



# Council Agenda Report

To: Mayor Grisanti and the Honorable Members of the City Council

Prepared by: John Cotti, Interim City Attorney

Date prepared: November 12, 2021 Meeting date: November 30, 2021

Subject: Wagner Affidavit Investigation - Consider the Release of Information Protected by the Attorney-Client Privilege and Work Product Doctrine

---

RECOMMENDED ACTION: Discuss whether to waive any attorney client or work product protection afforded the final investigation report and authorize its release.

FISCAL IMPACT: There is no fiscal impact associated with the recommended action.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal Year 2021-2022.

DISCUSSION: At the Malibu City Council meeting on December 14, 2020, the City was made aware of an affidavit from outgoing councilmember Jefferson Wagner that contained allegations of wrongdoing and corruption in city government. The City Council sought to investigate the allegations and, after a request for proposals and interviews of prospective investigators by Councilmember Farrer and Mayor Pro Tem Silverstein, on April 26, 2021, the Council retained attorneys Evan Jenness and George Newhouse to conduct an investigation of the allegations contained in the Wagner Affidavit.

Counsel for the City has now finished their investigation and prepared their report. A copy of the transmittal letter and investigative report were provided to the Council on October 28, 2021. In addition to the transmittal letter and the investigation report, there is a separate volume containing supporting memoranda, interview testimony collected by the attorneys, and other documents used to support information related to the investigation. Each of these documents are labeled "Privileged" and "[Attorney] Work Product." Much of the information set forth in the memoranda are "sensitive" and individuals might consider the information provided to be personal in nature, if not "confidential". And to the extent that information in the supporting information was material to the allegations in the Wagner Affidavit, it is included in the final investigative report.

As our office has advised that the Wagner Investigation Report is protected by the attorney-client privilege and work product doctrine. Under State law, a “client ... has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.” The purpose of the attorney client privilege is to “safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters”. Similarly, under the work product doctrine, a writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is entitled to absolute protection, meaning that it is not discoverable under any circumstances.

Ms. Jenness and Mr. Newhouse were retained as outside special counsel in connection with the investigation and charged with addressing the legal issues flowing from the allegations in the Wagner Affidavit, including interviewing witnesses, analyzing potentially applicable laws, assessing the accuracy or apparent inaccuracy of allegations in the Affidavit, preparing a written report of their findings and conclusions, and advising the City Council on what subsequent actions, if any, should be taken based on the attorneys’ findings and conclusions. The dominant purpose of their work related to the provision of legal advice to the City Council.

The attorney-client privilege can be waived at the client’s election. Because the holder of the privilege is the City itself, authorization by the City Council is required to waive the attorney-client privilege. If it chooses to do so, the privilege is irrevocably waived. Notably, a single Councilmember or employee cannot unilaterally waive the privilege. Therefore, unless the City Council agrees to waive this privilege by publicly releasing the Investigative Report, it cannot be released to the public and probably will remain protected against public disclosure or release.

At its meeting on November 8, 2021, the Council asked that this matter be placed on the agenda for a discussion of whether to waive any attorney client or work product protection afforded the final investigation report and authorize its release. In order to waive the attorney-client privilege, a Council member must make a motion identifying the portion of the investigative report to be made public and the majority of the Council must vote to make that identified portion, if not all, of the report public

The City Council has the following available options:

1. The City may direct Counsel to undertake further investigation or analysis and issue a “revised” report before the Council decides to accept the report as written.
2. The Council may decline to release the cover letter, investigative report and related work product materials and issue a statement that it is satisfied that

there is no need for further investigation or action and that the matter is closed.

3. The Council may partially waive the attorney client privilege and release the cover letter and investigative report while maintaining as confidential attorney work product including the witness interviews and related documents. The Council could also direct that witness names and other identifying information be redacted from the report. Redacting names and other personal identifying information from the investigate report and declining to release the work product materials ensures that that witness information will be maintained in confidence so that future witnesses (in other matters) will not be chilled from coming forward.
4. The Council can waive the attorney client privilege and work product doctrine and release the entirety of the cover letter, investigative report and related work product materials.

However, if the Council elects this option, allowing the public disclosure of both the report and supporting materials, it is recommended that Council redact from the interview reports, information that the persons supplying the information might consider personal identifying information that a witness might consider “confidential” so as to keep that information out of the public domain.