

conduct an independent investigation. The articulated focus of the investigation was campaign contributions made to Mr. Sidhu and other members of the City Council, whether campaign donors had been awarded City projects or contracts, whether City staff was involved in any potential misconduct related the issues identified in the FBI investigation, and whether any serial communications/meetings in violation of the Brown Act occurred in the context of the facts alleged in the federal investigation. Consistent with other investigations involving City officials/employees, the contract between the City and JL Group provided that JL Group's work product and report would be confidential in order to protect applicable privileges and the constitutional privacy rights of any affected employees. Specifically, the contract states that "All documents, including drafts, notes, ideas and communications that result from the Services provided under this Agreement are protected by the attorney-client privilege and shall be kept confidential by [JL Group] and only disclosed to ANAHEIM and/or Clay M. Smith, the neutral assigned to the Project, unless otherwise authorized in writing by ANAHEIM."

Several months later, at the November 15, 2022 City Council meeting, former Council Member Jose Moreno made a motion to publicly release JL Group's report upon its receipt. Since the City had no knowledge of what JL Group's investigation was uncovering, the Council had no basis to contemplate or expect that the release could invade the privacy rights of employees who might be the subjects of that report. Nor did the Council expressly consider or waive the attorney-client privilege or other privileges.¹

After JL Group and Judge Smith became aware of the Council's November 15 action to publicly release the JL report, Judge Smith cautioned the City about the privacy interests that could be implicated by the release and recommended that the City take appropriate remedial action. More specifically, the majority (3 of 5) of the progress reports submitted to the City by Judge Smith (attached) raised concerns about the public release of the report given employee privacy rights and the privileged information to which JL Group had been given access, and suggested that the City consider removing privileged and confidential information from the report before its distribution.

3. *Legal Analysis*

a. *Attorney-Client Privilege*

The City has cooperated with JL Group in its investigation and provided investigators with access to confidential attorney-client and other privileged information concerning, among other things, the Angel Stadium real estate transaction and its aftermath. It was able to provide that access without waiving privilege because JL Group was commissioned to prepare a confidential report protected by the attorney-client privilege. *City of Petaluma v. Superior Court* (2016) 248 Cal. App. 4th 1023 (investigation conducted by attorney is privileged). The Council's only waiver of the attorney-client privilege (on February 28, 2023) was very limited: to allow JL Group to share information with the District Attorney's office related to potential criminal misconduct.

¹ Subsequently (at the February 28, 2023 Council meeting), the Council did waive the attorney-client privilege, but only for the limited purpose of allowing JL Group to talk to the District Attorney in relation to any potential criminal conduct it had uncovered.

Waiver is defined as “the intentional relinquishment of a known right after knowledge of the facts.” *Roesch v. De Mota* (1944) 24 Cal.2d 563, 572. Clear and convincing evidence of a specific intent to waive a privilege is required for an effective waiver; silence/inaction may not be used to impute intent. *Id*; *Craig v. White* (1921) 187 Cal. 489, 498 (there can be no waiver where the one against whom waiver is asserted has acted without full knowledge of the facts); *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108 (waiver must be proven by clear and convincing evidence). Here, while the prior City Council voted to make the JL Group report public, it did not discuss or consider a waiver of the attorney-client privilege with respect to either the JL Group report (which the contract provides is privileged) or any underlying privileged or confidential information that might be in that report. Nor could the Council know what it was waiving (or even that there might be a waiver) without having some information as to what would be in the JL Group report. Further, given that the Council was unaware of the information gathered by JL Group or what might be part of the final report, it did not discuss or consider any legal consequences of releasing a report that might violate individual privacy rights.

b. Employee Privacy Rights

California law affords employees a constitutional right to privacy in their personnel records, and broadly defines a personnel record as any record/document “relating to the employee’s performance or to any grievance concerning the employee.” California Labor Code 1198.5(a). The courts have repeatedly held that investigative reports concerning potential misconduct of employees are personnel records protected by the right to privacy. *See e.g., Associated Chino Teachers vs. Chino Valley Unified School Dist.*, (2018) 30 CalApp5th 530, 539-41 (disposition letters detailing results of investigation into employee misconduct are personnel records protected by right to privacy). It is therefore advisable for the City to find a pathway to provide the public with information concerning the JL Group investigation in a manner that does not violate its employees’ privacy rights or waive privileges the City did not expressly intend to waive.²

It is accordingly recommended that i) the City Council appoint Scott Tiedemann, Managing Partner of the firm Liebert Cassidy Whitmore, as Special Counsel to advise the City with respect to legal issues surrounding the JL Group investigation and report; ii) JL Group’s report be reviewed by Special Counsel prior to any public release to ensure that the release does not violate privacy rights, run afoul of constitutional protections, or disclose information protected by the attorney-client privilege, and iii) Special Counsel be authorized to work with JL Group/JL Group report to prepare/present a report that can be publicly released without violating rights or privileges. It is anticipated that Special Counsel will consult and share information with the Human Resources Director and the Chief Assistant City Attorney as necessary during this process. However, outside of this group/process, the JL Group report will not be disclosed to the City Council or anyone else at the City until a redacted report is ready for public release. City staff has conferred with JL Group and Judge Smith, who support this approach.

² As noted previously, for a waiver to be effective, it must be informed and intentional.

It should be noted that if there are misconduct findings against third parties or high-ranking public officials, that information is unlikely to be protected by the right to privacy and may be subject to immediate public release.³ In addition, in coordination with Special Counsel and the Chief Assistant City Attorney, the City's Human Resources Director (or other applicable authority should the matter fall outside the Human Resources Director's authority) will determine if disciplinary action is warranted, and all applicable processes provided by law, including those defined in the City's Personnel Rules or applicable Memoranda of Understanding will be followed. Furthermore, as detailed above, JL Group has met with and been authorized to release information about potential criminal conduct uncovered in the investigation to the Orange County District Attorney's Office, so the possibility of criminal proceedings exists as well.

CONCLUSION:

For the reasons set forth above, the City Attorney's Office and the Human Resources Department are recommending that the Council authorize the following actions:

1. Modify the decision of the previous City Council to immediately release the JL Group report in the manner set forth herein to be consistent with the terms of the parties' contract and to minimize the City's exposure to litigation and chances of violating rights and privileges.
2. Appoint Scott Tiedemann of the firm of Liebert Cassidy Whitmore as Special Counsel to advise the City concerning JL Group's investigation and report, and authorize him to work with JL Group/JL Group report to formulate a report that can be publicly released.

IMPACT ON BUDGET:

Approval of this item is not anticipated to have any budgetary impact. However, if the preparation of a redacted report requires JL Group to expend additional time or resources, a modest amendment in the scope or amount of the JL Group contract may be requested in the future.

Respectfully submitted,

Kristin Pelletier
Chief Assistant City Attorney,
Civil Division

Respectfully submitted,

Linda Andal
Human Resources Director

Attachments:

1. Interim Progress Reports Nos. 2 – 4

³ While staff and legal counsel believe that this information is unlikely to be protected, the law requires a balancing of interests, which can only be done once the JL Group report is analyzed for privacy and other privilege issues.