



Council Agenda Report

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

Prepared by: John Cotti, City Attorney

Date prepared: April 2, 2021 Meeting date: April 26, 2021

Subject: Ad Hoc Recommendation relative to the Investigation into the Allegations in the Wagner Affidavit (Continued from April 12, 2021)

RECOMMENDED ACTION: 1) Approve the recommendation to engage Evan Jenness, Esq. and George Newhouse, Esq. to conduct an investigation of allegations set forth in the Jefferson Wagner Affidavit; 2) Appropriate \$50,000 from the General Fund Undesignated Reserve for a retainer; and 3) Authorize and direct Councilmembers Farrer and Silverstein to continue to interact with Attorneys Jenness and Newhouse as the “client representatives.”

FISCAL IMPACT: This project was not included in the Adopted Budget for Fiscal Year 2020-2021. An appropriation of \$50,000 from the General Fund Undesignated Reserve to Account Number 100-7005-5100-01 (Legal Counsel - Investigations) is needed for the proposed project. The projected General Fund Reserve at June 30, 2021 is \$27.5 million.

City Council Policy #44 requires that all proposed appropriations over \$10,000 be reviewed and discussed by the Administration and Finance Subcommittee (A&F) prior to being presented to the City Council. Due to the sensitive nature of this investigation and prior direction from Council to move it forward, the proposed appropriation is being presented to the City Council without being discussed by A&F.

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

DISCUSSION: At the Malibu City Council meeting on December 14, 2020, the City was made aware of an affidavit from outgoing councilmember Jefferson Wagner that contains allegations of wrongdoing. On January 25, 2021, the Council directed that Councilmembers each provide names of investigators, attorneys, or law firms to conduct an investigation into the affidavit. Proposals were solicited from those recommended

firms to investigate the Wagner Affidavit. Of the ten requests for proposals sent, five proposals were received.

On March 8, 2021, the Council considered the proposals received. After considering the proposals, the Council directed that Councilmembers Farer and Silverstein interview the law firms that submitted proposals and bring their recommendation back to the Council for consideration.

On March 26, 2021, after narrowing the candidates based on cost, among other factors, Councilmembers Farer and Silverstein conducted interviews of attorneys from Crowell Moring, Cader Adams, and Evan A. Jenness/George Newhouse. Based on those interviews, Councilmembers Farer and Silverstein recommend that the Council engage Evan A. Jenness and George Newhouse to conduct the investigation of the allegations contained in the Wagner Affidavit.

The Jenness/Newhouse Proposal

Evan Jenness and George Newhouse (with the firm of Richards Carrington) propose to join forces to investigate the affidavit's allegations. Their proposal and a summary of the background and experience of Jenness and Newhouse is attached.

Jenness and Newhouse propose to investigate the affidavit in seven steps: (1) assessing the issues implicated in the affidavit; (2) planning the investigation; (3) collecting and evaluating the information obtained from witnesses, including identification of additional witnesses and documents that may shed additional light on the factual and legal issues raised; (4) researching and assessing potential remedial measures for any issues that may warrant action; (5) preparing an objective (and privileged) report to the City; (6) assuring confidentiality and the protection of attorney-client privileged matters so there is minimal outside disclosure of the findings (unless the City so directs); and (7) delivering the results of the investigation to the Council. Because an investigation is an ongoing process, some of these steps would be repeated when warranted based on new information.

Jenness and Newhouse proposed to work at the hourly rate of \$400 per hour for attorney's fees plus costs related to expenses billed at the amount incurred. They also request that the City provide a retainer payment of \$50,000, the unused portion of which (if any) would be fully refundable at the conclusion of services. Jenness and Newhouse have estimated that they will be able to conduct the investigation for approximately \$50,000, but the final fee for their services could be greater or lesser than \$50,000. They will keep the City Council apprised of their progress by interfacing with a client representative.

Jenness and Newhouse's qualifications are as follows:

George Newhouse

- a. Education: J.D., University of California, Berkeley School of Law, order of the coif, (1982); M.A., Oxford University (1983); A.B., Harvard University, cum laude.
- b. Experience: Has thirty-seven (37) years of experience, which includes criminal investigations and approximately 40 trials in a variety of white-collar criminal and complex civil trials and arbitrations, both as a prosecutor and defense lawyer.

Evan A. Jenness, *Principal of Law Firm*

- c. Education: J.D., Columbia University Law School (1988); B.A., Brandeis University (1984).
- d. Experience: Served for eight (8) years as a deputy federal public defender, defending and investigating similar alleged crimes. She specializes in the defense of white-collar cases, and regularly handled matters involving alleged corruption.

OPTIONS:

After reviewing the above information, the Council has the following options available to it:

1. Accept the recommendation of Councilmembers Farer and Silverstein;
2. Solicit further proposals from additional investigating firms;
3. Provide alternative direction to staff.

ATTACHMENT: Law Offices of Evan A. Jenness Proposal (February 22, 2021).

LAW OFFICES OF EVAN A. JENNESS

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February 19, 2021

Heather Glaser, City Clerk
Malibu City Council
23825 Stuart Ranch Road
Malibu, California 90265
Via email to: hglaser@malibucity.org

Confidential Attorney-Client Communication

Re: Proposal for an Independent Investigation Regarding Allegations Raised in
Affidavit of Former Councilmember Wagner

Dear Malibu City Council:

I write to submit a proposal for an independent investigation to be performed by attorney George Newhouse and me in connection with issues and allegations raised in the Wagner Affidavit referenced above. Both Mr. Newhouse and I are experienced white collar lawyers. Copies of our *curricula vitae* are attached. These materials reflect a combined experience of more than seventy years handling criminal, civil, administrative and sundry matters -- both from prosecution and defense perspectives. Mr. Newhouse, for example, spent seven of his twelve years as a federal prosecutor supervising the Public Corruption and Government Fraud section of the United States Attorney's Office in Los Angeles. I served for eight years as a deputy federal public defender, defending and investigating similar alleged crimes. Since opening my private office seventeen years ago, I have specialized in the defense of white collar cases, and regularly handled matters involving alleged corruption.

Together, we thus have significant professional experience investigating matters involving potential governmental corruption, "kick-backs," "pay-to-play" and bribery schemes. Our combined experience also includes numerous investigations involving the reliability of sworn statements, and assessments as to how to most effectively address, under the specific circumstances at hand, any adverse issues that an investigation may raise.

We possess the following attributes, which we view as essential for conducting a fair yet thorough investigation of the kind the City of Malibu seeks:

- Requisite skills and prior experience, and an intimate working knowledge of potentially applicable laws, both federal and state;
- Capability to investigate and evaluate objectively, and without bias;
- Professional reputations and experience needed to be perceived as neutral and fair in conducting an independent investigation of this nature;
- No personal or professional stake in the outcome of the investigation;
- Interpersonal skills and professional experience needed to develop an effective working relationship with any involved persons, and appropriate temperaments for conducting relevant interviews in a fair and objective fashion;
- Attention to detail, and the ability to assess 'big picture' issues, which are keys to evaluating sworn statements and the broader issues they may implicate;
- Communication skills needed to effectively and efficiently report (and discuss) the results of our investigation to the Council; and
- Experience handling media scrutiny in 'high profile' matters.

We believe that working as a team would both enhance our efficiency and the quality of our investigative product. Mr. Newhouse and I work together extremely well, and will produce a superior product consisting of an evaluation and assessment, and recommendations for any appropriate follow-up by the City.

In short, we have the experience and ability to proceed with expedition and discretion, which we assume is consistent with the City Council's duties to its residents and voters, and goals, given the seriousness of the allegations set forth in the Wagner Affidavit.

Our proposed investigation would consist of seven steps: (1) assessing the issues implicated in the Wagner Affidavit; (2) planning our investigation; (3) collecting and evaluating the information obtained from witnesses, including identification of additional witnesses and documents that may shed additional light on the factual and legal issues raised; (4) researching and assessing potential remedial measures for any issues that may warrant action; (5) preparing an objective (and privileged) report to the City; (6) assuring confidentiality and the protection of attorney-client privileged matters so there is minimal outside disclosure of our findings (unless the City so directs); and (7) delivering the results of our investigation to the Council. Because an investigation is an ongoing process, some of these steps would be repeated when warranted based on new information. In short, we would follow the evidence and facts wherever they lead, and report our

findings to the City. The City Council can then elect an appropriate course of action to preserve and protect the City's interests, as well as the interests of justice. Everything we do in that regard, including our ultimate advice to the City Council, will be handled with appropriate discretion, and treated confidentially.

While we generally work on an hourly basis -- our normal hourly rates range from \$700 to \$800 per hour -- we would be agreeable to work at a reduced rate in light of the fact that a municipality is the client and the public interest is impacted. We would propose a rate of \$400 per hour for attorneys' fees, plus costs and related expenses billed at the amount incurred. We would also ask that the City provide a retainer payment of \$50,000, which would be fully refundable at the conclusion of the undertaking.

Litigation and litigation-related activities, such as conducting an independent investigation, are all unpredictable by nature. Thus they are frequently resistant to precise estimation of time, labor and effort. The ultimate amount of our fees would depend on the number of witness interviews conducted and subpoenas issued, and the volume of responsive materials reviewed and evaluated, as well as the volume and complexity of other evidence which may be provided to us, and the format(s) in which our investigative results would be sought, whether written and/or oral.

The principal costs (as distinct from our fees) would be one or more private investigators to assist in conducting those witness interviews that reasonably could be delegated, and a paralegal to preliminarily review and organize relevant written and/or electronic materials obtained by subpoena or otherwise.

Beyond the requested investigation and report to the Council, we would respectfully request payment on an hourly basis for any further time and costs incurred as a consequence of the investigation and report. For example, we would seek to be compensated for our time and any costs incurred if, after we deliver our report and/or discuss the results of our investigation to the Council, we were asked to appear before another forum, or discuss the matter with law enforcement offices (such as the District Attorney's Public Integrity Section or the U.S. Attorney's Office with whom Mr. Newhouse maintains close connections).

We look forward to the opportunity to handle this matter, and are available to respond to any questions you may have about the preceding.

Best regards,

LAW OFFICES OF EVAN A. JENNESS

Evan A. Jenness

Evan A. Jenness

RICHARDS CARRINGTON

George B. Newhouse, Jr.

George B. Newhouse, Jr.