

KELL, ALTERMAN & RUNSTEIN, L.L.P.

SCOTT J. ALDWORTH **
SUSAN T. ALTERMAN **,****
BRETT E. ENGEL
JAY K. GRIFFITH **, ****
KINLEIGH JONES
ROBERT E. KABACY **
LEE DAVIS KELL
LINDSAY E. LANDSTROM **
MATHEW W. LAURITSEN **
ROBERT B. LOWRY ++
JOHN W. MAYER
CONNOR J. MORAN **
JULIE PARRISH
PAUL A. RANEY ***
THOMAS R. RASK, III **
TED E. RUNSTEIN
DENNIS STEINMAN
ZACHARY WALKER **
BETH ZILBERT

ATTORNEYS AT LAW
SUITE 600
520 S.W. YAMHILL STREET
PORTLAND, OREGON 97204-1329
TELEPHONE (503) 222-3531
FACSIMILE (503) 227-2980
WWW.KELRUN.COM
E-MAIL: dsteinman@kelrun.com

RAYMOND M. KELL
(1911-1991)
CLIFFORD B. ALTERMAN
(1925-1995)
ALSO ADMITTED IN
*CALIFORNIA
**WASHINGTON
***GEORGIA
****COLORADO
*****ILLINOIS
++OF COUNSEL

Mayor Engelke and City Council:

I represent Councilor Noordhoff and appreciate the opportunity to address the proposal to censure her. I will discuss the merits of the allegations underlying the proposed censure, but would first like to address some of the procedural aspects of this censure effort that are troubling.

First, the manner in which this has been pursued has deprived Councilor Noordhoff of her constitutional right to due process. The City has refused to provide Councilor Noordhoff with a copy of the investigative report relating to the allegations. Just last Wednesday, the District Attorney held that this was improper and required the City to turn over the report. The DA also found that the summary that the City had previously provided in lieu of the report did not adequately describe the significant facts contained in that report.

My office received a redacted version of that report late on Thursday, giving us limited time to review the findings and prepare for this hearing. Additionally, all of the investigator's conclusions were redacted from the report we received. While this was allowed by the DA's order, it is troubling because the notice of this hearing repeatedly stated that the "investigation revealed" certain actions that purport to support the censure. With the investigator's findings and conclusions redacted from the report we received, it is impossible for us to know what the investigation actually revealed or adequately respond to the investigator's reasoning. Councilor Noordhoff has been placed in a position where she is required to defend herself against findings that her legal counsel does not have access to.

The City has deprived Councilor Noordhoff of information and time necessary to defend herself. We requested that this hearing be postponed so that we would have adequate time to review the investigative report and prepare for this meeting, but the City refused. The City is apparently more concerned with ramming this censure motion through than with getting to the bottom of the allegations and making the correct decision. Councilor Noordhoff has not been afforded the opportunity to present witnesses on her behalf or have any real hearing involving these allegations. Instead, she has been rushed into this meeting without adequate time to prepare a defense. I hope that this is taken into consideration when each of you decide how to vote on whether to approve the censure.

Second, I want to address the type of censure the Council is considering against Councilor Noordhoff. North Bend's municipal code is unusual in that it allows the Council to discipline a member through not allowing that member to be recognized by the chair to speak at meetings.

That kind of punishment is not included in the model rules created by the League of Oregon Cities and is highly unusual. This is likely because attempting to discipline a member in this manner would be unconstitutional and violate the First Amendment right to free speech.

I understand that the Council's attorney has advised it of a recent 2022 United States Supreme Court case that held that a verbal censure does not violate the First Amendment. I want to make clear that that case would not support punishing Councilor Noordhoff by taking away her ability to speak at meetings. That case, *Houston Community College Systems v. Wilson*, involved a member of the board of a public body who used various media outlets to sharply criticize the rest of the board. In response, the board voted to verbally censure the member. The member filed a lawsuit alleging that the board had violated his First Amendment right to free speech. The Supreme Court held that, because the censure was simply a reprimand that did not impact the member's ability to speak freely and fully participate in the business of the board, it did not violate the member's First Amendment rights.

Indeed, courts have repeatedly held that the censure of a public official is only permissible if it does not inhibit their ability to speak freely and perform their official duties. In *Peeper v. Callaway County Ambulance Dist.*, the Eighth Circuit discussed how measures that restrict a public official's ability to do their job not only affect the public official's First Amendment rights, but also infringe on voters' right to be represented by the elected official.

If the Council votes to restrict Councilor Noordhoff's ability to speak at meetings, it would be a clear violation of her First Amendment rights and would also violate the rights of the voters who elected Councilor Noordhoff to represent them. It would also set a terrible example to the public if the Council's way of dealing with speech it doesn't like is to silence the speaker.

On a practical level, taking this action would subject the City to certain litigation, as Councilor Noordhoff would be able to pursue a claim under Section 1983 for violation of her constitutional rights. Based on existing precedent, the City is very likely to lose on such a claim. Additionally, the City would not only have to pay its own attorneys' fees to defend its actions, but, if Councilor Noordhoff prevails, the City would also be required to pay her attorneys' fees and costs. Attempting to silence Councilor Noordhoff will not achieve anything other than subjecting the City to costly litigation and damaging the reputation of the Council.

Turning to the underlying allegations, there is nothing here that supports any kind of disciplinary action against Councilor Noordhoff. The notice for this hearing identifies eight allegations that purport to support the proposed censure. The entire driving force behind this has been Councilor Noordhoff's conflicts with the City Administrator, Mr. Milliron. It's no secret that there is no love lost between these two. However, while Councilor Noordhoff has made some mistakes, which she acknowledges and takes responsibility for, so has Mr. Milliron. While Mr. Milliron has attempted to excuse his mistakes as the result of him being new to the position, similar mistakes by Councilor Noordhoff—who became a Councilor at almost the exact same time as Mr. Milliron became the City Administrator—have been used as justification to censure her. Additionally, Mr. Milliron has unnecessarily escalated their conflict and come after her personally. This is not limited to this censure effort. He has also filed public records requests seeking Councilor Noordhoff's emails and has sent her a litigation hold with the implied threat that he

would be suing her. While the conflict between Councilor Noordhoff and Mr. Milliron is unfortunate, it is also not fair to single Councilor Noordhoff out for punishment.

Turning to the specific allegations, the hearing notice set out eight allegations that purport to support the censure of Councilor Noordhoff.

Allegation 1: That Councilor Noordhoff falsely accused the City Administrator of accessing her emails.

This issue only arose because Mr. Milliron made an unnecessary and inappropriate statement about a member of the public who spoke at a council meeting in support of Councilor Noordhoff's position on a project item. After the person spoke, Mr. Milliron was dismissive of the person and inappropriately stated that the person had only spoken at the encouragement of Councilor Noordhoff. Councilor Noordhoff had sent an email that morning about the topic being on the council agenda and did not know that a supporter had turned this into a Facebook post. She was offended by Mr. Milliron's unnecessary statement and believed that the only basis for him to make that statement would have been if he had seen her email. She acknowledges that she was wrong about this and should not have made that accusation. However, it was nothing more than a mistaken comment in the heat of the moment and she did not take any other action based on her mistaken belief. It is not the kind of action that would justify a censure of Councilor Noordhoff.

Allegation 2: That Councilor Noordhoff falsely accused the City Administrator of violating public meetings laws.

This relates to several instances in which Councilor Noordhoff has attempted to ensure strict adherence to Council Rules, not public meetings laws as stated in the notice of this hearing. Each time, Councilor Noordhoff acted in accordance with her understanding of what the Council Rules required. As such, she could not have made any kind of knowingly false accusation against Mr. Milliron. She was motivated entirely by ensuring compliance with Council Rules.

The first part of this allegation relates to the property committee. Councilor Noordhoff has expressed concern about the property committee's failure to provide required reports to the full Council after it meets. Councilor Noordhoff is simply concerned about compliance with the Council Rules and making sure the full Council is informed of committee decisions. This is a valid concern, as there have been instances in which Mr. Milliron has referred to property being surplussed that the full Council was not aware of. She should not be censured for simply expressing her concern about the property committee's compliance with the Council Rules.

The second part of this allegation relates Councilor Noordhoff's complaints about the City failing to keep accurate meeting minutes. Under the Council Rules, the meeting notes must reflect the name, topic discussed, and point of view conveyed for each person providing public comment. However, the City's meeting notes often fail to comply with this requirement and often reduce lengthy comments into a short sentence that does not include the speaker's point of view. Again, her actions were based on legitimate concerns and ensuring that the City was complying with the applicable law. This is not the basis for a censure.

It bears noting that there were two related allegations that were investigated that were not included in the notice of this meeting. While the investigative report we were provided was redacted so that we cannot see the investigator's conclusions, we can only presume that these allegations were not sustained. The first relates to a meeting that Mr. Milliron organized between the mayor, the council president, and two members of the Coos County Airport District. Councilor Noordhoff believed that, to comply with public meetings laws, a public notice of the meeting was required. The Airport District apparently agreed with this interpretation of the law because it put out an appropriate public notice. Councilor Noordhoff believed this was an ad hoc committee that excluded the rest of the council, and the City could have complied with public meetings laws by simply issuing a public notice and passing a motion to form the committee under Council Rule 2.04.090. Mr. Milliron disagreed and ignored her concerns. Mr. Milliron used this legitimate disagreement over what is required by public meeting laws and Councilor Noordhoff's efforts to ensure compliance with the law as a basis to try to censure her. Apparently, the investigators disagreed with his contention and did not sustain the allegation.

The second allegation that was not included in the notice relates to Councilor Noordhoff's concerns over how the vote on the disc golf course was handled. The vote was initially tied 2-2, meaning the motion failed. However, Mr. Milliron questioned whether the Chairman was allowed to vote, which caused the Chairman to retract his vote and led to the other member who voted no to change to abstaining from the vote. The meeting minutes did not reflect this and just reflected the motion passing 2-0. Councilor Noordhoff knew that the Chairman was permitted to vote at the meeting, which Mr. Milliron has since acknowledged. Mr. Milliron blamed his action on the fact that he was new at the time this occurred, but, as I'll discuss shortly, he has attempted to use actions taken by Councilor Noordhoff when she was new to the council and did not have full knowledge of the rules as a basis for this censure. Like the issue with the meeting with the Airport District, Councilor Noordhoff's concerns appear to have been substantiated, as this was not included in the hearing notice. However, Mr. Milliron is still relying on Councilor Noordhoff's other efforts to ensure compliance with the law and Council Rules with respect to the property committee and keeping accurate meeting minutes as a basis for this censure. Councilor Noordhoff should not be punished for trying to protect the City by ensuring it complies with its legal obligations.

Allegation 3: That Councilor Noordhoff undermined the City Administrator's authority as the city administrator.

The notice identifies two instances in which Councilor Noordhoff undermined Mr. Milliron's authority. Again, however, the investigator's report shows that Mr. Milliron based this allegation on two additional actions that are not included in the notice. Presumably, this is because the investigator found that there was nothing improper about Councilor Noordhoff's conduct.

The first allegation not included illustrates how this censure effort is attempting to use even the most benign actions of Councilor Noordhoff against her. Mr. Milliron claimed that Councilor Noordhoff had undermined his authority by asking public works staff for a map of city properties. She did this based on Mr. Milliron's explicit direction. She had emailed Mr. Milliron asking to see a map showing the property owned by the city. Mr. Milliron responded to the email and wrote to her that there was a map of all city-owned property available for inspection in public works.

She followed his instructions, went to the public works department, and asked to see the map. The public works staff provided her with a copy of the map. Mr. Milliron subsequently took exception to this, believing that she should only have been able to look at a map posted on the wall of the public works office. His email said nothing about that, though, and she had no reason to question the staff giving her a copy of the map. Despite this, Mr. Milliron publicly berated Councilor Noordhoff at a Council meeting after he learned she had a copy of the map. The fact that he then attempted to use this as a basis to censure Councilor Noordhoff is ludicrous.

The second allegation not included in the hearing notice relates to Councilor Noordhoff questioning Mr. Milliron's decision to rehire the Parks Superintendent after retirement and give him a 6% raise. Councilor Noordhoff was unaware at the time of a recent change in the law that allowed public employees to work after they had retired for purposes of PERS. She believed the decision to hire the employee back and give him a substantial raise was odd. However, she was simply concerned about the City's budget and asked for transparency about the decision. Mr. Milliron apparently did not like his decisions being questioned and attempted to use this as a basis to censure Councilor Noordhoff. It appears that the investigator also did not sustain this allegation.

With respect to the two allegations included in the hearing notice, the first relates to Councilor Noordhoff contacting the Confederated Tribes directly about issues at the Pittum Loop Project site. Councilor Noordhoff had an interest in the work being done at the site and its potential impact as an archeological site. The project was supposed to avoid the use of machinery in certain areas, but that did not appear to be followed based on Councilor Noordhoff's observations when she drove by the site. After the Council was not given any information about the status of the project, Councilor Noordhoff decided to reach out as a private citizen to someone from the Confederated Tribes to get information about the project. She never claimed that she was representing the Council when doing so. This was not done to undermine Mr. Milliron and nothing about her actions impaired the City's relationship with the Confederated Tribes. It is not a basis to censure Councilor Noordhoff.

The second allegation included in the hearing notice relates to Councilor Noordhoff asking public works employees about paving in front of her house. The street where Councilor Noordhoff lives had significant drainage issues and she had the idea to place a small amount of asphalt down herself to protect it from erosion. Mr. Milliron was out of town at the time and she talked about this with Ralph Dunham, the Public Works Director. He told her that the City generally doesn't allow people to work on the roads for liability reasons, but, with small projects where the private party buys the materials, the City will sometimes just come out and install it for them. Mr. Dunham then talked with the City attorney, who advised that Councilor Noordhoff should get an opinion from the Oregon Government Ethics Commission before moving forward. He passed this on to Councilor Noordhoff, who followed his direction and reached out to the OGEC for an opinion. The OGEC advised that she should recuse herself from any council discussion involving repairs on the street and should not use her position as a councilor for financial gain. Councilor Noordhoff followed the OGEC's advice and the Council ultimately decided to wait to address the issue until the City completed its storm water master plan. Again, nothing about Councilor Noordhoff's actions was improper. She did not attempt to improperly use her position as a Councilor for personal gain and sought advice from the OGEC to ensure that she did not commit any ethical violations. This issue is not a valid basis for a censure.

Allegation 4: That Councilor Noordhoff accused the City Administrator of violating Council Rules with respect to how agenda items are handled and how items are placed on the consent agenda.

This relates to Councilor Noordhoff being critical of Mr. Milliron's decision to place the contract for the Pittum Loop undergrowth removal project on the consent calendar. Under the Council Rules, the consent calendar is only to be used for routine items that will not be the subject of debate. Councilor Noordhoff reasonably believed that the approval of a large contract that would have a significant impact on the City's natural environment was not a routine decision appropriate for the consent calendar. The notice of this hearing claims that Councilor Noordhoff's "falsely accused" Mr. Milliron of violating the Council Rules by placing this item on the consent calendar. However, she had a legitimate belief that this was not the type of issue that is appropriate for the consent calendar. This was not a "false accusation" and is not a basis to censure her.

Again, there was a separate part of this allegation that was included in the investigator's report, but not included in the hearing notice. We are left to presume that the investigator also did not sustain this part of the allegation. It related to Councilor Noordhoff's criticism of Mr. Milliron for placing on the consent calendar an item related to the appointment of an unidentified individual to the water board budget committee. Again, Councilor Noordhoff was simply seeking transparency and the investigator apparently agreed there was nothing improper about her criticism of Mr. Milliron's use of the consent calendar in this instance.

Allegation 5: That Councilor Noordhoff engaged in serial meetings by emailing a quorum about action items.

This relates to Councilor Noordhoff emailing a quorum of the Council a comment relating to a demand letter sent by my office relating to the City's failure to follow a court order requiring that she be reinstated to the water budget committee. The administration had distributed a copy of the letter to each member of the Council's mailbox and one member mistakenly believed it had come directly from Councilor Noordhoff. He left it on Councilor Noordhoff's place on the dais with a note that it should have come from administration. She sent the email to confirm that it had come from administration and that she had not been the one who distributed it. Councilor Noordhoff acknowledges that this technically constituted a serial meeting and that it was a mistake to include a quorum of the Council on the email. However, this was not a situation where she was discussing pending council business. While it was a mistake that Councilor Noordhoff takes accountability for, it is not something that merits a censure.

Allegation 6: That Councilor Noordhoff made disparaging remarks about the City Administrator.

This allegation is based on several statements that Mr. Milliron claims were disparaging. The first is that Councilor Noordhoff stated that Mr. Milliron was acting like a bully. This was Councilor Noordhoff's opinion and if a council member can be censured for calling someone out when they believe he is acting like a bully, what does that say about this Council? Setting aside the basis of Councilor Noordhoff's opinion—and she has numerous reasons to believe that, from her perspective, Mr. Milliron has acted like a bully—it would send a horrible message to punish

councilmembers for calling out behavior they believe to be bullying or for being critical of actions they disagree with. Councilor Noordhoff's statement of opinion is not a valid basis to censure her.

The next statement relates to Councilor Noordhoff accusing Mr. Milliron of reading her emails. I addressed this previously. Councilor Noordhoff acknowledges that it was a mistake following Mr. Milliron's inappropriate commentary about someone's public comment at a meeting. This leads to the next statement, which is that Councilor Noordhoff accused Mr. Milliron of panning public comment. Again, after a member of the public spoke at a council meeting in support of Councilor Noordhoff's position, Mr. Milliron inappropriately stated that the person had only spoken at the encouragement of Councilor Noordhoff. It was simply not Mr. Milliron's place to provide this commentary and, to Councilor Noordhoff, the message was clear that Mr. Milliron thought the person's public comment should be dismissed because it was made at her encouragement. Councilor Noordhoff calling Mr. Milliron out for this inappropriate comment is not a basis to censure her.

The next statement relates to Councilor Noordhoff accusing Mr. Milliron of initiating an ethics complaint against a member of the parks committee. Councilor Noordhoff had learned from a member of the parks committee that comments made by Mr. Milliron to them sent the message that, if they took action in their private capacity, such as signing a petition, to oppose a disc golf project Mr. Milliron supported, it could result in an ethics complaint. Mr. Milliron did, in fact, initiate an informal investigation with the OGE to determine whether this kind of activity would be a violation of ethical rules. The OGE found that this would not be an ethics violation. Based on the investigator's report, it appears that the parks committee member who told Councilor Noordhoff about Mr. Milliron's comments may have misunderstood them, but Councilor Noordhoff's concerns were legitimate and she did not knowingly make any false accusations that would justify a censure.

The next statement relates to Councilor Noordhoff accusing Mr. Milliron of controlling the Council. The City Charter places limitations on the City Administrator's authority, including that the City Administrator cannot control the Council. This issue arose after Councilor Noordhoff requested to have an agenda item added to propose additional signage to discourage the use of prohibited motorized vehicles on the Simpson Bluff trail. Mr. Milliron responded with an email that included the rest of the Council and that effectively said that Councilor's Noordhoff's proposal would be ineffective and was not a good idea. Councilor Noordhoff was offended by his comment and did not believe it was his place to advocate for one side or the other, especially when the item had not even been brought to the Council for discussion yet. She responded to his email by stating that she believed his comments were inappropriately attempting to influence the Council's vote on her proposal and that she thought this was a violation of the City Charter prohibition on the City Administrator controlling the Council. Again, Councilor Noordhoff calling out Mr. Milliron for actions that she believes are inappropriate and that violate the applicable rules is not a basis to censure her.

Finally, the last statement relates to Councilor Noordhoff accusing Mr. Milliron of accessing her Zoom account and taking a screen grab of her. Councilor Noordhoff acknowledges that this was a mistake. She was informed that someone in the City had taken a screen grab of her and, given their history, believed that Mr. Milliron was the most likely suspect. She was wrong

and takes accountability for this mistake. This was simply a verbal comment, however; she never made a formal accusation or took any other action based on her suspicion. This is not significant enough to merit a censure.

Allegation 7: That Councilor Noordhoff violated state ethics laws.

The hearing notice states that the investigation found that Councilor Noordhoff violated state ethics laws in two ways: by participating in discussions about drainage improvements on her street and by participating in discussions about transportation plans that impacted her neighborhood. Again, it bears noting that the investigator's report also states that Mr. Milliron accused Councilor Noordhoff of violating state ethics laws by divulging confidential information. Given that this is not included in the hearing notice, we are left to presume that the investigator found that Mr. Milliron's allegation was unfounded.

With respect to the claim about participating in discussions about drainage improvements, the investigator's report does not appear to have made this finding. The investigator's report simply references the allegation that Councilor Noordhoff had attempted to have the City pave her street. As stated earlier, she did not attempt to have the City pave her street. She wanted to put asphalt down on her own and was advised by Mr. Dunham that the City doesn't allow this, but will sometimes do the work if the homeowner provides the materials. He advised her to seek guidance from the OGEC, which she did. She complied with the OGEC's advise and there was no ethics violation that would merit a censure.

With respect to the allegation that she had participated in discussions about transportation plans that impacted her neighborhood, Councilor Noordhoff acknowledges that this was a mistake. However, it happened over three years ago when she was new to the Council and still learning the rules that applied. Again, Mr. Milliron has justified his mistakes by saying they occurred when he was new to his position, but is now using Councilor Noordhoff's similar mistakes to support his effort to censure her. Councilor Noordhoff learned from this incident and it would not be appropriate to censure her for something that happened over three years ago.

Allegation 8: That Councilor Noordhoff retaliated against the City Administrator for filing a complaint against her.

This relates to Councilor Noordhoff writing a letter to the editor of a local newspaper drawing attention to a claim that Mr. Milliron had made during a Council meeting that certain property had been surplussed, which was false. Mr. Milliron alleges that this was in retaliation for him filing a complaint against Councilor Noordhoff. Mr. Milliron has not alleged that Councilor Noordhoff mischaracterized his statement and has admitted that the statement was false. Rather, he takes issue with Councilor Noordhoff pointing out his mistake and, because it happened shortly after he filed a complaint against her, claims it was retaliatory. As should be very evident, there is a long history of animosity between these two individuals. Given how these parties have acted towards one another over the years, there is little doubt that Councilor Noordhoff would have taken the same action even if Mr. Milliron had not filed the complaint. As such, it cannot be considered retaliation any more than Mr. Milliron filing public records requests for Councilor Noordhoff's emails and sending her a litigation hold can be considered retaliation. It was simply one more

incident in the long-running feud between Mr. Milliron and Councilor Noordhoff, of which this censure effort is a part.

None of these accusations support a censure of Councilor Noordhoff. This effort is being rushed through without Councilor Noordhoff being afforded an adequate opportunity to prepare a defense and without her legal counsel having any idea of the investigator's actual findings. While Councilor Noordhoff acknowledges that she has made some mistakes and accepts responsibility for those, Mr. Milliron has not taken accountability for his own role in their fractured relationship. Instead, he has driven this censure effort based on petty grievances and instances in which he believes that Councilor Noordhoff has inappropriately questioned his authority. Passing this censure will not do anything other than add fuel to the animosity between Mr. Milliron and Councilor Noordhoff. While the censure effort as a whole appears designed to make Councilor Noordhoff afraid of speaking out in the future about conduct that she believes to be inappropriate or unlawful, if the Council elects to go beyond a verbal censure and votes to actually silence Councilor Noordhoff by not allowing her to be recognized by the chair to speak at meetings, it would violate her Constitutional rights and guarantee costly and prolonged litigation. There are no reasons to vote in favor of a censure and myriad reasons to vote against it.

Thank you.

Dennis Steinman

R. Paul Frasier

District Attorney for Coos County.



Office of the District Attorney

Coos County Courthouse
250 N. Baxter St.
Coquille, OR 9742
Phone: 541-396-7550
Fax: 541-396-1015
TOD: 1-800-735-2900

April 24, 2024

Mr. Dennis Steinman
Kell, Alterman and Runstein, L.L.P
520 S.W. Yamhill Street, Suite 600
Portland, Oregon 97204-1329

Mr. Mark A. Wolf
Local Government Law Group
975 Oak St Ste 700
Eugene OR 97401

Re: Public Records Request by Susanna Noordhoff

BY EMAIL ONLY

Greetings:

On April 17, 2024, I received a request that I review an alleged public records denial made by the City of North Bend, Oregon (City) for certain public records requested by Susanna Noordhoff. I was also asked to review the accuracy of summary given to Ms. Noordhoff by the City in lieu of providing the document in question.

FACTS

Susanna Noordhoff is an elected member of the North Bend City Council. It has been alleged that her behavior since she has been on the council has been disruptive to the point that the City began proceedings to determine if Ms. Noordhoff was in violation of City policies and procedure, and if so, what if any action should be taken against her by the Council. To that end, the City hired, through the Local Government Law Group, the law firm of Beery, Elsner and Hammond (BEH) to investigate certain allegations and to

render an opinion as to whether any the allegations had been sustained. BEH wrote a report where they set forth the facts they had found as to each allegation and then provided an analysis whether in their opinion the facts sustained a policy or rules violation by Ms. Noordhoff. **Some of the allegations were sustained. Some of the allegations were not sustained.** The report is 170 pages long, with 49 pages being the actual report and 121 pages being exhibits attached to the report. The report is presented in 12-point font.

The report was then shown to members of the City Council, including Ms. Noordhoff. Each time a member of the council reviewed the report, another person was present, such as an attorney for the City or the Mayor. Ms. Noordhoff viewed the complete report. She then requested a copy of the complete report on three different occasions. The requests were apparently made directly to Mr. Wolf, the attorney for the City. Mr. Wolf declined to release the complete report. Subsequent to her requests the City prepared a summary of the document pursuant to ORS 192.360, a portion of Oregon's Public Records Law and provided a copy of that document to each City Council member, including Ms. Noordhoff. The summary is 16 pages long, but is presented in a much smaller font. Had it been in the 12-point font as the original report, the summary would be many pages longer.

QUESTIONS PRESENTED

Based upon the comments from both sides, it is clear that the complete report is a public record subject to the disclosure and non-disclosure aspects of Oregon's Public Records laws. As stated above, I have been asked to determine if the alleged denial for disclosure of the complete report was proper under the Oregon Public Records Laws. Secondly, I have been asked to determine if the summary document is a substantially accurate summary of the facts set forth in the complete report.

DISCUSSION

1. The alleged denial of the report to Ms. Noordhoff

A. Was a request made and did a denial occur?

The City argues that Ms. Noordhoff never made a public records request to the City and because no such request was made, no denial took place. If the City is correct, the matter is not properly before me.

I am somewhat familiar with the process that the City uses when a person requests a public record. Normally a form is filled out or an email is sent by the requestor and submitted to either the City Recorder or the City Manager. A decision is then made on whether to provide the record in question. It is clear that Ms. Noordhoff did not fill out a form and/or email and made a request directly to the City Recorder or the City Manager.

She did ask the attorney for the City, Mr. Wolf, on three occasions for a copy of the report. Mr. Wolf did not provide her a copy of the complete report. Instead, the City

prepared a summary document that in its opening paragraph indicated that it was being prepared in part pursuant to ORS 192.360.

ORS 190.360 provides that when a public record is subject to disclosure, the public body, in lieu of making the record available, may provide a condensed form of the record in question of the significant facts that are not otherwise exempt from disclosure.

In reading this statute, there would have been no reason for the City to prepare the summary document pursuant to the Public Records Laws unless the City understood that a public request had been made for the complete report and that the City had already made the decision that in lieu of providing the record, the City would prepare and release a summary. That being the case, I find that a request was made for the report and that the City, in lieu of releasing it, provided a summary. In preparing the summary, the City, in essence, denied the request of Ms. Noordhoff for the complete report. Therefore, I find that this request by Ms. Noordhoff is properly before me. ⁱ

B. Is the complete report exempt from disclosure to Ms. Noordhoff?

The City claims that disclosure of the complete report would violate the attorney client privilege. ORS 192.360 does provide that in providing the summary, the City is not waiving any privilege as to the record itself. Ms. Noordhoff's position is that in showing her the complete report, the City has waived the privilege, at least as it pertains to her. ⁱⁱ

I will begin my discussion on this issue on whether the City waived the privilege when it showed Ms. Noordhoff the report. If the City waived the privilege, there would no further need for me to analyze this case.

Ms. Noordhoff is a member of the City Council, the governing body of the City of North Bend. For lack of a better term, she is a "director" of the governing body. Under ORE 503 and ORE 503-1, as a director, she is, in a corporate sense, part of the client. As a client, showing her the report in her capacity as a member of the City Council does not waive the privilege. See, State ex rel OHSU v. Haas, 325 Or 492 (1997). I find that the privilege has not been waived by the City.

It is now incumbent upon me to determine if the complete report is subject to the attorney-client privilege. While the Haas case is illustrative on this issue, I believe the case of Port of Portland v. Or. Ctr. For Env'tl. Health, 238 Or App 404 (2010) is more helpful.

The Court of Appeals in the Port of Portland case noted that there is an inherent tension between the policies driving Oregon's Public Records Laws and the attorney-client privilege. The public records law encapsulates the strong and enduring policy that public records and governmental activities be open to the public. Ibid. at 408 - 409.

I am required to narrowly construe any exemptions from disclosure. The public body has the burden of sustaining that action. ORS 192.490(1).

On the other hand, the attorney-client privilege promotes the full disclosure of information by clients to their attorneys by protecting that communication. In doing so, the privilege invokes the principle that lawyers can "act effectively only when fully advised of the facts by the parties whom they represent," and maintains that a client's confidential communications to his lawyer cannot be revealed without his permission. Port of Portland, at 409. See also, State v. Jancsek, 302 Or 270, 274 (1986).

Because the Public Records Laws include an exemption for attorney-client privileged communications, I must proceed in light of the general rule that favors disclosure of public records, I have to recognize that the purposes of the attorney-client privilege likewise must be upheld, because the privilege promotes broader public interests in the observance of law and administration of justice and that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. See. State ex rel OHSU v. Haas, at 500.

Not all communications between a lawyer and client are confidential. In looking at the Hass and the Port of Portland cases, to be a confidential communication I believe must find the record in question was made for the purpose of rendering professional legal services. I must find that the document contains legal advice or contains legal services.

This makes my decision a bit more problematic in that the beginning provisions of ORS 192.360 clearly state **if a record is subject to disclosure**, in lieu of providing the record a summary can be prepared which would not waive any privilege as to the record itself. In preparing the summary document, it appears to me that the City is conceding that at least the factual representations in the complete report are subject to public disclosure.

The vast majority of the complete report are statements of facts found by the lawyers acting as investigators. The only parts of the complete report that I believe will be covered by the privilege are the sections as to each allegation where BEH makes a legal analysis and conclusion as to whether the allegation was sustained or not sustained. I would also include the section where BEH made a legal analysis and conclusion as to any violation of North Bend City Policies that were either sustained or not sustained.

None of the exhibits attached to the complete report contain any legal advice or legal services and frankly all appear to be subject to disclosure in and of themselves if a public records request was made for the exhibit independent of the report ⁱⁱⁱ

As I read the above cited cases, I have to balance the public's right to access to public records against the societal values placed upon matters of privilege. ^{iv}

I find that the complete report, including the exhibits, minus the legal analysis and conclusions of BEH as to each allegation, are subject to disclosure. ^v I order that the City prepare a redacted copy of the report in accordance with my findings above.

2. Does the summary document adequately describe the significant facts in the complete report?

If the City complies with my above order, the summary document issue becomes moot.

As the parties may chose to appeal my decision, I will give you my analysis on the summary document. ^{vi}

I would note that I am at a disadvantage in deciding what a significant fact is as it pertains to this case. One way to look at this issue is to consider the parties perspective to the complete report. As I understand it, the complete report was prepared to determine if Ms. Noordhoff violated any City polices or rules and if so, what the repercussions of such violations will be. I am not the trier of fact in this case, nor am I defending Ms. Noordhoff. Consequently, I do not know what the City Council will consider to be a significant fact, nor do I know what Ms. Noordhoff and her counsel believes to be a significant fact for her defense, I believe the correct analysis in this situation is to determine what the public would consider to be a significant fact as to the conduct of its elected officials and the process to investigate and address misconduct by a public official. With this in mind, I have the following observations and findings.

I find that the summary document, for the most part, appears to be a "cut and paste" version of the complete report. However, I am concerned that the summary document as to certain areas does not contain information that adequately describes the facts. In particular I note the following:

- a. The complete report, in describing facts, in numerous places, refers to the source of the information as contained in the attached exhibits. The summary deletes this source of information when a fact is premised upon an exhibit;
- b. The complete report contains a section entitled 'Factual Summary'. This factual summary is not included in the summary document;
- c. As to the allegation regarding the accusation of Ms. Noordhoff that Mr. Milliron improperly accessed her emails, I note that statements made by Mr. Milliron in a meeting on August 8, 2023 are not included in the summary document. The summary document does not identify the person who is the source of information from the IT Department;
- d. As to the allegation regarding public meeting laws violations, I note the complete report contains information that about a letter to the editor by Ms. Noordhoff that Mr. Milliron referred to in a council meeting. This information does not appear in the summary document;

- e As to the allegation involving the property committee, the complete report contains information regarding an August 8, 2023 council meeting. The summary document does not contain that information;
- f As the allegation of Ms. Noordhoff undermining Mr. Milliron's authority pertaining the Confederated Tribes and the Pittum Loop project, the complete report contains information about the project provided by Chief Brown. The summary document does not contain the information from Chief Brown;
- g As to the paving the street in front of Ms. Noordhoff's home, the complete report makes mention of comments made at a September 25, 2023 meeting where it was discussed that in regards to the seal coating Ms. Noordhoff wished to use, that for small items, the City may install those items on behalf of the requestor. The complete report also identifies city staff she allegedly spoke with on this issue. The complete report also discussed how the drainage issue on the street where Ms. Noordhoff's home is located was recognized by the council and a decision on what to do with that street was delayed until after the storm water master plan was complete. All of this information is not in the summary document;
- h As to the Pittum Loop undergrowth removal, the complete report contains information pertaining to May 9, 2023 council meeting. The complete report also contains information from a July 11, 2023 council meeting. The complete report also contains information about two bids received for the project in 2023. All of this information is not in the summary document;
- i As to the section pertaining to Ms. Noordhoff calling Mr. Milliron a bully, the complete report contains quotes from Mr. Garboden. Those quotes are not in the summary document;
- j There is a section entitled "Panning Public Comment" in both the complete report and the summary document. I suspect this is a typo and that it should read Banning Public Comment. In any event, the complete report contains a quote from Mr. Milliron about Ms. Noordhoff. The summary document does not contain this information;
- k. As to the initiating a false ethics complaint, the complete report contains information received from Andrea Sharman. The complete report also contains information about Mr. Milliron's response to the OGEC and OGEC's response back to Mr. Milliron. The complete report also includes a quote of Ms. Noordhoff pertaining to Mr. Milliron about the Park's Committee. All of this information is not in the summary document;
- l. As to the Zoom account allegations, the complete report contains information from council member Gleason. It also contains information about media

coverage by The World newspaper and the television station KEI. None of this information is in the summary document; and

- m. As to the divulging of confidential information allegation, the complete report contained information from Mr. Milliron where he claimed that Ms. Noordhoff would insert confidential information into personnel evaluations. This is not contained in the summary document.

Based upon the above, I find the summary document does not adequately describe the significant facts as contained in the complete report.

CONCLUSION

I believe I have addressed the requests made of me in this matter. As a consequence, my involvement in this matter is at an end. As this letter is being released to the parties, the hard copy I made of the complete report is being shredded. The electronic copy of the report will be permanently deleted from my computer system.

The parties are free to appeal my decisions to the Coos County Circuit Court. Please keep in mind there are time limits to filing such an appeal.
Sincerely:

R. Paul Frasier

ⁱ If I am wrong regarding whether a request and a denial has taken place, all Ms. Noordhoff would need to do would be to make a formal request. Given the City's current position, the request would be denied, and in a couple of weeks this matter would be back before me. In all likelihood I would then be making the same decisions as set forth in this letter.

ⁱⁱ• This brings up an interesting side note. Ms. Noordhoff is duly elected member of the North Bend City Council. In Mr. Wolf's response to my request for the position of the City, Mr. Wolf states that the "report is the Council's report." As Ms. Noordhoff is a member of the City Council, and as the report is the "Council's report how can the City deny her a copy of the report? This is outside my purview of the Public Records Laws, and I will not make my decision based upon this line of thought but it does bring up an interesting issue on what records the City can decline to give to a member of its governing body based upon the attorney - client privilege.

ⁱⁱⁱ Ms. Noordhoff does not indicate whether the summary she received contained copies of the exhibits. Given that references to the exhibits are not included in the summary document, I assume the exhibits were not provided to Ms. Noordhoff.

^{iv} Another case helpful to my decision is State v. Gallup, 108 Or App 508, 511 (1991) where the Court of Appeals held that interview notes which contain no opinions, theories or conclusions cannot be held to be work product.

^v The solution I have chosen is identical to that used by the Oregon State Bar. Years ago I was a volunteer with the Bar assigned to investigate alleged violations of the Rules of Professional Conduct by local lawyers. In the reports I wrote, I set forth the facts as I discovered them. I then set forth my legal analysis and conclusions as to whether a particular rule was violated. If further action by the Bar was taken against the lawyer, a copy of my report, minus my legal analysis and conclusions, would be given to the accused lawyer. It is my understanding that this procedure has survived public records challenges in the past based upon attorney-client privilege, although I have no particular case I can point to.

^{vi} For the parties information over the last three days I have, spent over twelve hours reviewing the requests made in the case, doing legal research, comparing the summary document to the complete report and in drafting this opinion.