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November 3, 2014

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

VIA EMAIL
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Richard Doyle, Esq.
City Attorney
Office of the City Attorney
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

Re: Investigation

Dear Mr. Doyle:

As you are aware, the City of San Jose hired our firm to conduct an independent investigation into a complaint raised by [redacted] against [redacted]. As part of that investigation, we were asked to interview [redacted] about [redacted] handling of the investigation of a whistleblower complaint regarding [redacted]. We interviewed [redacted] on October 8, 2014 and again at [redacted] request on October 13, 2014, and we interviewed [redacted] on October 8, 2014.

You have requested that we provide you with our perspective on how the investigation was conducted. The following is a summary of our conclusions:

1. The investigation was triggered by an anonymous complaint made through the City's hotline. The gravamen of the complaint was that [redacted] were "misusing City time and funds". The entire basis for that complaint rested on this un-named complainant allegedly seeing [redacted] outside the City's [redacted] at 4:30 p.m. on a work day.

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Apparently, the contention is that [redacted] may have been leaving work early and, therefore, inappropriately compensated for non-work activities.

2. Based on receipt of this hotline complaint, [redacted] initiated an investigation. [redacted] investigation began by interviewing [redacted] stated that [redacted] was driving to a work event because [redacted] At the start of the interview, [redacted] was questioned about whether [redacted] was told that they were asking this question despite the fact that even if [redacted], it would not violate City policy.

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6. We have the following concerns over how this investigation was handled:

(a) When we questioned [redacted] about this investigation, [redacted] were convinced that launching the investigation was appropriate. When we asked [redacted] how [redacted] felt a hotline complaint about "misusing City time" based on a single alleged sighting of [redacted] in a vehicle [redacted] on a weekday at 4:30 p.m. was sufficient, [redacted] stated that [redacted] felt compelled to investigate this issue since a hotline complaint had been made. [redacted] stated that [redacted] felt all such complaints must be investigated. [redacted] stated that [redacted] does not believe [redacted] has the discretion, nor should [redacted] to independently determine which complaints actually merit an investigation. [redacted] further commented that when [redacted] discussed this complaint with City Manager, Ed Shikada, Mr. Shikada told [redacted] to handle this like any other complaint. [redacted] took that statement to mean that [redacted] was being instructed to conduct an investigation.

(b) We do not agree with the contention that every hotline complaint must be investigated. From our perspective, each complaint needs to be assessed in order to determine whether a legitimate allegation has been raised and whether sufficient facts have been identified to warrant conducting an investigation. A city official charged with determining what to do with complaints raised must use discretion and judgment in determining whether the matter should be pursued. The idea that every single complaint needs to be looked into is both unrealistic and potentially disruptive. In this case, [redacted] exempt administrators were accused of leaving work early on a single day. No evidence was provided that they had been shirking their responsibilities at work. Nor was there evidence raised that this event represented a pattern of behavior. Simply stated, we do not believe this hotline complaint warranted an investigation and we are troubled by the fact that apparently every hotline complaint gets investigated without first determining whether it is justified. The mere fact that Mr. Shikada told [redacted] that [redacted] should treat this complaint like any other, does not mean that an investigation should have been launched. In our view, the appropriate course of action should have been for [redacted] to think through the appropriate response and then report back to Mr. Shikada that an investigation was not warranted.

(c) Even assuming that an investigation was justified, we do not believe that either [redacted] should have been questioned [redacted]. That issue is simply irrelevant. If, in fact, City employees were "stealing time", what they were doing with that non-work time simply doesn't matter, [redacted] readily acknowledge that [redacted] indeed irrelevant and not subject to [redacted] and therefore wouldn't violate the City's [redacted] policy. [redacted] admitted this to [redacted]. When we asked [redacted]

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why [redacted] insisted on nevertheless pursuing that line of questioning, [redacted] stated that [redacted] believed it was necessary to get at the bottom of the complaint about "misusing City time". Despite continued questioning on this point, [redacted] failed to acknowledge that it had been a mistake and that [redacted] could have pursued this issue without getting into whether [redacted] on the other hand, did tell us that looking back on it now, [redacted] could have investigated the complaint without having to question these individuals on [redacted]. We are concerned that [redacted] seems to not understand this point.

(d) It was apparent from an initial reading of the hotline complaint that the complainant had an ulterior motive.

There is simply no other logical reason for raising this issue. Seeing [redacted] exempt employees leaving work [redacted] at 4:30 p.m. in the afternoon could not possibly cause a reasonable person to assume that they might be "misusing City time". For whatever reason, the complaining party thought this conduct [redacted] brought to the attention of City officials. We believe that this ulterior motive should have been considered by [redacted] and caused [redacted] to realize that pursuing this issue was misguided.

* * *

In light of the above, we recommend that the City reevaluate how these complaints are handled, implement protocols to help ensure greater thought and care is taken when determining

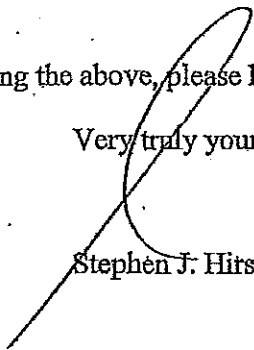
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if and how an investigation should be initiated, and conduct training to ensure that these matters are investigated appropriately.

If you have any questions concerning the above, please let us know.

Very truly yours,


Stephen J. Hirschfeld

SJH:sf