

CITY OF LAGUNA NIGUEL

AGENDA ITEM CITY COUNCIL

SEPTEMBER 5, 2017

TO: Honorable Mayor and Council Members

FROM: Debbie Bell, Interim Assistant City Manager/Management Services Director
Terry E. Dixon, City Attorney

SUBJECT: Investigation into Alleged Bullying and Harassment by Council Member Jerry Slusiewicz

SUMMARY: At the July 24, 2017, Special City Council meeting, the City Council authorized an investigation into then-Mayor Jerry Slusiewicz's conduct toward City staff. The conservatively estimated cost for the investigation is \$24,000 to \$39,000. In accordance with the City's Purchasing Policy, City Council approval is necessary before entering into an agreement of this amount. Staff recommends that the City Council reaffirm their action taken on July 24, 2017 to conduct an investigation, retain Ellis Buehler Makus LLP to conduct the investigation, approve the engagement letter, authorize the Interim City Manager to sign the engagement letter on behalf of the City Council, and appropriate necessary funds for this purpose.

BACKGROUND/ANALYSIS

At the July 24, 2017 Special City Council meeting, the City Council reviewed a number of complaints about the conduct of Council Member Jerry Slusiewicz, including allegations of bullying, harassment and unlawful conduct toward City staff. Several of the complaints about conduct toward former City Manager Rod Foster and other City staff are found in the attached email dated June 8, 2017 (Attachment A).

Employers are required by Title VII of the Civil Rights Act to establish, publicize, and enforce anti-harassment policies and complaint procedures. This requirement includes the obligation for a prompt, thorough, and impartial investigation into alleged harassment and to protect those who file complaints against retaliatory actions. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should begin as soon as practicable. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses. For this particular complaint, it is estimated that 28 witnesses will need to be interviewed.

At the July 24, 2017, Special City Council meeting, then-Mayor Jerry Slusiewicz denied all of the complaints against him. The City Council directed and authorized an investigation into the following issues (Attachment B):

1. The allegations in the June 8, 2017, email from former City Manager Rod Foster.
2. The apparent violation of Laguna Niguel Municipal Code Section 2-4-7, regarding the prohibition on Council Members giving direct orders to City staff.
3. Any collaboration or interference Council Member Slusiewicz may have had regarding the draft Agreed-Upon Procedures report.
4. Whether anyone that was part of the audit process shared confidential information that could have affected the future employment of former City Manager Rod Foster.

Following the meeting, Interim Assistant City Manager/Management Services Director Bell contacted Attorneys Kelly Trainer and Katy Suttorp at Burke, Williams & Sorensen LLP. Ms. Trainer and Ms. Suttorp are well-known anti-harassment trainers and practicing public employment attorneys. Ms. Suttorp was the trainer for the California Joint Powers Insurance Authority, the City's insurance pool, for Harassment Prevention Training presented on March 15, 2017 to the City's elected and appointed officials.

The Equal Employment Opportunity Commission requires employers to ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

The nature and scope of the workplace harassment and bullying investigation were discussed and a list of potential investigators developed. Based on the recommendation of Ms. Suttorp, Ellis Buehler Makus LLP was selected and Attorney Leslie Ellis submitted a letter of engagement which was received on August 10, 2017 (Attachment C). After reviewing the proposal, City Attorney Dixon and Interim Assistant City Manager/Management Services Director Bell requested additional information about the potential cost estimate, which was received on August 17, 2017 (Attachment D).

The cost of the investigation is impacted by a variety of factors, including the number of witnesses, the time required to interview each witness, the amount of documents involved and the complexity of the issues. Ms. Ellis is proposing to conduct the majority of the 28 interviews identified, with her partner conducting a few as well. She is offering the City a discounted hourly rate of \$295 from her usual rate of \$320 per hour, and a further discounted rate of \$195 per hour for travel time. It is estimated that the interviews will take at least 4 days. A conservative

estimate is that the investigation will cost between \$24,000 and \$39,000 to complete. Depending on the factors identified above, the final cost could be less, or more, than this range.

Staff recommends retaining Ellis Buehler Makus LLP to conduct the workplace investigation as described above.

FISCAL IMPACT

Requires an appropriation of \$39,000 from the unappropriated General Fund reserve. There are sufficient funds for this purpose.

RECOMMENDATION

That the City Council:

- a. Reaffirm its action taken at the July 24, 2017, Special City Council meeting to investigate:
 1. The allegations in the June 8, 2017, email from former City Manager Rod Foster.
 2. The apparent violation of Laguna Niguel Municipal Code Section 2-4-7, regarding the prohibition on Council Members giving direct orders to City staff.
 3. Any collaboration or interference Council Member Slusiewicz may have had regarding the draft Agreed-Upon Procedures report.
 4. Whether anyone that was part of the audit process shared confidential information that could have affected the future employment of former City Manager Rod Foster.
 - b. Retain Ellis Buehler Makus LLP to conduct the investigation into allegations of bullying, harassment and other inappropriate conduct by Council Member Jerry Slusiewicz toward City staff and other Council Members.
 - c. Approve the engagement letter from Ellis Buehler Makus LLP.
 - d. Authorize the Interim City Manager to sign the engagement letter on behalf of the City Council.
 - e. Appropriate \$39,000 from the General Fund reserve for this purpose.
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PREPARED

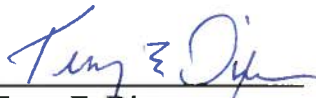
BY:



Debbie Bell
Interim Assistant City Manager/Management Services Director

REVIEWED


BY:



Terry E. Dixon
City Attorney

REVIEWED

BY:



Stephen Eklundson
Interim City Manager

Attachments:

- A. Email from Rod Foster dated June 8, 2017
- B. Minutes of the July 24, 2017, Special City Council meeting, p. 12
- C. Engagement letter from Ellis Buehler Makus LLP
- D. Follow up email from Ellis Buehler Makus LLP, dated August 17, 2017

ATTACHMENT A

Email from Rod Foster dated June 8, 2017

Terry Dixon

From: Rod Foster
Sent: Thursday, June 08, 2017 9:48 AM
To: Jerry Slusiewicz (jerry@pfpinvest.com) (jerry@pfpinvest.com); Fred Minagar; ldavies499@sbcglobal.net; elainegennawey@gmail.com; 'John M Jennings'
Cc: Terry Dixon
Subject: Memo from Nasser Regarding Mayor Slusiewicz
Attachments: Memo from Nasser.PDF

City Council,

I want you to know that the attached memo now constitutes the absolute lowest point of my public career. To think that anyone would direct that both Dan and my names be removed from a dedication plaque is the absolute most vile and despicable action I have ever witnessed by an elected official. I make these affirmative statements as both Nasser and Ziad are mentioned as witnessing the statements made in the memo by the Mayor.

Second, for the Mayor to state to my Public Works Director that the Mayor plans on removing me at last Tuesday's Council Meeting is nothing short of now trying to harm me personally and financially, as well as undermining and neutering my authority as City Manager. I make this statement affirmatively since at Orange County City Managers Association (OCCMA) luncheon held yesterday David Doyle, City Manager of Aliso Viejo, told me that he had been told (David would not mention from who), that Mayor Slusiewicz ordered a financial audit of me and finance and then found nothing was wrong. Why would David Doyle know this? For the record, this is now the second city that has questioned or provided information that someone is potentially disparaging my character publicly. The first was Dana Point during the recruitment process and now I receive the same information openly from a representative of Aliso Viejo.

Even more disturbing is the fact that Newport Beach City Manager David Kiff, who was hosting the OCCMA lunch, was in the process of introducing retirees when I entered the banquet room. David Kiff introduced Tim Casey and then said that Tim will be returning to Laguna Niguel. (I do not think that David meant that he would be returning to his house in LN but you can ask him that if you like). Why would David Kiff make such a public statement? After David Kiff asked if there are any other retirees in the room, I announced my future retirement on July 24.

If the allegation of the Mayor directing Nasser and Ziad is true, then it would be clear that the Mayor violated Section 2-4-7 of the Laguna Niguel Municipal Code which reads in substantive part, "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 members thereof shall give orders to any subordinates of the city manager."

I believe that the Council needs to know the truth now about my leaving, Dan's leaving and potentially other executives as well:

- I am leaving because of the way Mayor Slusiewicz treats me and others. I have witnessed the tears from the way he treats people first hand.
- Dan is leaving because he does not want to work for Laguna Niguel any longer. I asked him if I was able to find a way for the Council potentially to offer my contract to him would he stay, he said no and said that he does not want to work with the Mayor. (As information, my contract pays just over \$241,000; Dan accepted about \$217,000 and a drive from San Juan to Diamond Bar).
- Steve Erlandson is very upset about how he has been treated publicly by the Mayor, especially at last Tuesday's Council Meeting. Steve told me today that he is considering other employment.
- Debbie Bell stated that she is concerned about her position with the City since the Mayor has threatened her job.

➤ Eileen Gomez told me that she is scared about her future at the City and is looking for other employment. I read the above individual statements to each City Executive listed and each validated the statement and provided permission to be included in this email to the City Council.

Even with all this, I have been told that the Mayor has been telling prominent leaders and developers in our community that I am a "figurehead only and that while I am in the office; I am not there."

My staff and I seek and request the full protection of the Council so that we can work without fear as detailed herein.
Rod

Rod Foster
City Manager
City of Laguna Niguel

Confidential Memorandum

To: Rod Foster, City Manager
From: Nasser Abbaszadeh, PW Director N.A.
Date: June 7, 2017
Subject: Comments By Mayor Slusiewicz on June 6, 2017

On Tuesday, June 6, 2017, Mayor Slusiewicz spoke to Ziad Mazboudi and me and directed that we change the wording on the plaque for the Tier 2 Bridge. He stated that since both the City Manager and the Assistant CM will not be with the City at the August 8th project dedication, their names and titles should be removed from the plaque.

When we stated that the plaque might already have been made; he stated that it should be re-done and the project will cover the cost.

He further stated that he will ask for the City Council's help to remove the City Manager from the office as soon as possible before his retirement date of July 24, 2017. He mentioned that he had someone on his mind for the Interim CM, but no names were mentioned.

ATTACHMENT B

Minutes of the July 24, 2017, Special City Council meeting, p. 12

Council Member Jennings recommended that the City Council approves staff recommendation and direct the City Attorney to retain outside legal counsel and investigators to assist in the required review and report back their findings to the City Council. He stated the Municipal Code needs to be revised to the extent that it does not allow the City Council to take action against the sitting Mayor.

Discussion ensued regarding the recommendation to direct the City Attorney to retain outside legal counsel and investigators to assist in the required review of procedures for removing Jerry Slusiewicz as Mayor of the City of Laguna Niguel.

A MOTION was made by Council Member Gennawey, seconded by Council Member Davies as follows:

1. The City Council authorized and directed the City Attorney to review and advise the City Council regarding,
 - a. The allegations in the June 8, 2017, email from City Manager Rod Foster regarding the actions of Mayor Jerry Slusiewicz.
 - b. The apparent violation of Laguna Niguel Municipal Code Section 2-4-7 (regarding the prohibition on Council members giving direct orders to City staff).
 - c. The contracting with and payment for Tree Services by West Coast Arborists.
 - d. The preparation of the draft Agreed-Upon Procedures Report.
 - e. The email dated June 5, 2017, from the Laguna Niguel Community Theatre.
2. The City Council authorized the City Attorney to review and advise on the procedures for removing a person as mayor of the City of Laguna Niguel.
3. The City Council authorized and directed the City Attorney to report on the status of the matters set forth in this report at a special meeting to be held on or before August 7, 2017.
4. The City Council authorized and directed the City Attorney to retain outside legal counsel and investigators to assist in the required review and advise.

Council Member Davies requested that the items she provided earlier be included as follows: That City Attorney Dixon investigate any collaboration Mayor Slusiewicz may have had with any outside person(s) as well as any City employees regarding the draft audit; and to have City Attorney Dixon investigate whether or not anyone that was part of this audit process shared confidential information that could have affected the potential employment of former City Manager Rod Foster.

Motion carried 4-1-0, with Mayor Slusiewicz voting no.

Mayor Slusiewicz stated he was elected twice, served 17 years between several different City committees and commissions, and 10 years with the County for a total of 27 years of public service. He stated a legal review has been requested over a name on

ATTACHMENT C

Engagement letter from Ellis Buehler Makus LLP

Debbie Bell

From: Suttorp, Katy <KSuttorp@bwslaw.com>
Sent: Thursday, August 10, 2017 10:28 AM
To: Diane Vasquez
Cc: McEwen, Stephen A.; Debbie Bell; Gomez, Melanie Y.
Subject: FW: Laguna Niguel Engagement Letter
Attachments: LN - Engagement Ltr 8.8.17.pdf

Good morning, Terry,

Please find attached a draft retainer letter for Leslie Ellis of the investigation firm Ellis Buehler Makus. Leslie would be available to start the investigation into employee complaints regarding Mayor Slusiewicz before the end of this month. Her partner, Eli, can also be available as needed to assist with interviews. Our firm has worked with both Leslie and Eli in the past regarding some extremely sensitive issues and we have been extremely pleased with their work.

I am out of the office today, but will be in again tomorrow if you have any questions regarding the draft retainer letter or would like to discuss any of these matters further.

Katy

Katy A. Suttorp | Partner

1851 East First Street, Suite 1550 | Santa Ana, CA 92705

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From: Leslie Ellis [<mailto:lesliedellis@gmail.com>] **On Behalf Of** Leslie Ellis
Sent: Tuesday, August 08, 2017 1:29 PM
To: Suttorp, Katy
Subject: Laguna Niguel Engagement Letter

Hi Katy,

Here is the engagement letter for Laguna Niguel. Please let me know if you have any questions or want to discuss. Thank you.

Best,
Leslie

Leslie D. Ellis | Ellis Buehler Makus LLP | 980 9th Street, 16th Floor, Sacramento, CA 95814 | Main 916.426.9180 | Direct 916.426.9181 | lellis@ebmlawgroup.com | www.ebmlawgroup.com

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Via email

August 8, 2017

Terry E. Dixon
City Attorney
City of Laguna Niguel
30111 Crown Valley Parkway
Laguna Niguel, CA 92677

Re: Engagement for Legal Services

Dear Mr. Dixon:

We are pleased that the City of Laguna Niguel (the City) has engaged Ellis Buehler Makus LLP (EBM) to conduct a workplace investigation. This letter will confirm the terms of this engagement. This engagement will become effective upon our receipt of a signed copy of this letter.

Scope of Engagement

The City has retained EBM to conduct an investigation into allegations of misconduct. EBM will conduct an impartial investigation into the allegations.

The City understands that there are no guarantees as to the outcome of the investigation. As an independent contractor, EBM has the right to determine means, manner, and findings related to the investigation. The City agrees to allow EBM full discretion to undertake the investigation and otherwise make findings without influencing or interfering with the outcome. The City understands and acknowledges that EBM will exercise independent judgment to make whatever findings it deems are warranted based on the evidence developed in the investigation, and that this engagement is not dependent on EBM making or failing to make particular credibility determination, finding of fact, or conclusion. After conducting relevant interviews and reviewing relevant documents and information, EBM will prepare a written report summarizing the investigation and findings.

It is understood that in this engagement, EBM and the City have an attorney-client relationship. The parties intend that the investigation and investigation report will be

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covered by the attorney-client privilege and attorney work product protections to the extent legally permissible and subject to the City's right to waive the attorney-client privilege in the future.

EBM will render legal advice to the City on issues limited to the investigation process. The City will seek legal advice, as appropriate, from other counsel regarding what action to take as a result of the investigation. The scope of the investigation does not include rendering any legal conclusions, making recommendations, or in the event of litigation or administrative claim, representation of the City or anyone else involved in the litigation. The investigation will be conducted in furtherance of the City seeking legal advice to resolve the underlying issues.

The City's Duties and Communication

The City acknowledges that its cooperation and support is required for EBM to provide services effectively. Therefore, the City will keep EBM fully informed as to the facts and developments relevant to EBM's representation of the City. The City will provide EBM with complete and accurate information, including written materials when requested and, in the context of an impartial workplace investigation, full access to witnesses and documents.

The City has authorized EBM to communicate about its services with its counsel, Katy Suttorp, a Partner at Burke, Williams. During the course of the engagement, if requested by the City or its outside counsel, EBM will provide status updates of the progress of the engagement.

Fees, Expenses and Billing Practices

The City understands that Leslie Ellis is the attorney responsible for this matter and his hourly billing rate for this engagement is \$295, with travel time billed at \$195 an hour. Time is billed in increments of one-tenth of an hour. From time to time, where appropriate to use other individuals on a matter, EBM hourly billing rates is as follows: \$295 for Partners, \$270 for Associates and \$150 for Legal Specialist support. If called upon in the future to testify or respond to discovery about the engagement, Ms. Ellis agrees to make herself reasonably available to testify and perform work related to such testimony or discovery at then applicable current rates for such work. In the event of a rate increase, EBM will notify the City in writing before any increase becomes effective.

EBM expenses and direct costs incurred in rendering services under this engagement will be reimbursed by the City. Such costs will include, but are not limited to, attorneys' fees incurred while preparing for and testifying about the investigation, mileage at then current IRS mileage reimbursement rate, messenger delivery services, overnight mail delivery services, and other incidental costs.

EBM will bill the City no more than once a month and the City agrees to pay the invoice

within thirty days of receipt.

Conflicts of Interest

EBM and EBM's partners and employees shall not have a conflict of interest, or acquire any conflict of interest, direct or indirect, in any business, property or source of income, which could be financially affected by or otherwise conflict in any manner or degree with the performance of services required under this engagement. In the event that any such of conflict arises, EBM shall promptly notify the City.

Indemnification

EBM agrees to defend, indemnify and hold the City harmless for and against all other actions, claims, and complaints, whether formal or informal, actual or threatened, arising from or related to the investigation brought or asserted against the City, other than any claim brought by an employee or witness arising from the facts and issues under investigation.

Insurance

EBM shall maintain in force at all times during the term of this engagement and any extensions or modifications thereto, appropriate professional errors and omissions insurance applicable to the work performed under this engagement.

Ownership of Documents and Retention

All documents, data, studies, drawings, maps, models, photographs and reports prepared by EBM under this engagement are the City's property. EBM shall retain copies of said documents in the normal course of business and will deliver all original materials to the City upon the City's written notice. EBM's document retention policy provides that all documents and information may be disposed of after five years from the date a matter is closed. EBM shall notify the City prior to destroying any documents or information gathered or developed during the course of this engagement.

Future Matters

Unless otherwise agreed upon in writing, all other matters referred to EBM for representation shall be governed by the terms of this engagement letter, except that EBM's obligation to represent the City shall consist of an obligation to furnish appropriate representation in such future matters with reasonable diligence as applicable to the matter in question.

Arbitration

While we certainly do not anticipate a conflict between us, in the event of any material dispute regarding services provided or fees charged by EBM which cannot be settled

amicably, EBM and the City both agree that such dispute shall be submitted, as soon as practicable, to arbitration in Los Angeles County in accordance with the rules and procedures of JAMS Inc., a private mediation and arbitration facilitator. Any dispute shall be strictly confidential between EBM and the City and, except for our own representatives, will not be disclosed to any other person or entity, subject to any limitations imposed upon such confidentiality under the Ralph M. Brown Act or the California Public Records Act.

Termination of Agreement

Either party may terminate this Agreement at any time upon notice to the other. The attorney-client relationship between the City and EBM will end when EBM has concluded all work associated with this engagement. Upon conclusion of the engagement or termination of this Agreement, all unpaid fees are immediately due and payable.

Entire Agreement

This Agreement represents the entire agreement between the City and EBM and supersedes any prior oral, written, or implied agreements. The City's signature below signifies acceptance of the terms of this Agreement. Please sign it and return it to EBM.

We look forward to working with you.

Sincerely,



Leslie D. Ellis
Partner

I agree to the foregoing terms and conditions of engagement.

Date: _____

By: _____

Terry E. Dixon
City Attorney

ATTACHMENT D

Follow up email from Ellis Buehler Makus LLP, dated August 17, 2017

Debbie Bell

From: Suttorp, Katy <KSuttorp@bwsllaw.com>
Sent: Thursday, August 17, 2017 12:39 PM
To: Diane Vasquez; Debbie Bell
Cc: McEwen, Stephen A.; Gomez, Melanie Y.
Subject: Investigation Budget Estimate info for staff report

Hi Terry and Debbie,

Below is the information you requested from proposed investigator, Leslie Ellis, regarding her budget estimate for the pending investigation. I spoke with Leslie, and she is comfortable having you include any or all of this information in the staff report for Council.

Please let me know if you have any questions or would like to discuss these issues further.

Katy

Katy A. Suttorp | Partner

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From: Leslie Ellis [<mailto:lesliedellis@gmail.com>] **On Behalf Of** Leslie Ellis

Sent: Thursday, August 17, 2017 12:34 PM

To: Suttorp, Katy

Subject: COLN - Investigation Budget Estimate

Hello Katy,

This email provides a budget estimate for the City of Laguna Niguel (City) investigation we discussed. It is generally not easy to provide a precise budget at the outset of a workplace investigation. A lot of different factors can impact the cost, including the number of witnesses, the time required to interview each witness, the amount of documents involved and the complexity of issues.

I understand that the investigation is likely to include up to twenty-eight witnesses. I understand that many of the employees may have similar concerns about the respondent. Ideally, we would schedule all the witnesses over a three-day period and then a separate day for the respondent's interview and any final witnesses.

Based on my experience with investigations involving a similar number of witnesses, and without knowing more about the allegations, a conservative estimate is that the investigation will cost between \$24,000 and \$39,000. Depending on the factors identified above, the final cost could be less or, though not likely, more than this range. My normal practice is to provide regular status updates to the client and, if desired, outside counsel. During these updates, I provide information about the sequence and scheduling of witnesses, any factors that might affect the budget, and whether new issues arose that could alter the scope of the investigation. For instance, if the complainants' interviews are much longer than anticipated, this could signal a larger investigation than average given this amount of witnesses.

As you know, my hourly rate is \$320, but we are offering the City a discounted hourly rate of \$295, and a further discounted hourly rate for travel time at \$195. We have also agreed to not bill for travel costs. This is based on an estimated two to four trips to the area.

I hope this information is helpful. Please do not hesitate to contact me with any questions.

Best,
Leslie

Leslie D. Ellis | Ellis Buehler Makus LLP | 980 9th Street, 16th Floor, Sacramento, CA 95814 | Main 916.426.9180 | Direct 916.426.9181 | lellis@ebmlawgroup.com | www.ebmlawgroup.com

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