



CITY ATTORNEY'S OFFICE

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3195 • FAX: (408) 777- 3366
EMAIL: CITYATTORNEY@CUPERTINO.ORG

CITY COUNCIL STAFF REPORT

Meeting: September 6, 2023

Subject

Review of Councilmember compliance with Municipal Code Chapter 2.17, recommendations in May 2023 Fact Finding Report, and related governance issues.

Recommended Action

Consider findings regarding Councilmember compliance with Municipal Code Chapter 2.17, recommendations in May 2023 Fact Finding Report, and related governance issues, and provide direction on further measures to improve governance practices, as recommended below.

Reasons for Recommendation

Background

1. December 2022 Grand Jury Report

On December 19, 2022, the Santa Clara County Civil Grand Jury issued a report entitled, "A House Divided: Cupertino City Council and City Staff" (Attachment A). The Grand Jury report arose from multiple complaints concerning the conduct of the City Councilmembers toward City management and staff. According to the Grand Jury report, the Civil Grand Jury reviewed allegations that (1) Councilmembers interfered in the day-to-day operations of the City; (2) Councilmembers routinely berated and belittled presentations made by the City staff during the City Council meetings; and (3) certain Councilmembers gave direct work assignments to City employees, contrary to the requirements of the Council-Manager form of government as set forth under the Cupertino Municipal Code.

Following its deliberations, the Grand Jury released a report that included four findings, three of which are relevant to the item pending before Council.

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.

Finding 4: A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, if 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.

2. May 2023 Fact Finding Report

On February 21, 2023, the City Council considered the Grand Jury report and approved the City's response to the report pursuant to Penal Code section 933 (Attachment B). As part of the City's response, the City Council directed the City Attorney's Office to investigate and report back on violations of the Municipal Code with respect to Council-staff and commissioner-staff relations. The City Attorney's Office retained Linda Daube, Esq. to conduct an independent investigation of potential violations of the Municipal Code and related violations of City policies.

The City Council was initially provided a confidential, attorney-client privileged Report regarding the investigation. On May 2, 2023, the City Council voted to waive privilege, release the report to the public, and to continue discussion of the Report to provide the public an opportunity to review it.

On May 9, 2023, following its release to the public, the City Council considered the Report (Attachment C) and entertained extensive public comment on Ms. Daube's findings. After deliberating on the Report, the City Council adopted Ms. Daube's recommendations for facilitating more effective Council-staff relations and enhancing the City Council's ability to accomplish its goals. Those recommendations include the following, as summarized below:

1. Councilmembers should avoid "governance by email" and should rely on their 1:1 meetings with the City Manager to avoid adverse impacts to City operations and to facilitate communication and trust between the Councilmembers and the City Manager and City staff.
2. Councilmembers should attempt to improve the contentious relationship that certain members have had with City staff and should communicate any concerns about staff to the City Manager, who is accountable to the City Council for her staff's performance.
3. Councilmembers 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.

4. The City Council should continue to use the City Work Program as a way to implement Council's goals, and the City should rely on the Work Program to focus resources and determine staffing needs.
5. The 2018 Ethics Code should be used as a basis for developing revisions to a new Ethics Policy.
6. 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 needs for information, given limited staff resources (*e.g.*, 1:1 meetings).

Council also provided additional direction to the City Attorney and City Manager, including:

1. That Councilmembers receive training from the City Clerk's office on the use of the City's digital archive system.
2. That certain documents considered in preparing the Report be disclosed and posted in a publicly accessible location on the City's website.
3. That the City Attorney's Office continue to monitor compliance of Councilmembers with the Municipal Code with respect to the Council-staff relationship and to report back to the Council in four to five months with a progress report.
4. That staff return to Council with a censure resolution if insufficient progress is made toward compliance with the Municipal Code.
5. That Councilmembers Moore and Chao be removed immediately from their respective committee assignments, subject to reassignment to these committees.
6. That the City Attorney make a limited scope referral to the District Attorney's office with respect to the FactFinding Report's evidence of any current or former councilmember's interference in the hiring and firing decisions that are the province of the City Manager.

3. *July 2023 Enterprise Leadership Assessment Report*

After the City Council received the Fact Finding Report, the City's internal auditor, Moss Adams LLP, prepared pursuant to its Council-approved workplan a separate Enterprise Leadership Assessment ("Assessment") addressing governance issues (Attachment D). The governance issues addressed in the assessment were initially identified in a December 2020 Enterprise Risk Assessment prepared by Moss Adams (Attachment E), which expressed concerns regarding the length of City Council meetings; "potential role confusion related to [Councilmembers] directing operational matters"; and Council's focus on operational matters at the expense of long-term strategic goals.

The Assessment was developed to evaluate the effectiveness of the City's management and governance collaboration framework and provide recommendations to strengthen and streamline procedures to align with best practices for municipal leadership. As part of this work, the auditor evaluated governance topics including:

- Council’s capacity to set the City’s strategic direction and monitor financial sustainability.
- Council meeting procedures and resources.
- The working relationship and collaboration between Council members, City management, and staff.
- Training and onboarding.
- Committee and commission roles, core function, and support.

The Assessment was conducted between March 2023 and June 2023 and was informed by interviews with the City’s leadership and staff, and a review of data and documents provided by the organization.

Many of the Assessment’s observations and recommendations regarding the City Council’s compliance with best practices for governance echo the findings of the Grand Jury and Fact Finding Reports and are summarized in the table below.

ENTERPRISE LEADERSHIP ASSESEMENT OBSERVATIONS AND RECOMMENDATIONS		
City Council		
1.	Observation	While the City has established many policies that are aligned with best practice, there are opportunities to increase the effectiveness of current policies.
	Recommendations	<ul style="list-style-type: none"> A. Continue current efforts to review and update the City’s governance policies, including the Ethics Policy and Commission Handbook. B. Establish a process to ensure all governance policies are reviewed at least once every five years.
2.	Observation	With the adoption of the City Council Procedures Manual and other recent changes, the City has made positive progress toward increasing the effectiveness of City Council meetings. However, ongoing challenges remain to ensure that meetings are productive and timely.
	Recommendation	Continue current efforts to implement the City Council Procedures Manual and hold meeting participants accountable.
3.	Observation	There is a well-documented history of mistrust and poor communication between Council and management.
	Recommendations	<ul style="list-style-type: none"> A. Continue current efforts to implement recommendations from the 2023 Internal Review, with a focus on expanding the use of 1:1 pre-meetings with Council members B. Consider developing additional criteria to determine when requests for information will require a significant allocation of staff time. C. Continue current efforts to clarify roles and responsibilities and build productive working relationships by providing regular governance trainings and retreats.

**ENTERPRISE LEADERSHIP ASSESEMENT
OBSERVATIONS AND RECOMMENDATIONS**

4.	Observation	The City Council onboarding and orientation process has recently been updated to increase its effectiveness. This process could be further strengthened by focusing additional attention on roles, responsibilities, and practical application of guidelines.
	Recommendation	Take steps to expand and strengthen the orientation process for new Council members.
5.	Observation	The City has established many best practice elements of a comprehensive ethics program. However, there are gaps in the City's compliance enforcement.
	Recommendation	Strengthen internal processes for tracking and holding elected and appointed individuals accountable to timely completion of Form 700 Disclosures.
6.	Observation	A core function of any governing body is to set and monitor the strategic direction of the organization. While the City Council has adopted a two-year Work Program to prioritize annual initiatives, it has not yet developed a long-range strategic plan.
	Recommendations	<p>A. Consider developing a long-range strategic plan to increase the City's ability to strategically plan and advance initiatives.</p> <p>B. Continue current efforts to utilize and refine the annual Work Program prioritization practice.</p> <p>C. Consider expanding the City's reporting processes to more effectively track progress toward strategic goals over time.</p>
7.	Observation	While the City has established some strong community engagement practices, interviewees noted that Council members may have an overreliance on anecdotal evidence and/or public comment that may not be representative of the wider community perspective.
	Recommendations	<p>A. Consider setting clearer expectations for the intended scope of community engagement at the start of City initiatives.</p> <p>B. Continue current efforts to implementing a statistically significant, representative community survey.</p> <p>C. Consider providing media and crises communication training to all Council members.</p>

Overall, the Assessment reports progress toward implementing the recommendations in the Grand Jury and Fact Finding Report, including development and implementation of the Council Procedures Manual and improved practices for Council-staff communications, such as the expanded use of one-on-one meetings. However, the Assessment notes that the efficiency and effectiveness of City Council meetings remains “a high area of concern according to interviewed staff” and identifies concerns that the City’s public participation processes may not be effective or representative of wider community perspectives. The Assessment was presented to the Audit Committee on July 24, 2023.

Collectively, the Fact Finding Report and the Enterprise Leadership Assessment largely confirmed the findings of the Grand Jury Report and identify the same overarching governance issues: a pervasive lack of trust between Councilmembers and City staff; Councilmembers' failure to consistently understand their role as elected officials in a City with a Council-Manager form of government; and concerns about the effectiveness of the City Council as a policy- and decision-making body.

Progress Report

Presently before the Council is the progress report prepared at the direction of Council. (See Additional Direction No. 3, above). Pursuant to Council's direction, the City Attorney's Office has monitored Councilmembers compliance with the requirements of the Municipal Code governing Council-staff relations, primarily those requirements codified in Municipal Code section 2.17, as explained below.

1. Municipal Code Provisions Governing Council-Staff Relations

CMC section 2.28.050 defines the role of the City Manager (and her staff) vis-à-vis the City Council:

The City Council and its members shall deal with the administrative services of the City only through the City Manager, except for the purpose of inquiry, and neither the City Council nor any member thereof shall give orders to any subordinates of the City Manager. The City Manager shall take his or her instructions from the City Council only when given at a duly held meeting of the City Council, and no individual councilperson shall give any instructions to the City Manager.

(CMC § 2.28.050.)

Consistent with these responsibilities, section 2.17.020 describes the intent of Chapter 2.17 as follows:

- A. Maintaining control and direction of the City by the City Council as a whole;
- B. Insuring that City Council members have free access to the flow of any information relative to the operation of the City and insuring that such information is communicated by staff in full and with candor to the Council;
- C. Ensuring that the Council decision making process benefits from the unencumbered input and advice from the professional staff free from undue influence in staff decision making, formation of staff recommendations, scheduling of work, and executing department priorities without intervention by individual Council members;

D. Allowing city staff to execute priorities given by management and the City Council and protecting city staff from undue influence from individual Council members.

(CMC § 2.17.020; see also CMC § 2.17.010 (“[The Council/Manager form of government is intended to provide the best of unencumbered professional/technical staff input balanced with the collective oversight of elected officials. Under the Council/Manager form of government 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.”].) City staff, through the City Manager, has an obligation to keep the Council “informed regarding the general operations of the city.” (CMC § 2.17.041.)

Further, section 2.17.032 states that “[i]ndividual Council members shall not attempt to influence staff decisions, recommendations, workloads, and schedules, and department priorities without prior knowledge and approval of the City Council.” (CMC § 2.17.032; see also CMC § 2.17.033 [“If a Council member wishes to influence the actions, decisions, recommendations, workloads, work schedules and priorities of staff, that member must prevail upon the City Council to do so as a matter of council policy.”].) Staff is similarly prohibited “from accepting direction or being unduly influenced by individual Council members” and is subject to discipline if work schedules or priorities are changed as a result of such undue influence. (CMC § 2.17.042.)

2. Progress in Addressing Fact Finding Report Recommendations

Four of seven recommendation of the Fact Finding Report address compliance with the rules and principles set forth in Chapter 2.17. Progress on each of those four recommendations is outlined below.

Recommendation 1:

Councilmembers should avoid “governance by email” and should rely on their 1:1 meetings with the City Manager to avoid adverse impacts to City operations and to facilitate communication and trust between the Councilmembers and the City Manager and City staff.

City Councilmembers have made significant progress towards the implementation of this recommendation. The number of emails per week to the City Manager from Councilmembers has decreased from 50-70/week prior to the May 1st Report to 25-30/week, with Councilmembers Moore and Chao significantly decreasing their emails to the City Manager. Staff interviewees generally noted a decrease in accusatory or caustic emails from Councilmembers Chao and Moore and improvements in their working environment flowing from greater professionalism among Councilmembers.

Interviewed staff did note a modest uptick in hostile or accusatory emails sent to staff from known supporters of Councilmember Chao and Moore who closely follow Council affairs. It is possible that some of the criticism previously voiced by Councilmember Chao or Moore is now being voiced through these individuals. However, staff reported that open criticism of staff from members of the community is far more appropriate and less damaging than personal attacks on staff by sitting Councilmembers. Thus, overall, the City Council, and Councilmembers Chao and Moore in particular, appear to have taken this recommendation seriously and are working to implement it.

Recommendation 2:

Councilmembers should attempt to improve the contentious relationship that certain members have had with City staff and should communicate any concerns about staff to the City Manager, who is accountable to the City Council for her staff's performance.

City Councilmembers have made significant progress towards the implementation of this recommendation. As noted above, interviewed staff noted an improvement in the tone of emails received from Councilmembers Chao and Moore. In particular, emails from Councilmember Chao reviewed in connection with the preparation of this Report were almost uniformly polite and respectful. In addition, based on observations of recent City Council meetings, civility among Councilmembers and among Councilmembers and staff during Council meetings is improving.

That said, interviewed staff noted several instances in recent months where Councilmember Moore's conduct in particular fell below standards for civility and consequently undermined efforts to build a constructive relationship with the City Manager and her staff. (It should be noted that Councilmember Moore apologized to staff on at least one of these instances after jumping to conclusions based on incomplete information.) In addition, Councilmember Moore's refusal to participate in one-on-one meetings with the City Manager and/or City Attorney is a serious hinderance to efforts to build an effective working relationship among Council-appointed staff and all Councilmembers.

Recommendation 3:

Councilmembers 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.

Councilmembers have made significant progress toward the implementation of this recommendation. As noted below, Councilmembers have taken advantage of preparation sessions regarding major agenda items such as the budget and housing element and have generally used those sessions as an opportunity to engage constructively with professional staff. These opportunities have led to more informed discussion at the City Council meetings and have, with some exceptions, resulted in deliberations that focus on legitimate policy disagreements rather than attacks on the motivation of staff or other Councilmembers. While interviewed staff report lingering distrust and at times fundamental disagreements about the

role of Councilmembers within the Council-Manager form of government (which is sometimes reflected in Councilmembers' apparent reliance on their own research or non-expert opinion rather than staff's expertise), there has been an observable improvement in process and tone with regards to the consideration of significant agenda items such as the budget and housing element.

Recommendation 7:

The City Manager should explore ways to resolve Councilmember needs for information, given limited staff resources (e.g., 1:1 meetings).

Within the constraints of California open meeting laws, City Manager Wu has offered Councilmembers with multiple opportunities to acquire information regarding pending agenda matters through one-on-one meetings or through meetings with the City Manager's staff on major agenda items. In addition, the informational calendar adopted as part of the City Council Procedures Manual in February 2023 has provided a new avenue for Council and members of the public to obtain information about City activities that do not require Council action and are often more operational in nature.

A challenge faced by City Manager Wu is Councilmember Moore's, and to a significantly lesser extent Councilmember Chao's, unwilling to participate in one-on-one meetings. While Councilmember Moore has consistently attended agenda item-specific briefings with staff, she has refused to attend one-on-one meetings offered by the City Manager and/or City Attorney. Councilmember Chao's attendance at one-on-one meetings has been uneven, although she has not to our knowledge expressed any unwillingness to participate in the meetings. The effectiveness of the City Manager and her staff in providing professional advice to all Councilmembers will continue to be limited if some Councilmembers do not participate in one-on-one meetings.

Recommendations

Based on the findings above, there has been progress toward implementing Recommendations 1-3 and 7 in the Fact Finding Report. The volume of Councilmember email directed at the City Manager and her staff has decreased, and both Councilmembers Chao and Moore have made an apparent effort to limit "governance by email." In addition, both Councilmember Chao and Moore have participated in one-on-one briefings with staff to prepare for City Council meetings, and Councilmember Chao has participated intermittently in weekly one-on-one meetings with the City Manager and/or City Attorney, although Councilmember Moore has refused to participate in one-on-one meetings. Staff also report an improvement in tone and a decreased level of antagonism toward staff in public and private settings. For these reasons, the City Attorney's Office has not submitted a censure resolution to the Council and recommends restoring Councilmember Chao's and Moore's committee assignments. In addition, the City Attorney's Office recommends the following additional steps to continue the process of improving Council governance:

1. Completion of an Ethics Policy for Councilmembers Board/Commissioners, along with onboarding and ongoing training regarding the policy.
2. Continuing training regarding California open meeting rules.
3. Training on Rosenberg's Rules of Order, especially with respect to the difference in amended (friendly) and substitute motions.

In addition, the City Attorney's Office recommends that Councilmembers Moore and Chao continue working to improve relationships with the City's management team, and strongly encourages them to take advantage of opportunities for one-on-one meetings offered by City Manager Wu.

Additional Observations

The significant progress made towards implementing the recommendations in the May 2023 Fact Finding Report does not minimize other ongoing governance issues that limit the effectiveness of the City Council as a governing body, including the following:

- Councilmembers continue to misunderstand the distinction between operational and policy issues, to the point where some members appear to rely on their own lay research or the lay opinions of select community members rather than the professional opinions of staff to guide their decision-making process. As a result, some Council meetings continue to focus excessively on operational details at the expense of serious policy discussion.
- Councilmembers continue to view City Council meetings as a venue for representative public participation, rather than a forum for carrying out the Council's function as a decision-making, governing body.
- Relatedly, overall public engagement in the governance process is, with the exception of a handful of issues, limited. With a few noteworthy exceptions, City Council meetings are poorly attended and dominated by a small group of residents. In addition, the Moss Adams Assessment notes that "Council members may have an overreliance on anecdotal evidence and/or public comment that may not be representative of the wider community perspective." This overreliance on the opinions of a small number of highly engaged residents has a high potential to lead to biased decision making and sub-optimal decision making that does not reflect the preferences of the Cupertino electorate as a whole.¹

¹ See, e.g., K.L. Einstein, M. Palmer & D. Glick, *Who Participates in Local Government Meetings? Evidence from Meeting Minutes* (Aug. 25, 2017).

These issues remain concerning, despite progress in implementing the recommendations of the Fact Finding Report and long-overdue procedural changes made through the adoption of the Council Procedures Manual. Council may consider additional procedural measures to attempt to focus Councilmembers on their policy and decision-making responsibilities, as well as considering procedural provisions to reduce the undue influence of unrepresentative community members that Council previously declined to adopt. However, the efficacy that additional procedural rules would have in promoting efficient and effective Council meetings and decision making procedures may be limited in the absence of a good-faith effort to reach a shared understanding of the respective roles that the City Council, City staff, and the public should play in the governance process.

Council may consider other recommended actions to attempt to reach consensus on Councilmembers' role in the decision-making process and to improve community engagement. For example, to address concerns about Councilmember perceptions about their role in the governance process, Council may consider recommending or requiring members to attend additional training or mentoring or could direct the City Manager to schedule Council workshops directed at remedying the concerns identified by the Grand Jury Report, the May 2023 Fact Finding Report, and the Enterprise Leadership Assessment. With respect to community engagement, Council could direct the City Manager to address Moss Adam's recommendations by adopting a policy that "set[s] clearer expectations for the intended scope of community engagement at the start of City initiatives" and incorporates more consistent and sophisticated community engagement concepts than those that have heretofore been employed by the City. Initiatives requiring a significant commitment of staff time or other resources would be incorporated into the City Manager's recommendations for future City work programs unless the City Council acts to reprioritize items in the Fiscal Year 2023–24 work program.

Sustainability Impact

Not applicable.

Fiscal Impact

No fiscal impact.

California Environmental Quality Act

Not applicable.

Prepared by: Christopher D. Jensen, City Attorney

Approved for Submission by: Pamela Wu, City Manager

Attachments:

A – Grand Jury Report – "A House Divided: Cupertino City Council and City Staff"

B – City of Cupertino Response to Grand Jury Report

- C – Fact Finding Report
- D – Enterprise Leadership Assessment
- E – Enterprise Risk Assessment