City Council Meeting
01-11-21
Item 7.F.

Council Agenda Report

To: Mayor Pierson and the Honorable Members of the City Council

Date prepared: December 29, 2020 Meeting date: January 11, 2021

Subject: Proposal to Instill Transparency, Accountability and Ethics in All Aspects of Malibu's City Government (Councilmembers Silverstein and Uhring)

The attached document was drafted and provided by Councilmembers Silverstein and Uhring.

Council Agenda Report

City Council Meeting
11-23-20
Item
7. .

To: Mayor Pierson and the Honorable Members of the City Council

Prepared by: Bruce Lee Silverstein & Steve Uhring, Councilmembers

Date submitted: December 29, 2020

Meeting date: January 11, 2021

Subject: **PROPOSAL TO INSTILL TRANSPARENCY, ACCOUNTABILITY & ETHICS IN ALL ASPECTS OF MALIBU'S CITY GOVERNMENT**

RECOMMENDED ACTION: At the request of City Councilmembers Silverstein and Uhring, 1) Adopt Transparency, Accountability, and Ethics Policy; 2) Appoint City Councilmembers Uhring and Silverstein to City Council Policy Review Ad Hoc Committee; 3) Amend City Council Policy No. 8 to provide City Councilmembers unconstrained inspection and information rights; 4) Amend City Council Policy No. 28 to provide City Council control over the Agenda for meetings of City Council; 5) Schedule Semi-Annual Performance Evaluation of City Manager, and discuss and vote on whether the Performance Evaluation shall be conducted transparently in a Public Session or secretly in a Closed Session; 6) Establish a True Document "Retention" (as opposed to "Destruction") Policy by amending City Council Policy No. 51 and Administrative Directive 5.1; 7) Create Special Independent Investigation Subcommittee to investigate the allegations set forth in the Affidavit of Jefferson Wagner and related matters; 8) Consider reforms to City Council Meeting process that are inviting to and respectful of the residents; and 9) Consider other possible initiatives for Government Reform.

FISCAL IMPACT: Although the City Staff routinely asserts "[t]here is no fiscal impact associated with the recommended action," the fact is that there is no way to predict or forecast with any degree of certainty the fiscal impact of any proposal submitted to City Council. If adopted, the recommended actions will promote Transparency, Accountability and Ethics in all aspects of Malibu's City Government. There are no direct financial costs associated with the adoption of the Transparency, Accountability and Ethics initiatives.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal year 2020- 2021.

DISCUSSION: A detailed discussion of the proposed Transparency, Accountability and Ethics initiatives is set forth in a Report appended hereto.

PROPOSAL TO INSTILL TRANSPARENCY, ACCOUNTABILITY & ETHICS IN ALL ASPECTS OF MALIBU'S CITY GOVERNMENT

Submitted by City Councilmembers

Bruce Lee Silverstein

&

Steve Uhring

Dated: December 29, 2020

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EXECUTIVE SUMMARY

On December 17, 2021, Mayor Pierson issued a public statement, which he and the City of Malibu held out as an Official Statement of the City Malibu, and which included the following assertion:

> **"The City is committed to transparency, accountability and ethical conduct in everything it does, both at the staff and Council levels."**

As explained herein, Mayor Pierson lacked the authority to issue an Official Statement on behalf of the City of Malibu without the advance approval of the City Council – which Mayor Pierson did not have. The fact that Mayor Pierson would impermissibly take matters into his own hands is especially problematic given that fact that City Councilmember Silverstein had called for a Special Meeting of the City Council to address the issue that was the subject of Mayor Pierson's unauthorized Official Statement, and his call for a meeting was ignored.[1] The veracity Mayor Pierson's quoted assertion also is questionable, because there has not been a true commitment to Transparency, Accountability or Ethics in all aspects of Malibu City Government for some time now. Rather, there has, at times, been a systemic Evasion and Avoidance of Transparency and Accountability, along with multiple instances of Unethical Conduct, at the highest levels of City Government.

It is unarguable that Malibu **should be** committed to true Transparency, Accountability, and Ethical conduct in all aspects of Malibu's City Government. Yet, there are many aspects of Malibu's City Government that are opaque, unaccountable, and unethical. Some lack of Transparency, Accountability and Ethics is the result of lax (and sometimes nonexistent) historical oversight by the City Council, and other lack of Transparency, Accountability and Ethics is by design

[1] This is not the first time that Mayor Pierson has improperly purported to speak for the City of Malibu without authorization to do so. A few months ago, Mayor Pierson sent a letter to Congress on City of Malibu letter head and purported to advocate legislative action in direct contravention of City Council Policy Nos. 27 and 38, which provide both (i) that no City Councilmember can advocate legislative action on behalf of the City of Malibu without first obtaining a 4/5 vote of approval of the City Council, and (ii) that no City Councilmember can communicate a position to another government agency on behalf of the City of Malibu that does not reflect the policy of a majority of the City Councilmembers. Significantly, these policies apply to all City Councilmembers, including the "Mayor" – which is an honorary and/or ceremonial position with very few specified powers that are beyond those of any other City Councilmember, which do not include the authority to speak for the City without the advance approval of the City Council as a body.

– created by opaque, evasive, and unethical policies (stated and unstated) of the City Manager, aided by the now-former City Attorney.

Undoubtedly, some Malibu residents will be offended by negative comments regarding the City Manager and former City Attorney. The fact is, however, that there will never be true Transparency, Accountability, and Ethics in all aspects of Malibu's City Government unless and until the residents and City Councilmembers open their eyes to the secrecy, tyrannical oppression, deflection and deceit that are the true hallmarks of the monarchical fiefdom the City Manager has managed to build and sustain in Malibu – some of which is touched upon in the allegations of the Affidavit of Jefferson Wagner (the "Wagner Affidavit") submitted to City Council on December 14, 2020, and some of which is discussed in detail herein.

To instill true Transparency, Accountability, and Ethics in all aspects of Malibu's City Government, this Report proposes the following reform initiatives, among others:

- Adopt a Transparency, Accountability, and Ethics Policy
- Record Closed Session Meetings of City Council
- City Council Direction of City's Attorneys
- Regular Review & Update of City Council Policies
- City Council Control of its Agenda
- City Councilmember Unconditional Information Rights
- Semi-Annual Performance Evaluation of City Employees
- A True Document "Retention" (and not Destruction) Policy
- Internal Investigations of Allegations of Wrongdoing
- Reform City Council Meeting Format

Some of the reform initiatives proposed herein are consistent with common practice for assuring Transparency, Accountability and Ethics in other cities and in the private sector, some are the result of reading judicial opinion, academic literature, articles, and public commentary respecting "best practices" for achieving true Transparency, Accountability and Ethics, and others are novel and may serve as a model for other cities to emulate.

Undoubtedly, that there will be some who oppose the proposals set forth herein based on a fallacious appeal to tradition, and not based on a substantive consideration of value of the proposals in achieving a truly Transparent, Accountable and Ethical local government. In logic, such fallacious reasoning is known *argumentum ad antiquitatem* – which is commonly known as "appeal to common practice" and which literally means "appeal to antiquity."

It has been said that "Nothing Changes if Nothing Changes." That will be true of Malibu is we do not begin making meaningful changes now. As John F. Kennedy has been quoted as having said, "If Not Us, Who. If Not Now, When?"

Each of the foregoing proposals is discussed, seriatim, in greater detail below.

Transparency, Accountability, and Ethics Policy

Title: "Transparency, Accountability, and Ethics Policy."

Purpose: To promote Transparency, Accountability, and Ethics in all aspects of Malibu's City Government.

Policy Statement:

The Malibu City Council believes that all aspects of Malibu's City Government should be conducted with the utmost Transparency, Accountability and Ethics. There is no room for a lack of Transparency, Accountability, or Ethical behavior or policies in any aspect of Malibu's City Government.

Overview

In administration, ***civil servants have a special responsibility because they are trusted with managing resources on behalf of the community, delivering services to the community and taking decisions that affect a citizen's life.*** The civil servants have a pivotal role to ensure continuity and change in administration. However, they are dictated by the rules and procedures which are formulated taking their advice into account. It is the "rule of law" rather than the "rule of man" that is often blamed for widespread abuse of power and corruption among government officials. The community, therefore, must be able to trust the integrity of the civil service decision-making process. ***Civil executives are expected to uphold high standards of professionalism, responsiveness and impartiality***. ***Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.***[2]

[2] *Accountability and Ethical Governance* Civil Service India (https://www.civilserviceindia.com/subject/General-Studies/notes/accountability-and-ethical-governance.html) (emphasis added).

Transparency

Transparency means that citizens have an inherent right to know the truth about public issues and the government ensures that this right is met. ***Administrators and politicians have more methods of secrecy, and more secret content, than any other profession. Public discussions are littered with false opinions and data to divert the public from knowing certain truths.*** Finding information on regulations, legislative sessions, etc. is only accessible if you are skilled in law or government. With that being said, public administrators are expected to be forthcoming with all information related to their agency. The purpose of public administration is to serve the public. If the public is not provided with the data obtained by that agency, then the service relationship will be damaged.[3]

The benefit of providing as much information to the public as possible is that it gives them an opportunity to think about decisions that the local officials made and provide valuable feedback to them. The comments and feedback open up yet another opportunity for the all-important two-way communication. Local governments are continually looking at how to improve the quality of life for their citizens. The best decision-making is a result of multiple perspectives, including the perspectives of community members. Based on their comments, government officials can incorporate necessary changes. The value in two-way communication is that it shows that the local government is listening and responding to the community's needs.[4]

Accountability

It can be contended that accountability is the fundamental requirement for preventing the abuse of power and for ensuring that power is directed towards the achievement of efficiency, effectiveness, responsiveness and transparency. ***Open, transparent and accountable government is an imperative prerequisite for community-oriented***

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[3] Caitlin P. Stein, "*Accountability and Transparency in Public Administration,*" PA Times, American Society for Public Administration (March 19, 2019) (https://patimes.org/accountability-and-transparency-in-public-administration/) (emphasis added).

[4] Lena Eisenstein, "*Why Is Transparency Critical in Local Government?*," Digital Insights (June 19th, 2019) (available at https://insights.diligent.com/public-transparency-local-government/why-transparency-critical-local-government/).

public service delivery because without it covert unethical behaviour will result. In theoretical studies, it has been represented that accountability is the process whereby public sector organisations, and the individuals within them, are responsible for their decisions and actions and submit themselves to appropriate external scrutiny.[5]

Ethics

Ethics is vital part of corporate governance, and administration must reflect accountability for their actions on a global community scale.[6]

Local governments not only need to operate lawfully and ethically, but they need to work hard to ***avoid even the appearance of impropriety***."[7]

Implementation:

In order to ensure that all aspects of Malibu's City Government are conducted in a Transparent, Accountable and Ethical manner, these policies and procedures shall be followed by all City Councilmembers, the City Manager, City Attorney, all members of the City Staff, and al outside contractors, including attorneys retained by the City who are other than the City Attorney.

A. Timing and Manner of Providing Information Related to the "People's Business" to City Councilmembers and the Public

1. Equal Access to Information

A truly Transparent, Accountable, and Ethical process for providing information to City Councilmembers and the public includes, at a bare minimum, (i) a prohibition against the provision of any information related to the "City's Business" (broadly defined) being provided to any one or more City Councilmembers that is not provided to all City Councilmembers, (ii) a requirement that all information related to the City's Business be provided to all City Councilmembers concurrently, and (iii) a requirement that all information related to the City's Business made available

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[5] "*Accountability and Ethical Governance*," Civil Service India (https://www.civilserviceindia.com/subject/General-Studies/notes/accountability-and-ethical-governance.html) (emphasis added).

[6] *Id.*

[7] "Importance of Accountability in Local Government" (https://www.powerdms.com/blog/importance-of-accountability-in-local-government/) (emphasis added).

to City Councilmembers also be made available to the public – subject only to rare instances in which public disclosure (x) is permitted to be withheld from the public pursuant to the Brown Act, California Public Records Act and other applicable law **and** (y) would be detrimental to the best interests of the City and its residents.

Equal access to information ensures that (i) all decisions of the City Council are made in the basis of a body of information known by all City Councilmembers, and (ii) all information related to decisions of the City Council will be known to or knowable by the public. Equal access to information also ensures that the City Manager and other City employees do not "play favorites" among the City Councilmembers and/or secretly orchestrate or manipulate action by the City Council behind the scenes.[8]

Equal access to information shall be accomplished in the following manner:

a. In the case of information that is provided to City Councilmembers in the form of "hard copy" documents or an audio or video recording, such information shall be distributed to all City Councilmembers in the same manner and at the same time, with notification by email that the information is being distributed and the manner of distribution.

b. In the case of case of email or other electronic communication, the email or other electronic communication shall be addressed to all City Councilmembers, and no email shall be sent to any one or more City Councilmembers that is not addressed and sent concurrently to all City Councilmembers.

c. In the case of information made available by telephone, videoconference, or other such technology, all City Councilmembers shall be provided advance notice of the call, conference or other form of communication sufficient to participate if they should desire to do so, and the call, conference or other form of communication shall be recorded and transcribed so that any City Councilmember who was unable to join the call, conference or other communication can obtain

[8] For an excellent discussion of the policy bases underlying the importance of these objectives, see Minutes of the November 6, 2002 Regular Meeting of the City Council of City of Palo Alto, at pp. 4-35 (https://www.cityofpaloalto.org/civicax/filebank/blobdload.aspx?t=67494.73&BlobID=68583)

precisely the same information that was conveyed to the other City Councilmembers.

d. In the case of information that is made available in a face-to-face conversation, all City Councilmembers shall be provided advance notice of the conversation sufficient to participate if they should desire to do so, and the conversation shall be recorded and transcribed so that any City Councilmember who was unable to participate in the conversation can obtain precisely the same information that was conveyed to the other City Councilmembers.

Additionally, all information pertinent to matters to be discussed or determined at a Regular Meeting or Special Meeting of the City Council must be provided to the City Councilmembers and the Public no later than 72 hours in advance of the meeting unless there is a demonstrable urgency that precludes doing so.

Compliance with the recording requirements set forth above shall be accomplished using readily available and relatively inexpensive technology that records telephone conversations, videoconferences, and face-to-face conversations and creates an indexed transcript of the recorded audio.

> Advancements in technology have provided new ways for local governments to share information publicly in ways that are efficient, cost-effective, and fast. New digital tools make it drastically easier to store and manage documents and other information. Citizens are familiar enough with technology that they expect their governments to be current on how technology can make information more transparent and accountable.[9]

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[9] Lena Eisenstein, "*Why Is Transparency Critical in Local Government?*," Digital Insights (June 19th, 2019) (available at https://insights.diligent.com/public-transparency-local-government/why-transparency-critical-local-government/).

See also City of Lawton (Oklahoma) Administrative Policy No. 14-2, which states by way of background:

> Technological advancements allow telephone calls received at City of Lawton offices and sites to be recorded, saved or archived. City of Lawton management may grant such capabilities through a formal request process, which is outlined in this policy, in order to ensure staff members are reflecting the highest ethical and professional standards of conduct in communicating with citizens. In addition to training and employee development purposes, recordings may also be referenced by City management in working to navigate miscommunications, protect City interests or evaluate other legitimate business needs.

Equal access to information in the manner set forth above is permitted by the Brown Act so long as the City Councilmembers limit their interaction with the City Manager, City Attorney, and members of City Staff to receiving information related to the City's Business, and do not share their views pertaining to the business. Moreover, equal access to information in the manner set forth above also will deter purposeful or inadvertent violations of the Brown Act by ensuring that there are no serial meetings and all permissible meetings to obtain information will be recorded.

2. City Response to CPRA Requests by Members of the Public

A truly Transparent, Accountable and Ethical government demands that members of the public be afforded broad rights to inspect documents in the possession, custody, or control of the government and to obtain other information related to the City's Business, and that the City not make liberal use of exceptions, exemptions and privileges that permit information related to the City's Business to be shielded from sunshine of public review.

The California Public Records Act (the "CPRA") establishes the statutory right of the public to access public records (broadly defined). The CPRA sets forth numerous exceptions and exemptions from disclosure that the City "may" (but is not required) to rely upon to deny all or some part of a requested inspection. Additionally, there is judicial authority that the City has relied upon to avoid providing a description of withheld documents sufficient to permit a member of the public to assess whether the withholding is lawful or violative of the CPRA.

With respect to CPRA requests, this Report proposes the following guidelines for the City of Malibu:

a. When responding to a CPRA request, in addition to producing all public records required by the CPRA, the City also shall produce public records the City is entitled to withhold from production unless doing so would be adverse to the best interests of the City and its Residents.

b. If the City should determine to withhold any public records responsive to a CPRA request on the grounds that production is excused or exempted by the CPRA or other applicable law, the City shall (i) explain why the requested production would be adverse to the best interests of the City and its residents, and (ii) identify the withheld material in a manner sufficient to permit a reasonable member of the public the ability to evaluate the

veracity and adequacy of the City's basis for withholding such production. For purposes of these requirements, it shall be insufficient for the City to merely identify a provision of the CPRA the City claims to support the denial of production and to assert that production of the material would be adverse to the best interests of the City and its residents.

B. Closed Sessions of the City Council

A truly Transparent, Accountable and Ethical government demands that (i) there be as few Closed Sessions of the City Council as practicable, and (ii) there be a record of what transpires at Closed Sessions that can be reviewed by an appropriate authority if the need to do so should arise. To accomplish these dual objectives:

a. Closed Sessions of the City Council shall be conducted only in instances where (i) a Closed Session is permitted by the Brown Act, **and** (ii) a Public Session would be detrimental to the best interests of the City and its residents.

b. For every Closed Session of the City Council, the City Attorney shall (i) explain why a Public Session would be detrimental to the best interests of the City and its residents, and (ii) explain the purpose of the Closed Session in a manner sufficient to permit a reasonable member of the public the ability to evaluate the veracity and adequacy of the City Attorney's explanation.

c. All Closed Sessions of the City Council shall be recorded with both audio and video to create a historical record of what transpired at the Closed Session and to ensure compliance with the Brown Act.

C. Communication with City's Attorneys

A truly Transparent, Accountable and Ethical government demands that the City's Attorneys act in compliance with the California Rules of Professional Conduct and strive to avoid even the appearance of impropriety.

The City of Malibu, and not any individual, is the "client" of the City's Attorneys. Because the City is an entity, and the City Council speaks for the City, the City's Attorneys serve at the pleasure of the City Council and must take direction exclusively from the City Council, which direction may include authorization to interact and take guidance from a subcommittee of the City Council in specified

circumstances and/or the City Manager on matters within the ordinary course of the City's Business.

Because the City Council speaks for the City as a body, there should be no private communications between or among (i) the City Attorney (or any other attorney retained by the City), on the one hand, and (ii) any individual Member of the City Council, the City Manager, or any other Member of the City Staff, on the other hand, unless the communication is in a writing that is addressed to all City Councilmembers or in an oral communication in which all City Councilmembers have an equal opportunity to participate and which is recorded and transcribed for the benefit of any City Councilmember who is unable to participate in the oral communication.

If the Brown Act should preclude City Councilmembers from sharing their views in a conversation between the City Attorney and the City Manager (or other member of the City Staff), Members of the City Council shall be permitted to listen to such conversation without sharing their views outside of the context of a Meeting of City Council – be it opened or behind closed doors.

Action Respecting City Council Policy No. 14

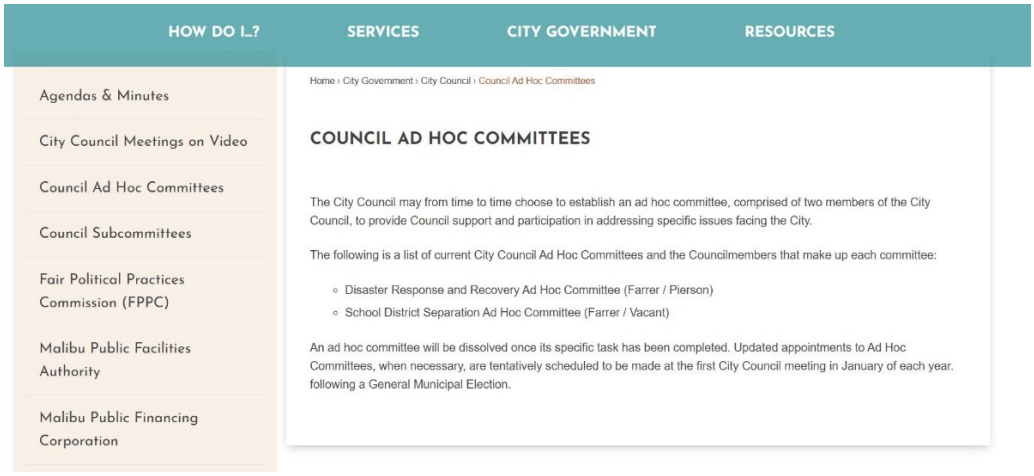
A truly Transparent, Accountable, and Ethical City Government flexibly updates its policies to deal with new developments.

Council Policy No. 14 provides, in pertinent part, as follows:

> The City shall develop a manual of City Council policies and periodically review, update, add or delete policies to keep policies current with the governing philosophy of the City Council.

The most recent City Council Policy was adopted on June 22, 2015. There has not been a new City Council Policy added during the time that Reva Feldman has been the City Manager.

On April 8, 2019, at the request of City Councilmember Farrer, the City Council established a "City Council Policy Review Ad Hoc Committee" comprised of City Councilmember Farrer and then-Mayor Wagner. There is no record of that Ad Hoc Committee having met, much less performed any work. Additionally, the page of the City's website that identifies the existing "Council Ad Hoc Committees" omits the City Council Policy Review Ad Hoc Committee. See https://www.malibucity.org/211/Council-Ad-Hoc-Committees, which appeared as follows as of the date of this Report:



It is hereby proposed that the City Council Policy Review Ad Hoc Committee be reconstituted to consist of City Councilmembers Silverstein and Uhring – both of whom have demonstrated a keen interest in reviewing and proposing updates, additions, or deletions to policies to keep policies current with the governing philosophy of the City Council, as required by City Council Policy No. 14.

Amend City Council Policy No. 8 – City Councilmember Information Access

A truly Transparent, Accountable, and Ethical City Government provides its elected officials with unfettered and unconditional access to information in the possession, custody, or control of the City.

In the private sector, the passive investors in a business (e.g., stockholders, limited partners, and limited liability company members) have broad, but circumscribed inspection rights to protect their investments. The CPRA provides the public sector analog to the limited inspection rights of passive investors in the private sector.

In the private sector, Members of a Board of Directors have essentially unfettered and unconditional inspection rights to facilitate their compliance with their fiduciary responsibilities. For Members of the City Council, City Council Policy No. 8 serves as a weak analog to the directors' inspection rights in the private sector. City Council Policy No. 8 should be strengthened to ensure that Members of the City Council are equipped to satisfy their responsibilities to the residents of Malibu.

City Council Policy No.8 currently provides, in pertinent part, as follows:

> Members of the City Council shall have the right to request information of department heads. Departments heads shall determine whether a response to the request for information will take more than one hour of work to respond. If not then the response may be made directly, if so then the department head shall consult with the City Manager so that the work can be assigned appropriately within the context of the existing work load.

Thus, City Councilmembers have an unqualified right to request information of department heads, and the information must be provided – subject only to the qualification that the work must be assigned in consultation with the City Manager if it will require more than one (1) hour of work to respond.

City Council Policy #8 also provides, in pertinent part, as follows:

> The City Council shall assign staff work through the office of the City Manager or the City Attorney as the case may be. All work assigned shall be determined by a majority of the City Council at a meeting of the City Council.

Pursuant to this language of the policy, the City Council can vote to direct the City Manager or City Attorney to assign staff work (even if not agendized).

City Council Policy No. 8 is "clunky" and antiquated and does not satisfy the important public policy of ensuring that City Councilmembers are equipped to satisfy their responsibilities to the residents of Malibu.

It is hereby propsosed that City Council Policy No. 8 be amended to provide as follows:

> All City Councilmembers shall have the right to inspect (i) all documents and other material in the possession, custody, or control of the City of Malibu, and (ii) all documents and other material in the possession, custody, or control of the City's employees (including outside counsel and other third-party contractors) that are related to the City's Business (broadly defined). All City Councilmembers also shall have the right to request information related to the City's Business that known or knowable to employees of the City (including outside counsel and other third-party contractors), and such information shall be provided when requested.
>
> A City Councilmember may exercise the foregoing inspection and information right by providing an email to the City Clerk, with a copy to all other City Councilmembers, identifying the documents or other material the City Council Member desires to inspect and/or the information sought by the City Councilmember, and the City Clerk shall make arrangements with the appropriate City employee(s) (including outside counsel and other third-party contractors) to accommodate the inspection and/or information request. No authorization of the City Manager shall be required for a City Council Member inspection.
>
> Documents or other material or information requested by a City Council Member in the manner described above shall be provided promptly, and in no event no later seventy-two (72) hours from the time it is requested (excluding hours occurring during weekends and holidays) unless the City Clerk states in writing that the request cannot be accommodated within such time frame and provides a written explanation for the delay.
>
> City Councilmembers are encouraged to be respectful of the other obligations of the City employees whose assistance is required to satisfy a request for inspection or information.

Documents or other material and information provided to any City Councilmember shall be made available concurrently to all City Councilmembers who have an interest in reviewing such documents or material or learning such information.

In addition to anything else provided herein, the City Council, as a body, may direct that documents, material or information requested by any City Councilmember be provided sooner than seventy-two (72) hours from the time of the request and may specify the person or person to honor the request.

Amend City Council Policy No. 28 – Control of Agenda

A truly Transparent, Accountable, and Ethical City Government is democratic and not subject to the control of an unelected individual with disproportionate power. In this connection, it is imperative that the City Council have the power to control its own Agenda.

City Council Policy #28 currently provides, in pertinent part, as follows:

> Individual members of the City Council may place an item on a City Council agenda for consideration by the Council when less than one hour of staff work is involved in preparing the item by providing agenda back-up material to the staff. When more than one hour of staff work is to be required to prepare necessary back-up materials, the individual member may submit a written or verbal request at the City Council meeting for a vote to have the matter placed on a future agenda for consideration.

Under the heading of "Implementation," City Council Policy No. 28 currently states as follows:

> Resolution No. 91-24 requires that items to be placed on the agenda must be submitted to the City Manager not later than noon on the Tuesday before the regular City Council meeting. Since the agenda for such meetings will have been prepared and posted on the previous Friday, such items shall be treated as amendments to the published agenda and a revised agenda shall be prepared and posted the following day. A written request for the item to be placed on the agenda, in the case where it is estimated that staff work to prepare background material-will exceed one hour, shall be forwarded to each member of the City Council and included in the final agenda packet available to the general public at the meeting. In the case of back-up material submitted for an item which will take less than one hour of staff time to prepare, both the back-up material and the staff work related to the item will be forwarded to each member of the City Council and included in the final agenda packet available to the general public at the meeting. [This requirement follows the procedure set forth in Resolution No. 91-24, which states that "no item shall be placed on the agenda unless staff has reviewed and prepared a report on the item and it is ready for Council action."] (Bracket in Original)

Over the years in which the current City Manager has been in office, the City Manager has controlled the right of City Councilmembers to include items on the Agenda through City Council Policy No. 28.

Apparently unbeknownst to some current and former City Councilmembers, City Council Policy No. 28 was superseded by Resolution No. 98-083, which repealed Resolution No. 91-24, and which provides, in pertinent part, as follows:

> **B. <u>Placement of Items on a City Council Meeting Agenda.</u>** All items to be placed on a City Council meeting agenda must be submitted to the City Manager not later than twelve days preceding the City Council meeting. Individual City Councilmembers must submit a brief report to the Council explaining their item and supporting materials for the items by this deadline. To avoid overloading the staff or the Council agenda, individual Councilmembers should not submit more than one agenda item per Council meeting. All such individual Councilmember agenda items shall be placed at the end of New Business. The City Manager shall be responsible for scheduling all other agenda items submitted by City-staff, consultants or recommendations from City Commissions, Boards or Committees unless otherwise specifically directed by a majority of the City Council at a public meeting. Any detailed review of City Council goals/objectives or City departments, programs or services should take place at the City Council's Quarterly Review Meetings.

To break down this paragraph, it provides, in pertinent part, as follows:

1. Each City Councilmember has the right to place items on the Agenda so long as the City Councilmember both (i) submits the item no later than 12 days prior to the date of the Regular Meeting of the City Council at which the City Councilmember desires the item to be placed on the Agenda, and (ii) provides a brief report brief report to the Council explaining their item and supporting materials for the items by this deadline.

2. City Councilmembers are encouraged, but not mandated, to limit the submission of Agenda items to one per meeting.

3. City Councilmember Agenda items "shall" be placed in the "New Business" section of Agenda, following other items of New Business.

4. Unless otherwise specified by the City Council, the City Manager is otherwise responsible placing other items on the Agenda.

For avoidance of doubt, Resolution No. 98-083 repealed the requirement of Resolution No. 91-24 [referenced in the bracketed sentence as the end of the "Implementation" provision of City Council Policy No. 28] that "no item shall be placed on the agenda unless staff has reviewed and prepared a report on the item and it is ready for Council action."

It is hereby proposed that the rules pertaining to the control of the Agenda be further amended to create an Agenda Subcommittee of the City Council with the authority to establish the Agenda of the Meetings of the City Council, and to deny the City Manager the right to have any matter placed on the Agenda without the prior approval of the Agenda Subcommittee. The Agenda Subcommittee should be comprised of two City Councilmembers – one of which shall be the Mayor and at least one of which shall be a City Councilmember who was elected at the most recent General Municipal Election. Additionally, at the commencement of each Meeting of the City Council, the Mayor shall ask if any City Councilmember wishes to have an Agenda Item submitted by the City Manager and authorized by the Agenda Subcommittee removed from the Agenda, and the City Council shall vote on any such request before conducting further business. Finally, the amount of time in advance of a Regular Meeting that a City Councilmember is required to submit an Agenda Item should be reduced to five (5) business days to provide time for a Councilmember to respond to the events of the last Regular Meeting prior to the submission.

Performance Evaluations of City Manager, City Attorney and City Treasurer

A truly Transparent, Accountable, and Ethical City Government requires that the City Manager, City Attorney, City Treasurer, and any other Council appointed staff members are subject to periodic evaluation by the City Council to ensure that they are performing their responsibilities in a professional manner that is responsive and responsible to the residents. After all, such employees serve as the pleasure of the City Council, which is the elected body charged with the authority of hiring, managing, and replacing such employees when necessary or appropriate.

City Council Policy No. 36 states as follows:

> It is the policy of the City Council to conduct semi-annual evaluations of the City Manager, City Attorney, City Treasurer, and any other Council appointed staff members in order to provide a regular and frequent forum for the Council to review each of these official's job performance.

As a general matter, **City Council Policy No. 36 is honored in the breach.**

There is no record of any Performance Evaluations of the City Attorney, City Treasurer, or any other "Council appointed staff members" (if there are any) by the City Council over the past two years (or longer).

In that same time, the City Council has met multiple times in Closed Sessions for the stated purpose of conducting the City Manager's Performance Evaluation, but each time (with one exception) the City Attorney has offered the Delphic statement that the City Council "took no reportable action" – which many residents have taken to mean that a formal Performance Evaluation did not occur. In fact, however, the City Attorney's inscrutable and impenetrably opaque statement seems to be a legal euphemism for conducting a Performance Evaluation, but not explicitly authorizing a salary increase. If that is the case, then the City Attorney's cryptic comment is purposefully misleading.

As noted in the Wagner Affidavit, the City Manager's employment contract was amended on May 29, 2018 over the objection of Councilmember Wagner (just days before his home was raided). As explained in the Council Agenda Report for the May 29, 2018 meeting of the City Council. the amended employment contract provides for "salary increases to $248,000 on May 3, 2019, $254,000 on May 3, 2020, and $260,000 on May 3, 2021, each ***conditioned upon the City Manager receiving a positive evaluation from the City Council***." (emphasis added). Specifically, the amended employment contract states, as follows:

> At any time as desired by the City Council, but at least annually, City agrees to review Employee's performance. Conditioned on a positive evaluation from the City Council, Employee's base salary shall increase to $248,000 on May 3, 2019; and, conditioned on a positive evaluation from the City Council, Employee's base salary shall increase to $254,000 on May 3, 2020; and, conditioned on a positive evaluation from the City Council, Employee's base salary shall increase to $260,000 on May 3, 2021.

By design, the City Manager's employment contract does not require a specific City Council resolution to increase the City Manager's salary on an annual basis. Instead, the contract was drafted to provide for a "positive evaluation from the City Council" to trigger a salary increase. As such, **if the City Council provided the City Manager with a positive Performance Evaluation at secret Closed Sessions in 2018 and 2019, then the City Council indirectly approved salary increases for the City Manager in Closed Session – which is not only a reportable action, but one that the Brown Act prohibits occurring in a Closed Session**.

For the City Attorney to report that "no reportable action" occurred at Closed Session meetings that resulted in salary increases for the City Manager is misleading and arguably unlawful. This is the opposite of the Transparency, Accountability, and Ethics the City supposedly strives to achieve.

Separate and apart from the foregoing, the City Manager has self-directed that her secretive Performance Evaluations be conducted in Closed Session, which is a permissible approach, but not a required approach, and which is subject to the determination of the City Council that must be made in an Open Session, and which determination has never occurred.

On February 19, 2019, City Councilmember Silverstein wrote the City Council to protest the City Manager's unilateral act of scheduling her Performance Evaluation and placing it on the Agenda for a Closed Session. Specifically, under the bold heading of "**Objection to Secretive Conduct of City Manager's 'Performance Review' Behind Closed Doors Without Public Scrutiny**," City Councilmember Silverstein wrote the following:

> The Agenda for the next regularly scheduled meeting of City Council states that the City Manager's "Performance Evaluation" is scheduled to occur in a "Closed Session" of City Council on February 25, 2019. I respectfully request that the Performance Evaluation be performed in

an open setting so that members of the public may first offer comments and then witness the Performance Evaluation.

As was explained in City Councilmember Silverstein's letter to the City Council:

> Although the Brown Act does not prohibit a "performance evaluation" of a public employee from being conducted in a closed session, the Brown Act does not require a closed session for a performance evaluation either. Rather, the determination of whether to conduct a performance evaluation openly in the light of the public eye or secretly behind closed doors is left to the discretion of City Council. *See*, *e.g.*, *Memorandum from the City Attorney for the City and County of San Francisco to the Elections Commission*, dated April 22, 2002 (explaining that an elected body "has the authority – but was not required - to conduct the performance evaluation . . . in closed session," and "[w]hether to discuss such matters in closed session . . . were policy decisions" for the governing body).

Additionally, City Councilmember Silverstein added the following:

> Plainly, for City Council to exercise its discretion in one direction or another, the members of City Council are required to make a decision one way or the other. And the absence of a decision is a decision in itself. As Rush sings in *Freewill*, "If you choose not to decide, you still have made a choice." Obviously, someone (i.e., some human being) has "decided" to conduct the City Manager's performance evaluation secretly behind closed doors. The item did not place itself on the Agenda.

City Councilmember Silverstein then asked the following:

> **What person decided to conduct the City Manager's performance evaluation secretly behind closed doors?**
>
> Did City Council formally determine to exercise its discretion to hold the City Manager's performance evaluation in secret behind closed doors? If so, precisely when and how was this decision made? We know that this decision, itself, could not have been made secretly behind closed doors because the Brown Act does not authorize that decision to made in that manner.

> Did a single member of City Council make the decision to conduct the City Manager's performance evaluation in secret behind closed doors? If so, which member of City Council was it? We know it could not have been more than two members of City Council, because there was no public vote on this question before the item appeared on the Agenda.
>
> Did the City Manager, herself, make the decision to conduct her performance evaluation in secret behind closed doors? If so, by what authority did this the City Manager usurp City Council's decision-making authority to determine, in the exercise of its discretion, whether to conduct the performance evaluation in secret behind closed doors or in the light of public observation?
>
> Was the City Attorney consulted to determine whether the performance review "may" be conducted in a public manner or "must" be conducted secretly behind closed doors?

City Councilmember Silverstein's questions were not publicly acknowledged by a single City Councilmember, much less answered. Privately, however, then-Mayor Wagner told City Councilmember Silverstein that the City Manager self-scheduled her Performance Evaluation for a Closed Session.

Finally, City Councilmember Silverstein made the following request:

> I respectfully request that City Council defer the City Manager's performance evaluation for two weeks and place on the agenda of the February 25 meeting a vote on the decision to exercise City Council's discretionary authority to hold the performance review in a public setting.

City Councilmember Silverstein offered the following explanation for his request:

> As I am certain all members of City Council are aware, a meaningful portion of the constituency have substantial issues with the performance of the City Manager, which has led to a very public campaign and petition supporting her removal and/or termination. Moreover, the City Manager's defensive outburst that "I didn't start the fire and I'm not responsible for putting out the fire, so your booing is inappropriate" at the Town Hall meeting with Fire Chief Daryl Osby has not helped her cause – especially since she has not publicly apologized for her outburst. Nor does the City's recent handling of the Destroyed Field bode well for the performance of the City Manager.

> Another issue that is worthy of consideration and public comment includes the fact that the judicial invalidation of Measure R occurred on the City Manager's watch, and no meaningful effort was made to amend Measure R to address the legal issues identified by the court or to otherwise curtail or delay the construction of the shopping center that the residents of the City had made clear they opposed.
>
> Personally, l also find it incredible that the City Manager took an extended vacation in Europe (Paris I am told) while the City was still reeling in the aftermath of the Woolsey Fire and dealing with the threat of potentially disastrous mudslides.
>
> As with the issues pertaining to the Destroyed Field, I am certain that there are other many other issues that various residents have with the performance of the City Manager, which are beyond my individual capability to identify - which is why it would have been best for the City Manager's performance review to be conducted an open and notorious manner, so that all members of the public will have an opportunity to provide their thoughts and insights - both positive and negative.
>
> Because the of the intense and acute public concern about the performance of the City Manager, City Council owes it to the residents of the City of Malibu to conduct the City Manager's performance evaluation in a public setting, so that members of the public can offer their views during a period of public comment that "precedes" (as opposed to follows) the performance review, and at which the comments and determinations of the members of City Council can be witnessed by the residents who elected them - some of whom have suggested the recall of some members of City Council who are perceived (rightly or wrongly) as being beholden to the City Manager for one reason or another.

As with City Councilmember Silverstein's questions, his request and objections were not publicly acknowledged by a single City Councilmember, much less discussed by the City Council. As with City Councilmember Silverstein's questions, then-Mayor Wagner privately told him that Mayor Wagner agreed with City Councilmember Silverstein's objections.

Following the Closed Session on February 25, 2019, the City Attorney misleadingly reported that the City Council "discussed the items listed on the Closed Session

agenda and took no reportable action." The City Attorney's report does not state whether the vote (if any) of the City Councilmembers to provide a positive Performance Evaluation, which triggered a salary increase for the City Manager.

On March 29, 2019, the City Manager caused an Agenda for a Special Meeting of the City Council to be promulgated. The Agenda (signed by the Deputy City Clerk) stated that the Special Meeting had been called by then-Mayor Wagner. That statement in the Agenda was a fabricated misrepresentation. Mayor Wagner had not called the Special Meeting and did not even favor its occurrence – as he has publicly confirmed.

Again, City Councilmember Silverstein objected to City Manager's Performance Evaluation being secretly conducted in a Closed Session, and again his objection was ignored – not even acknowledged, much less discussed. Again, the City Manager usurped the City Council's authority to determine whether the Performance Evaluation should occur in public or in secret. Again, the City Council supinely followed the City Manager's lead in dereliction of the City Council's statutory responsibilities. Nonetheless, as reported by the City Attorney following the Closed Session, City Council "decided to continue the evaluation of the City Manager to after the City Council received the Management Partners report on the City's response to the Woolsey Fire."

On November 7, 2019, the City Manager again caused an Agenda to be issued for a Special Meeting to conduct a Closed Session to conduct her Performance Evaluation. Multiple residents attended the Public Session preceding the Closed Session and expressed varying degrees of dissatisfaction with the City Manager including (i) "Malibu deserves excellence" that the City Manager did not provide; (ii) the City Manager was "not qualified"; (iii) the City Manager's "leadership had been inept" and City Council was "complicit in ineptitude"; (iv) the City Manager had "let the City down" during the Woolsey Fire, "the City was at fault for the experiences of the community during the Woolsey Fire," and "the after-action report was a cover-up." Again, the City Council went forward with the City Manager's scheduled Closed Session, and again the City Attorney misleadingly reported the City Council "discussed the items listed on the Closed Session agenda and took no reportable action."

The City Manager scheduled her next Performance Evaluation for herself for October 12, 2020 – which conveniently was less than a month before the General Municipal Election in which three candidates were running on a slate that sought Change, which included replacing the City Manager. No doubt the City Manager would have scheduled her salary-increase triggering Performance Evaluation for a

sooner date but was advised by one of her pet City Councilmembers that doing so would be politically unwise during the early days of the Pandemic. Again, City Councilmember Silverstein objected to City Manager's Performance Evaluation being secretly conducted in a Closed Session, and again his objection was ignored – not even acknowledged, much less discussed. Again, the City Manager usurped the City Council's authority to determine whether the Performance Evaluation should occur in public or in secret Closed session. Again, the City Council supinely followed the City Manager's lead in dereliction of the City Council's statutory responsibilities. Again, the City Attorney misleadingly reported the City Council "discussed the items listed on the Closed Session agenda . . . and took no reportable action."

That brings us to today. As of today, the City Manager has had only one semi-annual Performance Evaluation over the course of the past year; the City Manager has never had a Performance Evaluation in public (or even one in which the results were publicly reported), and the City Council has never discussed, much less voted on, the question of whether the City Manager's Performance Evaluation should be conducted in a public setting or at least publicly reported.

It is hereby proposed that the City Manager's first semi-annual Performance Evaluation of 2021 be scheduled post haste, and that the City Council determine to conduct the evaluation in a Public setting. If any Member of the City Council prefers to conduct the City Manager's Performance Evaluation in a secretive Closed Session, they should have the maturity to vote to do so in a public setting so that the residents know where each Member of the City Council stands on the subject.

It also is proposed that the City Council commit to conducting Performance Evaluations of the City Manager, City Attorney, City Treasurer, and any other person appointed by the City Council twice a year – near the end of June and December.

If the City Council is willing to do its job and vote on the issue of whether the City Manager's Performance Evaluation should be conducted in public or in a secretive Closed Session, the sponsors of this proposal intend to vote for a public Performance Evaluation. Either way, at the City Manager's Performance Evaluation, one or both of the co-sponsors intend(s) to raise the following issues, among others:

- All the issues raised in City Councilmember Silverstein's February 19, 2019 letter to City Council

- Wrongfully approved the purchase of an 8-year Certificate of Deposit in the amount of $250,000 from a Utah Bank in violation of the City's Investment Policy
- Created and maintains a draconian email destruction policy that defies the City's objectives of transparency and accountability
- Misrepresented (negligently or willfully) that the City lacks the authority to enforce the remediation requirements of the permit granted to SCE to destroy the Bell Property
- Wrongfully directed that gravel remain on Chili Cook-Off Lot without following any applicable process
- Resident concerns of Intimidation / Retribution & Reprisal
- Failure to explore purchase of Smith Property and then add water rights – thereby dramatically increasing the value of the property, which was later capitalized upon by a developer
- Refuses to speak to City Councilmembers without the conversation being recorded
- Discourteous to City Councilmembers
- Non-Responsive to City Councilmember requests and questions
- Allows inaccurate legal information to be published in City press releases
- Issues raised by Wagner Affidavit
- Issues raised in City Councilmember Silverstein's Human Resources Complaint about the City Manager, submitted to the City of Malibu on December 28, 2020.

The co-sponsors also intend to invite and encourage Public Comment from the residents – just as the City Manager previously has arranged for residents and City employees to commend her performance to support a positive Performance Evaluation that would trigger a salary increase.

A True Document "Retention" (and not "Destruction") Policy

A truly Transparent, Accountable, and Ethical City Government requires a robust policy for ensuring that documents related to the City's Business and other important matters are retained so that they are available when needed at a future date. The City's current policies – as unilaterally adopted by the City Manager and as adopted by the City Council – are the opposite of robust. Yet, the City Manager (with the assistance of the now-former City Attorney) has created a Document Destruction Policy that is designed to evade and avoid transparency and accountability, and which is arguably unethical and borderline unlawful. Other "policies" of the City Manager are equally evasive of transparency and accountability.

A. Administrative Guideline No. 5.1

In March 2018, the City Manager promulgated Administrative Guideline No. 5.1 titled "Email and Internet Use." Under the heading of "Records Management and File Management," the City Manager's directive begins with the following instruction:

> Email messages are considered "transitory" documents (work-in-progress) and therefore usually not subject to the City's record retention requirements. All email messages are deleted from the network email server on a regular basis.
>
> For file management and storage purposes, email messages should only be retained on the workstation for as long as needed. In most instances, this means deleting messages as soon as you have read them, and shortly after you have sent them.

Administrative Guideline No. 5.1 then establishes four categories of email messages that should be retained as a hard copy, but there is no person responsible for ensuring that emails are properly retained, and there is no system established to determine whether a given email falls within one of the four categories or should be destroyed "as soon as" they have been read or "shortly after" they have been sent. Plainly, Administrative Guideline No. 5.1 should be amended to establish a reliable process for ensuring that appropriate decisions are made respecting the significance of email messages. Of course, repealing the "read and delete" provisions of the directive, and adding a requirement to preserve all email, would obviate the need for such a system and would guarantee that no email that should be preserved is destroyed.

When members of the Malibu community who are experienced Information Services professionals learned of the City Manager's email destruction policy, they offered the following observations:

> Having worked in IT for 40 years and written many policies, and even a book . . . on how to write IT policies, I must agree. It's the most nonsensical policy I've ever seen and has no basis in technical practicality or utility.
>
> . . .
>
> [O]bviously, the language about file management and storage is a subterfuge . . . Again, the opposite of transparency and ethics.
>
> * * * * *
>
> This type of policy is outrageous. I have every single email sent and received by me since 1998, the first year I had email. You can setup outlook to also archive all your messages on your laptop. I am far from an outlook expert and haven't used it in years, but last time I used it that was most certainly an option.
>
> I did document management for several large law firms, State of California (CalFire), and Four Seasons Hotels and Resorts. I have never encountered such a preposterous policy in any of those organizations.

The latter comment is from an individual who also is a lawyer.

Another local lawyer has expressed the view that the "read and delete" email destruction policy seems suspect and is bound to get the City into hot water if the City finds itself in litigation and relevant documents were destroyed based on that policy.

Yet another Malibu resident commented: "This policy seems absolutely Orwellian. I have a hard time believing that it's actually legal."

City Councilmember Silverstein recently wrote to the City Manager as follows:

> For nearly 35 years, I have retained most of my email indefinitely so that I am able to search prior communications when issues arise with respect to which such prior communications may be relevant and/or helpful in formulating present plans, strategies, and communications.

> I understand that the City has a document destruction protocol (which I intend to press to change) that calls for the destruction of some emails immediately after they are read and many others within some relatively short period of time. This poses a problem for me with respect to email that I receive at and/or send from my City email address.
>
> Is there a way for my emails to be saved indefinitely (or at least until such time as I am no longer a Member of the City Council), or do I need to make copies and/or forward copies of email I wish to preserve to another email account?

The City Manager's entire reply, was the following:

> The City's document retention protocols are approved by the City Council. If you would like to have a different protocol, you can raise the matter at a City Council meeting.

The co-sponsors of the proposal that is the subject of this Report leave it to the other City Councilmembers and the public to decide for themselves whether they believe this is the type of response they expect the City Manager to provide to a City Councilmember who asks the type of question City Councilmember Silverstein asked. Personally, the co-sponsors view the City Manager's response to be recalcitrant and insubordinate. And one member of the community offered the following comment after reading the exchange between the City Manager and City Councilmember Silverstein:

> This is disturbing. The City should be able to answer your question about how to preserve your emails irrespective of the protocol that the City takes. Changing the policies is clearly a separate issue, which you fully understood and acknowledged.

Lastly, it should be noted that Administrative Guideline 5.1 states that it "applies to all full-time and temporary City employees, volunteers, elected officials, contractors and other individuals with access to the City's email, internet systems, and encompasses all computers connected to the network." Notwithstanding the City Manager's inclusion of this broad language, Administrative Guideline No. 5.1 plainly does **NOT** apply to "elected officials" (i.e., Members of the City Council) – as they are the City Manager's superiors in the City's organizational structure, and the City Manager has no authority to direct the conduct of the City Councilmembers.

B. The City Council's Document Destruction Resolution

The City also has a policy that was adopted by the City Council at the recommendation of the City Manager, which calls for the routine destruction of all sorts of documents in a time frame that the now-former City Attorney advised to be the shortest time permissible by law. In short, any retention of documents occurs only for so long as is legally mandated, and documents are directed to be destroyed at the soonest possible time. Again, this is the opposite of seeking to be Transparent and Accountable. It is hereby proposed that the Document Retention Policy be revised to provide for the true "retention" (and not destruction) of documents for time-period that are truly conducive to full Transparency, Accountability and Ethics, and not simply to comply with minimum legal requirements.

C. City Council Policy No. 51

City Council Policy No. 51 currently provides as follows:

> A. Primary use of the City-issued device and server. A Councilmember who is issued a City-owned device for City business through electronic communications and documents will use that device for such purpose and will avoid using personal devices for City business. Emails from third parties pertaining to City business should be forwarded to the Councilmember's City email account and persons contacting the Councilmember should be advised of the preference for all City business to be done through the Councilmember's City email account. Nothing in this policy amends or changes the City's email policy. Public records should be printed for retention.
>
> B. Access to equipment when required to respond to public records request. Councilmembers must make City-owned devices available so the City may promptly reply to Public Records Act requests.

City Council Policy No. 51 does not reference "text messages" or other forms of electronic communication. City Council Policy No. 51 should be amended to include such alternative forms of communications. Additionally, both City Council Policy No. 51 and Administrative Guideline No. 5.1 should be revised to prohibit the use of Snapchat, Confide, Facebook vanish mode and/or any other form of written communication that self-deletes.

City Council Policy No. 51 pertains only to City Councilmembers, and does not reference the City Manager, City Attorney, or other City employees (including outside counsel and other third-party contractors). City Council Policy No. 51 should be amended to include such other individuals.

City Council Policy No. 51 refers to "the City's email policy," but there is no definition of that term, and it is unclear what policy is referenced. Plainly, the reference is not to Administrative Guideline No. 5.1, as that directive was not in existence when the City Council adopted City Council Policy No. 51, and Administrative Guideline 5.1 is **NOT** applicable to City Councilmembers (even though the City Manager purported to make it applicable through legally ineffective language) because it was unilaterally adopted by the City Manager (and not the City Council).

The preamble to City Council Policy No. 51 states as follows:

> The Public Records Act defines a "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." Gov't Code § 6252(e). ***The Act*** also defines "local agency" as a county and city but ***does not include individual officials or employees*** in that definition Gov't Code § 6252(a). (Emphasis added).

Although the above quoted statement is literally accurate, the gist of the statement is inaccurate, because the California Supreme Court ruled in *City of San José v. Superior Court*, 2 Cal.5th 608 (2017) that the CPRA does apply to the writing of City employees. As such, the preamble needs to be revised. Additionally, and as noted above, for the avoidance of doubt, City Council Policy No. 51 should be amended to expressly include the City Manager, City Attorney, or other City employees (including outside counsel and other third-party contractors).

D. Enforcement of the Rules

The City Manager's Administrative Guideline No. 5.1 includes the following directive:

> <u>Personal Device and Email Account Use for City Business</u>
>
> ***Personal devices and email accounts shall not be used by City employees to conduct City business.*** Employees who are issued personal devices (including, but not limited to, cell phones, tablets, and

> computers) will use such devices only to conduct City business and are prohibited from using such devices for personal use. ***Communications that are sent to a personal email account or device shall be forwarded to the employee's City email account and persons contacting the employee should be advised that all communications related to City business must be done through the employee's City email account and City-owned electronic device.*** Nothing in this policy amends or changes City Council Policy #51. Public records should be printed for retention. Violation of these policies may result in loss of use of the personal device or other disciplinary action by the City. (Emphasis Added).

Notwithstanding this clear directive, it is unclear whether the City Manager, herself, complies with her own directive. Over the past month, City Councilmember Silverstein has made numerous CPRA requests for the City Manager's emails, text messages and other electronic communications, among other things, and City Councilmember Silverstein has received only a handful of text messages and relatively few emails from the City Manager. It is possible that the City Manager simply conducts City Business in a largely clandestine manner, but it also may be that the City Manager has used some alternative form of written communications that are outside the City's possession or custody (but which are under the City's control under the decision in *City of San José v. Superior Court*, 2 Cal.5th 608 (2017)).

E. City Manager Access to City Council Communications

Under the heading of "Ownership and Privacy," the City Manager's Administrative Guideline No. 5.1 states, in pertinent part, as follows:

> All electronic data placed on the City's network is under the control of and is the sole property of the City. Use of the City's network is a privilege, not a right. There should be no expectation of privacy with email messages (or any other data files residing on the City's network), whether sent or received. . . . The City reserves the right for authorized staff to review all email messages and data files on the City's computers or network at any time. . . .

The gist if this statement is that the City Manager reserves the right to read the email that is sent or received by anyone who is subject to Administrative Guideline No. 5.1 – who the City Manager erroneously claims to include City Councilmembers, whose email may include communications with the City Attorney about the City

Manager, which are privileged from the City Manager. Thus, within the City Manager's monarchical structure, she is empowered to read the emails of anyone else, but her own email are immunized from review by others unless she authorizes such review. In fact, however, the City Manager is mistaken about her right to read the email of City Councilmembers (who are not subject to Administrative Guideline No. 5.1 for the reasons previously discussed herein), and the City Manager's own email is subject to the information rights of the City Councilmembers pursuant to City Council Policy No. 8 and other applicable law.

The co-sponsors of the proposal that that is the subject of this Report intend to learn whether the City Manager has, directly or indirectly, been surreptitiously accessing the private email of City Councilmembers without their knowledge or consent – as such action may be unlawful under both state and federal law if it has occurred.

Internal Investigation of Sworn Allegations of Wrongdoing

A truly Transparent, Accountable, and Ethical City Government not only welcomes scrutiny, but also conducts internal investigations, led by independent elected officials, when serious allegations of wrongdoing are advanced – and particularly when they are set out in a sworn Affidavit of a City Official.

For this reason, this Report calls for the creation of an Independent Special Investigation Subcommittee of the City Council, charged with authority to investigate the allegations in the Wagner Affidavit.

A. Importance of Internal Investigations

The willingness of a local government to pursue an independent internal investigation of alleged criminality, corruption or other wrongdoing involving government employees is a hallmark of Transparency, Accountability and Ethics in local government.

In *Spielbauer v. County of Santa Clara*, 45 Cal. 4th 704 (2009), the California Supreme Court recognized the importance of independent internal investigations in effective government. By analogy, in the private sector, since the enactment of the Sarbanes-Oxley Act to combat the corruption of the securities markets by publicly-traded company insiders, "**companies include internal investigations as key component of Compliance, Ethics and Legal plan**."[10]

It is for this reason that the California Government Code vests general law cities, such as Malibu, with subpoena power – akin to the subpoena power possessed by Congress when it conducts public investigations. Specifically, Section 37104 of the California Government Codes provides:

> The legislative body may issue subpoenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it.

As City Councilmember Silverstein explained on his website during the campaign:

> ***Investigate Credible Claims of Corruption***
>
> Many residents claim to have knowledge of corruption within City Hall.

[10] https://www.perkinscoie.com/images/content/2/1/v2/21792/le-10-05-19-workshop-collins-rivera.pdf, at 2 (emphasis added).

> As a member of City Council, I will press to create an independent commission to investigate any credible claims of corruption, and I will press to use City Council's little-known power to issue investigative subpoenas (just like Congress does) to ensure that any investigations are properly performed.
>
> The power of City Council to conduct investigations and issue subpoenas derives from Section 37104 of the California Government Code.
>
> As best I can tell, the City Attorney has not explained this extraordinary power to the current members of City Council.

Additionally, in recognition of the importance of independent government investigations of alleged wrongdoing by public employees, the California Supreme Court has held that a public employee can be terminated for cause for refusal to cooperate with an internal investigation – even if the employee has the constitutional right to remain silent pursuant to the Fifth Amendment to the United States Constitution. As the California Supreme Court instructed in *Spielbauer*:

> [T]he United States Supreme Court has explicitly stated that the Fifth Amendment does not prevent a public employer from disciplining an employee who refuses to answer official job-related questions, where there is no further requirement that the employee forfeit the privilege against self-incrimination and agree that the answers thus compelled may be used in a criminal prosecution against the employee.
>
> . . .
>
> [A]bsent a contrary statute, a public employer, acting for noncriminal reasons, may demand answers from its own employee about the employee's job conduct and may discipline the employee's refusal to cooperate, without first involving the prosecuting authorities in a decision about granting formal immunity. The vast majority of such cases are unlikely to have criminal implications; on the other hand, the public employer must be able to act promptly and freely, in its administrative capacity, to investigate and remedy misconduct and breaches of trust by those serving on the public payroll. This strong interest outweighs the incidental effect on enforcement of criminal laws that may arise from the rule that statements thus compelled by the

> employer cannot be used in aid of a later criminal prosecution against the employee.
>
> Accordingly, we confirm that neither the federal nor the California Constitution allowed plaintiff, free of any sanction, to refuse to answer his employer's questions about his possible job misconduct unless and until he received, in advance, a formal grant of immunity from subsequent criminal use of his statements. Here, as noted, plaintiff's employer did not require him to *waive* his constitutional privilege against such criminal use. On the contrary, plaintiff was accurately advised, on more than one occasion, that any statements he made under compulsion in connection with the employer's internal disciplinary investigation could not be used against him in a criminal case. Under these circumstances, plaintiff's dismissal, insofar as based on disobedience of the employer's order to answer questions, was constitutionally valid.

B. The Importance of Creating A Truly Independent Special Investigation Subcommittee

When sworn allegations of criminality, corruption or other wrongdoing within the government are made, it is critical that an internal investigation be overseen and conducted by truly independent individuals, who have no personal or financial relationship to or with the individuals who are the object of the allegations.

The importance of a truly independent special investigation committee can be understood by reference to the *ad hoc* committee the City Council that was created after the Woolsey Fire. That process also highlights the inadequacy of delegating the responsibility for an independent internal investigation to an outside consultant.

Following the Woolsey Fire, City Council considered approving a process to "investigate" the City's preparation for and response to the Woolsey Fire. At a Special Meeting of City Council on December 18, 2018, City Council tentatively decided to appoint City Councilmembers Mullen and Peak to oversee that process. Inasmuch as City Councilmembers Mullen and Peak were on City Council prior to and at the time of the Woolsey Fire, City Council had tentatively decided to have City Councilmembers investigate themselves.

Following the December 18 meeting, City Councilmember Silverstein wrote to City Council formally objecting to the tentative selection of City Councilmembers Mullen and Peak to oversee the City's "investigation" on the basis that they were

hopelessly conflicted from being objective. Among other things, Mr. Silverstein wrote:

> For whatever it may be worth to you, it is my view that the three members of City Council who were Council Members at the time of the Fire, as well as the City Manager, are inherently conflicted with respect to both the potential result of any such assessment as well as the very determination of how to pursue such an assessment. Indeed, this conflict of interest is so obvious that I am surprised that it was not raised by the City Attorney as a caution to the City Council.
>
> . . .
>
> In the private sector, whenever there is an internal investigation following a crisis event, the officers and directors who were participants in the events at issue are disqualified (voluntarily or involuntarily) from the investigation – without regard to how clear it might appear that they did nothing untoward. Moreover, this disqualification extends to the very determination of whether to have an investigation, how to staff the investigation, and how to proceed with the investigation. The "self-interested" directors and officers also are excluded from learning of the status of the investigation as it proceeds, and their only participation in the process is as witnesses who are interviewed by the investigators.
>
> A similar process typically is followed in government, as Sam Kaplan explained during his comment time on the proposal to create a task force or other investigatory body. . . .
>
> It seems to me that any investigation by the City of the adequacy of the preparation for and response to the Woolsey Fire by various government agencies, including the City, must be led, in the first instance, by one or both of Council Member Pierson or Mayor Pro-Tem Farrer, and to the exclusion of former Mayor Mullen, Council Member Peak, Mayor [Wagner] and City Manager Feldman. That is how a matter of this nature would be handled anywhere else, and it is how it ought to be handled in Malibu.
>
> . . .
>
> If any investigation of the City's preparation for and response to the Woolsey Fire is to have any credibility, . . . it cannot be done with the

> involvement, much less under the auspices, of the very representatives of the City whose conduct will need to be evaluated and considered.

At the January 14, 2019 meeting of City Council, a formal vote was taken in the tentative decision to appoint City Councilmembers Mullen and Peak to oversee the investigation of the City's preparedness and response to the Woolsey Fire. Consistent with his formal written objection, City Councilmember Silverstein spoke publicly at that meeting, and urged that any investigation be conducted and overseen by independent people, and not City Councilmembers Mullen or Peak.

For some reason, there is no video recording of January 14, 2019 meeting on the City's website. The minutes of that meeting do state that "Bruce Silverstein discussed the proposed Disaster Response and Recovery Ad Hoc Committee. He stated any investigation of the Woolsey Fire should be independent."

The Malibu Times provided a more detailed summary of City Councilmember Silverstein's comments, writing:

> The selection of Farrer and Pierson came after one Malibu resident, Bruce Silverstein, spoke to urge Mullen, Peak and Wagner to sit out the committee.
>
> I don't have any preconceived notion that anyone in the city did anything wrong, or did anything that anyone ought to be, at the end of the day, complaining about – there are complaints at this time, but I don't have any reason to believe one way or the other what that's going to be, Silverstein said. "But if there's going to be a conclusion – if there were a conclusion that the city did everything right, it will have no credibility whatsoever if people who are subject to that analysis were on or touched the investigation that led to that analysis. This has to be an independent process."

Despite City Councilmember Silverstein's written objection and public comments, City Councilmembers Mullen and Peak still sought to have their appointment finalized without regard to their obvious conflict. Thankfully, City Council heeded City Councilmember Silverstein's caution, and voted to appoint City Councilmembers Pierson and Farrer – the only City Councilmembers who were not seated until after the Woolsey Fire.

Although they failed in their efforts to have themselves appointed to the task force, City Councilmembers Mullen and Peak did manage to downgrade the "investigation" of the City's preparation and response to the Woolsey Fire to an

"identification" of measures to improve the City's response to the next fire. City Councilmembers Mullen and Peak were aided in this alteration of the nature of the process by the City Manager and the City Attorney.

Again, the video recording of this meeting is mysteriously missing, so there is no way to review the transparent effort by City Councilmembers Mullen and Peak, aided by the City Manager and City Attorney to prevent an actual investigation of their preparedness for and response to the Woolsey Fire.

Moreover, even after the purpose of the independent investigation was wrongfully watered down to a "review," Councilmembers Pierson and Farrer further diluted the process by retaining a consultant that lacked true independence and which was provided only limited authority and an even more limited budget.

Unsurprisingly, the process that started off as an independent investigation sought by the community withered into a white-washed review that left the community less satisfied than it would have been if the charade had not occurred at all.

The only way to guarantee a truly independent internal investigation is to appoint a Special Investigation Subcommittee of the City Council, vested with the subpoena power of the City Council. To qualify as truly "independent," members of the subcommittee must lack personal or financial relationships to and with the individuals who are accused of criminality, corruption, and other wrongdoing.

C. Impropriety of Action Orchestrated by City Manager, Interim City Attorney, Mayor Pierson and Unknown Others

On December 17, 2020, Mayor Pierson issued a statement that was publicly held out by the City of Malibu as "City of Malibu Statement in Response to Recent Allegations." As discussed below (and elsewhere in this Report), Mayor Pierson lacked the legal authority to speak for the City without the advance approval of the City Council as a deliberative body. Moreover, the background to Mayor Pierson's statement raises serious questions of conflict of interest and legal ethics.

The day after Mayor Pierson issued his unauthorized Official Statement, the putative "Interim City Attorney" sent an unexecuted copy of the Wagner Affidavit to a Deputy District Attorney, under cover of a letter that was not shared with, discussed with, or approved by the City Council prior to its being sent. As discussed below, this action was unauthorized by the putative Interim City Attorney's "client," was orchestrated by a conflicted lawyer (and possibly the conflicted City Manager) and appears to be a violation of the California Rules of Professional Conduct.

1 Mayor Pierson's Unauthorized "Official Statement"

Malibu lacks a "strong Mayor" who is elected by the residents. Instead, the "Mayor" of Malibu is an honorary position that designates an individual who sits at the center of the dais and oversees the orderly conduct of the meetings of the City Council. Otherwise, the ceremonial Mayor is just one of five Councilmembers on a legislative body that can act only at a public meeting that is properly noticed and agendized and which acts by a roll-call vote. As Malibu's honorary Mayor, City Councilmember Pierson lacked the legal authority to make public statements on behalf of the City of Malibu.

We are not aware of any legal authorization for any individual City Councilmember (including the Mayor) speaking for the City without running the issue through the City Council – especially on an issue of the significance of public announcement about the sworn allegations of the Wagner Affidavit. Moreover, City Council Policy No. 38 provides, in pertinent part, as follows:

> As the elected representatives of the people of Malibu, the Mayor and City Councilmembers shall be the principle spokespersons for the City, unless specific responsibilities are herein delegated to others.

The implication of City Council is than no individual City Councilmember (including the honorary Mayor) has the authority to speak for the City. Were the rule otherwise, every individual City Councilmember would have that authority – which could be an untenable situation.

Under the heading of "Implementation," City Council Policy No. 38 states as follows:

> All news media inquiries on City policies, political issues and decision-making that are within the policy-making jurisdiction of the City Council shall be referred to the City Councilmembers, the City Manager or designated staff.

Again, the import of the language is that the City Council, as a body, determines appropriate responses to press inquiries that are not addressed by the City Manager.

Policy #38 also states that "All news media inquiries concerning City litigation and legal services shall be referred to the City Attorney." There is no statement about the authority of anyone to respond to such inquiries.

Finally, the City Manager repeatedly has informed City Councilmember Silverstein over the past month that she does not answer to any individual City Councilmember (presumably including the Mayor), and answers only to the City Council as a body. City Councilmember Silverstein has copies of the City Manager's emails (which he did not "read and delete") and he would be pleased to provide copies to other City Councilmembers who have not seen them already.

Mayor Pierson's unauthorized Official Statement does not speak for us, and there is no way of knowing whether it speaks for any other City Councilmember, because Mayor Pierson acted on his own initiative – as if he were an "elected" Mayor – which he is not (and which he has voted to deprive the residents of the opportunity of so much as considering at a City Council meeting). City Councilmember Silverstein prepared a different form of statement, but the conflicted City Manager refused to publish it – even as an "unofficial" statement of the City.

Mayor Pierson's unauthorized official statement was carefully crafted to present the City of Malibu in a false positive light, to denigrate the Wagner Affidavit, and to suggest that the matter has now been handled – when, in fact, the process of properly handling the affidavit has not even yet to begin.

Additionally, it appears that the putative Interim City Attorney – who was secretly hand-picked by City Councilmembers Pierson and Farrer in concert with the City Manager and the now-former City Attorney – worked with the City Manager (who is conflicted based on the allegations in the Wagner Affidavit) and Mayor Pierson (only one of five City Councilmembers) to craft Mayor Pierson's unauthorized Official Statement. This raises substantial issues of legal ethics – especially when the law firm in which the Interim City Attorney is a partner also is implicated by the allegations set forth in the Wagner Affidavit.

2. The Putative Interim City Attorney's Unethical Misconduct

The putative Interim City Attorney's letter to the Deputy District Attorney is even more troubling than Mayor Pierson's unauthorized Official Statement. As explained below, (i) the putative Interim City Attorney lacked authority from his "client" (the City of Malibu) to send that letter (or to decide to which of various law enforcement authorities he might send it), (ii) all lawyers at the putative Interim City Attorney's firm are hopelessly conflicted with respect to this matter, and (iii) the City Manager and members of the City Staff also are hopelessly conflicted from dealing with this matter. Additionally, and as noted in a "Cure and Correct Demand" City Councilmember Silverstein provided the City following the putative "appointment" of the Interim City Attorney, Councilmember Silverstein disputes the validity of the

putative appointment in the first instance. Lastly, it is passing strange that the putative Interim City Attorney did not even forward the executed and notarized Wagner Affidavit.

a. The Putative Interim City Attorney Acted Without Client Direction or Consent

The "client" of the putative Interim City Attorney is the City of Malibu, and not any individual within the City of Malibu. The putative Interim City Attorney serves at the pleasure of, and takes direction from, the City Council on matters of significance to the City of Malibu that are outside the ordinary course of City Business. The appropriate response to the Wagner Affidavit is of the utmost significance and could not be more outside the ordinary course of City Business.

The City Council has not yet determined how to deal with the Wagner Affidavit. This includes (i) determining whether to report the Affidavit to appropriate authorities (which it is presumed, but not known, will be approved by the City Council), (ii) determining which authorities to contact, and (iii) determining what to communicate to such authorities. As any competent attorney well knows, the words used when communicating with others (especially outside agencies and even more especially law enforcement) set the course for future dealings and for the response to those words. It was not within the putative Interim City Attorney's province to determine, in the first instance, the manner the City of Malibu would bring this matter to the attention to the appropriate authorities. That was for the City Council to determine. At this point, the content of the putative Interim City Attorney's letter may have prejudiced a potential investigation from the start – especially when considered in the light of the unauthorized public statements of the honorary "Mayor," which he lacked the authority to make on behalf of the City.

Although the City Manager has authority to interact with and direct the putative Interim City Attorney with respect to matters within the ordinary course of City Business, deciding how the City should deal with Wagner Affidavit is about as far from the ordinary course of City Business as it gets. Moreover, the City Manager is personally implicated by the allegations of the Wagner Affidavit and is hopelessly conflicted from providing direction to the putative Interim City Attorney even if it were assumed (*arguendo*) that City Manager did have the authority to do so.

The putative Interim City Attorney's action without the direction or consent of his client appears to be a violation of the California Rules of Professional Conduct, which demands immediate correction, as well as that the putative Interim City Attorney cease and desist such conduct going forward.

b. The Putative Interim City Attorney is Hopelessly Conflicted with Respect to this Matter

The Wagner Affidavit alleges that Malibu's now-former City Attorney was informed of a criminal effort to bribe a Member of the City Council and did nothing in response. If this is true (which remains to be seen), the former City Attorney (and her law firm) could be civilly and/or criminally culpable in some manner or another.

Because the putative Interim City Attorney is a member of the same law firm as the former City Attorney, the putative Interim City Attorney is hopelessly conflicted from advising the City of Malibu (through the City Council) on this matter – especially without first obtaining the City's written informed consent to waive the conflict.[11]

Rule 1.7 of the California Rules of Professional Conduct is titled "Conflict of Interest: Current Clients." Paragraph (b) of Rule 1.7 states as follows:

> A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

Paragraph (d) of Rule 1.7 provides, as follows:

> Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

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[11] This is not the first time that lawyers from the putative Interim City Attorney's law firm have been involved in a matter involving alleged and/or proved City corruption. That was the same dynamic in the case of the City of Bell. *See* "5 Convicted Bell Leaders Sue Former City Attorney" (available to be viewed at https://losangeles.cbslocal.com/2014/03/07/5-convicted-bell-leaders-sue-former-city-attorney/). Other lawyers from the putative Interim City Attorney's law firm have been implicated in alleged corruption and wrongdoing in other cities. *See*, *e.g.*, "Downey Fires City Attorney Ed Lee In Wake Of Bell Scandal" (available to be viewed at https://www.huffpost.com/entry/downey-fires-city-attorne_n_664429?guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAAGwBtnhbLrYKNbAquucuSgc_tUxbeqsjmeaWCkrFAA36ZiFxKjbycZvVNBhBGzJrt_0cDm9KqZxo3QMCPNQsohiHzLKUkbC0UQCz9qHtXptEs7dop9aDQb3aeOGULRQY0DPKdvSFZ-OehJYtiAYTfhbFZmJGheow1DzkgaX3jG17&fbclid=IwAR2SPPaUCUEjFeNEb7tZLinQ0kwxmEHJdv7djLnW89NSa6_UAk56KktkwbM&guccounter=2); "School attorney firm Best Best & Krieger sued for in City of Bell corruption: is similar corruption is going on in our schools?" (available to be viewed athttps://learningboosters.blogspot.com/2013/10/school-attorney-firm-best-best-krieger.html).

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment 4 to Rule 1.7 states as follows:

> Even where there is no direct adversity, a conflict of interest requiring informed written consent under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. . . . The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm, with a party, a witness, or another person who may be affected substantially by the resolution of the matter.

It is inarguable that there is a significant risk the putative Interim City Attorney's representation of the City of Malibu with respect matters involving the Wagner Affidavit will be materially limited by the putative Interim City Attorney's own interests in avoiding the civil or criminal liability of a member of his law firm and/or the firm, itself.

Presumably, this is one of the reasons that a Malibu resident (who is a lawyer) has written to the Interim City Attorney and suggested that Best Best & Krieger place its legal malpractice carrier on notice.

c. The Putative Interim City Attorney Was Not Properly Appointed

The Interim City Attorney was "appointed" at a Closed Session of the City Council City Councilmember Silverstein has asserted to be a Brown Act violation and improper for other reasons as well. The reasons for City Councilmember Silverstein's contention are set out in two emails to the now-former City Attorney and in a formal "Cure and Correct Demand" dated December 11, 2020.

In short, the issues surrounding the putative appointment of the putative Interim City Attorney are that (i) the putative appointment was secretly orchestrated by the City Manager, the now-former City Attorney, Mayor Pierson and City Councilmember Farrer to the exclusion of the other three City Councilmembers, and (ii) the "appointment" was made in a Closed Session that (x) was not properly Noticed, and (y) can be used only to "consider" such an appointment, but not actually to make the appointment – which must be done through a public discussion and roll-call vote.[12]

Notably, Mayor Pierson has publicly criticized City Councilmember Silverstein for not reaching out to Mayor Pierson before sending a Cure and Correct Demand. The fact is that City Councilmember Silverstein's doing so would, itself, have been a Brown Act violation because the two co-sponsors of the proposal that is the subject of this Report already had discussed the matter, and the Brown Act prohibits the discussion of such matters with more than one other City Councilmember.

3. The City Manager is Hopelessly Conflicted with Respect to this Matter

The Wagner Affidavit alleges that City Manager may be involved, in some manner, in criminal, corrupt or other improper activity. If this is true, the City Manager may be civilly or criminally culpable in some manner or another. As such, the City Manager is hopelessly conflicted from providing guidance or direction to the City's lawyers respecting this matter – especially without prior direction from the City Council, which has not yet occurred. The City Manager's involvement in this matter may also violate applicable California conflict of interest laws – as would the involvement of any City Councilmember (if any) who may be implicated by the allegations in the Wagner Affidavit.

[12] The legal issues raised by City Councilmember Silverstein have not been addressed, much less resolved, by the California Supreme Court and are, therefore, unsettled issues of California law.

* * *

Based on the foregoing, it is apparent that neither Mayor Pierson nor City Councilmember Farrer is sufficiently independent to participate in an independent internal investigation – just as City Councilmembers Mullen and Peak lacked such independence respecting the Woolsey Fire review that ultimately was overseen by City Councilmembers Pierson and Farrer. It is unknown what, if any, personal or financial relationships City Councilmember Grisanti has with the City Manager, the former City Attorney or former City Councilmembers who may be implicated by the allegations of the Wagner Affidavit.

D. Inadequacy of Reliance Upon Law Enforcement "Authorities"

Although criminal investigation of allegations of criminality, corruption and other wrongdoing in local government serves an important societal interest, it is not a substitute for an independent internal investigation of such conduct by the local government itself. This is so for multiple reasons.

First, some of the matters alleged in the Wagner Affidavit may be beyond the applicable statute of limitations for a criminal prosecution and conviction. As such, the criminal authorities are not likely to devote their limited resources to such a matter – even though it remains important to the local government for reasons separate and apart from any criminal prosecution or conviction.

Second, a criminal conviction – which is the sole interest of criminal authorities – requires proof beyond a reasonable doubt in a jury trial at which rules of evidence may preclude the jury's consideration of relevant evidence for one reason or another. For these reasons, the criminal authorities are loath to pursue an investigation that they do not expect to result in a probable conviction – out of concern of diminishing their "conviction rate," which is their measuring stick for success in the eyes of the public.

Third, the District Attorney, United States Attorney and other Chief prosecutorial officials are political animals, who make investigative decisions based on a host of factors that have little or nothing to do with the merits. By contrast, the City Council has a responsibility to the residents of Malibu to ensure that their house is clean and in good order. It is for that reason the California legislature has vested local government with subpoena powers and the California Supreme Court has held that government employees can be dismissed for failure to cooperate in an internal investigation notwithstanding their constitutional right to do so.

Finally, in this specific matter, the District Attorney (and Deputy District Attorney) and other law enforcement authorities, themselves, are conflicted on account of the fact that the allegations of the Wager Affidavit implicate the former District Attorney (as well as the former Mayor of Los Angeles and a Gubernatorial candidate with deep contacts) and expose the County of Los Angeles and its personnel to potential embarrassment, if not civil or criminal liability.

E. City Councilmember Silverstein's Internal Investigation Experience

During City Councilmember Silverstein's more than 30 years as an attorney, he led an independent internal investigation of the Chairman and Chief Executive Officer of a multi-billion-dollar corporation among the Fortune 100, and he participated in multiple other internal investigations and matters involving such investigations – including one matter involving one of the major Hollywood studios. City Councilmember Silverstein understands how to conduct an internal investigation, and he understand how to ferret out the true facts on an independent and thorough manner.

In private practice, City Councilmember Silverstein's legal fees for this sort of work are $1,000 per hour. The City of Malibu has access to that experience for free.

City Councilmember Silverstein has no personal or financial relationship with the City of Malibu (beyond his minor compensation for serving as a City Councilmembers), the City Manager, the former City Attorney (or her firm) or any former City Councilmember or City employee who might be implicated by the allegations in the Wagner Affidavit. The same is true of City Councilmember Uhring.

Reform City Council Meeting Process

True Transparency, Accountability and Ethics in all aspects of Malibu's City Government includes a City Council Meeting process that is inviting to and respectful of the residents. In that regard, City Councilmember Silverstein put forth the following initiatives to improve City Council Meetings during his campaign for City Council:

Initiatives to Improve City Council Meetings

City Council meetings are widely perceived as dog and pony shows where the results of items on the Agenda is predetermined before the meeting begins.

As a member of City Council, I will press for various reforms of the procedure of City Council meetings to make them more transparent, more welcoming to involvement by the Residents, and more responsible in their results.

Among other things, I intend to pursue the following initiatives:

Equal Time for Residents Who Oppose the "Recommendation of the Staff"

City Council Meetings provide a disproportionate amount of time for the City Manager, City Attorney and City Staff to present their views, and inadequate time for Malibu's Residents to state their contrary views.

The process needs to be reformed to provide equal time for all sides of a position.

"*Hearings" to be Conducted with Fair and Reliable Rules of Procedure and Evidence*

So-Called "Hearings" at which legal rights of Residents are "Adjudicated" are conducted without Procedural Safeguards for reaching Fair and Reliable Decisions.

The process needs to be reformed to ensure Fair and Reliable Decisions.

Resident Opportunity to Respond to City Council Comments

> City Council Members do not express their views until all Residents have expressed their views, and Residents have no opportunity to respond – even when City Council Members misstate or overlook important facts.
>
> There should be a limited opportunity for Residents to respond to City Council Member comments before City Council votes the matter before it.

In addition to the foregoing, this Report proposes that the City Council consider adopting a policy that would preclude *ex parte* communications respecting matters that come before the City Council in a quasi-judicial setting and precluding City Councilmembers from conducting independent factual investigation beyond the record presented by the City Staff and "litigants."

The co-sponsors of the proposal that is the subject of this Report are hopeful that these, and other reforms to the City Council meeting process will be given serious consideration by the City Council.

Other Matters of Potential Reform

In addition to the foregoing matter, this Report proposes that the City Council consider adopting policies addressing the following issues to endure true Transparency, Accountability and Ethics in all aspects of Malibu's City Government:

Ombudsman. When he was a City Councilmember, Jefferson Wagner explored the establishment of an Ombudsman who would serve as an advocate for the residents in matters of local government. Further consideration of this concept should be pursued

Oversight Commission. For some time now, Sam Kaplan has consistently called for the creation of an Oversight Commission, which would serve as an internal watchdog agency within the City. This would be a beneficial extension of the Special Independent Investigation Subcommittee and could help to prevent the need for another such subcommittee in the future.

Self-Recusals. In addition to the requirements of applicable California law, a City Councilmember should self-recuse in any matters that would establish a precedent for other matters with respect to which the City Councilmember has a personal financial interest and/or a close personal relationship with somebody with such an interest.

Outside Fees received by Members of City Council. If a City Councilmember serves on some other body or obtains some other third-party financial benefit from serving on the City Council, any compensation paid for serving in another body and any financial benefit obtained by virtue of being a City Councilmember should be contributed to the City of Malibu.

Staff Reports. Staff Reports should be objective and provide both the upside and downside of recommendation, as opposed to being "advocacy pieces" designed to persuade the City Council to adopt the action recommended by the Staff. If the Staff is not capable of being objective, interested parties having a contrary view should be permitted to work with the Staff to ensure that the Staff report is fair and balanced.

Other. The co-sponsors of the proposal subject to this Report are confident that members of the public and other City Councilmembers will have additional ideas for ensuring that there is true Transparency, Accountability and Ethics in all aspects of Malibu's City Government.