

Confidential Fact Finding Report

Review of Outstanding Issues and Concerns Raised by the Findings and Recommendations of the 2022 Santa Clara Civil Grand Jury Report, A House Divided: Cupertino City Council and City Staff, Published on December 19, 2022

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***THIS REPORT SHALL ONLY BE PUBLICLY DISCLOSED ON CONDITION
THAT THE CITY COUNCIL OF THE CITY OF CUPERTINO WAIVES THE
ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT***

I. Procedural History and Overview of the Allegations: Basis for Additional Review

The Undersigned was retained on February 14, 2023 to independently review some of the findings set forth in the 2022 Santa Clara County Civil Grand Jury Report, "A House Divided: Cupertino City Council and City Staff", dated December 19, 2022 (hereinafter referred to as "Report"). Specifically, the scope of my review included reviewing past and on-going communications among City of Cupertino ("City") staff, City Councilmembers, and City Commission members. The scope of the assignment was the result of City Council direction to staff during its February 7, 2023 City Council meeting regarding the City's proposed response to the Report's Finding No. 4, Recommendation 4b, that provided:

"The City should reinstate enforcement procedures to enable the City Council and the public to file complaints and testify at public hearings to help remediate ethics violations. This revision should include a procedure for public admonishment, revocation of special privileges, or censure. This recommendation should be implemented by March 31, 2023." [Report, @ p. 16].

In a subsequent City Council meeting on February 21, 2023, Councilmember Fruen moved that the following language be added to the City's response to Recommendation 4(b) of the Report: "...the City Council has directed the City Attorney to investigate and report back to Council

regarding other potential violations of the Municipal Code arising out of Council-staff or commission-staff relations. The intent of the Report is to allow Council opportunities to correct past Municipal code violations and prevent future violations." [emphasis added]. Councilmember Fruen's motion was approved by the City Council. This Investigator initiated the review at the direction of the City Attorney.

What was relevant to determining the scope of the review as well as determining the appropriate individuals to be contacted was the discussion among Councilmembers during the February 7 and the February 21, 2023 City Council meetings. During these meetings both Councilmember Moore and Councilmember Chao raised concerns about the investigative review process of the Santa Clara County Civil Grand Jury, and Councilmember Moore pointed to a significant inaccuracy in the December 19, 2022 report regarding the description of her (Moore's) purported contact with a subordinate staff member regarding a City employee's charges incurred on a City issued credit card.¹ [Refer to p. 8 of the Report].

Councilmember Chao raised issues that the Civil Grand Jury process was flawed and there was no opportunity to cross-examine complainants. Chao stated that she had been contacted and had been interviewed by the Civil Grand Jury and had offered emails and documents to them, but the Civil Grand Jury ignored her (Chao's) explanations and offer to provide additional documentation. Chao also contended that she was not admonished to tell the truth as is done in any court proceeding and could only conclude that other interviewees had likewise not been admonished. During the February 21st meeting, Chao expressed concerns that there was no accountability for statements made by those interviewed by the Civil Grand Jury. Accordingly, both Moore and Chao were contacted during this investigation to provide an opportunity to more fully respond to the Findings or Recommendations set forth in the Report.

As will be more fully discussed under Section II, *Investigative Methodology*, individuals to be interviewed were initially selected based upon whether that individual had been specifically or by reference involved in the incidents discussed in the Report.

Overview of the Civil Grand Jury Findings and Recommendations

On December 19, 2022, the Santa Clara County Civil Grand Jury issued its findings in a report entitled, "A House Divided: Cupertino City Council and City Staff". The report was the result of the Civil Grand Jury

¹ During the February 7, 2023 meeting, City Attorney Jensen publicly reported that in responding to the Civil Grand Jury Report, the response would not include a response to all purported inaccurate factual statements; however, Jensen stated that the description of Councilmember Moore's requests for information regarding staff credit card usage was incorrect.

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receiving multiple complaints concerning the conduct of City Councilmembers toward City management and staff. According to the Report, the Civil Grand Jury reviewed the following allegations that: 1) Councilmembers interfered in the day-to-day operations of the City; 2) Councilmembers routinely berated and belittled presentations made by City staff during City Council meetings; and, 3) certain Councilmembers gave direct work assignments to City employees, thwarting the requirements of the Council-Manager form of government set forth under the City's Municipal Code.

The Report resulted in four (4) Findings, three (3) of which directly related to the scope of this review:

- **Finding 1** – The City has a culture of distrust between the Councilmembers and City staff that is creating dysfunction;
- **Finding 2** – The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult; and,
- **Finding 4** – A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, it includes sanctions and consequences for deviations from the stand. The City's Ethics Policy is generic and lacks enforcement provisions and therefore fails to provide a framework to address ramifications for policy violations. [Civil Grand Jury Report @ pp. 15-16.]

Moreover, the Report included references to complaints that had been brought forth during the course of its investigation including, without limitation, the following:

1. Existence of Councilmember distrust of City staff and staff fear of retaliation from Councilmembers [Report @ p. 3];
2. City Councilmembers behaving inappropriately toward the City Manager and staff, including routine disrespect and the inclination to doubt the accuracy of the City's staff work [Report @ p. 3];
3. Evidence of high turnover in key management and leadership positions within City government resulting in the loss of employees with significant capabilities and experience [Report @ p. 3];
4. Some Councilmembers' requests have been voluminous or "come on the heels of the Councilmember's specific dissatisfaction with a staff report on a certain subject and, thus, appears punitive as opposed to a genuine information request" [Report @ p. 7];
5. High staff and management turnover has reduced the operating efficiency of the City's government [Report @ p. 3];

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6. High staff turnover was not supported by the contention that the turnover was the result of retirements and staff seeking better, higher paying positions [Report @ p. 12];
7. The “abnormally” high turnover rate among City staff, including key staff positions, is the result of the belief of City staff that their work is unappreciated and devalued by Councilmembers [Report @ p. 12];
8. The abnormally high turnover rate of management and executive management staff has negatively impacted the City’s reputation and, in turn, has led to its inability to attract qualified people for some key staff and managements positions [Report @ p. 12];
9. Councilmember requests for information is often perceived by City staff as “councilmanic interference” and the time to respond to requests could be interpreted as inappropriately interfering with department workloads, staff decisions, schedules, and/or department priorities [Report @ p. 7];
10. In some instances, when City Councilmembers believed they did not receive requested information, the individual Councilmember filed a Public Records Request (“PRA”) pursuant to California Government Code § 6250 *et seq.*, which generally is an option available to members of the public and is not typically used by City Councilmembers [Report @ p. 7];
11. It may be frustrating to Councilmembers who request additional staff information to not receive such information as Councilmembers are charged with governing and must be informed to make important decisions about the direction of the City [Report @ p. 7].

As will be more fully discussed in Section IV, *Allegations and Factual Findings*, of this Fact-Finding Report, based upon the consistent and unequivocal statements provided by current and former City executive and management staff interviewed and the numerous email communications between Councilmembers, Commissioners, and staff, there was substantial evidence to support and sustain all of these factual findings.

While many of the Civil Grand Jury’s findings were described in somewhat “conclusory” terms, e.g., “existence of distrust and fear”, “berated”, “councilmanic”,² the Report clearly highlighted several government operational issues that warranted further review given the direction of the City Council at its February 21, 2023 meeting. Accordingly, the focus of my review was to ascertain facts that either supported in full or in part and/or did not support the ultimate findings/recommendations of the Report.

² As will be more fully discussed below, interviewees were asked what these “conclusions” referenced in the Report meant to them and what factual examples reflected, supported, and/or did not support these conclusions. Specific examples of interviewee responses will be more fully discussed below.

My evaluation takes into account the undisputed fact that the City's turnover rate in key executive management positions is significant with the employment of four City Managers since 2019. Moreover, as cited in the Report, over 50% of Planning Division staff and 60% of the City's senior management staff have left the City since January 2022.

It is also significant that after the publication of the Report, on February 3, 2023, the City Council engaged in a comprehensive City Council Governance Workshop with the purpose of: 1) strengthening the effectiveness of the City Council as a governing body; 2) clarifying roles within the governance and administrative structure of the City; and 3) establishing agreement on norms for working together with each other and with staff on behalf of the Cupertino community.

Further, at a regular Council meeting on February 7, 2023, by majority vote, the City Council adopted Resolution No. 23-021, *Cupertino City Council Procedures Manual* (hereinafter referred to as "Manual"). The Manual included guidelines for communication with City staff, Councilmember access to information and requests for information, decorum and civility in interacting with City staff and with other Councilmembers, and the conduct of deliberations/debates during City Council meetings. The Manual also incorporates applicable sections of the Municipal Code and, in essence, provides administrative guidelines to comply with and implement certain provisions of the Municipal Code. Moreover, and consistent with the issues raised by the Civil Grand Jury regarding the lack of enforcement procedures of the City's Code of Ethics policy, the Manual provides that "[t]he City Council may enforce repeated or serious violations of the rules set forth in the Manual through a censure action placed on a Council agenda."

As part of the scope of this review, interviewees were asked whether they felt that the February 3rd workshop as well as the adoption of the Manual has had any significant impact on improving the alleged improper conduct of Councilmembers. The overall consensus of the staff interviewed was that while there had been a short "grace" period following the workshop and the adoption of the Manual where Councilmembers appeared to act professionally; however, starting at the end of February 2023, at least two Councilmembers, Councilmember Moore and Chao, have re-engaged in extensive email requests for information that have significantly interfered with the overall operations and productivity of management staff and the respective City departments. Moreover, some of the more recent emails from Councilmembers Moore and Chao following the February 7, 2023 adoption of the Manual have been perceived by City staff members as accusatory, disrespectful, and condescending.

Scope of Review

Based upon the above, the scope of this review was to:

1. Determine whether there is additional factual evidence to further support the Civil Grand Jury Findings regarding possible violations of the City of Cupertino's Municipal Code and/or whether there are any additional factual findings that may support violations of one or more of the Municipal Code provisions following the December 2022 issuance of the Report;
2. Determine whether there are facts and documentary evidence that may support possible violations of the Manual, adopted on February 7, 2023;
3. Develop policy recommendations to potentially mitigate any further violations of the Municipal Code and/or the Manual; and,
4. Develop policy considerations in updating the City's Code of Ethics using the 2018 Policy as a starting point.

While the purpose of this review is to evaluate the past and current conduct of Councilmembers, the findings may also serve as guidelines to improve City Council/City Staff relationships moving forward.

II. Investigative Methodology

To begin my review, I received approximately 1,500 email documents that had been lodged. The emails and documents covered approximately a two year period, from 2021 to the present. Primarily, the documents consisted of emails between Councilmembers and staff, in particular, the former and current City Managers and department heads.

On or about March 9, 2023, I received from the City Attorney a list of past and current executive and management City staff who might be possible witnesses to various incidents involving current and former Councilmembers/Mayors and City Commission members. Prior to receiving the list of possible witnesses, I reviewed and summarized the most relevant email documents and also viewed various video segments of four previous City Council meetings. Further, I reviewed the Report, the Manual, applicable sections of the City's Municipal Code, City Resolution 18-115, *Adopting the City of Cupertino Code of Ethics and Conduct for Elected and Appointed Officials*, and, City Resolution No. 20-011, *Adopting the City of Cupertino Ethics Policy*, that had been referred to in the Report.³

³ As part of its commitment and response to the Report, the City Council will be considering revisions to the current *Ethics Policy*, using the prior policy adopted by the Council in 2018. Such review will be incorporated in the City's FY 2023-2025 Work Plan. [City's Response to The Civil Grand Jury's Recommendation No. 4a].

The above-referenced three "Findings" and the eleven factual complaints set forth by the Civil Grand Jury in its Report (pp.3-4 above) served as the foundational allegations that, if proven to be supported by substantial evidence, may support violations of one or more applicable provisions of the City's Municipal Code as well as the newly adopted Council Procedures Manual⁴. In summary, the findings and the factual complaints set forth in the Report formed the basis for developing questions for interviews and the further review of videos of selected City Council meetings and Logikcull email communications.

Legal Framework for Review

The gravamen of the issues reviewed by the Civil Grand Jury and by this Investigator emanate from the basic structure of the City of Cupertino's government, which, is clearly defined under the City's Municipal Code as a Council/City Manager form of government.⁵ The preamble to Chapter 2.17 *City Council/City Staff Relationships* of the Municipal Code provides the blueprint for establishing the City of Cupertino's Council/City Manager form of government and sets forth in pertinent part:

"After the City of Cupertino's incorporation, the City Council enacted Ordinance No. 1-06 creating and establishing the Council/City Manager form of government whereby the City Council controls the administrative services of the City *only* through the City Manager. *The Council/Manager form of government is intended to provide the best of unencumbered support of professional/technical staff's input balanced with the collective oversight of elected officials.* . . . Neither the City Council, nor individual Council members, can give orders to any subordinates of the City Manager. . . . The City Manager takes his or her orders and instructions from the City Council *only* when given at a duly held meeting of the City Council. No individual council member can give any orders or *instructions* to the City Manager." [*emphasis added.*]

⁴ The guidelines provided in the newly adopted Manual were used only to review actions occurring *after* its adoption by the City Council on February 21, 2023.

⁵ The City Council/City Manager form of government, while common throughout California, is not the only model as there are several California cities that are "charter" cities. Moreover, even those municipalities having a Council/City Manager form of government also have municipal code ordinances, council procedures, and Code of Ethics policies that are unique to that particular agency. The procedures of how City business is, and has been, conducted in the City of Cupertino is strictly dependent on Cupertino's laws and administrative rules set forth under its Municipal Code and therefore, comparisons to other municipalities having different underlying governance structures, municipal code provisions, and/or administrative policies may be irrelevant. The conduct of Councilmembers and City staff is strictly governed by the applicable duly enacted municipal code provisions and administrative rules and procedures.

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As cited by the Civil Grand Jury in its Report, §§ 2.17.020, 2.17.032, and § 2.17.034 of the Municipal Code provide specific laws regarding the conduct of City business and interactions with the City Manager. The two (2) areas that are pertinent to this investigation include the following:

1) The City Council (as an entire body) retains full power to accept, reject, amend, or otherwise guide and direct staff actions, decisions, recommendations, workloads and schedules, department priorities, and the conduct of city business through the City Manager; *this power cannot be delegated to individual Council members*, nor to committees composed of council members consisting of less than a quorum. [§ 2.17.031]. While nothing in the City's Municipal Code precludes *individual Council members requesting information*, in accordance with § 2.17.034, the City Manager retains discretion in how, and whether, the requested information will be provided to all Council members, if at all. Further, individual Councilmember requests to the City Manager for information are further limited by the criteria and authority provided to the city Manager provided under § 2.17.043 (cited below). Consistent with this Municipal Code section, the City Manager retains the sole authority to determine whether the individual request for information and assistance would adversely impact City staff's work priorities and available resources.

2) § 2.17.032 and § 2.17.042 specifically preclude individual Councilmembers from attempting to influence staff decisions, recommendations, workloads, and schedules and department priorities without prior knowledge and approval by the *entire* City Council. Likewise, City staff may only be guided by City management and/or the City Council as a whole. Under § 2.12.042, City staff may be disciplined for violating this Municipal Code provision and may report attempts by individual Councilmembers to unduly influence or pressure staff into making, changing or otherwise suppressing staff decisions or recommendations, or changing departmental work schedules and priorities.

As referenced above, one of the provisions of the City's Municipal Code that had not been referenced by the Report was § 2.17.043, *Timely Responses*, which provides in pertinent part that the City Manager has sole discretion to determine whether a Councilmember's request for information would require such significant allocation of staff time as to alter other work priorities and, if so, such an individual request should be directed to staff through a collective direction of the entire City Council. § 2.17.043 further provides guideline by which the City Manager can exercise this discretion: 1) Is the request specific and limited in scope so that staff can respond without altering other priorities and with only minimal delay to other assignments; 2) Is the request a "one time" work requirement, as opposed to an on-going

work requirement?; and 3) Does the response to a request require a significant allocation of staff resources (generally defined as consisting of more than one staff person, or a single staff person working on the request in excess of two hours? Based upon the scope of this review, § 2.17.043 was also incorporated in reviewing the Councilmember/staff relations and communication.

In the event that a Councilmember's conduct is determined to have possibly violated applicable provisions of the City's Municipal Code as referenced above, such violation(s) may be a misdemeanor subject to criminal prosecution. [§1.12.010 of the Cupertino Municipal Code].

City Council Procedures Manual, Resolution 23-021

In reviewing Councilmember-staff relationships *following* the adoption of Resolution 23-021 *Cupertino City Council Procedures Manual*, provisions of the Manual were incorporated as guidelines. While the Manual essentially incorporates several of the above-mentioned Municipal Code sections, Section 6.5 *Decorum*, highlights civility requirements that all Councilmembers and City staff *shall* treat each other with dignity, courtesy, and respect. Further, § 6.5 provides that Councilmembers should avoid personal attacks on City staff and shall refrain from publicly criticizing the general abilities, character, or motivations of any staff members and should share any such concerns privately with the City Manager or City Attorney.

§ 6.6 of the Manual *Councilmember Access to Information* provides that "no Councilmember shall circumvent the City's Manager's direction regarding a request for information by seeking information through a Public Records Act request."

Finally, the Manual is consistent with the Civil Grand Jury's concerns that the City's *Ethics Policy* [Recommendation 4a, p.16 of the Report] provided no enforcement provisions, the Manual sets forth enforcement rules in Section 10: "The City Council may enforce repeated or serious violations of the rules set forth in this Manual through a censure action placed on the Council agenda."⁶ [Manual @ p. 14].

⁶ Censure is a disciplinary procedure naming a particular member of the legislative body as an offender. It does not "diminish" a Councilmember's rights but may limit or preclude certain conduct that has been determined, by a majority of the legislative body, to constitute violations of applicable rules and policies. Censure has been protected as an appropriate remedy under the First Amendment and under California Anti-SLAPP statutes.

Evaluation of the Outstanding Issues

In evaluating the allegations, the following criteria will be incorporated as part of the final report:

1. ***Not Sustained:*** The investigation failed to disclose sufficient evidence to support the alleged conduct beyond a preponderance of evidence.
2. ***Inconclusive:*** The investigation uncovered conflicting evidence of relatively equal weight as to whether the alleged conduct did or did not occur.
3. ***Sustained:*** The investigation disclosed that there is substantial evidence that the act or omission occurred as alleged beyond a preponderance of evidence.

Sixteen (16) current and former executive and management staff members have been interviewed. Following the initial staff interviews, Mayor Wei, Councilmember Moore, and Councilmember Chao were also interviewed. Former Mayor Darcy Paul was invited to participate in an interview, but due to his scheduling conflicts, was unable to do so prior to the completion of this Fact-Finding Report. A copy of Paul's email response that had been sent to the City Attorney, City Manager, and all Councilmembers has been included as part of this Fact-Finding Report.

To maintain the integrity of the fact finding, I asked each of the sixteen (16) interviewees to identify other possible witnesses/complainants, if any. Further, I asked each staff member interviewed to provide to me any emails/documents that they believed would support their statements and/or were relevant to the scope of my review. I did receive numerous documents from the interviewees, some of which had been provided by the City Attorney's Office and some of which had not been included.

Some of the witnesses suggested names of individuals, both current and former City employees, who should be interviewed. Finally, each staff member interviewed was admonished to: 1) answer my questions truthfully; 2) provide any and all information that he/she believed would be relevant to the scope of my review; 3) refrain from talking to anyone about my questions to them and their answers to me; and, 4) if they answered the questions, I would assume that they understood the question and, if they did not, they had my permission to let me know. I also informed them that if they felt that they were treated adversely or retaliated against because someone suspected that they had participated in this review, they should contact the City Attorney as the City had an absolute prohibition against retaliation for participating in an investigation. Following the interviews of the current and former City staff members, I reviewed email documentation provided to me and viewed the

videos of specific City Council meetings concerning agenda items that had been referenced by the staff members during their interviews.

Finally, during the course of my interviews, I discovered that there had been at least five (5) "informal" complaints and one (1) formal complaint filed with the Human Resources Department ("HR") in accordance with the City's Administrative Rules and Regulations of the Personnel Code, Section 3 *Prohibition Against Harassment, Discrimination & Retaliation*. Most of these complaints had been lodged prior to January 2023; however, several of the other interviewees stated that they had *not* notified HR about their complaints regarding interactions with current and former Councilmembers and Commissioners for fear of retaliation.

With respect to the five (5) "informal" complaints that had been lodged with HR, the individuals interviewed told me that they had initially been reluctant to file a formal complaint as they were fearful of retaliation as the alleged misconduct involved former and current Councilmembers and Commissioners. The five (5) complainants told this Investigator that they were concerned that if the Councilmember or Commissioner became aware of their complaint, these individuals would have created such a hostile and intolerable work environment that the employees would feel forced to leave City employment. Even though these staff members had decided to file an informal complaint, they did not want any formal investigation but merely wanted to let HR know what had happened in case there were further incidents. All of the complaints were based upon bullying and harassment where the staff member felt that the "subjects" of their complaint were interfering with the scope of their work duties and that of their respective City departments. It did not appear that the allegations were based upon a "protected classification"; however, the alleged conduct, if supported by substantial evidence, may violate applicable provisions of the Municipal Code and Section 3 of the City's Administrative Regulations, particularly with respect to § 3.3 *No Retaliation*⁷.

The City has a strict "confidentiality" provision under its Administrative Regulations regarding anti-harassment and retaliation which provides in pertinent part that: "The City recognizes that confidentiality is important to all parties involved in an investigation and it will not disclose a completed investigation report, except as it deems necessary to support a disciplinary action, to take remedial action, to defend itself in adversarial proceedings, or to comply with the law or a court action." A separate review of the complaints lodged only with HR Department and those disclosed to this Investigator

⁷ § 3.3 provides in pertinent part that a retaliatory "adverse conduct" includes: taking sides because an individual has reported harassment or discrimination; spreading rumors about a complaint; shunning or avoiding an individual who reports harassment or discrimination; or real or implied threats of intimidation to prevent an individual from reporting harassment or discrimination.

during the course of the staff interviews has yet to be fully concluded, and the names of the current and former City staff interviewed shall remain confidential.

III. Witness Credibility

Credibility of the interviewees was based on the following: 1) factual consistency of the individual's statement with that of statements of other witnesses and/or documents produced; 2) ability of the person interviewed to specifically articulate examples of his/her generic comments; 3) whether the interviewee had personally observed certain incidents that they relayed to the Investigator; and 4) whether there were potential biases based upon his/her employment history with the City, i.e., whether the staff member was concerned about the stability of his/her employment or the damage to their professional reputation should they be totally candid with this Investigator. In reviewing the credibility of the interviewees' statements, all current and former staff interviewees were admonished by this Investigator at the beginning of each interview to answer all questions truthfully and provide all relevant information, to which all interviewees responded that they would do so.

This Investigator found the staff interviewees forthcoming and candid. More importantly, there was consistency in the statements that each had made regarding his/her experience in working with former and current Councilmembers and Commissioners. With respect to Mayor Wei, Councilmember Moore, and Councilmember Chao, this Investigator found all three forthcoming in expressing concerns and goals for enabling the City Council to more effectively work together and to improve working relationships between the City Council and the City Manager and staff. Councilmember Moore did state that in making decisions, she often requires more information than perhaps other Councilmembers may need and that she is frequently frustrated with getting the information needed.⁸ Likewise, Councilmember Chao told this Investigator that she needs sufficient information to make sure that staff has reviewed all alternatives/options before making a recommendation to the City Council. Further, Chao told this Investigator that she also needs information verifying that City staff has made sure that any agenda item brought before the City Council has *procedurally* complied with any required approvals, i.e., any required approvals by the appropriate City Commissions. Finally, Chao told this Investigator that she needs information to assure that the proposed action complies with applicable City codes and regulations.

⁸ Moore's comment is consistent with the Civil Grand Jury's observation that "it may be frustrating to Councilmembers who request additional staff information as Councilmembers are charged with governing and must be informed to make important decisions about the directions of the City"; however, voluminous requests for information may appear "punitive" by City staff and the time to respond to such requests diverts staff resources from priority project work. [Report @ p. 7].

During her interview, Chao also questioned the validity of the current and former City staff statements regarding the reasons for the City's significantly high staff turnover that included the dysfunctional work environment due to conduct of former Councilmembers and Commissioners. Chao continued to insist that the turnover was due to retirements and that the departing staff was leaving for better positions and higher paying positions. Further, Chao stated from her perspective, some of City staff who had left had had performance problems and personally realized that they couldn't be successful.

IV. Discussion of Allegations and Factual Findings

One of the witnesses best expressed the general consensus of the current staff (and some former staff members) by stating, "The Civil Grand Jury Report is the tip of the iceberg and only reflects half of what has happened." Overall, following the February 3rd workshop and the adoption of the Manual, some of the interviewees felt that "things" would get better; however, all current staff interviewed agreed that since February, there has been a gradual decline in civility and growing distrust of staff's professional capabilities, especially demonstrated by Councilmembers Moore and Chao.

The factual evidence collected as a result of this review has been divided among the three (3) Findings that served as the basis for the further fact finding. As stated above, the factual support for these findings as referenced in Section I, *Procedural History and Overview of the Allegations: Basis for Additional Review*, were used as a basis for developing interview questions for the sixteen (16) current and former executive and management staff. Based upon the interviewees' statements and the numerous email communications reviewed, all of the eleven (11) factual complaints cited by the Civil Grand Jury in its December 19, 2022 Report are supported by substantial evidence and are **Sustained**.

The additional factual determinations obtained as a result of this review include the following and further **Sustain** the Civil Grand Jury findings:

Civil Grand Jury Finding 1: The City has a culture of distrust between the Councilmembers and City staff that is creating dysfunction.

1. Staff believes that there continues to be "distrust" from at least two Councilmembers, Councilmembers Moore and Chao, and such distrust has been reflected in the continuous challenges by these two Councilmembers through voluminous email requests for additional and duplicative information regarding the staff's recommendations for Council actions. Both Councilmembers Moore and Chao told this Investigator that

they did have some "trust" issues with current City staff. As referred to above, Councilmember's Moore distrust is primarily based upon the City's embezzlement issue that had been discovered in 2017 and upon some of the financial and audit issues that had been raised by the Civil Grand Jury Report. Chao told this Investigator that her lack of trust was based upon the fact that she had uncovered several incidents where staff members had made "mistakes" and/or had relied upon incorrect information. According to Chao, when she has pointed out these mistakes to staff, the staff member does not admit that he/she was wrong. Chao stated that she cannot trust staff if they are not willing to admit that they have made a mistake. Chao even went so far as to suggest that the public has trust issues with staff. Both Moore and Chao told this Investigator that they frequently and independently research the projects that are matters subject to City Council agenda matters because they don't trust staff's recommendations as they don't feel that they are provided adequate information to evaluate the recommendation.

2. Staff uniformly stated that the purported "distrust" is reflected in the continuing blaming staff for Council decisions that have been criticized by members of the public. As an example, some of the email exchanges reflected that when a Council decision, made collectively at a regular or special meeting, has been challenged by a constituent, the Councilmember's excuse for supporting (or not supporting) that decision was that "staff did not provide sufficient information" to properly evaluate the proposed recommendation. In such cases, the Councilmember then emailed the City Manager for additional information on the matter that had already been considered and voted on by the entire Council.
3. Four of the interviewees told me that the tone of the email communications from two of the Councilmembers was threatening, accusatory, and somewhat coercive in that they believe that if they don't appropriately respond, they will continue to be "badgered". One interviewee told me that she had reviewed some of the emails between Councilmembers and City staff and that, "literally, she has cried over the tone/texture of such emails." This interviewee "loved" working for the City and was disheartened that Councilmembers would "attack" City management staff.
4. In addition to the distrust, there was substantial evidence, both in emails and videos of Council meetings, that Councilmember

Moore has responded to City staff in a discourteous and disrespectful manner. Both Moore and Chao have made public comments that have been perceived by staff members as criticizing their work product to the extent that some staff members are fearful of even making a recommendation for Council action.

5. The abusive and controlling behavior of former Mayor, Darcy Paul, and former Planning Commissioner Wang, is substantiated in email communications between these two individuals and City staff. For example, as reported by four of the interviewees, at a public event, Mayor Paul publicly stated something to the effect that, "I guess I should say thank you to staff but they always want to make it all about them." Further, the email communications reflect that Paul would berate staff, dictate procedures, direct hiring and firing decisions, and intermittently make comments in front of staff, "remember who you work for." Uniformly, the interviewees stated that Paul's conduct and staff relationships were a significant factor in creating a dysfunctional work environment. In fact, two interviewees told this Investigator that they only stayed with the City because they knew that Paul's term was ending. These statements and conduct are pending further review.
6. The majority of the current and former staff interviewed told this Investigator that the dysfunction was the result of Councilmembers Moore and Chao not understanding their roles in carrying out their council duties. In accordance with applicable provisions of the Municipal Code, Councilmembers make decisions collectively during a scheduled meeting and must seek information solely through the City Manager. The email exchanges reviewed by this Investigator reveal that Councilmember Moore has repeatedly failed to appear for 1:1 meetings with the City Manager but instead has engaged in sending voluminous emails to the City Manager with copies of the emails to other staff members and, in some cases, has sent emails directly to staff members, thereby bypassing the City Manager.⁹ Councilmember Moore told this Investigator that she perceived her Councilmember role to double check staff's work by actually conducting her own independent research and staff work, particularly with respect to performing audits and producing financial reports. This perception may be fueled in

⁹ It appears, however, that since January 2023, both Councilmember Moore and Chao are now directing their information requests to the City Manager rather than directly to the subordinate staff. This observation was based on a review of email communications from 2022 through the present.

Moore's stated distrust of the City's financial reports is based primarily on the 2017 discovery of the embezzlement. In a recent exchange regarding Councilmember Moore's research regarding lawsuits and City contracts, Councilmember Moore described her role as a Councilmember as *not* being a "silent observer" and that it was necessary to her job to "analyze and critique." Councilmember Chao told this Investigator that she believes her job as a Councilmember is not to "rubber stamp" staff's recommendations. Like Councilmember Moore, Councilmember Chao independently investigates matters and projects that will be placed on City Council agendas and, many times, she believes that, based upon her independent research, staff has made errors in their analysis and has relied upon incorrect information. However, Councilmembers Moore and Chao's duties as councilpersons are, in accordance with the Municipal Code, separate and distinct from the performing of independent work as a City auditor, planner, housing specialist, or financial consultant, especially without approval by the entire City Council.

Both Councilmembers Moore and Chao told this Investigator that they often contact other agencies, both cities and counties, to find out what that agency is doing or how that agency is handling the particular project. How other agencies are addressing certain issues or projects *may or may not be relevant* to how the City of Cupertino is addressing its project goals and objectives as the City of Cupertino is unique from other agencies. Moreover, both Councilmembers Moore and Chao appear to assume that City staff is *not* to be trusted and it is their job to double-check staff work product. While Councilmembers Moore and Chao want to assure that the staff recommendations presented to the entire City Council are based upon credible staff review, independently researching staff agenda items is perhaps not the more effective way to accomplish their need for information and assurances that the staff reports and recommendations have included a review of alternative options and are based upon valid information. If there are questions about staff reports and recommendations, those questions should, in accordance with the Municipal Code, be directed to the City Manager. The City Manager, in turn can either address those issues and/or, if additional information is needed, direct the question/concern to the staff member so that when the staff report is published as part of the City Council agenda, Councilmembers Moore and Chao can be assured that their concerns have been reviewed and considered as part of any staff recommendation. As will be discussed more fully

discussed below, the voluminous email requests based upon Councilmembers Moore and Chao's independent research of particular agenda items require significant staff time and resources to respond.

Civil Grand Jury Finding 2: The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult.

7. Collectively, the current and former management staff interviewed told me that they felt devalued, demeaned, and significantly frustrated by two of the Councilmembers in that there appeared to be no way that they could ever produce satisfactory work. Two of the interviewees told me they were actively looking for other employment. Many interviewees told this Investigator that staff members who had left City employment told them that they were leaving primarily because of how badly they had been treated and bullied by City Councilmembers.¹⁰ Both former and current staff concurred that the City's work environment was "toxic" and stressful.
8. One interviewee told me that it is almost impossible to get project work accomplished because of the number of staff hours required to respond to Councilmember information requests in addition to preparing staff reports and back-up materials for all of the regular and continued meetings. Another interviewee shared that most recently, once staff provides an answer to a Councilmember's request, it seems like, "any answer is never good enough for them." According to the interviewees, the additional work is "exhausting" and significantly diverts staff resources from work priorities and "undermines the ability of City staff to effectively serve the citizens of Cupertino." The significant staff turnover has exacerbated the problem of insufficient staff to handle increasing Councilmember demands.
9. There is substantial evidence to support the Civil Grand Jury's conclusion that the high turnover rate was *not based* on staff retirements and/or staff seeking better, higher paying positions. All interviewees told me that they really like their jobs and tried to do their best, but nothing they did appeared to be satisfactory to former Mayor Paul and Councilmembers Moore

¹⁰ While the interviewee statement could be considered "hearsay", the observations were consistent with the personal statements of current and former City staff members.

and Chao. More importantly, the workload due to the inordinate number of Councilmembers' information requests is overwhelming and almost impossible to accommodate given the current staff resources. Both current and former staff members felt that the additional workload in responding to the emails as well as that additional work due to staffing shortages was overwhelming. As to the compensation package for City employees, based upon a comparison to several other agencies, Cupertino's compensation package is competitive, and it is unlikely that the management staff exodus is the result of the City's compensation package. It is significant that the last two (2) City Managers voluntarily resigned with no severance package. Further, at least one management employee left for a lower position with another agency because of the treatment by former Mayor Paul and Councilmembers.

***Email Communication Issues Contributing to the Overall
Ineffectiveness of and Interference With
Effective City Operations***

Collectively, current and former staff members told this Investigator that the excessive number of emails from Councilmembers Moore and Chao was indeed intimidating and adversely impacted department operations and workloads. In reviewing the email exchanges, a continuing pattern of emails of Councilmembers Moore and Chao are the on-going requests for information that is considered "old business" of what previous City Councils had reviewed and decided. Further, there were misstatements of facts based upon both Councilmembers "independent research" of certain Council agenda items. To some extent, it appeared that Councilmembers Moore and Chao have determined that their roles and functions as Councilmembers are best performed by "governance through email exchange". Specific examples are included below.

10. In reviewing the number of emails from City Council members to the City Manager in recent months (since January 2023), the average number of emails per week is 50-70 initial emails, not counting any follow-up emails which sometimes was five additional emails per initial email. Over fifty percent (50%) of these weekly emails were initiated by Councilmembers Moore and Chao and this average did not include the follow-up emails sent in response to the initial email. Depending upon the topic, up to 20-30 pages of email exchanges were generated as a result of an initial email. Three (3) interviewees told me that they didn't think that Councilmember Moore and Chao really

understood how long it takes staff to read through significantly long emails and then respond.

11. The two Councilmembers' email requests for staff "information" were, and have been, perceived by the majority of staff interviewed as "subtle attempts" to influence staff priorities and recommendations. At issue is whether the Councilmembers' continued requests for information is for information only or is intended to interfere with departmental and City operations or for some other reason. In some cases, these requests for staff assistance with independent research or other questions appear motivated by individual policy preferences not adopted by the full Council. For example, there is evidence that Councilmember requests for information have been repeated and, in one case, a staff member provided the same information to the same Councilmember on at least three occasions. Moreover, there is evidence that the informational requests frequently revert to "old news" such as the employee embezzlement issue that was discovered in 2017 and/or former decisions regarding a funding agreement with the Chamber of Commerce. When current staff attempts to "fix" and address some issues, Councilmembers Moore and Chao appear, through voluminous emails, to focus on, from their perspective, the purported egregious staff screw-up as opposed to focusing on how to effectively correct the situation. [Note: From all of the information collected as part of this review, the "embezzlement" issue was effectively addressed through the installation of a new financial management system and that a significant portion of the embezzled funds have been repaid to the City.] As discussed in the Civil Grand Jury's Report, attempts by an individual Councilmember to direct staff work or influence staff priorities outside of a noticed meeting is a violation of Municipal Code Chapter 2.17. In the herein matter, instances where Councilmembers have attempted to direct staff work in service of a personal policy agenda not adopted by the full City Council is likewise concerning.

Civil Grand Jury Finding 4: A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, it includes sanctions and consequences for deviations from the stand. The City's Ethics Policy is generic and lacks enforcement provisions for policy violations.

To date, one of the most significant City Council responses to the Report's Recommendation, Finding 4, has been the recent adoption of the Manual that addresses many of the deficiencies identified by the Civil Grand

Jury regarding the current *Ethics Policy*. While acknowledging that the City Council has committed to revising the *Ethics Policy* using the 2018 Policy as a starting point, the recently adopted Manual addresses civility, Councilmember debate, and respect standards and, consistent with the Civil Grand Jury's Recommendation No. 4, provides remedies, i.e., censorship, where there are violations. In my professional opinion, based upon over thirty years as a public lawyer, both serving as in-house attorney in the City of Long Beach, City Attorney's office, and, thereafter, as a contract City Attorney and special counsel to numerous public agencies throughout California, the Manual more than adequately addresses the Report's concerns regarding the City's Ethics Policy and serves as an effective oversight tool until such time as a final policy for both Councilmembers and appointed Commissioners can be developed and approved. That being said, a revision of the current ethics policy using the *Code of Ethics and Conduct for Elected and Appointed Officials Policy*, Resolution No. 18-115 is the recommended starting point, especially for appointed officials.

Undue Influence on Hiring Decisions

On page 12 of the Report, the Civil Grand Jury mentions that, "Interviews with current and former City managers confirmed that some City Councilmembers inserted themselves in the process of recruiting and hiring for open positions with the City." If this factual finding is supported by substantial evidence, there may be violations of the above mentioned Municipal Code provisions regarding attempts to pressure staff and engage in conduct reflecting undue influence on staff decisions, as well as Municipal Code § 2.28.040(D) that authorizes the City Manager to "appoint, discipline and dismiss any and all officers and employees of the City except those elected by the electors of the City" (See also Municipal Code CMC § 2.52.100(A) [City Manager has responsibility "[t]o appoint persons to and remove persons from positions subject to the provisions of [the Personnel Code].")

Based upon the information gathered during the course of this investigation, there was substantial evidence to **Sustain** the Civil Grand Jury's finding that there had been attempts by former Mayor Paul, City Councilmembers and Commissioners to direct the hiring and firing of City staff. However, after January 1, 2023, there are insufficient facts to support a finding that current Councilmembers have attempted to direct and/or pressure City staff hiring and/or firing decisions.

V. Conclusions & Recommendations

For the foregoing reasons, this Investigator finds that based upon the interviews and the documents reviewed as part of this Fact-Finding Report, the Civil Grand Jury Findings No. 1 and No. 2 were supported by substantial factual evidence and that the distrust of City staff by Councilmembers Moore and Chao has continued since the publication of the Report in December 2022 resulting in: 1) excessive and duplicative email requests for information; 2) independent “investigations” of agenda matters without City Manager and/or Council knowledge or authority; 3) communication with staff in emails and/or public meetings in an accusatory, discourteous and disrespectful manner; 4) an adverse impact to staffing workloads, work schedules and priorities; and, 5) the overall low morale of key management staff that may result in increased staff turnover adversely impacting the City’s ability to accomplish its goals and priorities for the benefit of City of Cupertino residents and businesses. Based upon these findings, there may be violations of the applicable and above referenced Municipal Code provisions and the standards set forth in Resolution No. 23-021 *Cupertino City Council Procedures Manual*.¹¹ What is most significant from this review is the consistency of the statements of the sixteen former and current executive and management staff employees regarding current and former Mayors, City Councilmembers, and Commissioners. The statements provided to this Investigator were unequivocal about their descriptions of and experience with the City of Cupertino’s work environment.

Recommendations

Based upon the above review, the Undersigned recommends the following alternatives in order to facilitate more effective City Council/City staff relationships and enhance the City Council’s ability to accomplish its goals in order to best serve City residents and businesses:

- 1) Current City staff needs to be supported (and trusted) in carrying out their respective duties and, more importantly, current staff needs to feel that they are valued in providing professional services to the City. Councilmembers do have an obligation to make informed decisions; however, voluminous email exchanges regarding requests for information may be less efficient than bringing those concerns to the City Manager through the scheduled 1:1 meetings. In the 1:1 meetings, the City Manager may be able to address the question directly and, if not, refer the question to the appropriate staff member. In a nutshell, while it is true that

¹¹ As to the remedy for violations of the Municipal Code and/or the Manual, the City Council has the ultimate authority based upon the factual findings to determine appropriate action that may include 1) censure; 2) referral to the District Attorney; 3) referral to the Grand Jury; and/or 4) remove the Councilmember from certain committees and/or serving as chairperson to certain committees.

in accordance with the Municipal Code, all Councilmember's requests for information are to be directed to the City Manager, voluminous emails are rarely the most efficient way to address both Councilmembers' Moore and Chao's requests for information, and the sheer volume of email has adversely impacted departmental operations. The 1:1 meetings between the City Manager and individual Councilmembers is, and traditionally has been in California public agencies, the most efficient way to respond to a Councilmember's inquiries and such meetings should facilitate communication and trust between the Councilmember and the City Manager.

2) The adverse and contentious relationships between and among former and current Councilmembers and former and current City staff members have contributed to staff turnover in the City of Cupertino. The impact of these contentious working relationships has been a significant staff turnover adversely impacting the overall effectiveness and efficiency of City operations. Generally, it will take a new City Manager and/or senior level staff member at least 6 – 12 months to become fully versed in the past history of council decisions on specific projects and to become fully acclimated with the capabilities and accomplishments of subordinate staff. Turnover in executive and management staff in any organization is costly in loss of staff productivity, training costs, and loss of institutional knowledge. If Councilmembers, including Councilmembers Moore and Chao, distrust or question current City staff members' abilities to carry out the responsibilities of their position, then those concerns and the reasons therefore must be communicated to the City Manager so that these concerns may be addressed. The City Council as a whole is responsible for evaluating the City Manager's performance if it feels that such concerns are not being addressed.

3) The City Council should rely on the advice of and give weight to the recommendations of executive management staff and other professionals in considering items that come before the City Council, particularly when those items require technical expertise or specialized knowledge or experience.. Otherwise, the City of Cupertino will be burdened in making timely decisions essential to providing the infrastructure and services necessary to best serve Cupertino residents and businesses. This is not to say that Councilmembers should simply "rubber-stamp" all staff recommendations; however, the voluminous email requests for information and independent investigations appear to be a counterproductive and time consuming process. Councilmember Chao did inform this Investigator that City Manager Wu should inform her if she had received comments from staff regarding her (Chao's) requests and/or if staff felt that Chao had engaged in conduct that the staff member perceived as accusatory or condescending manner.

4) The City Council's approval of the City's "Work Plan" is an excellent way to implement Council's goals and work projects and allows Department Heads to focus resources and to determine appropriate staffing needs and/or whether outside consultant resources are needed to meet Council goals/objectives.

5) The 2018 Ethics Code should be used as a basis for developing revisions to a new City Code of Ethics policy, especially in developing a Code of Ethics for City appointed positions. As referenced above, the newly adopted Manual addresses many of the Code of Ethics issues cited by the Civil Grand Jury in its Report; however, a new Ethics Code using the 2018 Ethics Code provides an effective starting point for Commissioners Handbook.

6) If not already conducted, the City Attorney and City Clerk should consider providing Councilmember training on Rosenberg's Rules of Order.

7) The City Manager should explore ways to resolve Councilmember Moore and Chao's need for information given limited staff and departmental resources. In accordance with applicable Municipal Code provisions, 1:1 meetings between the City Manager and Councilmember Moore and Chao could be used to address the need for information without appearing to direct or influence staff priorities.

Finally and most importantly, effective city governance is recognizing that there will be problems beyond anyone's control and when those situations appear, the priority should be addressing the solution, not focusing on or blaming staff for what happened. Trust in City management staff is an essential component of effective municipal governance.

Respectfully Submitted:



Linda L. Daube, Attorney
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