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DATE: July 11, 2013

TO: Oakland City Councilmembers

FROM: Council President Kernighan

REPORT AND RECOMMENDATIONS REGARDING CITY COUNCIL RESPONSES TO THE 2012-2013 ALAMEDA COUNTY GRAND JURY REPORT ENTITLED "MISGOVERNING THE CITY OF OAKLAND" AND THE MARCH 21, 2012, CITY AUDITOR'S PERFORMANCE AUDIT ON NON-INTERFERENCE IN ADMINISTRATIVE AFFAIRS.

Dear Colleagues:

As you know, a Grand Jury report was issued on June 24, 2013, and a City Auditor's Performance Audit was issued on March 21, 2013, both addressing to the issue of Oakland City Council adherence to City Charter mandates and other laws and ethical standards. Both reports made findings and recommendations for action on the part of the Oakland City Council. Both reports require an official written response by the Oakland City Council to those findings and recommendations. In the case of the Grand Jury report, the response is mandated by Penal Code 933.05. Thus, I have scheduled these matters for a public discussion by our body so that we may adopt official responses to be submitted to these reports. To facilitate the process, I have prepared suggested responses to each of the recommendations for your consideration and possible adoption.

The fact that the Oakland City Council has been the subject of an audit and a Grand Jury report for alleged ethical violations is a serious matter. Findings of legal or ethical violations on the part of any of our members, whether we agree with them or not, erode the public's trust in this City Council. Ultimately, the public will judge this body on how we respond to the allegations and findings contained in the Grand Jury report and the audit.

The Report and Audit each make two types of findings: findings of particular instances of misconduct by individual councilmembers and findings of a more general nature, i.e., that there is a long-standing "culture of interference" by Councilmembers in administrative affairs which has been allowed to persist. I address those two types of findings separately below.

Audit Findings pertaining to Conduct by Specific Councilmembers

Demolition Contract at the Army Base:

In the City Auditor's Performance Audit on Non-Interference, there are findings against two Councilmembers alleging interference in a demolition contract at the Army Base. I am not recommending Council action with respect to these findings because neither the accused Councilmembers nor the rest of the City Council can see the evidence upon which the findings are based. The bulk of the evidence upon which the City Auditor substantiates these findings consists of interviews with witnesses (mainly City employees) who are protected by State Whistleblower laws. Neither the identity of the witnesses or the content of their testimony can ever be made public. Given that the accused Councilmembers cannot see the evidence against them and do not have an opportunity to rebut it, I do not think it is fair or appropriate for the City Council to take action regarding these specific findings.

Teen Center:

The City Auditor and the Grand Jury both made findings of misconduct against the Councilmember for District 6 for her actions pertaining to the building and staffing of the Rainbow Teen Center (also called DACA). Though the evidence of on this matter is also not published in the Audit or the Grand Jury report, there is substantial documentary evidence in the public record which does support the findings of misconduct. Since there is public evidence to support the findings of misconduct on the part of the District 6 Councilmember regarding the teen center, I am recommending in a separate agenda item that the City Council pass a Motion to Censure Councilmember Brooks.

Promoting an Ethical Climate to Assure the Effective conduct of City Government: Proactive steps the Council Can take to assure future compliance by Councilmembers with the City Charter, laws, and ethics standards.

Both the Audit and the Grand Jury Report find that there has been a long-standing culture of City Councilmember interference in the administrative affairs of City government. According to the City Auditor's Survey of Ethical Climate, many City employees also perceive a culture of interference. Though I don't have specific proof of instances of interference in past years, I have heard rumors and allegations about such interference on the part of several former Councilmembers and I personally conclude that various levels of interference have occurred and been tolerated over many years. We need to change the culture to one of adherence to the law and high ethical standards.

The City Auditor's recommendations with respect to the "culture of interference" are directed to both the City Council and the City Administrator. I agree that both branches of government have a critical role to play in preventing future Councilmember interference. Indeed, it was the vigilance of the current City Administrator which surfaced the misconduct with respect to the building and staffing of the teen center. The emails from City staff that were made public as part of the City Administrator's research and report on the history of the Rainbow teen center are emblematic of the culture of interference. Many otherwise conscientious City employees acquiesced to pressure from a Councilmember, even when the employee

was asked to take actions in violation of City rules and procedures. Numerous employees failed to report the improper conduct by the Councilmember and failed to report violations of City policy. It is understandable why employees did not do so, when it is perceived that this behavior is tolerated in the organization and the employees fear retaliation if they object or report. It is also important to note that acquiescence by City staff in actions that violate City rules and laws does not absolve Councilmembers from the responsibility to adhere to Charter mandates and prohibitions.

I am encouraged that the present City Administrator has issued Administrative Instructions to employees stating that it is their responsibility to report violations of City policy, including instances of undue pressure or interference by City Councilmembers, and if they do so, they will have the support of the Administration to protect them against retaliation. It is also important that the City Council as a whole officially communicate our position to City staff that we also want them to report to the City Administrator any instances of improper conduct by a Councilmember and that we will not tolerate retaliation against them.

Ethical and legal conduct by members of our City Council is of the utmost importance and we, as a body, should take proactive steps to make sure that we all understand what the rules are and abide by them. To that end, I recommend that we:

- require biannual ethics training for Councilmembers and their aides, including on the provisions of City Charter section 218.
- work with the City Administrator to develop guidelines for communications between Councilmembers/Council aides with City staff, particularly on how to work together on community projects. A key provision of section 218 of the City Charter is that City Councilmembers and aides not give direct orders to administration staff. While in theory this seems like a simple rule, in practice, it is sometimes difficult to determine what is appropriate communication and what is not. I propose that a small ad hoc committee of Councilmembers meet with the City Administrator to try to reach consensus on guidelines that will provide clarity to all involved. We will then schedule an item for City Council meetings in the fall where we debate and hopefully approve the guidelines.

In the suggested responses to the Grand Jury Report and Audit which follow, there are additional proactive steps proposed that the Council can take to help ensure a high standard of ethical and legal conduct on the part of Councilmembers going forward. I invite your comments and amendments to the responses I have proposed.

Respectfully submitted,



Patricia Kernighan, City Council President

Exhibit 1.

Requirements for Responding to a Grand Jury Report

Pursuant to the letter to the City Council from Foreperson of the Grand Jury, the City Council must file a written response to the findings and recommendations of the Grand Jury by September 24, 2013, according to the following instructions.

**HOW TO RESPOND TO FINDINGS & RECOMMENDATIONS
IN THIS REPORT**

Pursuant to the California Penal Code section 933.05, the person or entity responding to each grand jury finding shall indicate one of the following:

1. The respondent agrees with the finding.
2. The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

The person or entity responding to each grand jury recommendation shall report one of the following actions:

1. The recommendation has been implemented, with a summary regarding the implemented action.
 2. The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation.
 3. The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency where applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.
 4. The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
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GRAND JURY FINDINGS

Finding 13-1:

The Oakland City Council's failure to provide the Public Ethics Commission with the power to fine and penalize for ethics violations renders the commission largely ineffective.

Response: We agree in part. We agree that the Public Ethics Commission has not historically played an effective role in monitoring the activities of the City Council and that their limited authority to fine and penalize is a significant contributor to that ineffectiveness.

Finding 13-2:

The Oakland Public Ethics Commission lacks the financial resources to adequately do its job.

Response: Partial agreement. Since the release of the Grand Jury report, the City Council added a full-time position of policy analyst to the Public Ethics Commission to assist the fulltime Director. This is substantially more resources than the PEC has had for several years. The addition of the position was made as part of the two-year City budget passed on June 27, 2013.

Finding 13-3:

A lack of participation in state-mandated ethics training could potentially lead to a breakdown in efficient and ethical administration and performance of duties.

Response: Agreed.

Finding 13-4:

The Oakland city council's interference with, and intimidation of, staff diminish the overall effectiveness of city government.

Response: Agreed. Instances of Councilmember interference and intimidation diminish the overall effectiveness of city government.

Finding 13-5:

City council individual budgets are not subject to the same scrutiny (open review process) as other city department budgets, creating a potential for misuse of funds.

Response: Agreed. This has generally been the case in the past, in that there have not been public staff reports to the Finance Committee showing the expenditures of individual Council offices. Last year for the first time, the net amount of expenditures for each Council office was included in a staff report, showing which offices were over or under budget. It should be noted that Council office budgets always have been accessible through the filing of a public records request, according to the State law.

Finding 13-6:

Oakland city staff and department heads' failure to report or stop council interference contributes to the unacceptable culture of intimidation and leads to continued misconduct.

Response: Agreed. The willingness of Department heads and city staff to report Councilmember interference is probably the most effective means of preventing such misconduct. Most of instances of interference are known only to the staff who are being directed or intimidated. Significant positive change has taken place under the current City Administrator, who has issued instructions to staff requiring them to report such misconduct to department heads or to the City Administrator herself, and also assuring city staff that they will be supported by the Administration if they do report.

2012-2013 Alameda County Grand Jury Final Report

GRAND JURY RECOMMENDATIONS

Recommendation 13-1:

The Oakland City Council must provide the Public Ethics Commission with the power to enforce the city's ethics related ordinances (power to fine and punish, including the right to mandate specific training).

Response: The Council agrees in part. Enhanced powers of the PEC would be helpful to enforcing ethical behavior by Councilmembers. Work is in progress toward this goal: Even prior to the Grand Jury report, Councilmember Kalb convened a working group of ethics experts to work with him and the PEC Director to research, draft, and consider various enhancements and expansions of powers of the PEC. The Commission will hold public hearings on these recommendations, and after reaching their own consensus, will bring such recommendations to the City Council for adoption.

Recommendation 13-2:

The Oakland City Council must provide the Public Ethics Commission with sufficient financial resources to properly investigate allegations of ethics violations.

Response: Agree in part. Subsequent to the release of the Grand Jury report, the City Council added a full-time position of policy analyst to the Public Ethics Commission to assist the fulltime Director. This is substantially more staff resources than the PEC has had for many years. The addition of the position was made as part of the two-year City budget passed on June 27, 2013.

Recommendation 13-3:

Elected officials within the city of Oakland must receive ethics training as required by AB1234 every two years and proof of compliance must be available to the public through the city's website.

Response: Agreed. The PEC Director has agreed to monitor the compliance of City Councilmembers with taking the State-mandated ethics training and will post that compliance information publicly. Most City Councilmembers completed a State-approved on-line ethics training in May and June 2013.

Recommendation 13-4:

The individual Oakland City Council district budgets must be subject to the same scrutiny and transparency as other city department budgets.

Response: Agreed. The Council President will take responsibility for seeing that a report is published annually to the Council's Finance Committee showing the actual expenditures of each Council office after every fiscal year.

Recommendation 13-5:

No member of the city council should conduct any city business outside of the realm of their council powers as designated in the city Charter and in the municipal code. Additionally, the council should follow its own Code of Ethics including its mandate to "be willing to censure any member who willfully violates the rules of conduct contained in [the] Code of Ethics."

Response: Agreed. In July 2013, the Council President presented for Council consideration a Resolution of Public Reprimand (a censure) directed to Councilmember Brooks for the misconduct that was the subject of the Grand Jury Report.

City Auditor's Recommendations to the City Council:

Recommendation #1 Councilmembers and their Aides should comply with Section 218 of the City Charter, including not directing or ordering administrative staff to meet deadlines set by the Councilmembers. Additionally, Councilmember requests should never result in non-compliance with laws or City policy.

Suggested City Council Response: Agreed.

Recommendation #4 Councilmembers and their Aides should comply with Section 218 of the City Charter, including not coercing or influencing staff with respect to any contract or purchase of supplies.

Suggested City Council Response: Agreed.

Recommendation #5 Councilmembers and their Aides should comply with Sections 207 and 504.g by not conducting any administrative actions. For example, Councilmembers should not be involved in negotiating, establishing terms, or drafting contracts or grants on behalf of the City. Nor should Councilmembers ever sign to release department funds for expenditures.

Suggested City Council Response: Agreed.

Recommendation #6 Councilmembers should comply with Section 218 of the City Charter, including not hiring individuals to work in City departments or programs.

Suggested City Council Response: Agreed.

Recommendation #7 Councilmembers and their Aides should complete annual training on Section 218, Non-interference in Administrative Affairs and should annually certify that he or she has attended the training and agrees to uphold Section 218.

Suggested City Council Response:

We agree that Councilmembers and their Aides should complete ethics training at least every two years and in compliance with any State laws pertaining to ethics training for elected officials. The training shall also address compliance with Section 218. Each Councilmember must certify that he or she has attended the training and agrees to uphold Section 218.

Recommendation #8 Councilmembers and their Aides should comply with Section 218 of the City Charter, including not directing or pressuring staff to remove staff recommendations from City Council or Committee meeting agendas.

Suggested City Council Response: Agreed.

Recommendation #10 Councilmembers and their Aides should comply with Section 218 of the City Charter, including never threatening to fire or remove administrative staff from their positions or an assignment.

Suggested City Council Response: Agreed.

Recommendation #12 Councilmembers and their Aides should comply with Section 218 of the City Charter, including never attempting to have parking staff or parking enforcement officers dismiss or reduce the amount of the Councilmember's or Council Aide's personal (i.e., non-work related) ticket.

Suggested City Council Response: Agreed.

Recommendation #15 Councilmembers and their Aides should comply with the City Council's Code of Conduct.

Suggested City Council Response: Agreed

Recommendation #18 The City Council should develop procedures to enforce the City Council's Code of Conduct including censure of a Councilmember or Council Aide who breaches public trust or improperly attempts to influence legislation, or willingly violates the rules of conduct. Such procedures should include a mechanism to capture and address concerns regarding the conduct of Councilmembers in a timely fashion, including complying with Section 218.

Suggested City Council Response:

The Council President has requested and received a public legal opinion from the City Attorney setting forth the legal and procedural requirements for the City Council to censure one of its members. That legal opinion is attached to this report. According to the legal opinion, the Council already has all the authority that is needed to proceed with a censure. The memo also sets forth the procedural steps that would be required for the Oakland City Council to issue a censure of one of its members.

Recommendation #20 The City Council should establish guidelines in conjunction with the City Administrator as to how Councilmembers and Council Aides should work with administrative staff on community projects.

Suggested City Council Response:

The City Council will agendize a public discussion of this issue in the fall of 2013. Prior to the discussion of the item at a Committee meeting and City Council meeting, the Council President and the City Administrator will draft suggested guidelines for the Council to consider. During the public discussion, the City Administrator and Councilmembers can discuss the practical considerations involved and try to reach consensus on guidelines for how Councilmembers and aides should communicate and work with City staff on community projects.