



# Supplemental Council Agenda Report

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

Prepared by: John Cotti, Interim City Attorney

Date prepared: January 18, 2022 Meeting date: January 24, 2022

Subject: Consider the Release of Information Protected by the Attorney-Client Privilege Relating to a Report Prepared by Outside Counsel Re Personnel Matter

---

**RECOMMENDED ACTION:** Discuss whether to waive any attorney-client privilege protection afforded Attorney Leslie Ellis' final investigation report to the City Council and whether to authorize its release and discuss whether to divulge confidential closed session discussions surrounding the Council's approval of the Separation Agreement with former City Manager Reva Feldman.

**FISCAL IMPACT:** There is no known or direct fiscal impact associated with the recommended action.

**WORK PLAN:** This item was not included in the Adopted Work Plan for Fiscal Year 2021-2022.

**DISCUSSION:** On January 16, 2021, the City received a letter on behalf of former City Manager Reva Feldman ("Ms. Feldman") from Cannata, O'Toole, Fickes, & Olson asserting allegations of workplace harassment and gender discrimination. The letter notified the City of Ms. Feldman's desire to separate from the City based on these alleged claims. On April 27, 2021, the City and Ms. Feldman entered into a Separation Agreement that dictated the terms of her separation from employment by the City.

In the interim, on March 8, 2021, the Council authorized an investigation into the allegations raised by Reva Feldman, and Attorney Leslie Ellis was retained to conduct the investigation and provide the City legal advice based on the facts and evidence she discovered. Ms. Ellis completed the investigation and transmitted a cover letter and report (the "Investigation Report") to Interim City Attorney John Cotti on July 20, 2021. The Cover Letter and Investigation Report were provided to the Council as an attorney client communication shortly thereafter.

1. *The Report is Protected by the Attorney Client Privilege*

The purpose of the attorney-client privilege is to “safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters“. For reasons similar to the Wagner Investigation Report, our office advised that the Investigation Report is protected by the attorney-client privilege.

Ms. Ellis was retained as outside counsel to conduct the investigation and charged with addressing the legal issues flowing from the allegations in the Cannata letter, including interviewing witnesses, analyzing potentially applicable laws, assessing the accuracy or inaccuracy of allegations in the Cannata letter, and preparing a written report of her findings and conclusions. The dominant purpose of the work was to provide legal advice to the City Council. Indeed, public employment and antidiscrimination law is a highly specialized area. The Investigation Report into Ms. Feldman’s allegations required detailed analysis applying the facts of the investigation to the legal principles and standards applicable to Ms. Feldman’s claims.

Under State law, a “client ... has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.”

2. *The Confidentiality of Closed Session Discussions*

The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired by any person present at a closed session meeting and offers various remedies to address breaches of confidentiality, including referral to the Grand Jury. As with the attorney client privilege, only the Council acting as a body can agree to release confidential closed session information.

3. *The Attorney Client Privilege and Closed Session Confidentiality Can Be Waived*

The attorney-client privilege can be waived at the client’s election. Because the holder of the privilege is the City itself, authorization by the City Council is required to waive the attorney-client privilege. Individual councilmembers and employees cannot waive the privilege; they must abide the decision of the Council. If the City Council chooses to do so, the privilege is irrevocably waived as to this material subject to the privilege (in this case, the Investigation Report).

At its meeting on January 10, 2022, the Council asked that this matter be placed on the agenda for a discussion of whether to waive any attorney-client privilege afforded the final Investigation Report and authorize its release. The Council also asked that the item include a discussion on whether to waive the confidentiality of closed session discussions

surrounding the Separation Agreement entered into with Ms. Feldman. In order to waive the attorney-client privilege, a Councilmember must make a motion identifying the portion of the Investigation Report to be made public and the majority of the Council must vote to make that identified portion, if not all, of the report public.

Similarly, the Council acting as a body can agree to divulge confidential closed session information or discussions.

#### 4. *Does the Feldman Separation Agreement Impact a Waiver of the Privilege?*

Section 11.1 of the April 27, 2021 Separation Agreement states as follows:

“The Parties shall not affirmatively disclose, discuss or communicate to any third party (including any current or former City of Malibu employees, officials, or their representatives), any information related to the nature, basis, pursuit or resolution of the claims alleged herein, including any documents or copies of documents produced or obtained in connection with the resolution of this matter; provided, however, that the Parties acknowledge that this Agreement shall be a Public Record that can be obtained by a member of the public through a Public Records Act request pursuant to California Government Code §§ 6250 *et seq* and that the City’s production of the Agreement pursuant to such a request shall not violate this Non-disclosure provision of this Agreement. The Parties have the right to issue a press release on the Effective Date, attaching a copy of this Agreement, if they wish.”

This clause purports to prohibit the disclosure of documents produced or obtained in connection with the resolution of Ms. Feldman’s employment matter.<sup>1</sup> There is some ambiguity in whether this clause would apply to the Investigation Report. This Separation Agreement was dated April 27, 2021. The Report was not dated until July 20, 2021. The above clause on its face applies to documents or records that went into the resolution of Ms. Feldman’s claims and employment situation that culminated in the Separation Agreement. The Investigation Report was submitted after the Separation Agreement and played no part in the Separation Agreement that resolved the matter as between Ms. Feldman and the City. The Separation Agreement had already been fully executed and was not contingent on the results of the Report.

Ultimately, while section 11.1 of the Separation Agreement must be considered due to the timing and content of the Report, we do not think section 11.1 prohibits the City Council from waiving the attorney client privilege and releasing the Report. That position, however, is not without legal risk. Section 11.1 does purport to prohibit the disclosure of “any information related to the nature, basis, pursuit or resolution of the claims alleged herein ...” Thus, the words are vulnerable to the argument that the Investigation Report contains

---

<sup>1</sup> Note that if the Report is considered a public record subject to disclosure (which we do not believe it is), then the City would be required to produce it regardless of the terms of the Separation Agreement as the City cannot contract out of its obligations under the Public Records Act.

information related to the basis of Ms. Feldman's allegations of discrimination and harassment within the purview of Section 11.1.

As to the release of any closed session communications or information, Recital B of the Separation Agreement indicates that Ms. Feldman "notified the City of her desire to separate from City service based on alleged claims of, inter alia, workplace harassment, gender discrimination and defamation." Divulging closed session communications and information would necessarily involve the release of contemporaneous discussions about the "nature, basis, pursuit or resolution" of the claims asserted by Ms. Feldman and would therefore likely violate the Separation Agreement.

Of course, the courts are always open to Ms. Feldman and the risk of even successfully defending any claim or action must be weighed against the benefit of releasing the Report.

At a minimum, Councilmembers should continue to refrain from making any extraneous comments regarding the Report or Ms. Feldman's separation from the City that could run afoul of the non-disparagement clause.

The City Council has the following available options:

1. The Council may decline to release the Investigation Report and issue a statement that it is satisfied that there is no need for further investigation or action and that the matter is closed.
2. The Council may waive the attorney-client privilege and release the entirety (or any portion) of the Investigation Report.
3. The Council may waive the confidentiality of the Closed Session discussions surrounding the Separation Agreement.

Should the Council waive the attorney client or closed session confidentiality, the City will make the report and any comments available as soon as possible.