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July 24, 2014

FILED

JUL 29 2013

The Honorable Diane M. Price
Presiding Judge of the Napa County Superior Court
The Honorable Mark S. Boessenecker
Supervising Judge of the Napa County Superior Court
825 Brown Street
Napa, CA 94559

Clerk of the Napa Superior Court
By: C. Bannan
Deputy

Re: City of Napa Response to Napa County Grand Jury (2012-2013) Final Report
On The Integrity Of Grand Jury Investigations

Dear Judge Price and Judge Boessenecker:

The City Council of the City of Napa has reviewed the findings and recommendations contained in the Napa County Grand Jury (2012-2013) Final Report On the Integrity of Grand Jury Investigations. As required by California Penal Code Section 933(c), the City Council considered its response to that Grand Jury Report during its regular meeting of July 23, 2013, and the City Council approved the response attached to this letter.

The City of Napa commends the members of the Grand Jury for their service to our community. We are prepared to discuss any questions the Grand Jury may have regarding the City's response.

Sincerely

Mike Parness
City Manager

cc: J. Alan Galbraith, Napa County Grand Jury Foreperson
Mayor and Members of City Council
Michael W. Barrett, City Attorney

CITY OF NAPA CITY COUNCIL
AGENDA REPORT

ADMIN CALENDAR
AGENDA ITEM 6.A.
Date: July 23, 2013

To: Honorable Mayor and Members of City Council

From: Mike Parness, City Manager; Michael W. Barrett, City Attorney

Prepared by: Michael W. Barrett, City Attorney

Subject: Response to Grand Jury Report On the Integrity of Grand Jury Investigations

ISSUE STATEMENT:

Approve the City response to the 2012-2013 Napa County Grand Jury Report – On the Integrity of Grand Jury Investigations.

DISCUSSION:

Background:

On April 25, 2013, the City received the Napa County Grand Jury Report entitled “On the Integrity of Grand Jury Investigations.” The same report was issued to all cities in Napa County as well as elected officials of the County. In essence, the report finds that certain unidentified Grand Jury witnesses, from unidentified local agencies, violated an obligation to maintain the secrecy of information learned during questioning by the Grand Jury (the “secrecy admonition”). The Grand Jury recommends that the City Council instruct all City employees regarding their duties and responsibilities regarding the Grand Jury process.

As described in the responses to findings and recommendations, below, the City is not aware of any violation of the secrecy admonition by any City employee. (For the purpose of this agenda report, the term “employee” is used broadly to refer to any City employee, officer, or official.) The City acknowledges, understands, and respects the Grand Jury’s authority to investigate the City’s operations (as set forth in California Penal Code sections 888, et seq., notably section 925a), and the City’s corresponding obligations to provide certain information and records to the Grand Jury. Any City employee who appears as a witness before the Grand Jury is required to comply with a secrecy admonition which often substantially provides:

“You are admonished not to reveal to any person, except as directed by the court, which questions were asked or what responses were given or any other matters concerning the nature or subject of the grand jury’s investigation which you learned during your appearance before the grand jury, unless and until such time as a transcript (if any), or a final report, of this grand jury proceeding is

made public or until authorized by this grand jury or the court to disclose such matters. A violation of this admonition is punishable as contempt of court.” (86 Ops.Cal.Atty.Gen. 101)

The City Attorney's Office regularly advises City employees regarding the scope of each employee's obligations in responding to the Grand Jury, as summarized above. However, this agenda report also summarizes two important clarifications. First, there are practical limitations on the secrecy admonition as it relates to Grand Jury requests for City records. Second, when a City employee is requested to provide testimony to the Grand Jury, it is important for the City employee to contact the City Attorney's Office in order to obtain legal advice to resolve conflicts that may exist between the obligation to provide testimony and documents to the Grand Jury, on the one hand, and the obligation to withhold confidential information from the Grand Jury (e.g., information protected by the attorney client privilege or the official information privilege), on the other.

First, as a practical matter, while there is a clear obligation for a City employee to maintain the confidentiality of questions asked and answers provided orally during questioning by the Grand Jury, it is likely that a Grand Jury request for City records will require the involvement of more than one City employee to prepare the response (depending, of course, on the scope of records requested, and the individual City employee being questioned). Even if an individual City employee has direct access to records requested by the Grand Jury, it is likely that the requested records are used in the normal course of City operations by more than that one employee. Frequently City records that are relevant to a Grand Jury investigation will require assembly by more than one City employee, and coordination of copying the records with others in the organization who use the records.

There are certainly methods that may be used by the City in order to minimize the number of City employees who are aware of the identity and substance of the records requested from the Grand Jury, and within that limited number of affected City employees, those employees may be effectively directed by the City to maintain the confidentiality of the Grand Jury's request for the records. The City has, in the past, had successful discussions with the Grand Jury to implement this type of limitation on the number of employees involved in obtaining requested City records, and the City remains open to having that discussion on an ongoing basis with the Grand Jury as requests for City records are made.

It is the City's understanding that this practice of coordination between the Grand Jury and the City is included as a part of the "Napa County Grand Jury Procedures Manual." In particular, from the June 2005 version of the Procedures Manual, the section entitled "Communications with Agency" on page VII-2 provides:

"Upon selection of an agency to be investigated, the assigned committee chair shall communicate with the agency head [for the City of Napa, this would be the City Manager] and set a time to meet. The purposes of this meeting are to allow [City] and committee personnel to meet each other; to establish the agenda; to agree upon mutually satisfactory procedures concerning schedules, access to

personnel, documentation requirements; and to create an atmosphere of mutual respect and cordiality....”

From the City’s perspective, this type of initial meeting is an excellent opportunity for the City to efficiently provide the Grand Jury access to all information and witnesses needed to conduct the investigation, with minimal disruption to the City’s ongoing obligations to provide daily services to the general public. Such a meeting also provides an opportunity to ensure that all City employees who will be needed to provide information (either oral testimony or documents) to the Grand Jury are provided training regarding the secrecy admonition.

Perhaps more importantly, such a meeting is an opportunity for the City to identify and provide training to non-witness City employees within departments affected by the Grand Jury investigation (supervisors and co-workers of Grand Jury witnesses), regarding the obligations of non-witnesses to refrain from questioning witnesses regarding matters subject to the Grand Jury secrecy admonition. It is important to note that the City’s authority to manage the conduct of non-witnesses is broader than the scope of the secrecy admonition, which the California Attorney General has concluded only applies to Grand Jury witnesses (83 Ops.Cal.Atty.Gen. 161).

The initial meeting recommended by the Grand Jury Procedures Manual is also an opportunity to identify any information requested by the Grand Jury that must be withheld by the City, based on an obligation of the City to maintain the confidentiality of certain information from the Grand Jury. The law is settled that while Grand Juries have authority to review certain documents and information, that authority is subject to limitations. The clearest example of this limitation is the City’s obligation to withhold from the Grand Jury information that is protected by the attorney client privilege (per California Evidence Code section 954). The California Attorney General has concluded Grand Jury witnesses have the authority to assert the attorney client privilege to prevent disclosure of certain information. (See 70 Ops.Cal.Atty.Gen. 28.) That same Attorney General opinion also cites the “official information privilege” (as defined by Evidence Code section 1040) as a basis for the City to refuse to disclose certain information. In general, the official information privilege protects information that was provided to the City in confidence, such as (to cite two examples): health information (protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)), and financial information (protected by California Revenue and Taxation Code section 7056). And, at least one appellate court has ruled that Grand Juries are not entitled to review confidential employee personnel records. (Board of Trustees v. Leach (1968) 258 Cal.App.2d 281.)

Due to the potentially conflicting responsibilities of City employees called as witnesses to the Grand Jury, balancing the obligation to provide information to the Grand Jury against the obligation to maintain the confidentiality of certain information, it is essential that City employees called as witnesses before the Grand Jury have an opportunity to seek legal advice from the City Attorney’s Office. It is also noted that, if any City employee is called to give testimony under oath, that City employee may have the City Attorney present to provide legal advice during the questioning (per Penal Code section 939.22).

One final issue that could be clarified in the initial meeting between the Grand Jury and the City would be the manner of distributing the "early" non-public version of each report (provided to the City two working days prior to public release, per Penal Code Section 933.05(f)). From the City's perspective, it is important for this early report to be provided to the City Manager and the City Attorney, so that the City has an opportunity to determine whether or not any information in the report is confidential in nature and should not be released to the public. While the report is reviewed by the Presiding Judge to ensure that privileged information is not inadvertently revealed to the public (per Penal Code Section 929), the Presiding Judge may not be aware of the privileged nature of certain information, and the identity and interests of affected stakeholders. If the City Attorney is provided a copy of the non-public version of each report, the City Attorney will have an opportunity to notify the Presiding Judge and the Grand Jury Foreperson if there is any confidential information in the document, along with a request to redact the confidential information prior to publication. (See McClatchy Newspapers v. Superior Court of Fresno County (1988) 44 Cal.3d 1162.)

The City's Response to the Grand Jury's Findings and Recommendations:

Finding F1: Certain witnesses interviewed by the Grand Jury, knowingly, repeatedly, and willfully violated their lawful secrecy admonition.

Response to Finding F1: The City has no information upon which to agree or disagree with this finding. The Grand Jury has provided no information to the City to indicate that any City employee has ever violated the secrecy admonition, and the City has no information that any City employee has ever violated the secrecy admonition.

Finding F2: The conduct of the witnesses in repeatedly violating the Grand Jury's lawful secrecy admonition created an atmosphere of apprehension and intimidation which impeded the proper investigation of the Grand Jury.

Response to Finding F2: The City has no information upon which to agree or disagree with this finding. The City has consistently taken extraordinary efforts to cooperate with requests for information from the Grand Jury.

Finding F3: The conduct of the witnesses who violate the secrecy admonition is punishable as contempt of the Superior Court.

Response to Finding F3: The City agrees that a violation of the secrecy admonition may constitute a contempt of court; however, it is within the discretion of the court to determine whether or not particular conduct rises to the level of contempt. The City has no information upon which to assess whether any City employee has acted inappropriately, or in a manner that would rise to a contempt of court.

Recommendation R1: That ... the City Council ...provide instruction to all county [sic – intended to be "city"] employees within their jurisdiction regarding their duties and responsibilities towards the grand jury process and that said instruction be completed prior to the end of the year.

Response to Recommendation R1: This recommendation has been implemented prior to the issuance of this Grand Jury Report. The City Attorney's Office regularly advises Grand Jury witnesses who are called to testify before the Grand Jury regarding the scope and requirements of the secrecy admonition. The City Council directs the City Manager to ensure that each City employee called to provide testimony or records to the Grand Jury makes contact with the City Attorney to discuss the scope of the City employee's responsibilities to the Grand Jury, specifically including the scope of the secrecy admonition, and the scope of any potentially conflicting responsibilities by City employees to maintain confidential information from the Grand Jury (such as information protected by the attorney client privilege per California Evidence Code section 954, and information protected by the official information privilege per California Evidence Code section 1040).

FINANCIAL IMPACTS:

None.

CEQA:

The City Manager and the City Attorney have determined that the Recommended Action described in this Agenda Report is not subject to CEQA, pursuant to CEQA Guidelines Section 15060(c).

DOCUMENTS ATTACHED:

None.

NOTIFICATION:

A courtesy copy of this report was provided to the Napa County Grand Jury Foreperson.

RECOMMENDED ACTION:

Staff recommends that the City Council move, second and approve each of the actions set forth below, in the form of the following motion. Move to:

Approve the City's response to the findings and recommendations of the "2012-2013 Napa County Grand Jury Report – On the Integrity of Grand Jury Investigations" as set forth in this report, and incorporating any changes made to the responses by the City Council during the meeting, and direct the City Manager to submit the response on behalf of the City Council to the Presiding Judge of the Superior Court of Napa County.