollection?**

2 A Yes, please.

3 MR. TINKOV: All right. I will pass on to

4 Mr. Mierau -- I'll call it Exhibit 1. It is a two-page

5 e-mail from myself to the city clerk, Kathy Hollywood,

6 dated January 29, at 11:45 a.m., in the year 2019.

7 (Document handed to witness.)

8 **BY MR. TINKOV:**

9 **Q Please take all the time you need to review**

10 **it. If you would, I'm going to swap out that copy for**

11 **this one. That one is not a clean copy. And, again,**

12 **I'm going to -- the problems of being a lefty. And**

13 **there you go.**

14 (Exhibit 1 was marked for identification and

15 is attached hereto.)

16 (Document handed to witness.)

17 **BY MR. TINKOV:**

18 **Q When you're done, just let me know.**

19 A It says the same as that one?

20 **Q Exactly the same. Yeah.**

21 A Okay.

22 **Q Okay. Now that you've reviewed this record or**

23 **this document, which we've described as Exhibit 1, do**

24 **you recall seeing it before?**

25 A Not in this format. This isn't even directed

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1 to me.

2 **Q Okay. Great. So with respect to that issue,**

3 **can you tell us how it is you first learned -- actually,**

4 **let me take that back. Let's take a step back now.**

5 **Now that you have reviewed the Public Records**

6 **Act request that was originally submitted on January 29,**

7 **2019, can you please tell us a little bit about the**

8 **subject matter of that request; namely, can you please**

9 **describe the Portofino Hotel project, which is**

10 **referenced in that request.**

11 **MR. LUSITANA: Okay. Objection. Lacks**

12 **foundation. He's testified that he hasn't seen this**

13 **before so --**

14 **MR. TINKOV: Fine.**

15 **BY MR. TINKOV:**

16 **Q Let me -- actually -- and I won't even ask you**

17 **to finish that answer.**

18 **MR. LUSITANA: So do you need this exhibit**

19 **anymore?**

20 **MR. TINKOV: He will need this. Yes.**

21 **MR. LUSITANA: But he's never seen it**

22 **before.**

23 **MR. TINKOV: I will get to that point in one**

24 **second. Thank you.**

25 **MR. LUSITANA: Okay.**

Page 20

1 BY MR. TINKOV:
2 Q Now, can you please describe how you first
3 learned of the existence of this January 29, 2019,
4 California Public Records Act request?
5 MR. LUSITANA: Objection. Assumes facts not
6 in evidence.
7 BY MR. TINKOV:
8 Q Please answer.
9 MR. LUSITANA: Do you understand the question?
10 THE WITNESS: Not really.
11 BY MR. TINKOV:
12 Q Okay. Let me rephrase.
13 When did you first learn that you were being
14 asked to provide records, with respect to the subject of
15 this litigation?
16 A I don't have a specific date.
17 Q Okay. And do you recall how you were asked to
18 provide these records?
19 A I think I provided you the record. Right?
20 Those ten things are the letters that you requested.
21 MR. LUSITANA: No. Listen to his question. I
22 think he's talking about, initially, how were you first
23 asked about the -- to provide documents responsive to a
24 question.
25 Is that correct?

Page 21

1 MR. TINKOV: That is correct.
2 THE WITNESS: I mean, there's been 19 record
3 requests on this project. I think a few from you; a few
4 from McPherson's group itself. So there's physically 19
5 times that file has been sent to the clerk. And that's
6 all been accounted for and logged in.
7 BY MR. TINKOV:
8 Q When you say that the file has been sent to
9 the clerk --
10 A The hard copy file.
11 Q The hard copy file. So can you tell us how
12 that process is triggered?
13 A It would be through a records request. Right?
14 And, essentially, there's an electronic kind of process.
15 I guess, essentially, that is the request. So it's sent
16 out to a key group of people, asking for information on
17 the records request.
18 Q So specifically then, when you say there's an
19 electronic process, are you referring to, say, an e-mail
20 that's sent to all of the parties that are to gather
21 these records? Is that what I'm understanding?
22 A Yeah. Technically. It doesn't necessarily
23 mean it would be myself included. It would be a party
24 who would then figure out who may have the information.
25 Q So explain that to me.

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1 Who is this party you're referring to?
2 A Like key people in each department. Right?
3 So take, for instance, this records request is fairly
4 vague on the six items there. That could be something
5 in our engineering department. It could be something in
6 our fire department.
7 I mean, key words "Portofino" -- that could be
8 something that the fire department has inspected. It
9 could be a building permit that's currently being
10 inspected. It could be even a sheriff's report; some
11 item that's unrelated that has that key word in it from
12 some events that occurred.
13 So there's multiple things that would go out
14 to a group, depending on the request. If it's vague,
15 the requested information could be vague back, as
16 opposed to a specific project plan, let's say, that is
17 being requested. Right?
18 Q Okay. So in this instance, with respect to
19 this particular request, I believe you'd said you don't
20 recall ever seeing this request.
21 Do you recall ever being asked to gather the
22 information requested under this California Public
23 Records Act request?
24 A Like I said -- and this one is not directed to
25 me.

Page 23

1 Q Right.
2 A But 19 of them have come in, which I have
3 provided a hard-copy file of the complete record to the
4 clerk.
5 Q Okay. So --
6 MR. LUSITANA: Is that what's in this box
7 here?
8 THE WITNESS: I believe so. I mean, that's
9 what the clerk would have provided back as the records.
10 So, I mean, in theory it could have been copied 19 times
11 as it's changed through those requests and time frame,
12 but that's what would have happened or transpired.
13 MR. LUSITANA: You're more than welcome to
14 make yet another copy of the boxes, if you wish.
15 MR. TINKOV: I appreciate that.
16 So for the record, the deponent is pointing to
17 the records, which are reported to be the ones that were
18 given to my office, in response to the January 29, 2019,
19 California Public Records Act request.
20 BY MR. TINKOV:
21 Q With respect to that request -- and, again,
22 I'm only really going to be talking about the January
23 29, 2019 request. So I'm going to shorthand it, for the
24 most part, and say "with respect to that request." It
25 will only be with respect to that request, not the other

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1 **18 that were made.**
2 **I believe you'd said you don't recall seeing**
3 **it because it was effectively part of -- you know, one**
4 **of 19 other requests; is that correct?**
5 A Well, I don't know where this request falls
6 into the 19 that have been filed.
7 **Q Sure.**
8 A But I don't keep the record of that. The
9 clerk would keep the record of how many times it's been
10 filed on, let's say, this address or key words. You can
11 see there could be a blending, and maybe it falls into
12 one or the other. I know you, personally, had filed a
13 copy. Right? Or --
14 **Q I only just filed this one.**
15 A Okay. So there's only been one. I thought
16 there were multiple.
17 **Q Just for me just that one.**
18 **Okay. Let's talk a little bit about just the**
19 **process of how that request or any of these requests --**
20 **in fact, any public records act request gets to you.**
21 **I believe you briefly had mentioned that**
22 **there's an electronic notification to various**
23 **departments that asks for certain information they may**
24 **or may not have.**
25 **Is that what you think would have occurred in**

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1 **this instance?**
2 **MR. LUSITANA: Don't speculate.**
3 **THE WITNESS: Well --**
4 **BY MR. TINKOV:**
5 **Q Again, to the best of your recollection. I'm**
6 **not asking you to tell me something you don't know.**
7 **MR. LUSITANA: Why don't you rephrase it as a**
8 **typical thought process?**
9 **BY MR. TINKOV:**
10 **Q As a typical process --**
11 **MR. LUSITANA: There you go.**
12 **BY MR. TINKOV:**
13 **Q -- would you -- or can you please describe to**
14 **us the electronic notification that would have gone out**
15 **to a Public Records Act request?**
16 A Honestly, that's not really my expertise.
17 So that gets filed to the clerk. The clerk
18 would then transcribe that into some type of electronic
19 e-mail request. That is out of my control or out of my
20 hands. Right? So that then disperses to the group of
21 individuals who then would determine who has some of the
22 information.
23 **Q Sure.**
24 A But in theory the request is citywide. Right?
25 So it's a file. And it could, like I said, go across

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1 multiple disciplines, not just planning, per se.
2 **Q And, again, you don't recall the substance of**
3 **this request being sent on to you, to gather up that**
4 **particular file that you brought with you today?**
5 A Not in that particular order. I mean,
6 honestly, looking at this is fairly vague. It's just
7 the Portofino Beach Inn is not really related to this
8 project. It's a completely different hotel. So some of
9 this information may be incorrect.
10 **Q Okay. Can you tell us who it is from the city**
11 **attorney's office -- I'm sorry -- the city clerk's**
12 **office that would normally send out a notice of a**
13 **California Public Records Act request to you?**
14 A It's not really how it typically works. They
15 send it out to people within each department. So it
16 could be a varying number of people. I don't think it's
17 necessarily the same person in our department.
18 **Q Within your department then --**
19 A Yeah.
20 **Q -- who would normally get such a request?**
21 A There's a couple different people, typically.
22 Kathy Noel would be one.
23 **Q And can you spell her name?**
24 A Kathy, K-a-t-h-y. Noel, N-o-e-l. It could be
25 Deana. D-e-a-n-a. Last name, Gay, G-a-y. That's

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1 typically who I've seen, but I can't necessarily
2 guarantee it's to those two people.
3 **Q Sure.**
4 A In theory it could go to anybody who had the
5 authority then to, I guess, reassign it or however you
6 would look at it that way.
7 **Q Okay. So let's move on from who would have**
8 **received it to another line of questions here.**
9 **The materials that you -- let me take a step**
10 **back.**
11 **Do you believe that you provided all of the**
12 **records that were requested of you, with respect to this**
13 **California Public Records Act request?**
14 **MR. LUSITANA: This request referring to**
15 **Exhibit 1?**
16 **MR. TINKOV: Again, the January 29, 2019.**
17 **MR. LUSITANA: That he's never seen before?**
18 **MR. TINKOV: Correct.**
19 **MR. LUSITANA: You want to rephrase that,**
20 **Counsel?**
21 **MR. TINKOV: No.**
22 **THE WITNESS: I think it's a generalization.**
23 **This is very general. Like I said, I thought there was**
24 **more than one -- was your specific letter with the ten**
25 **key points that I specifically tacked out and made sure**

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1 you had the information.
2 **BY MR. TINKOV:**
3 **Q** Let's quickly put aside those ten points. And
4 I'll -- for your benefit, I'll describe what those were
5 and why they're not substantive, with respect to this
6 deposition.
7 Those ten requests that were sent on to the
8 city attorney, Glenn Sabine, were delivered on the day
9 in which we had already been in front of the Court on
10 this matter. So the dispute had already arisen. This
11 is literally four months after the original California
12 Public Records Act request had been submitted.
13 So I'm going to ask you to focus mostly,
14 unless I tell you otherwise, on this actual request from
15 January 29, 2019; is that clear?
16 A Okay.
17 **Q** Okay. So with respect to this particular
18 request, you, I believe, told us you don't remember
19 seeing this request, and you -- can you tell us --
20 again, do you recall ever having to fulfill any of the
21 points from this request?
22 A Not specifically. No.
23 **Q** Okay. And reviewing this request now does not
24 refresh your recollection in any way on that point?
25 A No.

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1 **Q** Okay.
2 A Like I said, if the request came in -- which I
3 thought there had been multiples from you, but we keep
4 going around in circles here -- is if the one records
5 request -- you would have received the file at the
6 clerk, and they would have copied the record and
7 provided that to you.
8 **Q** Right.
9 A The same thing with the letter that we just
10 talked about that we're not talking about. You got more
11 detailed on ten specific items that I personally flagged
12 and copied, and you got that record.
13 **Q** Okay.
14 A So that's the difference.
15 So whether you got the information back under
16 the records request -- right? -- there would have been a
17 whole file. So whether you got this complete box for
18 the probably 19th time at that point --
19 **Q** Right.
20 A -- you could have compared it to the original
21 time of the request or McPherson's group's request for
22 the information to see any changes or differences in the
23 project scope of work.
24 **Q** Okay. Well, then let's touch on that.
25 With respect to those ten items that you

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1 pulled together to bring to this deposition, were those
2 ten items in the response that the City of Encinitas
3 provided in response to the January 29, 2019, California
4 Public Records Act request?
5 A I can't confirm. Like I said, I'm not the one
6 that responds to you.
7 **Q** Sure. Let's get at it a different way.
8 Were those ten documents you prepared for
9 today's deposition --
10 **MR. LUSITANA:** Ten categories of documents.
11 **BY MR. TINKOV:**
12 **Q** Ten categories of documents. Were those ten
13 categories of documents in the project file that you
14 would have handed to the city clerk?
15 A Correct.
16 **Q** Okay. So then in theory those records should
17 have been provided to the requester.
18 A Correct. I mean -- so I haven't seen the
19 CD -- whatnot -- that you were provided or the
20 information that was provided to you. But the file --
21 the complete records since I think the request -- I
22 mean, there was -- very clearly the last resubmittal,
23 which has been disclosed, was August 2018.
24 So those are the documents that you reference
25 in your letter. Those are the documents that have

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1 always been on file. I have met with your client
2 specifically on those items in personal meetings. So
3 very much aware of the information and what's on the
4 record.
5 **Q** Okay. And just again so I get this right,
6 August 2018 was when this project resubmitted some
7 plans.
8 A That is the current set of plans that we all
9 saw at the last planning commission meeting. Those are
10 the documents that have been on file and been reviewed
11 by all parties, including your client, and have been
12 very much aware of. We're into May. So six months
13 time, those have been in the file, on file. They've
14 continuously, actually, come into the City to look at
15 them and make changes.
16 **Q** And each time -- I'm sorry. I didn't mean to
17 interrupt.
18 Each time individuals come in to take a look
19 at these records, you're providing them this very same
20 case file that you have; your hard copy of the project.
21 A Correct.
22 **Q** Okay. Well, let's see. When you have handed
23 over your project file, to whom have you handed that
24 file over? Is it the same person each time or different
25 people each time?

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1 A Different people.
2 Q Can you tell us who those would be?
3 A It could be any number of people working in
4 our department. It's not anybody specific. Generally,
5 it's our counter staff, which does rotate. Typically,
6 there are some core individuals that are counter staff,
7 but it could be administrative support, depending on
8 what it is, and at times it could be me. Face-to-face
9 meeting and handing the file over. Right? So --
10 Q Can you provide the names? And, again, spell
11 them if you can. The principal parties who you expect
12 would have received these records when you handed them
13 over, in response to a typical California Public Records
14 Acts request, even if it's multiple individuals.
15 Well, just simply going through the -- you
16 mentioned there were administrative staff. There might
17 be yourself there. There might be other planning staff.
18 Can you please describe any of the individuals
19 that you said are primarily --
20 A But you're relating it to the Public Records
21 Request Act. It has nothing to do with -- somebody
22 coming in to the counter and signing in to the public
23 counter requesting a file has nothing to do with the
24 Records Request Act. It's completely unrelated.
25 Q Oh. Well --

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1 A And -- so the file would be given to the
2 individual in our department who would courier it up to
3 the counter and hand it to the individual requesting the
4 file. Nothing to do with the Records Request Act at
5 all.
6 Q Okay.
7 A This is just a common request. When I say a
8 "case file," it's a public record. They can physically
9 review the file.
10 Q Okay. So are you aware that the California
11 Public Records Act request -- I'm sorry -- the
12 California Public Records Act itself permits the very
13 thing you're referencing, which is individuals to come
14 up to the counter to review public records?
15 MR. LUSITANA: Is that a question?
16 MR. TINKOV: Yeah.
17 MR. LUSITANA: Objection. Calls for a legal
18 conclusion. Argumentative.
19 BY MR. TINKOV:
20 Q I'm simply asking if you're aware of this.
21 MR. LUSITANA: Let me finish. Are we talking
22 about a specific -- this CPR request or in general the
23 typical process? I'm a little unclear.
24 MR. TINKOV: I am simply referring to what was
25 just heard by everyone here. That --

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1 BY MR. TINKOV:
2 Q Sorry. I'm going to mess up your name again.
3 Mierau?
4 A Mierau.
5 Q Thank you.
6 MR. TINKOV: Mr. Mierau had just informed us
7 that the Public Records Act request has nothing to do --
8 or the Public Records Act has nothing to do with the
9 individuals reviewing documents over the counter.
10 BY MR. TINKOV:
11 Q I'm asking, are you aware that the Public
12 Records Act request provides the public an opportunity
13 to review records over the counter?
14 MR. LUSITANA: Same objection. Calls for
15 legal opinion.
16 BY MR. TINKOV:
17 Q Please answer.
18 A I'm not saying yes or no. It's a public
19 record, a file -- a public document that -- yes -- the
20 public has access to it. But what I'm saying, somebody
21 didn't file a Records Act request to obtain the file.
22 Q Okay.
23 A Anybody could come in off and -- you know,
24 pull into city hall and say, hey, I want to take a look
25 at the hotel file, and anybody will get that. They

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1 would not have to file an official Public Records Act
2 request through the clerk to obtain it. That's the
3 difference.
4 Q Okay. I just want to be clear on this point.
5 Are you aware that a Public Records Act
6 request does not have to be a written request?
7 A I'm not aware of that.
8 Q Now, you had mentioned that each time a
9 California Public Records Act request had come in -- at
10 least with this particular project, the Portofino
11 project, we'll refer to it as -- you have handed over
12 your project file to someone.
13 Can you tell us who that someone might be,
14 when there's been an actual California Public Records
15 Act request?
16 A It's different. That's the thing. It could
17 be a number of people. Typically, that goes through the
18 clerk because the clerk -- the request is coming through
19 the clerk. So that file will go directly to the clerk.
20 It wouldn't necessarily be handed off to our department,
21 it would go right to the clerk.
22 The difference is, like I'm saying, somebody
23 comes to the counter. The file is going to that person
24 who's reviewing it. Right? Does that make sense?
25 Q Sure. Absolutely.

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1 A Okay.

2 Q Would you -- or do you recall speaking with

3 Claudia Bingham -- or I shouldn't say speaking with --

4 excuse me -- corresponding with Claudia Bingham, with

5 respect to this particular January 29, 2019, California

6 Public Records Act request?

7 A This particular one?

8 Q Uh-huh.

9 A Sure. It would have been Claudia or Kathy.

10 Right? Kathy is on this e-mail. They are the clerks.

11 So it would have been one of the two of them handling

12 the file, once the record request was received.

13 Q So I didn't hear with certainty, or I just

14 want to make sure.

15 Do you actually recall talking to Claudia

16 Bingham about this particular request?

17 A Not this specific one. No.

18 Q I'm going to provide you with an exchange

19 between myself and Ms. Bingham. It is 17 pages of

20 e-mails, and we'll refer to this as Exhibit 2, in order

21 to attempt to refresh your recollection.

22 And, again, please take all the time you need

23 to refer this.

24 MR. LUSITANA: And to clarify then, he's

25 trying to refresh his recollection to recall what?

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1 MR. TINKOV: If he had spoken with Ms. Bingham

2 with respect to the -- this particular request.

3 (Exhibit 2 was marked for identification and

4 is attached hereto.)

5 (Document handed to witness.)

6 BY MR. TINKOV:

7 Q And what I suggest, since it's an e-mail

8 thread, you might want to start from the back, just so

9 you can get the continuity of it.

10 MR. LUSITANA: Is Mr. Mierau's name on any of

11 this where he received any of these e-mails?

12 MR. TINKOV: No. This is specifically with

13 respect to Ms. Bingham stating that she had spoken with

14 Mr. Mierau.

15 MR. LUSITANA: Can you point out in the

16 17-page document where that is?

17 MR. TINKOV: It will be the very first page.

18 MR. LUSITANA: Here's the response from our

19 planning department per Todd. Okay.

20 BY MR. TINKOV:

21 Q But you might want to read the whole thing,

22 just to get a grasp of where it all came from.

23 A Okay.

24 Q All right. So on that very first page of

25 the -- what's that? Exhibit 2. Can you read into the

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1 record what Ms. Bingham responded to me within that

2 e-mail?

3 A With what? What her quotes are?

4 Q Just the entirety of that e-mail. It's fairly

5 short.

6 MR. LUSITANA: Okay. So this is from Claudia

7 Bingham, dated March 28th, to yourself, Counsel.

8 And go ahead and just read what that says

9 THE WITNESS: "Felix, here's the response from

10 our planning department. There's no claimed exemptions

11 per Todd. He provided all that exists. Claudia."

12 BY MR. TINKOV:

13 Q Okay. Does that refresh your recollection in

14 any way about Ms. Bingham contacting you to confirm that

15 all of the records had been provided, with respect to

16 this January 29, 2019, request?

17 MR. LUSITANA: Objection as to time. Vague.

18 What time frame are you talking about? Time of the

19 March 28 --

20 BY MR. TINKOV:

21 Q I'm asking right now, does that refresh your

22 recollection right now with respect to Ms. Bingham

23 contacting you to ask if you had provided all of the

24 records.

25 MR. LUSITANA: No. You don't understand. The

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1 objection is as to the time that the he recalls that it

2 occurring. Did he recall that occurring in that

3 sometime in this frame, in January or March. Not as to

4 now.

5 MR. TINKOV: Okay. I understand your

6 objection.

7 BY MR. TINKOV:

8 Q I will ask you to answer in this manner. I am

9 asking you, does this right now remind you of the fact

10 that Ms. Bingham -- or at least the claim that

11 Ms. Bingham had reached out to you, with respect to this

12 January 29, 2019, California Public Records Act request?

13 MR. LUSITANA: Same objection as to time.

14 Lacks foundation.

15 BY MR. TINKOV:

16 Q Please answer.

17 A Well, look at the time difference. This is

18 January 29 versus March 28. So you're speculating a lot

19 of time in between, whether the records request is still

20 active. Right?

21 At the time you filed this, the record would

22 have been provided as requested. And then there's a lot

23 of subsequent e-mails after the fact, assuming that that

24 record request was closed. I don't know. Was it closed

25 or is it not closed? Two months later, is it still

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1 open?
 2 MR. TINKOV: I'm going to move to strike as
 3 nonresponsive.
 4 MR. LUSITANA: I'm going to restate my
 5 objection, because the objection as to time goes exactly
 6 to the point that Mr. Mierau is making. He doesn't know
 7 when you're referencing Claudia contacting him. That's
 8 my objection. It's not about what he understands now.
 9 Do you understand that now, Counsel?
 10 MR. TINKOV: I understand.
 11 MR. LUSITANA: I'm just trying to get
 12 clarification.
 13 MR. TINKOV: I appreciate that.
 14 MR. LUSITANA: Okay.
 15 BY MR. TINKOV:
 16 Q So can you tell us the date that is shown on
 17 that e-mail from Ms. Bingham to myself on that first
 18 page in front of you in Exhibit 2.
 19 A Thursday, March 28, 2019.
 20 Q Do you recall Ms. Bingham reaching out to you
 21 within two to three days of that date, March 28, 2019,
 22 to ask you whether you had provided all of the records
 23 responsive to the January 29, 2019, Public Records Act
 24 request?
 25 A No.

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1 Q You do not. Great.
 2 Do you recall, at any time between January 29
 3 and March 28, 2019, Ms. Bingham reaching out to you, to
 4 confirm that you had provided all of the responsive
 5 records to the January 29, 2019, California Public
 6 Records Act request?
 7 A No.
 8 Q Okay. Let's see. Now, when you -- you've
 9 told us that you provide this hard copy -- this project
 10 file to either another person in planning or to the city
 11 clerk's office, with respect to the -- responding to a
 12 California Public Records Act request; is that correct?
 13 A Can you restate that?
 14 Q Sure. So you have told us that you -- your
 15 general process in responding to a California Public
 16 Records Act request is to hand over your project file,
 17 your paper file, on a particular project, in response to
 18 a California Public Records Act request; is that
 19 correct?
 20 A It's vague. It's not necessarily always a
 21 project file. Right? That depends on what it is.
 22 Q Okay.
 23 A If the request is a case file -- right? --
 24 then, potentially, that's what it would be. Okay. But
 25 it could be a number of things. Right?

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1 Q So in this instance, you have told us that
 2 there were 19 California Public Record Act requests,
 3 with respect to this project; is that correct?
 4 A As I understand it, I would not use the
 5 specific number, but you can verify that with the clerk.
 6 Q Certainly. And in those instances, did you
 7 provide the project file for this particular project, in
 8 response to the requests that were made?
 9 A Correct. Because an official records
 10 request -- the file would have been given to the clerk,
 11 who is technically the keeper of the record. Right?
 12 And they would copy the records appropriate for the
 13 recipient.
 14 Q So let's talk a little bit about the logistics
 15 of responding to a Public Records Act request.
 16 I understand that your memory is that these --
 17 the 19 or so Public Records Act requests that came in
 18 with respect to the Portofino project resulted in you
 19 providing the case file, your case file.
 20 Would you also perform any sort of search on
 21 your own with respect to electronic files, in response
 22 to a request?
 23 A Typically, if that's the request -- like I
 24 said, some of these are very specific. It's traffic
 25 study. That's what's being requested. So that's

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1 technically all that's performed. Right? It's not
 2 anything over and beyond that. That's why, when I'm
 3 looking at this e-mail, it's very vague on the five or
 4 six things.
 5 MR. LUSITANA: For the record, he's
 6 referencing Exhibit 1.
 7 THE WITNESS: Exhibit 1. And just to me, you
 8 know, for one, it's not even necessarily addressed
 9 specifically, let's say, to a project manager. This
 10 would go citywide This could come back in a number of
 11 different ways, depending on who grabs these key words.
 12 Like as I indicated, fire, building, engineering --
 13 whoever it may be. So it's very vague as -- it's not
 14 really getting you to the specifics -- right? -- of what
 15 maybe the request is.
 16 BY MR. TINKOV:
 17 Q So maybe we should start there then.
 18 Yes. Can you take another look at Exhibit 1.
 19 I believe now, at least a half a dozen times, you said
 20 this request is vague. I'd like for you to read the
 21 request one more time, specifically the part that starts
 22 with the bullet "All e-mails and messages" and so on.
 23 Please review that -- that bullet -- bulleted section
 24 and the next paragraph over, and, once you're done, I'd
 25 like to ask you some questions about that. Just let me

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1 know when you're done.
2 A The bullet -- "all e-mails" -- you want me to
3 read it?
4 Q No. You don't need to read it. Just to
5 yourself.
6 A Okay. Got it.
7 Q Okay. Now, you've mentioned that there's some
8 vagueness. I'd like to understand what you mean by
9 "vague."
10 What particularly do you find vague about this
11 request?
12 MR. LUSITANA: It's been asked and answered,
13 but he can testify again, I suppose.
14 Go ahead.
15 THE WITNESS: Well, like I said, the
16 request -- all e-mails matching on electronic, physical
17 correspondence, et cetera -- so, one, like I said, it's
18 not just me. It's to the City this request goes out to,
19 clearly. So the record of the project file is what I
20 hold, but I'm not in control of all the e-mails and
21 everything. Right?
22 This is what's physically being requested. A
23 lot of these things might not even be in the file
24 because they're unrelated. Some of this stuff is vague.
25 It could be duplicate. Right? It's a grant deed. It's

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1 an application. Whatever it might be.
2 One of the things that was -- when I go back
3 to that letter, of the ten things that we did provide,
4 was saying that we didn't provide those. This is the
5 correspondence. It's e-mails. It's not saying specific
6 technical studies or whatnot. It's just the e-mails,
7 messages, and electronic, physical correspondence. It
8 does not talk about technical studies, physical plans,
9 plan material, all of which is technically in that file
10 all dated August 2018.
11 BY MR. TINKOV:
12 Q Okay.
13 A So it is vague that way. Because the response
14 in your letter was we were withholding information, and
15 you didn't ask for that information. You're asking for
16 e-mails; messages; electronic, physical correspondence
17 in these vague contexts.
18 Q Okay. I just want to clarify this so that
19 everyone is on the same page.
20 A Sure.
21 Q When you're referring to "vagueness," you are
22 not saying that the request was unclear; is that
23 correct?
24 MR. LUSITANA: Objection. Argumentative.
25 ///

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1 BY MR. TINKOV:
2 Q I'm simply trying to understand what you mean
3 by "vague."
4 Is the request unclear in some fashion?
5 A I do think it's unclear. So --
6 Q What part, specifically, of the request do you
7 find unclear?
8 MR. LUSITANA: He's already testified. Asked
9 and answered.
10 BY MR. TINKOV:
11 Q I still want to understand. And let me
12 preface this by saying, I understand that you may not be
13 the sole custodian of all responsive records to this
14 request.
15 A Sure.
16 Q I do not consider that to be vague. You may
17 well.
18 Besides that particular issue, what is vague
19 about that request?
20 MR. LUSITANA: Asked and answered.
21 Go ahead and answer. If you truly need to,
22 I'll give him one more shot at it.
23 BY MR. TINKOV:
24 Q I'd love to hear it.
25 A I already answered it.

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1 MR. LUSITANA: He's already testified to it.
2 BY MR. TINKOV:
3 Q All I heard from you before was that it
4 simply -- these were not records that you had.
5 So what else is vague about this request?
6 MR. LUSITANA: Objection. Mischaracterizes
7 his prior testimony. You need to not testify when you
8 ask a question. Just ask the question.
9 MR. TINKOV: I'm asking a question, and I'm
10 trying to get an answer.
11 MR. LUSITANA: He's answered the question
12 already. Why don't we move on?
13 MR. TINKOV: Why don't we read it back so we
14 can understand what that response is.
15 MR. LUSITANA: Two people here understand the
16 response fine, and you're now testifying and arguing.
17 Why don't we move on?
18 MR. TINKOV: Because I want the answer.
19 MR. LUSITANA: He's given you an answer.
20 MR. TINKOV: I still have not heard the
21 answer.
22 MR. LUSITANA: Why don't you rephrase?
23 MR. TINKOV: I think I've rephrased it enough
24 times.
25 ///

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1 BY MR. TINKOV:
2 Q Do you know how to respond to my request? You
3 can respond to my request. You can hear the objections
4 of your counsel, but I'd like you to really respond --
5 MR. LUSITANA: You need to stop arguing and
6 ask a question.
7 MR. TINKOV: And you need to stop giving
8 talking objections or speaking objections.
9 MR. LUSITANA: I'm objecting it's
10 argumentative. Stop asking in argument. Just ask him a
11 question.
12 MR. TINKOV: I will ask him one more time.
13 MR. LUSITANA: Why don't you do that.
14 BY MR. TINKOV:
15 Q Okay. With respect to the January 29, 2019,
16 California Public Records Act request, which you have in
17 front you as Exhibit I, besides the request -- or
18 besides the issue that this request may not have posed a
19 series of responsive records that only you had, what
20 else do you find to be vague about this request?
21 MR. LUSITANA: Objection. Asked and answered,
22 especially when you're referencing an exhibit he's never
23 seen before.
24 But go ahead and try to answer.
25 THE WITNESS: I think that's exactly it. This

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1 isn't even dated to me. So how that request was
2 transferred and if it was in this fashion -- then you
3 can see how vague -- it would go to the whole city.
4 BY MR. TINKOV:
5 Q Right.
6 A So -- and what you would get back? I have no
7 idea what you'd get back.
8 Q I'm not asking you for that.
9 A Would you be getting old building permits from
10 the Portofino? Would you be getting something related
11 to the Beach Inn, which is a separate project? Would
12 you be getting businesses licenses or who knows what on
13 the 186 North Coast Highway 101? That's all I'm saying.
14 So it could be anything. That's what I'm saying. It's
15 not saying, hey, I want this traffic study specifically
16 dated August 2018 --
17 Q Right.
18 A -- and anything related to that. That's
19 specific.
20 This is -- it's huge in the scope of what it's
21 asking, and I don't think it narrows it down to maybe
22 what you want or what your client wanted. I don't know.
23 I'm not sure. Yeah.
24 Q So if someone had requested of you for all of
25 the e-mail correspondence with respect to the Portofino,

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1 would that have been vague?
2 A Those would have been printed, and they're in
3 the record. So they're physically in the project file
4 record.
5 Q All of your e-mails; all the e-mails you
6 receive on a particular development project are printed?
7 A Not all. No. No.
8 Q Please tell us what you mean by that.
9 A Pertinent e-mails. Right? So the ones that
10 would be pertaining to, let's say, the processing of the
11 project.
12 And the City does have -- does physically go
13 through and filters the e-mails out. I mean, we get
14 inundated with project material all day long. We only
15 have limited capacity, and plan material comes in all of
16 the time and, essentially, clogs it up.
17 Q Okay.
18 A So we're constantly deleting out. Literally,
19 two weeks old. That's about what we have in there.
20 Sometimes it's three weeks. And it depends on -- you
21 know, planning commission hearings are twice a month.
22 We compile all the information. I mean, all of that
23 plan material has to be accepted electronically,
24 uploaded, and compiled into a report.
25 So we're constantly deleting out e-mails that

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1 aren't, in our opinion, important to the project. If
2 it's "please resubmit the set of plans, I'm waiting,"
3 that's not going to get printed out and put into the
4 file.
5 Q Okay. Can you give us an example of something
6 that would be printed out?
7 A Something that needs a technical response from
8 an applicant or clear direction. "Please provide ten
9 sets of the plans with the information as specified in
10 the letter we've already previously given you."
11 Something like that.
12 Q So then as an example, if the applicant
13 submitted those ten sets of plans, that would be an
14 e-mail you would keep?
15 A Yeah. Well, it depends. It depends on what
16 it is. If it's just see the ten sets, I have the
17 hard-copy record. That's the record. Then what happens
18 after that is it comes in, and we route the plans to all
19 the disciplines reviewing the project. That's a
20 hard-copy routing. It's not an e-mail.
21 Q Okay. Now, you say that you're deleting
22 e-mails every, roughly, two to three weeks; is that
23 correct?
24 A No. I'm saying it gets deleted. We're
25 keeping about two weeks of information. A lot of times

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1 even less than that. It depends on what it is. If it's
 2 not important, it gets deleted. It fills up that fast.
 3 **Q I guess I'm not understanding completely.**
 4 **Is this a proactive effort where you're**
 5 **deleting e-mails, or is this a process that happens**
 6 **somehow automatically?**
 7 A It's both. It automatically happens. I can't
 8 tell you exact time, but it does happen. So
 9 documents -- if e-mails happen to be left on, they will
 10 physically be deleted out after a certain amount of
 11 time. Our IT goes through it and physically deletes it.
 12 **Q And then those times when it's not automatic,**
 13 **can you describe how that works?**
 14 A Same thing. It just depends. It would be
 15 deleted if it's not important.
 16 **Q So just so I understand, you're actually --**
 17 **let me start with this: What do you use -- what**
 18 **software do you use -- City of Encinitas -- to review**
 19 **your e-mail?**
 20 A Outlook.
 21 **Q Outlook. Okay. So I'm going to give you a**
 22 **scenario: You're working on the Portofino project. A**
 23 **few weeks have passed. You've gotten a series of e-mail**
 24 **correspondence with respect to the Portofino project.**
 25 **Do you now go back on some sort of regular**

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1 **schedule to review those e-mails and decide what needs**
 2 **to be deleted?**
 3 A It's not typically how it works. We're
 4 working with hard-copy studies. E-mails are kind of
 5 irrelevant. It's the phone call -- call up the
 6 architect. We need these changes. It's not an e-mail
 7 direction. I've already given a clear, concrete letter
 8 what needs to be submitted.
 9 Once it's submitted, the hard copies are
 10 routed and reviewed. Those e-mails are just please
 11 submit some plans, some information so we can do our job
 12 and review it. That's all I'm saying. It's not -- so,
 13 you know, those are the conversations that we typically
 14 have on the phone.
 15 **Q I'm not asking you for what's happening on the**
 16 **phone. I just want to get back to what you were saying**
 17 **about e-mails and deletion.**
 18 **So, again, can you just describe the process?**
 19 **Like, how do you determine or -- yes. How do you**
 20 **determine what e-mails are deleted on a project?**
 21 A It -- like I said, it's typically either
 22 correspondence -- let's say a lot of times it's an
 23 outside e-mail from inquiry. You know, a lot of times
 24 it goes to the commission. It's not directed. But
 25 that's the stuff that gets printed out and put in the

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1 file. But that's generally what it is. If it's "please
 2 submit something," that's not -- it's deleted.
 3 **Q I understand. You've told me a number of**
 4 **times that it's deleted. I'm not asking you whether**
 5 **it's deleted. I'm asking you how you go about deciding**
 6 **when you're deleting or how often you're deleting.**
 7 A I would say it varies. Physically, it's being
 8 deleted as the system deletes it out, you know. But I
 9 go through and clear out my e-mail, you know, to where I
 10 have probably about two weeks of e-mails at the most.
 11 **Q So then, roughly, every two weeks, you would**
 12 **go through your e-mails?**
 13 A Purge it -- yeah -- physically. There's a lot
 14 of stuff received that way. It's not important to the
 15 record, essentially.
 16 MR. TINKOV: Okay. We've missed our window
 17 for a break. Let's take a five-minute break, just so we
 18 can stretch our legs.
 19 Can we go off the record now?
 20 (Recess taken.)
 21 MR. TINKOV: We can go back on the record.
 22 BY MR. TINKOV:
 23 **Q All right. So where we last left, it was a**
 24 **brief discussion of e-mail deletion.**
 25 **So as I understand it -- please correct me if**

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1 **I'm wrong -- your typical process is to print out**
 2 **pertinent e-mails?**
 3 A Correct.
 4 **Q Thank you. So the ones that you would deem**
 5 **nonpertinent or trivial would be the ones that would be**
 6 **deleted, generally?**
 7 A Correct.
 8 **Q Okay. So with respect to those e-mails, if**
 9 **those e-mails are deemed -- well, actually, I take it**
 10 **back. Rewind a second.**
 11 **If an e-mail contains attachments, does that**
 12 **automatically categorize it for you as either pertinent**
 13 **or trivial?**
 14 A It depends, honestly. That's fairly vague.
 15 But a lot of it would be "here are the plans we
 16 submitted. Please see attached site plan." Whatever.
 17 Elevations. So there's attachments.
 18 They may be "we want you to see the window
 19 design." Okay? That's not -- that's not kept.
 20 Something like that. Yeah.
 21 **Q So in those instances then, where you already**
 22 **have the hard copy, you don't keep the attachments for**
 23 **those e-mails as well?**
 24 A Correct. I mean, like I said, it depends on
 25 what it is. If it's "please see the revised report" and

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1 it's a digital, that's going to get printed off and put
 2 in the record. Right?
 3 **Q But, generally, the ones that -- the e-mails**
 4 **that you treat as nonpertinent or trivial would be**
 5 **deleted with the attachments as well because they -- you**
 6 **already either have that copy --**
 7 A Correct.
 8 **Q Okay. Perfect.**
 9 A Yeah.
 10 **Q Now, just briefly -- you don't have to go into**
 11 **great depth with that, but can you just describe the**
 12 **Portofino Hotel project for the record.**
 13 A What it is?
 14 **Q Yes.**
 15 A Okay. Basically, it's a remodel of a hotel.
 16 There is 46 rooms physically on the record, essentially,
 17 and they're downsizing that to 35 rooms. Refacing it
 18 through a design permit process. Adding a valet parking
 19 model, essentially, to what technically is not there
 20 today.
 21 What else? Some landscape improvements. A
 22 restaurant piece. Yeah. There's some alcohol licenses
 23 being proposed. That's essentially what it is.
 24 **Q Okay. Do you recall -- and if you don't have**
 25 **an exact date, that's fine -- just, generally, when the**

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1 **project was originally submitted to the City of**
 2 **Encinitas?**
 3 A I don't.
 4 **Q You don't?**
 5 A No.
 6 **Q Okay. Now, have you been the planner for this**
 7 **project through this entire review process?**
 8 A Yeah. Technically, yeah.
 9 **Q Okay. And when you are working on the**
 10 **Portofino project, specifically with respect to other**
 11 **City of Encinitas staff, do you confer with other City**
 12 **staff members and, say, other disciplines on the**
 13 **project?**
 14 A Sure.
 15 **Q Do you call them?**
 16 A A lot of times, honestly, we walk and talk.
 17 **Q Walk and talk.**
 18 A We're kind of just down the office. You know,
 19 a lot of times, it's face-to-face meetings, going
 20 through plans or technical studies.
 21 I mean, in our world e-mails, technical
 22 studies, don't necessarily work. It's conversations and
 23 looking at physical plans.
 24 If you're talking to an engineer, and they're
 25 talking about hydraulics, how is that necessarily going

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1 to help out someone on fire? Right? How would that
 2 affect your discipline --
 3 **Q Right.**
 4 A -- physically? So we need to discuss how
 5 let's say a fire-access issue may affect a building code
 6 issue versus a setback-planning issue. Right? E-mail
 7 doesn't really work in that context. It's got to be
 8 face-to-face. There's a lot of meetings at city hall
 9 where we're meeting and sitting and talking about those
 10 things.
 11 **Q Do you ever e-mail other discipline staff**
 12 **members to talk about a project?**
 13 A I mean, at times. Yeah. But as I'm saying,
 14 typically, to review something it's a -- it's more
 15 conversational. What types of requirements may you have
 16 on this? That type of thing.
 17 **Q Okay. So let's go down that line.**
 18 **Where you're asking for particular conditions**
 19 **on a project from, say, engineering, would you ask them**
 20 **to write those out for you or just tell them to you?**
 21 A So they write those out to us. That is the
 22 hard-copy record. Right? So what happens is the
 23 project comes in. For example, came in on 2018, August.
 24 Gets routed. Engineering will review it. However long
 25 that takes. They would then send a hard copy back with

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1 physical conditions. And they may say, hey, I need
 2 these things before I can give conditions, and that is
 3 still a hard-copy record that is in the file. It's
 4 available to the public. Okay. That then is sent to
 5 the applicant who would then respond. Okay?
 6 **Q Understood.**
 7 A But if there's a question on -- hey, I'm
 8 thinking of conditioning this -- they're probably going
 9 to have a conversation. How does that affect what
 10 you're already conditioning or vice versa. Right?
 11 **Q So if engineering had set up a series of**
 12 **conditions, say, for this particular Portofino project**
 13 **and they wanted to run them by you first, would that be**
 14 **a normal process where --**
 15 A Yeah.
 16 **Q Okay.**
 17 A Probably walk right up to me with the hard
 18 copy and say, this is the idea; what we're thinking.
 19 Right? Yeah.
 20 So in our world too, we have kind of standard
 21 conditions, and we have specific conditions. And those
 22 specific conditions, as you know, are kind of custom and
 23 crafted to the best of the ability of what the project
 24 is trying to capture and can be changed at a public
 25 hearing based on the commission or public testimony --

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1 whatever happens to either further refine it or add to
 2 create that condition; whatever it's ultimately trying
 3 to do. Right?
 4 **Q So that paper file -- that would have come to**
 5 **you from the engineering staff with their conditions.**
 6 **That would have been something that -- would you keep**
 7 **that in your project file?**
 8 A Correct.
 9 **Q Okay.**
 10 A So they're called routing forms, and they're
 11 in there. And, basically, you would see the series of
 12 routing forms from each route. Each time it comes in,
 13 there would be a routing. Provide additional comment.
 14 Whatever it may be. Provide a technical study with XYZ.
 15 Whatever that may be.
 16 **Q Do you recall yourself having sent any e-mails**
 17 **to other staff members, with respect to this project?**
 18 A In general?
 19 **Q Generally.**
 20 A I mean, not specifically to specific people.
 21 Not necessarily. If they're in the file -- like I said,
 22 it would be printed out, if they were pertinent.
 23 **Q Okay. So then do you recall having e-mail**
 24 **communications with the project applicant on this**
 25 **project?**

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1 **MR. LUSITANA: At any time?**
 2 **MR. TINKOV: At any time.**
 3 **THE WITNESS: Sure. Like I said, a lot of**
 4 **that stuff is -- if it's pertinent -- here's the**
 5 **technical -- I mean, it's, like, a letter like this. If**
 6 **your letters are in our file -- right? -- it's a letter**
 7 **with specifics from an outside entity. Anything like**
 8 **that.**
 9 **The -- think of their development team. There**
 10 **is an architect. There is a project manager. There's**
 11 **multiple people working with multiple disciplines within**
 12 **the City also. So that's what I'm saying. It's --**
 13 **there could be correspondence. But please talk to**
 14 **so-and-so and provide the traffic study -- that doesn't**
 15 **get saved.**
 16 **BY MR. TINKOV:**
 17 **Q Sure.**
 18 A It's just saying do something. Right?
 19 **Q Right.**
 20 A And that could be easily handled. It's a
 21 phone call. You need to talk to so-and-so and provide
 22 the information they're requesting.
 23 **Q And I completely understand.**
 24 A Sure.
 25 **Q And we've gone through the process of you're**

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1 **deleting nonpertinent e-mails.**
 2 A Exactly.
 3 **Q When I'm asking you these questions, I mostly**
 4 **just want to know if there may have been e-mails that**
 5 **were in existence at one time or another. They may well**
 6 **have been deleted thereafter.**
 7 A Sure. Yeah. That I can't --
 8 **Q Do you recall having e-mail communications**
 9 **with members of the public, with respect to this**
 10 **project?**
 11 A Sure.
 12 **Q Okay. Would you -- just in your normal**
 13 **process, would you have kept those and printed them to**
 14 **your paper file, or would those be deleted?**
 15 A It depends. A lot of times, typically, with
 16 the public, it's usually some type of correspondence.
 17 Right? So it's printed out. Put in the record.
 18 **Q Okay.**
 19 A A lot of times it's comments received.
 20 Whatever it may be. In and out all the time. Does it
 21 warrant a response? It's a comment. A lot of times,
 22 especially on this project, most recently, it's comments
 23 being received as part of the record. Right? Right
 24 before the hearing is when we just get inundated with
 25 these comments. So they're attached to the planning

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1 commission report, which you have the record. Right?
 2 And that would be the protocol.
 3 **Q Uh-huh.**
 4 A They're not necessarily responded to in some
 5 dissertation. It's we received your comments, and I
 6 think it will be attached to the planning commission
 7 report.
 8 **Q By the way --**
 9 A And then it's deleted. It's not saved.
 10 **Q That's specifically what I was wondering.**
 11 A Yeah. So it would either be printed, which
 12 it's in the record -- it's in the hard-copy record, and
 13 then it's deleted. Because at that point, we don't need
 14 20 e-mails. Our system fills up too fast.
 15 **Q Between -- again, to the best of your**
 16 **recollection, of course, between May of 2018 and January**
 17 **29, 2019, do you recall having e-mail correspondence**
 18 **with respect to this project from any other person,**
 19 **whether that's applicant, consultants, other staff**
 20 **members, the public?**
 21 A Sure. That's obviously a range of time there.
 22 There would have been e-mails. Like I said, if they
 23 were pertinent, they would have been printed out and
 24 kept in the record.
 25 **Q Okay. For the record, do you recall who the**

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1 **applicant is for the Portofino Hotel project?**
2 A Who the applicant is?
3 **Q Uh-huh.**
4 A Yeah. It's the Swell -- Swell -- it's called
5 Swell Corporate -- there's a Swell --
6 **Q Can you spell that?**
7 A Like a wave. S-w-e-l-l. Swell.
8 So Swell is like the ownership group of it.
9 **Q Okay.**
10 A The applicant is listed as the Brown Design
11 Studio. So it's the architect. So it's hand in hand.
12 Both. But, technically, it's the owner Swell -- they're
13 called Swell Designs. It's just Swell.
14 MR. LUSITANA: Is it an LLC or something?
15 THE WITNESS: Yeah. It might be. LLC.
16 BY MR. TINKOV:
17 **Q I just wanted to know the parties --**
18 A It might be Hotel 1, LLC, but Swell is part of
19 it.
20 **Q I believe that's the name I've seen. I think**
21 **I've also -- maybe clarify this for me. I've seen RAF**
22 **on some of the documentation? RAF?**
23 A I'm not sure who that is.
24 **Q That might be a figment of my imagination.**
25 **So just so I'm clear, you will oftentimes get**

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1 **paper documents from the applicant. Say, for instance,**
2 **plans.**
3 **Would you ever get e-mails from them as well?**
4 A Well, it depends. We do get e-mails, but,
5 like I said, it's not something -- you know, we'll be
6 submitting plans to you next week. That doesn't get
7 saved, even though there is a correspondence that
8 occurs. That could have been a phone call. Hey, I'm
9 going to submit these ten things. Is that what you
10 needed? Sure.
11 **Q Let me flip it around a little bit. Let's say**
12 **you have a series of plans from the applicant or its**
13 **consultant, and you have completed your review of those**
14 **plans.**
15 **How do you convey your thoughts on those plans**
16 **back to the consultant?**
17 A Typically, it's in a comment letter.
18 **Q Okay. And is that comment letter mailed?**
19 **E-mailed?**
20 A Typically, it's mailed. Yeah.
21 **Q Okay. And that would be something, obviously,**
22 **that would be kept in your project file.**
23 A Yeah. They are -- they're clear letters
24 with -- I mean, some of them are 20 pages in there.
25 **Q I know.**

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1 A So yeah.
2 **Q Okay. Would you ever communicate where you**
3 **originated a message via e-mail to the consultant?**
4 A What do you mean?
5 **Q So, again, let's give that same example.**
6 **Let's say that plans have been submitted. You've**
7 **reviewed them, and let's say in this instance something**
8 **is missing.**
9 **Would you ever originate an e-mail to the**
10 **consultant? Say, hey, by the way, you missed this. Can**
11 **you provide this?**
12 A Well, I kind of already stated that.
13 Basically, please provide the traffic study that you
14 didn't. Yeah. That type of thing. But that doesn't
15 get necessarily kept. A lot of this stuff -- remember,
16 the letter that's going out has a very clear
17 understanding of what needs to be submitted back.
18 **Q Sure.**
19 A If -- we actually set up meetings, typically,
20 to take the project back in. So if it's missing that
21 traffic study or it's missing that, we're not taking the
22 project back in to route it because it doesn't do the
23 other discipline any good. They need the complete
24 package. That's why we tend to stick to the hard copy.
25 It's the complete hard-copy record. Take it

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1 in. Route it to -- so they can either finish the review
2 and condition the review. That's how it kind of works.
3 They would comment back to us. Hard copy. That's in
4 the record. Right? That then gets distributed back to
5 the applicant.
6 **Q Okay.**
7 A Right?
8 **Q Okay. And that gets back to the applicant**
9 **how?**
10 A It could be either directly from the
11 discipline. Right? The engineer says, "Put these in a
12 hydrology study." The hard copy comes in. That's
13 deemed the complete or final version of it.
14 **Q What I'm getting at is how do you convey back**
15 **that information to the consultant.**
16 A Typically it's a comment letter.
17 **Q Okay.**
18 A So we would compile all ten comments, if it
19 is -- right? But as you've seen those letters, they're
20 20, 30 pages long. A lot of times, if it's five things
21 left, provide the five things so we can deem this thing
22 completed and move forward. Right?
23 **Q Okay. Let's skip to a slightly different line**
24 **of questions.**
25 **So typically -- since you don't recall this**

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1 particular January 29, 2019, California Public Records
2 Act request, typically, if there's a request for e-mail
3 correspondence that would have been directed to you,
4 would you perform that e-mail search, or is that
5 something the city clerk would do or some other party?
6 A It happens a number of ways, I mean. But,
7 typically, I mean, like I said, I'm not going to do it
8 for the whole city. Right? It's basically -- right?
9 So it would be whatever e-mail, whatever correspondence
10 physically you had. Right?
11 Q Right.
12 A Yeah. So that's, like I said, in the physical
13 hard-copy record.
14 Q So you wouldn't actually do, like, an Outlook
15 key word search for e-mail correspondence you had.
16 You would rely on your hard copies of the
17 e-mails you've kept as the response?
18 A We search. I don't know if I can talk about
19 another case at all or --
20 MR. LUSITANA: As an example, sure.
21 THE WITNESS: Typical --
22 MR. LUSITANA: If it's the typical --
23 BY MR. TINKOV:
24 Q Typical stuff.
25 A With Streetscape --

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1 MR. LUSITANA: Yeah. That's been resolved.
2 THE WITNESS: Okay. In Streetscape,
3 literally, that exact same thing happened, where
4 everybody's computer was essentially was searched for
5 key words. Right? So --
6 BY MR. TINKOV:
7 Q So when you say everyone's e-mails were
8 searched --
9 A Everybody in the city hall's computer was
10 physically searched for e-mails and anything related to
11 it.
12 Q Do you know is that -- I'm talking about
13 process here solely.
14 Is that something where every individual
15 employee within the City has to do that search, or is it
16 an IT --
17 A Yeah. It was a different entity that did it.
18 Yeah.
19 Q Okay. Normally, as far as you're concerned,
20 if there is a request for certain key words or e-mails
21 or something of that nature, you're relying -- I don't
22 want to put words in your mouth.
23 Are you relying on your hard copy, or are you
24 doing a search?
25 A Well, it's more of an IT function.

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1 By the way, what you're asking for is kind of
2 beyond what, you know, a planner maybe is capable of
3 physically doing. Searching the system for key words --
4 right? -- and obtaining whatever documents. Right?
5 That's why I use the example of Streetscape.
6 It was, like, a third-party entity that came through and
7 searched everyone's computer, whether you were involved
8 in that project or not, searching for key words
9 Q But not in a -- that seems kind of -- and
10 maybe I'm wrong. Maybe that happens more often --
11 A It was on a big scale. It was just honestly
12 different than what I had seen.
13 MR. LUSITANA: That was a ten-year-long
14 project.
15 THE WITNESS: Yeah.
16 BY MR. TINKOV:
17 Q But in a -- I'm referring to a typical
18 development -- residential, commercial, hotels -- in the
19 city. You know, maybe a two-year or so process.
20 If there was a request for e-mails, you're not
21 doing the search. That would be IT, I imagine, or the
22 city clerk?
23 A Yeah. I think, like I said, probably be more
24 IT. Like, looking at this type of request would be more
25 of a citywide function. Right?

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1 Q Okay.
2 A Because like I said, it covers multiple
3 disciplines so --
4 Q So just so I'm clear, what you-all brought in
5 today -- besides the ten categories of documents, that
6 is the project file that you've brought in that Bankers
7 Box; is that correct?
8 A It's --
9 MR. LUSITANA: It's what's been produced.
10 THE WITNESS: It's what's been produced via
11 the records request.
12 MR. LUSITANA: Can we go off the record for a
13 second?
14 MR. TINKOV: Yes.
15 (Discussion held off the record.)
16 MR. TINKOV: Back on the record.
17 BY MR. TINKOV:
18 Q So by the way, did you work on -- what is
19 this -- the Beach Inn project?
20 A No.
21 Q You did not.
22 So since you can't recall this particular
23 request -- and by the way, my feelings are hurt because
24 I wrote it.
25 MR. LUSITANA: He didn't say he didn't recall

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1 **it. He said he's never seen it.**
2 **BY MR. TINKOV:**
3 **Q Right. But correct me if I'm wrong.**
4 **You don't even remember this particular**
5 **request from the 18 or so others that were out there,**
6 **with respect to this project.**
7 A I mean, I think it's vague, but this one
8 specifically -- like I said, it's not even directed to
9 me. But if the records request came in asking for
10 information related to this, we would have brought the
11 file, which we did, along with all this other stuff.
12 Right? The key words. So it's probably why that CD had
13 other information on it. Right?
14 MR. LUSITANA: Right.
15 THE WITNESS: Not related to the Portofino
16 project.
17 **BY MR. TINKOV:**
18 **Q Right.**
19 A That's what I'm saying. Where it's real broad
20 the information maybe that you get back isn't exactly
21 what you're looking for. Right? So I don't know if
22 that's -- that's where it's kind of vague. That's why I
23 was saying it's vague. Maybe it's -- broad is maybe
24 more of an appropriate term. Okay.
25 **Q Fair enough.**

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1 **MR. TINKOV: And, again, just so everybody in**
2 **the room knows it, I don't mind overproduction, and, if**
3 **there's more than what was there, that's perfectly fine.**
4 **BY MR. TINKOV:**
5 **Q I'm going to provide you with an e-mail for --**
6 **from my client, Dr. Donald McPherson, to Code**
7 **Enforcement, on which you were copied, along with a**
8 **number of other parties.**
9 **MR. TINKOV: This is a -- I believe it's an**
10 **18-page document. We're going to call this Exhibit 3.**
11 (Exhibit 3 was marked for identification and
12 is attached hereto.)
13 (Document handed to witness.)
14 **BY MR. TINKOV:**
15 **Q And can you take a look at that and tell me if**
16 **you recall seeing this e-mail.**
17 **And I should mention, behind that first page,**
18 **which is the actual e-mail, there's two -- there were**
19 **two attachments. So those pages you see afterwards --**
20 **the other 17 pages are the attachments that came with**
21 **the e-mail.**
22 **So can you just tell us if you recall this**
23 **particular e-mail.**
24 **MR. TINKOV: Do you need another copy?**
25 **MR. LUSITANA: I'm okay. Yes. It looks like**

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1 **this is referencing back on --**
2 **THE WITNESS: What's the date on this one?**
3 **MR. TINKOV: October 4, 2018.**
4 **THE WITNESS: I mean, honestly, in the detail,**
5 **I don't recall. But, obviously, my name is on it.**
6 **But here's the thing: Just even the way this**
7 **thing is organized, it's clearly a code enforcement**
8 **complaint.**
9 **BY MR. TINKOV:**
10 **Q Right.**
11 A Automatically, goes through code enforcement.
12 **Q Right.**
13 A Unless it was, hey, we need to resolve this, I
14 wouldn't be involved with this anymore.
15 **Q That's specifically why I bring this**
16 **particular e-mail up. In this sort of instance, you --**
17 **in your normal practice, your general practice -- would**
18 **not have kept this e-mail?**
19 A This would be kept with code enforcement.
20 **Q That's really all I wanted with that. So we**
21 **can put that one away.**
22 **Do you -- again, you may not remember, but do**
23 **you recall all of the dates on which the Portofino Hotel**
24 **project has been brought forward to a public hearing?**
25 A Not off the top but they are in the report.

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1 **Q They are in the report.**
2 **And can you recall the last date on which a**
3 **public hearing was held, with respect to the Portofino**
4 **Hotel?**
5 A April 18.
6 **Q April 18?**
7 A Yeah.
8 MR. TINKOV: Just so it's clear for the
9 record -- because I don't want anyone saying it's an "I
10 got you" sort of thing -- if I'm not mistaken, on May
11 2nd there was a request for a continuance or a
12 postponement on that project. So we're not going to
13 count that as an actual public hearing.
14 **BY MR. TINKOV:**
15 **Q We're utilizing April 18; is that correct?**
16 A April 18 was the actual hearing. Right? It
17 looks like it was then continued by the commission to
18 May 2nd, which the 2nd was then continued to the 16th.
19 **Q Now, prior to the April 18th, 2019, planning**
20 **commission hearing on the Portofino project, do you**
21 **recall conferring in some manner with the project**
22 **applicant/consultants, with respect to this project?**
23 A Conferring when? Like, before the hearing?
24 **Q Right.**
25 A Possibly. I believe they had a presentation.

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1 Right? But yeah. Would have been likely -- mostly, it
 2 was phone calls.
 3 MR. LUSITANA: Do you have a specific
 4 recollection? Don't guess. If you believe you had some
 5 specific contact --
 6 THE WITNESS: Sure. Yeah. It would have been
 7 like the time of the hearing. Any type of presentation
 8 needed. That type of thing. Sure.
 9 BY MR. TINKOV:
 10 Q Okay. And you say -- I think I heard you
 11 saying, normally, that would be a phone -- that you
 12 would call them and say, hey, your hearing is coming up
 13 April 18th at 6:00 p.m. Be there.
 14 A Right. At that point it's phone calls.
 15 Provide plan materials so we can compile the reports.
 16 Anything like that. Yeah.
 17 Q And so you're calling them to ask for
 18 materials to -- so that the city staff can prepare the
 19 staff report for the hearing.
 20 A Correct. Yeah. Electronic files. That's the
 21 thing. Right? Because we keep hard-copy records. We
 22 want the latest electronic record at that time.
 23 Q Okay.
 24 A Technically, the file that would be complete.
 25 Right? The deemed complete sets of plans. The

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1 technical studies to then upload that into the system.
 2 Q Right.
 3 A Right.
 4 Q So when you request these electronic forms or
 5 files, I should say, again, you're probably -- I think
 6 you said that you're calling to ask for them.
 7 How are they transmitted to you?
 8 A Could be a thumb drive sometimes. A lot of
 9 times, it's thumb drives because they're too big of
 10 files. I think 5 megabytes is our max. So one thing of
 11 plans and we're inundated. So a lot of times, it's a
 12 thumb drive, typically.
 13 Q So they'll drop it in the mail or stop by?
 14 A I mean, they would walk by. Yeah. Typically.
 15 I mean, it's usually like days before the hearing. We
 16 prepare reports a week before the actual meeting. They
 17 have to be done the Friday before the following Thursday
 18 of the actual meeting.
 19 Q I always wondered when you guys do those.
 20 A Trust me. It's a lot of work.
 21 Q It's a lot of reading to do afterwards as
 22 well.
 23 A Yeah.
 24 Q So -- and do you recall specifically, with
 25 respect to the Portofino project, how you would have

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1 received -- or how you did receive -- I'm sorry. Not
 2 how would you receive.
 3 But how did you receive any of these requested
 4 electronic files?
 5 MR. LUSITANA: Again, be specific.
 6 THE WITNESS: I -- I thought it was a thumb
 7 drive.
 8 BY MR. TINKOV:
 9 Q Okay. Do you consider -- again, just your own
 10 opinion -- lay opinion at this. The submission of a --
 11 say a thumb drive with the electronic files for the
 12 Portofino project -- would you consider that to be
 13 correspondence?
 14 A Like how so?
 15 MR. LUSITANA: Objection. Calls for a legal
 16 conclusion.
 17 But go ahead.
 18 THE WITNESS: How so? I mean --
 19 BY MR. TINKOV:
 20 Q I'm asking you. Like if -- if the applicant
 21 came in with a thumb drive --
 22 A Yeah.
 23 Q -- in response to your request for the files
 24 and a thumb drive was used, would you consider that
 25 thumb drive to be correspondence?

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1 MR. LUSITANA: Same objection.
 2 THE WITNESS: I don't think so. The thumb
 3 drive would come in. Right? And we would upload those
 4 files. Sometimes that thumb drive is physically given
 5 right back to them. It's their property. That's all
 6 we're really looking for -- is the digital record that
 7 we're going to upload and put into the public record of
 8 the report so --
 9 BY MR. TINKOV:
 10 Q Okay. And refresh my recollection here now.
 11 The materials that were brought with you in
 12 the Bankers Box there -- those are the documents that
 13 the City had provided in response to our January 29,
 14 2019, Public Records Act request; is that correct?
 15 A That --
 16 MR. LUSITANA: Does it also include the other
 17 18 requests?
 18 THE WITNESS: Yeah. I can't honestly state
 19 that as a fact. That, we would have to ask the clerk.
 20 Yeah.
 21 BY MR. TINKOV:
 22 Q Okay. Are you familiar with the files that
 23 you brought with you?
 24 A No.
 25 MR. LUSITANA: You want to look at them?

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1 MR. TINKOV: We will in a second.
 2 MR. LUSITANA: Okay.
 3 BY MR. TINKOV:
 4 Q To the best of your recollection, do you
 5 believe that you produced all of the records that were
 6 responsive to the January 29, 2019, California Public
 7 Records Act request, when it was transmitted to you?
 8 A It's the same -- it's the same thing as far as
 9 the e-mail. Technically, it was directed to somebody
 10 else. Right? So whether the records act that came
 11 through was this exact same thing I don't know, but the
 12 file was provided. The request.
 13 Q Let me rephrase that. I think your answer
 14 makes sense to me. I just want to make sure it's clear
 15 for the record.
 16 Notwithstanding any other parties within the
 17 City that may have had to respond to this request --
 18 A Sure.
 19 Q -- do you believe you provided everything that
 20 was requested of you?
 21 A Sure.
 22 Q Okay. With respect to that January 29, 2019,
 23 Public Records Act request.
 24 A Sure. I mean, based on -- yeah. Like I said,
 25 it's a wide request. So yeah.

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1 Q Do you have any idea as to why the records
 2 that were produced in response to that January 28, 2019,
 3 Public Records Acts request -- why there were little to
 4 no records in there post May 2018?
 5 MR. LUSITANA: Objection. Calls for
 6 speculation. It's argumentative.
 7 Go ahead and answer, if you can.
 8 Lacks foundation as well.
 9 THE WITNESS: I can't -- honestly -- but they
 10 were redesigning the project for a long time before they
 11 resubmitted it. So a lot of it was in their court.
 12 They were redesigning the project, which then ultimately
 13 came in, in August. So that was called the final
 14 version or whatnot.
 15 I don't know how much of the record you know
 16 going back in time, going to the public hearing in May
 17 of 2017 -- was the first hearing it went -- it was a
 18 different building. It had more units. And that has
 19 changed.
 20 So the last kind of rendition of that was
 21 direction from the commission to the applicant to look
 22 at traffic and parking. And from that time, the
 23 ownership group decided to kind of redesign the fascia;
 24 the amenities of it. Reevaluate kind of a lot of the
 25 public's concerns and come back with a completely

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1 different design. So that definitely took them some
 2 time.
 3 They did multiple outreach meetings to get the
 4 neighborhood groups -- any kind of concerns heard all
 5 the way through that process, and not till really August
 6 of 2018 was a complete record received by them, to then
 7 route, and, actually, from our standpoint, review. We
 8 didn't have all of the information -- traffic,
 9 valet-parking models, the plans -- to physically look at
 10 it and understand. So that was when that came in.
 11 BY MR. TINKOV:
 12 Q Okay. So given that you've just explained
 13 that in, roughly, August 2018 the applicant or
 14 consultants -- I'm going to use those words
 15 interchangeably -- submitted new plans.
 16 And those plans would have been in your
 17 project file. Is that correct, by the way? In your
 18 project file?
 19 A Correct. And I think that is in the record,
 20 as well as what's in the staff report that went before
 21 April 18.
 22 Q April 18.
 23 A 2019. And so that would have been the current
 24 record.
 25 Q Okay. As far as you know, if you had given a

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1 response to the January 29, 2019, Public Records Act
 2 request, that resubmittal of project plans in August of
 3 2018 would have been included in your project file.
 4 A Correct. Yeah.
 5 Q So when you had passed your project file along
 6 to whomever it might have been that would have
 7 ultimately responded to that Public Records Act request,
 8 they should have had those records.
 9 A Correct. I mean, the record -- the file in
 10 this sense had that in there. Right? So yeah. Should
 11 technically -- yeah. Yes.
 12 MR. TINKOV: And for the record, we're all
 13 having a good time.
 14 BY MR. TINKOV:
 15 Q Are you familiar -- by the way, I think we
 16 touched on this briefly.
 17 But are you familiar with the City of
 18 Encinitas's policy regarding e-mail retention?
 19 A Not a hundred percent, honestly.
 20 Q Do you know anything about the policy?
 21 A I mean, very --
 22 MR. LUSITANA: Other than what he's testified
 23 to?
 24 MR. TINKOV: Right.
 25 THE WITNESS: Yeah. That's probably --

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1 BY MR. TINKOV:
2 **Q So you're not aware that there's a 30-day**
3 **retention period?**
4 **MR. TINKOV: Am I right?**
5 **MR. LUSITANA: I think so.**
6 BY MR. TINKOV:
7 **Q You're not aware of that. Right?**
8 A There's a 30-day retention period, but I think
9 the system automatically deletes after that. But I
10 guess -- what's the question with the 30-day retention?
11 **Q I was just asking, are you aware of that being**
12 **the policy.**
13 A I just know that the system physically -- I
14 can't guarantee that it's 30 days. Right.
15 **Q I'm not asking for you to guarantee anything.**
16 A That's an IT request.
17 **Q And so, again, this is more just process just**
18 **to understand.**
19 **Since there is this automatic deletion**
20 **process, is there a way for you to somehow signify that**
21 **certain e-mails ought not be deleted?**
22 A Well, that's kind of where we would print them
23 out.
24 **Q Okay.**
25 A Because it's the record. Right? It's

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1 physically printing out the pertinent information for
2 the record. That's why the hard copy -- right?
3 **Q So you're not -- as far as you know, you don't**
4 **do anything to keep the electronic version?**
5 A No. No.
6 **Q Okay. So then, in fact, if you were to look**
7 **at your Outlook in-box today, there would be no e-mails**
8 **over 30 days?**
9 A Yeah. I guess you're right. Yeah. Yeah.
10 **Q Do you know -- again, it may be outside of**
11 **your realm too. So feel free to say.**
12 **Do you know if any of those deleted e-mails**
13 **are retrievable?**
14 A I have no idea. Yeah. That would be IT.
15 **Q Now I'm going to get into a couple of more**
16 **substantive things, and then we're going to start**
17 **talking about the Bankers Box of documents you brought,**
18 **and, hopefully, we'll wrap up shortly thereafter.**
19 **By the way -- and maybe I'm wrong on this.**
20 **But we've mentioned this a couple of times. That Beach**
21 **Inn is a different project.**
22 **I'm just wondering, do you know that the**
23 **Portofino Hotel is referred to as the Portofino Beach**
24 **Inn?**
25 A Now that you're saying that, I think I'd seen

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1 a sign that says that. But it's referred to -- I mean,
2 this project, being that it's an older project, started
3 off -- called it the Portofino. It's not like they
4 named it. It was Hotel 101, and then it kind of got
5 branded with this whole redesign, after the original
6 planning commission hearing, and they came back with the
7 name The Ray.
8 So, really, from our standpoint, what is it?
9 People know it as Portofino. People still don't know
10 where it is. They've heard Hotel 101. Okay. Now it's
11 called The Ray. Really, it's a brand name. You know,
12 as long as people can identify it, that's really what
13 our goal is.
14 **Q And I only ask that because I think I might**
15 **have Googled it once, and I saw the sign, and I believe**
16 **it did say Portofino Beach Inn.**
17 A I think there's the Beach Inn -- the hotel --
18 the La Casa one. Or it's the beach resort.
19 MR. LUSITANA: That's Encinitas Beach Inn.
20 THE WITNESS: Or Encinitas Beach Resort, I
21 think. Right? Or inn?
22 MR. LUSITANA: I think it's Beach Inn.
23 MR. TINKOV: Apparently, there's a lot of room
24 at the inn.
25 THE WITNESS: That's the one under

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1 construction now.
2 BY MR. TINKOV:
3 **Q I saw those records. I saw all the complaints**
4 **about the construction. So I assumed that was -- that**
5 **was the Encinitas Beach Inn or what have you there?**
6 A Yeah.
7 **Q So are you aware that the Portofino Hotel, in**
8 **its current iteration, is closed down right now for**
9 **business?**
10 A I've heard that, but I can't confirm that.
11 **Q So the applicant never brought it to your**
12 **attention?**
13 A Yeah.
14 **Q Okay. Specifically with respect to the**
15 **April 18, 2019, planning commission hearing -- again,**
16 **more of a process request -- are you the one who**
17 **prepares the staff report for that sort of hearing, or**
18 **is that handled by a bunch of different disciplines**
19 **somehow?**
20 A As far as how?
21 **Q Well, the actual staff report.**
22 A Like the assembly of it?
23 **Q Let's talk -- well, let's -- we'll get to that**
24 **part in a second, I guess.**
25 **But who physically writes up the report?**

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1 A It's kind of a group, but, generally, it would
 2 be me. And then it would be reviewed by my supervisor,
 3 essentially, and then, ultimately, our city planner.
 4 And then that would be -- you can see the way the report
 5 is written. Typically, it's the planner, via a couple
 6 of individuals, directing it to the planning commission.
 7 Right? So that's generally how it's assembled.
 8 And, obviously, there's a resolution -- that's
 9 a draft -- that has conditions from all different
 10 disciplines. So that's assembled into a reso; once
 11 again, the draft conditions, until they're codified
 12 through the approval process.
 13 Q And you said -- when you said your supervisor,
 14 would that be Roy Sapa'u, or would that be Anna Yentile?
 15 A Both of them. Yeah. I think that's what it
 16 says on the report. Right?
 17 Q The approval is both -- checked by both.
 18 A So yeah. So both of those, essentially -- at
 19 least with that report, that's kind of showing you who's
 20 looked at it, as far as reviewing the document.
 21 Q But you would have at least developed the bulk
 22 of the report?
 23 A Sure.
 24 Q Do you recall who assisted you in preparing
 25 other parts of the report that you did not prepare?

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1 A Like as far as what?
 2 Q Any other -- I guess, any other aspect or any
 3 other portion that sits outside of planning or outside
 4 of your expertise. Something that you would not have
 5 written up that ended up in this report.
 6 A Yeah. The only other thing would be
 7 assembling the report -- right? -- which is our clerk,
 8 essentially. Right? So Deana Gay, our clerk, you know,
 9 who sets the record, the agenda, and all that stuff
 10 would be --
 11 Q But Deana doesn't provide any sort of original
 12 thought. You are giving her all the materials, and
 13 she's physically putting it together?
 14 A Yeah. But keep in mind, especially with this
 15 April 18 hearing, there was a lot of correspondence
 16 coming in from various people. Large documents. A lot
 17 of that comes in to the planner; is forwarded to the
 18 clerk; please attach to the report. Right? So how that
 19 gets attached -- right? That's how it gets compiled.
 20 Q Okay.
 21 A Right?
 22 Q Okay.
 23 A And then there's a printed hard-copy record
 24 called the public records binder that you see in the
 25 hearing chamber. So anyone that wants to look at the

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1 hard-copy report has the ability to see that record.
 2 Right?
 3 Q I may have asked this. So I'm fully expecting
 4 an objection.
 5 So you don't have -- personally, you don't
 6 have any sort of understanding of why there might be
 7 certain records that we believe are potentially
 8 responsive to that January 29, 2019, Public Records Act
 9 request that ultimately did show up in the 606-page
 10 staff report.
 11 MR. LUSITANA: Objection. Calls for
 12 speculation. Argumentative. Asked and answered.
 13 THE WITNESS: What do you mean?
 14 BY MR. TINKOV:
 15 Q So if I were to tell you -- and take this
 16 as -- you know, as being the truth: That within the
 17 staff report, there are a series of documents that we
 18 have found that we believe should have been provided in
 19 response to that January 29, 2019, request.
 20 Do you have any idea why they might show up in
 21 the staff report, but they didn't show up in our
 22 response?
 23 MR. LUSITANA: Same objections. Also vague
 24 and ambiguous. Perhaps you'd like to show the specific
 25 documents you're referencing.

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1 MR. TINKOV: I'll get to the specifics. I
 2 want to -- generally speaking.
 3 THE WITNESS: No idea. But just -- once
 4 again, the request is broad. So how that comes back to
 5 you, obviously, is -- would be out of my physical hands
 6 or anybody else's. It goes through the records request
 7 process. What's physically copied and provided back to
 8 you I have no control over. Right?
 9 MR. TINKOV: So now -- can we go off the
 10 record for a second?
 11 MR. LUSITANA: Sure.
 12 MR. TINKOV: Back on the record, please.
 13 BY MR. TINKOV:
 14 Q Now, are you familiar with the Noise Impact
 15 Analysis produced by Eilar Associates, dated July 18,
 16 2018?
 17 A And how so?
 18 Q Are you aware of its existence?
 19 A I believe so. Is that the one that's
 20 physically in here, as far as the date?
 21 Q It should be. It's page 88 to 204 in the
 22 staff report.
 23 A Yes.
 24 MR. TINKOV: So let me pull that up on my
 25 side.

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1 We are up to Exhibit 4. So for the record,
 2 Exhibit 4 are pages 88 to 204 in the staff report, for
 3 the April 18, 2019, planning commission hearing on the
 4 Portofino project.
 5 (Exhibit 4 was marked for identification and
 6 is attached hereto.)
 7 BY MR. TINKOV:
 8 **Q Now, can you recall how you received this**
 9 **staff -- I'm sorry -- this Noise Impact Analysis,**
 10 **produced by Eilar Associates?**
 11 A Looks like a hard copy.
 12 **Q So you believe that this was not provided**
 13 **electronically to you, notwithstanding the fact that it**
 14 **looks pretty darn clean?**
 15 **MR. LUSITANA: Do you understand the question?**
 16 **THE WITNESS: Not really. I mean, like I**
 17 **said, it's a hard-copy record. So whether -- let's**
 18 **say it was e-mailed. Please see the received copy. We**
 19 **wouldn't necessarily print it out.**
 20 **We require three hard copies of documents; one**
 21 **to physically to distribute. So there wouldn't be a**
 22 **hard copy of the document.**
 23 BY MR. TINKOV:
 24 **Q Now, I thought you told me just a little while**
 25 **back that when you're preparing these reports that you**

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1 often ask for electronic files; say a thumb drive.
 2 A At the end. So when they're deemed a complete
 3 file. I mean, the file -- the study we say is complete.
 4 All we're saying is give us an electronic copy of that.
 5 It's in the hard copy. It's been in the record. Upload
 6 that electronically to put in the report.
 7 **Q So is this Exhibit 4, this Eilar Associates**
 8 **Noise Impact Analysis, is that sort of the final report**
 9 **you would have received in an electronic copy?**
 10 A Correct.
 11 **Q Do you recall how you received this particular**
 12 **document?**
 13 A I can. It was a thumb drive.
 14 **Q Thumb drive. And do you recall,**
 15 **approximately, when you would have received this report?**
 16 A It would have been days before the hearing.
 17 **Q Okay.**
 18 A Yeah.
 19 **Q I'd like you to take a look at the first page**
 20 **of the report and read out the date the report was**
 21 **originally prepared and when it was revised.**
 22 A November 6, 2017. Revised July 18, 2018.
 23 **Q Okay. So are you telling me then that you did**
 24 **not have an electronic copy of this up until a few days**
 25 **before the staff report?**

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1 **MR. LUSITANA: The staff report was what day**
 2 **again?**
 3 BY MR. TINKOV:
 4 **Q The staff report was prepared for the April**
 5 **18, 2019, hearing. And I believe that the staff report**
 6 **was prepared, from your testimony, about a week before**
 7 **then. So say April 11?**
 8 A So this would have been -- the resubmittal was
 9 August 2018. This is July 18, 2018. This is their
 10 date. They prepared it a month before. Gave it to
 11 their applicant, the architect, who didn't submit it to
 12 us until August. So a month later we received it in
 13 August.
 14 **Q Okay.**
 15 A So that's the hard copy. And this was the one
 16 that was found to be acceptable. And then the
 17 current -- so it's technically the August study. And
 18 this would have been on the thumb drive days before the
 19 hearing, to upload as a clean, digital copy versus
 20 taking the hard-copy record and scanning it through a
 21 system to where it's cluttered and not legible.
 22 **Q Right. So -- but as I understand, you at**
 23 **least got the hard-copy version of this in August of**
 24 **2018?**
 25 A Correct. Yeah.

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1 **Q So the Noise Impact Analysis by Eilar**
 2 **Associates, dated July 18, 2018, was provided in hard**
 3 **copy to you in some fashion sometime in August 2018.**
 4 **Correct?**
 5 A Correct.
 6 **Q Okay. And you don't recall how that was**
 7 **provided to you?**
 8 A It should have been hard copy.
 9 **Q I mean physically. Was it a courier? Was it**
 10 **the applicant?**
 11 A Typically, like I said, we meet with the
 12 applicant. So we -- rather than just accept some random
 13 package of plans and studies, it's the planner sits down
 14 and goes through the physical letter, saying, do we have
 15 this? It doesn't mean the study is complete. It means
 16 is a noise study here, hopefully addressing the points
 17 we've asked for. Right? So that would come in and then
 18 get routed and reviewed.
 19 **Q So with respect to this particular Noise**
 20 **Impact Analysis that you would have had back in August**
 21 **of 2018, when you were providing the materials that were**
 22 **requested in the January 29, 2019, Public Records Act**
 23 **request, would this have been in the file that you've**
 24 **handed over to whomever you handed over to, to respond**
 25 **to the Public Records Act request?**

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1 A Yeah. Should have been in the file.
 2 Q Okay. I am going to now --
 3 MR. LUSITANA: Here's my question: Is that
 4 true, even though the project resubmittal had occurred
 5 subsequent to that report?
 6 MR. TINKOV: I think we've answered that
 7 question. Because as I understand it, the submittal
 8 came in, in August 2018.
 9 MR. LUSITANA: Right.
 10 MR. TINKOV: And the request -- the Public
 11 Records Act request came in January 2019.
 12 MR. LUSITANA: Would this have been the study
 13 that applied to the resubmitted project? Or since the
 14 project had been resubmitted, would this study have not
 15 been included?
 16 THE WITNESS: Like I said, should have been
 17 included.
 18 MR. LUSITANA: Okay. Fair enough.
 19 THE WITNESS: Yeah. It should have been part
 20 of the August record.
 21 BY MR. TINKOV:
 22 Q Or could I maybe make it a little simpler.
 23 Perhaps it was not this specific document.
 24 There might have been, you know, some sort of
 25 typographical change, but the Noise Impact Analysis

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1 prepared by Eilar would have been in your project file
 2 sometime in August of 2018?
 3 A Yeah. There should be a date stamp on it.
 4 That's -- would be the specific -- there's a date stamp
 5 on it that would be a different date than these dates.
 6 But that would have been when it got received. Likely,
 7 in August, but we'd have to confirm that.
 8 Q But, definitively, it would be before
 9 January 29, 2019?
 10 A Yeah. Because this is the study that
 11 technically was to be completed to move forward.
 12 MR. TINKOV: I am now going to turn our
 13 attention to what I will refer to as Exhibit 5. And
 14 that is page 212 to 224 in the staff report. And that
 15 is referred to as the "Technical Memorandum" produced by
 16 Mizuta, M-i-z-u-t-a, Traffic Consulting.
 17 (Exhibit 5 was marked for identification and
 18 is attached hereto.)
 19 BY MR. TINKOV:
 20 Q Okay. So again, for the record, can you read
 21 out the date listed on this Technical Memorandum.
 22 A July 19, 2018.
 23 Q Would this technical memorandum have been in
 24 your project file at the time of January 29, 2019?
 25 A I believe so. I mean, like I say, I can't

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1 guarantee it.
 2 Is this the whole thing?
 3 Q No. It's -- it goes from page 212 to 224.
 4 A This is the two-pager. Right?
 5 Q I think there's just --
 6 A So, basically, this is an addendum to the
 7 original study. So we've got two studies here. One in
 8 October 13, 2017. This being the addendum calling out
 9 the reduction in room count. Right? So should have
 10 been in there, I believe.
 11 Q So, again, if you had been asked to provide
 12 your project file in January 29, 2019, or shortly
 13 thereafter, you would have provided this report because
 14 it would have been in your project file?
 15 A Correct. I mean -- yeah.
 16 Q And by the way, again, not trying to catch you
 17 or anything. That's exactly what I'm going to ask you
 18 for the balance of these. So let's just go through them
 19 just so we've got it out of the way.
 20 A Sure.
 21 MR. TINKOV: So then let's go to Exhibit 6,
 22 the Summary of the Proposed Development, prepared by 101
 23 Hotel, LLC. And that is pages 225 to 233 in the staff
 24 report for the planning commission hearing on April 19,
 25 2019. That's Exhibit 6.

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1 (Exhibit 6 was marked for identification and
 2 is attached hereto.)
 3 (Document handed to witness.)
 4 BY MR. TINKOV:
 5 Q Okay. For the record, can you -- do you
 6 recall this document, referring to Exhibit 6 now?
 7 A I do. Again, this is essentially their
 8 summary kind of going through what they kind of had
 9 revised. Since, obviously, this project took some time
 10 and some revisions, they were kind of summarizing what
 11 had changed.
 12 Q And you've said "their, them" --
 13 A Correct.
 14 Q For the Portofino Beach Inn?
 15 A There you go. Portofino Beach Inn.
 16 Q At the very top of this page, it does say,
 17 "Hotel 101, Portofino Beach Inn Redevelopment."
 18 Correct?
 19 A Correct.
 20 Q So I think that may be where -- if there was
 21 ever a question where I got it, that could be it as
 22 well.
 23 So, now, do you know when this would have come
 24 into your hands, I should say?
 25 A I don't.

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1 Q Okay. Would you be surprised if I told you
2 that it was dated August 7, 2018, with a timestamp,
3 which is not visible in this copy of the staff report
4 but which we have presented to the court as an exhibit
5 previously? Would that surprise you that it's August 7,
6 2018?

7 A That's probably the cover sheet of everything
8 else. Right?

9 Q Uh-huh.

10 A Yeah.

11 Q So, again, asking the same question I did
12 previously, with respect to the January 29, 2019, Public
13 Records Request, when you were asked to provide records,
14 this record of the Summary of Proposed Development would
15 have been in your file, and you'd hand it over.

16 A Remember, it's we. You said you provided the
17 record. Right?

18 Q Uh-huh.

19 A So yeah. This should have been in the
20 physical record.

21 Q Okay.

22 A So -- see what I'm saying? I think it has the
23 context. The record -- the resubmittal of August would
24 have had these documents in there. That's why we
25 provided that. So they should have been in the file.

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1 Correct.

2 Q Yeah. That's exactly what I'm asking. Just
3 to see if they would have been in there January 29,
4 2019, and they would have. Thank you.

5 MR. TINKOV: So let's go on to Exhibit 7.
6 Exhibit 7 is the CPP Newsletter Update, prepared by
7 101 Hotel, LLC. And that newsletter and its attachments
8 run from pages 375 to 400 in the staff report.
9 (Exhibit 7 was marked for identification and
10 is attached hereto.)
11 BY MR. TINKOV:

12 Q So again, page 375. And are you there?

13 A Uh-huh.

14 Q Great. Can you tell us what the date stamp is
15 at the top of this page?

16 A 9-18-18.

17 Q And is that the City's "approved" stamp?

18 A Yeah. Technically, it is. Yeah.

19 Q Does that therefore mean that the City had
20 received this particular file on September 18, 2018?

21 MR. LUSITANA: Objection. Calls for
22 speculation.

23 BY MR. TINKOV:

24 Q Or do you recall?

25 A Yeah. Not necessarily. This is kind of a

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1 separate process. So this is what we refer to as a
2 citizen participation process. Typically, it's the
3 preprocess to submitting a development application.
4 And this, I believe, is like their fourth or
5 fifth meeting physically on the project, as it changed
6 through time, to reach out to the public within a
7 500-foot radius and any additional people that wanted to
8 be notified beyond that. And so this would be them
9 holding that meeting.

10 This was actually a newsletter update -- so it
11 wasn't a physical meeting -- they sent out to that
12 radius. Any comments that came in would have been
13 coordinated through Maria Gremban in our office, and
14 that's kind of what this report is doing. It's
15 summarizing that -- that latest newsletter. This one
16 looks like it was mailed on August 9, 2018. So if what
17 you said that stamp was -- August 7 -- this likely
18 didn't happen till after. Right?

19 Q Yeah. Fair enough. So, again, I think I
20 heard you say a name --

21 A Maria Gremban.

22 Q Can you spell that?

23 A G-r-e-m-b-a-n.

24 Q And are those Maria's initials?

25 A Yeah.

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1 Q So right next to the September 18, 2018,
2 "approved" stamp, that's Maria's initials.
3 And that would imply then that she has
4 received this at that point?

5 A Correct. Yeah. Well, this is -- so August it
6 was mailed out to the public. The meeting -- or,
7 basically, there's correspondence time; 10 to 14 days.
8 And it was approved, meaning all the correspondence and
9 everything was received September 18. So over a month
10 later, it had vetted through that CPP process, and it
11 was deemed complete, meaning they sent out summary and
12 all that kind of stuff.

13 Q And when it's deemed complete and the summary
14 is sent out, that's when it gets sent to the City?

15 A That's essentially -- yeah -- when it would be
16 complete.

17 Q And this -- am I understanding correctly?
18 This may not be something that was in your project file?

19 A Ultimately, it gets into the project file
20 but --

21 Q Okay. But maybe not in September of 2018?

22 A Correct. Yeah.

23 Q So -- but someone at the City would have had
24 this --

25 A It's a record. Yeah. Yeah.

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1 Q So Maria Gremban's initial practically means
2 the City received, and it's somewhere within the City?
3 A Correct.
4 Q So, again, in theory this would have existed
5 as a record within the City's possession by the time of
6 the January 29, 2019, public records request?
7 A Correct.
8 Q And now I'm going to take you to Exhibit 7.
9 MR. LUSITANA: Actually, it's the new
10 letter.
11 (Discussion held off the record.)
12 (Exhibit 8 was marked for identification and
13 is attached hereto.)
14 MR. TINKOV: Exhibit 8 refers to a Cost of
15 Hotel Construction Research document, provided by
16 Dr. Donald McPherson, dated January 23, 2019, and is
17 found at pages 402 to 404 of the staff report to the
18 planning commission.
19 BY MR. TINKOV:
20 Q Now, do you recall receiving this document as
21 an e-mail attachment to an e-mail that my client,
22 Dr. McPherson, had sent to you on or about January 23,
23 2019?
24 A Not necessarily. I mean, this has obviously
25 come into the record. That's why it's in the report.

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1 But a lot of times these e-mails are going through our
2 planning commission clerk, like Deana. So they come in.
3 They're cc'd to everybody that would be attached in that
4 record, depending on what it is.
5 Q If I can show you that you were --
6 A On the e-mail?
7 Q -- on the e-mail --
8 A Yeah. More than likely. Yeah.
9 Q You don't dispute the fact that you would have
10 received this at some point?
11 A Correct. Yeah.
12 Q Okay.
13 A Like I said. But the specific date it came in
14 I don't know. Either way, like I said, it would have
15 been part of the record, and I believe it is in the
16 report; is it not?
17 Q It is.
18 A So how it gets in there -- right? That would
19 have been likely through the clerk. Right? See what
20 I'm saying?
21 Q Okay. So just to clarify for the record, what
22 I believe you're saying is, while you may have been
23 copied on the e-mail that had this attachment, you may
24 not have been the one to keep it in your project file.
25 That may have come from the different department. Maybe

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1 the city clerk's office?
2 A Correct. It depends on, like I said, when it
3 was received. As I recall, I think from his office -- I
4 think there was more than one e-mail related to
5 information like this. So it would have been attached,
6 like I said, through the clerk, which is why I think the
7 last time I'd seen this was days before the April 18,
8 2019 --
9 Q Sure. So if I told you that this e-mail was
10 sent on January 23, 2019, then it should have been in
11 the City's possession.
12 You would have seen it at that time?
13 A Like I said, I don't know who was it directed
14 to.
15 MR. LUSITANA: Objection. Calls for
16 speculation.
17 BY MR. TINKOV:
18 Q I can present you with an e-mail, if you'd
19 like. I'm just asking, generally speaking, that's the
20 way it worked?
21 A Sure.
22 Q Of course, it would have been available by
23 January 29, about six days later, to respond to the
24 January 29, 2019, California Public Records Act request?
25 MR. LUSITANA: Objection. Calls for

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1 speculation.
2 BY MR. TINKOV:
3 Q You can answer.
4 A Like I said, I don't know. These are dates.
5 I can't guarantee that date up there at the top.
6 Q Sure. And by the way, again, I appreciate the
7 fact that you are going exactly where you should. Where
8 you can't remember something, I don't want you to guess.
9 So I appreciate that.
10 A And in all honesty, I think a lot of these,
11 e-mails coming from your client. They're directed to
12 multiple people.
13 Q Okay.
14 A So it's not necessarily to one individual.
15 Right? So that's --
16 Q But the fact that it is in the staff report
17 would mean that it had to be somewhere within the City's
18 possession.
19 A Like I said, I think they're duplicate. A lot
20 of stuff had come in days before the hearing. So I
21 think your client had submitted, if I'm not mistaken,
22 two or three e-mails for this permit hearing of
23 April 18.
24 Q Okay.
25 A And they're in the record. But whatever is

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1 attached there -- and some may be from you,
 2 specifically, representing him. But either way that
 3 could be duplicate. Could be your cover letter with his
 4 information. So there could be duplicates there that
 5 I'm not recalling.
 6 **Q Fair enough. That's exactly what I wanted to**
 7 **understand. Again, I want to clarify this for the**
 8 **record, and correct me if I'm wrong in any part of this.**
 9 **What I'm gathering from what you're saying is**
 10 **that while this may well have come in sometime early or**
 11 **sometime in January -- like January 23, which is the**
 12 **date that we have, of 2019 -- it may well have been**
 13 **resubmitted again at a later time, just before the staff**
 14 **report was prepared, and that's where this document came**
 15 **from.**
 16 A Correct.
 17 **Q Okay.**
 18 A Because our dates show April 18 here at the
 19 bottom. So there's, obviously, a time gap there.
 20 **Q Okay. Now let's briefly talk about that**
 21 **April 18.**
 22 **We know that this was not produced on**
 23 **April 18. This was the staff report for the April 18**
 24 **planning commission hearing. So you would not have**
 25 **prepared the staff report that day, because we know that**

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1 **the City has to release the staff report sometime**
 2 **beforehand.**
 3 A Yeah. A week before.
 4 **Q Okay.**
 5 A It's the Friday before the Thursday meeting.
 6 **Q Okay.**
 7 A So, approximately, five, six days before.
 8 **Q Right. So the April 18, 2019, date is really**
 9 **reflective of the planning hearing commission date?**
 10 A Right. The one thing with the hard-copy date,
 11 if it's a hard copy, we would date stamp something.
 12 Right? That would have a hard-copy stamp just like
 13 we've seen --
 14 **Q Sure.**
 15 A -- on the other records, and that would have
 16 been what we call it. Right? Because it's like any of
 17 the conditions of approval. We look at specific dates
 18 and dates that it came in; received. Not when documents
 19 were prepared, let's say, by an architect or
 20 professional. When the City physically receives them,
 21 that is the date we're calling whatever the item is.
 22 **Q So, again, just -- if I showed you the**
 23 **January 23 e-mail -- so when this was originally**
 24 **attached, you may not have it, but someone at the City**
 25 **had it. That's why it -- no. I take it back. Because**

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1 **you explained to me that that may not have been the copy**
 2 **that ended up in the staff report.**
 3 **MR. LUSITANA: Objection. Lacks foundation.**
 4 **Calls for speculation.**
 5 **THE WITNESS: Yeah. I don't know if I can**
 6 **guarantee this specific document.**
 7 **I understand what you're saying. You're**
 8 **wanting to know if it was received and in our**
 9 **possession. I can't guarantee that.**
 10 **But if you look in the hard-copy file and it's**
 11 **physically there and date stamped, that would be -- that**
 12 **would show you the hard-copy file -- this is, I think,**
 13 **what's been copied, I think. Right?**
 14 **MR. LUSITANA: Yeah.**
 15 **THE WITNESS: So --**
 16 **BY MR. TINKOV:**
 17 **Q So, again, for the record, just so we have a**
 18 **clear -- the materials you've brought were copied from**
 19 **the hard-copy file?**
 20 **MR. LUSITANA: They were what's been produced.**
 21 **They were copies of what has been produced.**
 22 **BY MR. TINKOV:**
 23 **Q So the copy that you have in front of you**
 24 **doesn't have a date stamp then.**
 25 A Not where you tabbed it. I think this is part

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1 of the CPP record. So this is dated -- this is parts of
 2 this.
 3 **Q I don't think so. I think those are two**
 4 **separate documents.**
 5 A Well, that's what I don't know. What happens
 6 a lot of times is the citizen participation meeting --
 7 which is here to notify neighbors -- very common.
 8 Someone would submit a document with statistics or to
 9 this report and wanting the applicant -- because it's
 10 not the City; it's the applicant -- to respond to these
 11 things.
 12 **Q Right. So if I could help you here, the**
 13 **reason why it can't be part of that CPP newsletter is**
 14 **that CCP newsletter has an approved stamp date of**
 15 **September 18, 2018, when it was received by the City by**
 16 **Maria Gremban and the -- this -- I have a copy of an**
 17 **e-mail which shows that Mr. -- or that Dr. McPherson had**
 18 **sent it on January 23, 2019. So that would be several**
 19 **months later.**
 20 **So that's why I'm simply asking you, on your**
 21 **copy of it, there's no timestamp as to that particular**
 22 **document, the Exhibit 8.**
 23 **MR. LUSITANA: Do you want to include it as an**
 24 **exhibit to that e-mail that you keep referencing?**
 25 **MR. TINKOV: I could provide it. Sure. I can**

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1 go and print it.
2 In fact, we once again missed our break time.
3 Can we go off the record?
4 (Recess taken.)
5 MR. TINKOV: Back on the record.
6 And we were discussing Exhibit 8 --
7 MR. LUSITANA: Correct.
8 MR. TINKOV: -- which was pages 402 to 404 in
9 the staff report, for the April 18, 2019, planning
10 commission hearing.
11 I quickly tried to run -- to find the e-mail,
12 but I just didn't have the time, and I don't want to
13 hold anyone up here. So if I find it, I will send it
14 on. For now, that's fine on that particular one.
15 Let's go on to Exhibit 9. And Exhibit 9 is
16 the Hotel 101 Parking Study Review prepared by Craig
17 Neustaedter. Craig is C-r-a-i-g; middle initial, S, as
18 in Samuel; and last name is N-e-u-s-t-a-e-d-t-e-r. And
19 that is pages 485 to 494 of the 2018 -- April 18, 2019,
20 Planning Commission Staff Report.
21 (Exhibit 9 was marked for identification and
22 is attached hereto.)
23 BY MR. TINKOV:
24 Q Can you take a look at what we're referring to
25 as Exhibit 9 and read for us the date of that study --

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1 that parking study review.
2 A January 6, 2018.
3 Q That is correct. Do you happen to recall
4 receiving this study review?
5 A Actually, I don't.
6 Q Okay. If you had received this, would this be
7 a document that you would have kept in your project
8 file?
9 A Yeah. This would have been kept.
10 Q Okay. So if you had received this sometime in
11 early January 2019, then it would have been part of your
12 project file that would have been transmitted to
13 whomever was handling the January 29, 2019, California
14 Public Records Act request that we filed?
15 A Based on that date, I guess. Right?
16 MR. TINKOV: So I'm going to zoom through
17 these. So we don't need to go too far in depth. Great.
18 There's only a couple left.
19 So I'm going to go to Exhibit 10. And
20 Exhibit 10 is the Liquor License Application Review,
21 prepared by Ms. Lauren Tyson of Liquor License Advisor,
22 Inc., dated January 4, 2019. And that review runs from
23 pages 495 to 496 in the April 18, 2019, staff report.
24 (Exhibit 10 was marked for identification and
25 is attached hereto.)

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1 BY MR. TINKOV:
2 Q Do you have that one in front of you?
3 A Yes.
4 Q Great. Now, do you recall receiving this
5 document?
6 A Nope. Not specifically.
7 Q Okay. Again, same question as with respect to
8 Exhibit 9. Had you received this document, would you
9 have kept this in your -- this Liquor License Review
10 document -- would you have kept this in your project
11 file?
12 A If it was directed to me. Like I said, I
13 don't know how it was sent or received. So, I mean,
14 there's a date here, but there's no context of it being
15 stamped "received" by the City or by the planning
16 division, specifically. It could have been sent,
17 honestly, to anyone.
18 Q Right. But if it was sent to you, you would
19 have kept it in the project file?
20 A Right.
21 MR. LUSITANA: I'd like to place a standing
22 objection based on lack of foundation.
23 MR. TINKOV: Sure. So I'm going to skip right
24 to them because I think all the questions are roughly
25 the same. We don't need to worry too, too much about

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1 all of this.
2 BY MR. TINKOV:
3 Q Let's skip to Exhibit 11. And Exhibit 11 is a
4 Project Structural Nonconformity letter, provided by my
5 office. It's dated December 19, 2018.
6 A Which page?
7 Q It's pages 570 to 586 in the staff report.
8 (Exhibit 11 was marked for identification and
9 is attached hereto.)
10 BY MR. TINKOV:
11 Q Now, for the record, can you please tell us
12 who that letter was addressed to.
13 A Glenn Sabine, city attorney.
14 Q Right. And can you skip through to page 572
15 of the staff report and tell us if you're cc'd on this
16 message.
17 A Yes.
18 Q Okay. Do you recall receiving this letter?
19 A This letter? I think it's in the report,
20 isn't it?
21 Q Uh-huh.
22 A I'm on there. So yeah.
23 Q But do you actually --
24 MR. LUSITANA: Specific recollection.
25 ///

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1 **BY MR. TINKOV:**
2 **Q Specifically, do you recollect receiving this**
3 **letter?**
4 A Not specifically. I mean, honestly, there's
5 more than one letter from you. I do recall receiving
6 letters from you, but this one specifically not
7 necessarily.
8 **Q I'm glad I'm at least somewhat memorable.**
9 **So with respect to this letter, would**
10 **reviewing it briefly give you an opportunity to remember**
11 **if you had seen it or reviewed it?**
12 A Not specifically.
13 **Q Okay. So just, again, for the record, you've**
14 **taken a look at it.**
15 **You do not specifically recall this letter?**
16 A Not the specific content in its entirety. No.
17 **Q Okay. If I had sent this letter with you as a**
18 **cc in December 19, 2019, would you have kept this sort**
19 **of record in your files?**
20 **MR. LUSITANA: Same standing objections.**
21 **THE WITNESS: It's not directed to me. No.**
22 **BY MR. TINKOV:**
23 **Q Even though you were cc'd on it?**
24 A Yeah. I would not. No.
25 **MR. LUSITANA: Not as memorable as you**

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1 A Not typically. It's just -- like I said, it's
2 a conversation with a question, and it would have been
3 answered no different than a phone call. Yeah.
4 **Q So if this is not a document which you would**
5 **have kept, do you have any idea of how it ended up in**
6 **the staff report?**
7 A I don't. It could have been -- where did you
8 pull that from?
9 **Q That's the staff report. Every document I'm**
10 **referring to now -- the last eight or so exhibits are**
11 **from the --**
12 A It went to Benj. Right? Benj Gershman
13 printed. It's attached to the correspondence here. So
14 all stuff received.
15 **Q Right. But Mr. Gershman doesn't have the**
16 **ability to put this in the staff report.**
17 **So what I'm wondering is do you know -- I**
18 **mean, you're the one who prepared the staff report, for**
19 **the most part. Do you recall how this would have ended**
20 **up in there?**
21 A No. But the correspondence itself is
22 physically here. Right?
23 **Q Right.**
24 A This one looks like it's randomly out of
25 order. I would have to see it in the actual staff

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1 thought.
2 **MR. TINKOV: There's always another comedian**
3 **in the crowd.**
4 **MR. LUSITANA: Shot you down.**
5 **MR. TINKOV: And then now there's only two**
6 **left. So let's go to Exhibit 12.**
7 **BY MR. TINKOV:**
8 **Q And Exhibit 12 is correspondence between**
9 **yourself and Mr. Benjamin Gershman. B-e-n-j-a-m-i-n.**
10 **Last name is Gershman, G-e-r-s-h-m-a-n. And this**
11 **letter -- or I'm sorry. This correspondence is dated**
12 **November 27, 2018.**
13 (Exhibit 12 was marked for identification and
14 is attached hereto.)
15 **BY MR. TINKOV:**
16 **Q And it's found at pages 585 to 586 in the**
17 **staff report.**
18 **And are you looking at that right now?**
19 A Yup.
20 **Q Okay. Great. Do you recall this**
21 **correspondence between yourself and Mr. Gershman?**
22 A I guess it's kind of related to a meeting we
23 had in person, it looks like.
24 **Q Would this have been a document that you would**
25 **have kept in your project file?**

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1 report. You got it.
2 (Document handed to witness.)
3 **BY MR. TINKOV:**
4 **Q Yeah. You can skip directly to 585. It's**
5 **exactly as you have it though, I believe, if I'm not**
6 **mistaken.**
7 A This is all, I think, your letter. Right?
8 Your letter -- that's Exhibit C. That's not how we do
9 our reports. So your exhibits have been included there
10 in e-mail.
11 **Q Let me double-check that.**
12 A Yeah.
13 **Q You might be right.**
14 A And then it goes right back to the dollar
15 amount. So that's what I'm saying. This is where the
16 duplicate letters showed up. He obviously had the
17 e-mail. It was correspondence. Clearly, it says what
18 we talked about, and he printed it out.
19 **Q And so in that instance, this is not a record**
20 **you would have kept?**
21 A No.
22 **Q At least in that particular e-mail**
23 **correspondence because it was attached to a letter I had**
24 **sent --**
25 A Correct.

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1 Q -- and --
 2 A That would have been deleted.
 3 Q Let me double-check that, just so we're on the
 4 same page here.
 5 That is good to know. Right. You're
 6 absolutely right. Exhibit D to my letter, dated
 7 December 19, 2018, is this letter between Mr. Gershman
 8 and yourself -- or I'm sorry. The e-mail between
 9 yourself and Mr. Gershman dated November 27, 2018 --
 10 A And don't forget Kelly Hicks and your client
 11 were also cc'd on here. That's all.
 12 Q As was Ms. Hollywood, Kathy Hollywood, the
 13 city clerk?
 14 A Correct. Like I said, it's on here. That
 15 would have been deleted.
 16 Q So the only reason that you can think of that
 17 would have been kept was the fact that it was originally
 18 attached to a letter sent to the city attorney, Glenn
 19 Sabine?
 20 A If that's how -- if that's a letter to that
 21 but either way I think what you had submitted was public
 22 record. If that went to Glenn Sabine, that's not
 23 directed to me. That wouldn't be anything that I would
 24 automatically attach to the report.
 25 But you submitted that as record before the

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1 hearing, and that's public record. If that includes a
 2 letter to whomever, which you're submitting as public
 3 testimony, that would be included. So yours has
 4 multiple exhibits, one of them being directed to our
 5 city attorney.
 6 Q So I guess I'm trying to understand.
 7 You're saying whatever is submitted to a
 8 person within the City is a public record. Correct?
 9 A No.
 10 Q So please explain.
 11 A You submitted -- so as I recall, you submitted
 12 your letter with all these attachments, which included
 13 Don McPherson's analysis of however many pages that is,
 14 which we've seen previously; my e-mail; this one-page
 15 correspondence; the city attorney's e-mails that you had
 16 directed to the city attorney; some of Don's Exhibit B
 17 talks about the cost estimate and whatnot related to
 18 Don's information submitted.
 19 So you kind of in a sense summarized that as
 20 your submittal from you, and that could be duplicate in
 21 here, which I think it is because Don submitted directly
 22 up here, and yours is back here with the same
 23 information.
 24 Q So what I'm trying to understand is you were
 25 saying something about, when documents are submitted to

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1 the City, it's a public record.
 2 So what did you mean by that? Or am I
 3 completely misquoting you?
 4 A Yeah.
 5 Q So explain then -- let me rephrase.
 6 This letter from myself to the city attorney,
 7 Glenn Sabine -- it's dated is December 19, 2018; is that
 8 correct?
 9 A Uh-huh.
 10 Q Okay. So as I understood what you were
 11 saying, you don't keep those sorts of records in your
 12 project file.
 13 A It's not directed to me. No.
 14 Q You don't recall how this particular document
 15 got into this -- the staff report you prepared though?
 16 A I do not specifically.
 17 Q Okay.
 18 A But I know you had submitted something days
 19 before the hearing.
 20 Q Right.
 21 A Is it not this?
 22 Q My -- well --
 23 A I mean, this is the one that's dated. So what
 24 I'm wondering is, even though this is dated based on
 25 your letter -- which I can go back and look at our

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1 report, but as I recall you submitted an old letter,
 2 which was the original letter to the city attorney with
 3 all these exhibits, including this e-mail, and it was
 4 dated December 19. It was not April. So it was older.
 5 It was four months old. Whatever it may have been. And
 6 that is your record in the report -- in the planning
 7 commission report, in correspondence in the back of
 8 that.
 9 So from our perspective, it's a duplicate in
 10 some of the information, being that Don McPherson
 11 directly submitted information with some of this stuff
 12 in it, you also submitted the same information --
 13 possibly new stuff -- and there's duplicates there. So
 14 it's all correspondence.
 15 When you look at our report wherever -- the
 16 back part of the report -- which the correspondence is
 17 why it's 600 pages. It's like 200 pages of
 18 correspondence that we got days before the hearing.
 19 Q So just double-check that for one second.
 20 So you don't have a recollection of the
 21 initial time when it was sent back in December of 2018.
 22 Correct?
 23 A This letter?
 24 Q Right.
 25 A No.

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1 **Q But your impression is the reason why it's in**
2 **the staff report today or as of the April 18, 2018,**
3 **to -- 2019 planning hearing commission, was because it**
4 **was resubmitted just immediately prior sometime; maybe a**
5 **few days before that hearing?**
6 A By yourself. Correct.
7 **Q Okay.**
8 A Yeah. And I believe when you sent that
9 directly to me or Deana Gay, the clerk, that's how it
10 got in there. Because it would have been forwarded as
11 correspondence.
12 **Q Okay.**
13 A And I do recall getting a slew of these
14 comments at the end. Very large attachments. One from
15 you, one from Don, one from Kelly Hicks, and then -- so,
16 essentially, four parties that have been active in this
17 case, all submitting thick documents essentially at the
18 end -- or days prior to the hearing that did get
19 attached into that.
20 **Q So am I understanding then correctly, had**
21 **those submittals not been made immediately prior to the**
22 **April 18, 2019, planning hearing commission, they would**
23 **not have been in the staff report?**
24 A The letter not dated or directed to me.
25 Correct. This city attorney letter would not be in the

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1 staff report, unless you directly submitted that as your
2 public record.
3 **Q Okay.**
4 A Yeah.
5 MR. TINKOV: And one last one. It is going to
6 be referred to as Exhibit 13. Lucky 13. And that is an
7 electronic copy of the Portofino Hotel plans dated
8 August 6, 2018. And those plans are shown on pages 607
9 to 652, which is strange, considering this thing was
10 labeled as having 606 pages.
11 THE WITNESS: This one isn't numbered
12 either.
13 (Exhibit 13 was marked for identification and
14 is attached hereto.)
15 BY MR. TINKOV:
16 **Q Let me -- so --**
17 A So that one is not numbered?
18 **Q Let me check. Let me go back to the first**
19 **page. 606.**
20 A So a lot of this is in the electronic record.
21 Plans are larger files. So sometimes it does get
22 confused in numbering. So that may have been the issue.
23 But the hard-copy record is physically there. The
24 public binder that's in the chamber would have the
25 plans. They're definitely attached online.

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1 **Q Right.**
2 A Yeah.
3 **Q So I think just to clarify where I might have**
4 **gotten those pages numbers, because they don't appear on**
5 **the face of these plans, is that they were in the staff**
6 **report PDF that is linked online --**
7 A It might have been something like that.
8 **Q -- for the public to review.**
9 A Because this looks like it ends at 606, and,
10 see, it says "Full-sized plans to commissioner packet
11 only," right there?
12 MR. LUSITANA: Yeah. On attachment 7.
13 THE WITNESS: Yeah.
14 BY MR. TINKOV:
15 **Q Where? Oh, on the actual --**
16 A We get these plans digitally online but not
17 always. But I know these are definitely on there.
18 **Q What does that mean, by the way? What does**
19 **"Full-sized plans to commissioner packet only" mean?**
20 A Like a hard set of plans. A paper copy.
21 MR. LUSITANA: They have hard copies.
22 THE WITNESS: So they can reference.
23 MR. LUSITANA: That's correct. Plans --
24 MR. TINKOV: Full-sized plans that they can
25 pull out and roll out and take a look at, I understand.

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1 BY MR. TINKOV:
2 **Q All right. Well, do you recall receiving**
3 **these plans roughly around the date shown on the plans,**
4 **which is August 6, 2018?**
5 A Yeah. These are the August submittal plans.
6 Yeah.
7 **Q And I think you'd said this before, but just**
8 **again so we're sure, you believe that you received these**
9 **on a thumb drive; is that correct?**
10 A These? What do you mean? For the planning
11 hearing commission?
12 **Q Right.**
13 A That would have been a thumb drive. The hard
14 copy was in the file in August. So that's
15 essentially --
16 **Q That's really a good point. I keep confusing**
17 **these two.**
18 **So before the planning commission hearing,**
19 **when you're preparing your staff report, you would reach**
20 **out to this consultant or this applicant and say, can**
21 **you please bring in an electronic version of these files**
22 **so that I can make a PDF and post it?**
23 A Sure.
24 **Q And then the actual hard copy -- the full-size**
25 **plans you would have had in your project file back in**

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1 **August 2018?**
 2 A Correct.
 3 **Q Okay. How do those plans get to your hands?**
 4 A What do you mean?
 5 MR. LUSITANA: Which plans?
 6 MR. TINKOV: These full-sized sort of plans.
 7 BY MR. TINKOV:
 8 **Q I think you said you meet with the applicant**
 9 **or consultant and receive them at that point?**
 10 A Yeah. Just we request hard copies of plans.
 11 **Q Okay.**
 12 A Just they would drop them off. Whether they
 13 physically drop them off, or courier, I don't remember.
 14 Drops them off. Physically, we would get hard-copy
 15 plans to give to the commissioners that day.
 16 **Q Okay. So then these plans in hard-copy form**
 17 **are in your project file August 2018, meaning that when**
 18 **you handed that project file over to let's say the city**
 19 **clerk's office to respond to the Public Records Act**
 20 **request in January 29, 2019, these plans would have been**
 21 **in there?**
 22 A Sure.
 23 MR. TINKOV: Okay. With that I am pretty much
 24 done. I'm going to ask if you want to ask any
 25 questions.

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1 MR. LUSITANA: I have no questions.
 2 MR. TINKOV: Okay. So counsel has no
 3 questions.
 4 BY MR. TINKOV:
 5 **Q I'm going to give you an opportunity, if you'd**
 6 **like to explain anything else that you think was taken**
 7 **out of context during the course of this deposition or**
 8 **anything else you want to explain I may not have picked**
 9 **up on, or you want to clarify further.**
 10 A I don't think so.
 11 MR. LUSITANA: Just ask him a question, if you
 12 have anything.
 13 MR. TINKOV: No? Okay.
 14 So with that then, I'm going to say that we
 15 have concluded this deposition. I appreciate everyone
 16 coming and taking your time doing this.
 17 I failed to do this at the beginning. I
 18 should have done this at the beginning. This check for
 19 \$45.44 is yours pursuant to Government Code Section
 20 68093.
 21 MR. LUSITANA: You can buy me lunch.
 22 MR. TINKOV: And with that, I'd like to thank
 23 everyone. And we are done.
 24 MR. LUSITANA: Standard stipulation?
 25 MR. TINKOV: Are there any stipulations you'd

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1 like to make? Because I don't have any that I
 2 particularly want to make.
 3 MR. LUSITANA: Well, usually, we relieve the
 4 court reporter of her responsibilities under the code.
 5 And how do you want to -- let's go off the
 6 record.
 7 (Discussion held off the record.)
 8 MR. LUSITANA: We're back on the record.
 9 The parties have agreed that it will be a
 10 ten-day turnaround time, after the transcript has been
 11 completed; that Mr. Mierau will have an opportunity to
 12 review the transcript, make any changes or corrections,
 13 and then sign it under penalty of perjury.
 14 We will then forward the signed document back
 15 to Mr. Tinkov's office. Preferably the whole process
 16 will be in approximately 30 days. Fair enough?
 17 MR. TINKOV: So stipulated.
 18 MR. LUSITANA: So stipulated.
 19 (Deposition concluded at 4:02 p.m.)
 20 * * *
 21
 22
 23
 24
 25

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1 DECLARATION UNDER PENALTY OF PERJURY
 2
 3 I, TODD MIERAU, the witness herein, declare
 4 under penalty of perjury that I have read the foregoing
 5 in its entirety and that the testimony contained therein
 6 as corrected by me is a true and accurate transcription
 7 of my testimony elicited at said time and place.
 8
 9 Executed this _____ day of _____,
 10 2019, at _____, California.
 11
 12
 13
 14
 15 _____
 16 TODD MIERAU
 17
 18
 19
 20
 21
 22
 23
 24
 25

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1 REPORTER'S CERTIFICATE
 2
 3
 4 I, Karen Cosgrove, CSR 12425, a Certified
 5 Shorthand Reporter in and for the State of California,
 6 do hereby certify that prior to being examined, the
 7 witness named in the foregoing proceeding was by me duly
 8 sworn to testify the truth, the whole truth, and nothing
 9 but the truth; that said proceeding was taken down by me
 10 in shorthand at the time and place named therein and was
 11 thereafter transcribed under my supervision; that this
 12 transcript contains a full, true, and correct record of
 13 the proceeding which took place at the time and place
 14 set forth in the caption hereto; that this transcript
 15 was prepared in accordance with the minimum transcript
 16 format standards as set forth by the California
 17 Certified Shorthand Reporters Board.
 18 I further certify that I have no interest in
 19 the event of this action.
 20
 21 IN WITNESS WHEREOF, I have subscribed my name on this
 date: May 24, 2019
 22
 23
 24 _____
 Karen Cosgrove, CSR 12425
 25

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1 DEPOSITION ERRATA SHEET
 2
 3 Page No. ____ Line No. ____
 4 Change: _____
 5 Reason for change: _____
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