Stanislaus County Civil Grand Jury
City of Patterson
Case numbers 11-01C, 11-03C, 11-05C, & 11-06C
Part Five: Immediate Past City Attorney

SUMMARY

The 2010/2011 Stanislaus County Civil Grand Jury (SCCGJ) received nine (9) separate complaints to investigate allegations of the Brown Act and willful misconduct within the City government of the City of Patterson. Four (4) complaints made allegations against the Immediate Past City Attorney (IPCA).

After a review of documents and interviews of key personnel, it was determined:

1. The IPCA responded to a Californians Aware (CalAware) interpretation of the Brown Act and the attorney for CalAware sent the IPCA an email disagreeing with the IPCA's interpretation of the law. This expert attorney questions why the IPCA was not present in the room when the council met in closed session to provide what the SCCGJ believes to be a gift of public funds to a landlord/developer for a non-verified amount of funds.

The CalAware attorney reminded the IPCA that the closed session in question was in fact anticipated litigation, § 54956.9 (b), which, in the SCCGJ's opinion, requires the announcement of "existing facts and circumstances" to be listed on the agenda in every case.

2. In a November 8, 2009, a memo to both CalAware and the Patterson City Council, the IPCA places blame on the Council members that he/she was "right outside the door" and the council failed to call him/her back into the room to provide legal insight into the anticipated litigation involving a landlord/developer. The IPCA neglected to advise the City Council of this voting error at the time he/she learned of the violation.

3. The IPCA is a legal advisor and not a judge or arbitrator of private disputes. The IPCA indicated to the City Council that he/she heard a casual conversation in City Hall between the Immediate Past City Manager (IPCM) and the Immediate Past Community Development Director (CDD) that a landlord/developer was appealing the relocation of the Del Puerto Health Care District facility (HCD) because of a potential loss of income rather than a zoning issue. In response, the IPCA told the council that he/she would have to "testify against the city" if the landlord/developer issue was ever litigated. In essence, this placed the IPCA as a witness against the City Council and the IPCA should have recused himself/herself from any further legal advice involving the landlord/developer in this endeavor. The IPCA continued to provide advice to the City Council thus allowing the opportunity for the Council members to provide, what is in the SCCGJ's opinion, a gift of public funds.

4. The City Attorney is an independent contract employee subject to a contract drafted in February of 1997. The City Attorney is required to attend both the City Council and Planning Commission meetings. The IPCA receives a fee of $100.00 per hour of work. A monthly retainer of $1000.00 is paid to the IPCA indicating that he/she must provide at least ten (10) hours of service including attendance at Planning Commission and City Council meetings.

Section 5. c. (contained in Attorney's contract) indicates "City shall pay Attorney fees within thirty (30) days of receipt of a statement from Attorney. Attorney shall bill monthly, with an **itemized bill,** sufficient to show services performed, person performing them, and charges, in the form specified by the City." From a time period of January 10, 2008 through September 2, 2010, the IPCA received payments in the amount of **$425,495.55** from the City of Patterson. The IPCA tendered his/her resignation to the City of Patterson in May of 2010. On March 14, 2011, the IPCA submitted a letter to the Patterson City Council asking to be reinstated to his/her former position.

5. The SCCGJ requested itemized statements submitted by the IPCA. The SCCGJ feels these tax dollars should be transparent and a matter of public record. The SCCGJ first requested these records under the Public Records Act on March 16, 2011.

6. The IPCA is no longer the City Attorney for Patterson yet he/she represented a person deemed to be a focus of this investigation. The IPCA informed his/her client that he/she had appeared before the SCCGJ as a witness. The IPCA should have recused from representing a Council member after having been called himself/herself as a subject/witness on the same case. This perceived conflict of interest was ignored by the IPCA. The IPCA violated ethical protocol when representing Council member B at his/her invitation to speak with the SCCGJ.

7. In the opinion of the SCCGJ, the IPCA violated his/her oath of admonition as a witness before the SCCGJ when he/she informed Council member B that he/she had been called as a witness for this specific investigation.

GLOSSARY

§: A special character used to indicate the section of a statutory code.

Brown Act: Meetings of public bodies must be "open and public," actions may not be secret, and action taken in violation of open meetings laws may be voided. (California Government Code §§ 54953(a), 54953(c), 54960.1(d)). Closed meetings are the exception and permitted only if they meet for defined purposes of the Government Code and follow special requirements.

CalAware: A nonprofit organization established to help journalists and others keep Californians aware of what they need to know to hold government and other powerful institutions accountable for their actions. Its mission is to support and defend open government, an enquiring press and a citizenry free to exchange facts and opinions on public issues. In short, Californians

Aware will be a center for information, guidance and initiatives in public forum law.

CDD: City of Patterson Community Development Director.

HCD: Del Puerto Health Care District facility.

Investigative Functions: Techniques such as interviewing, auditing, and observing that the grand jury uses to gather data for civil investigations.

IPCA: Immediate Past City Attorney.

IPCM: Immediate Past City Manager.

IPM: Immediate Past Mayor.

Preponderance of Evidence: Preponderance of evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Public Records Act: The Public Records Act is designed to give the public access to information in possession of public agencies: "public records are open to inspection at all times." The Public Records Act is located within California Government Code § 6250 et seq.

Recusal: To remove oneself from participation to avoid a perceived conflict of interest.

SCCGJ: Stanislaus County Civil Grand Jury.

Sustain: To support by adequate proof.

BACKGROUND

Four (4) of the complaints alleged willful misconduct by the IPCA. The 2010/2011 SCCGJ investigated allegations that ranged from 2006-2010. These complaints were received during this term.

Based upon the information obtained by the CalAware attorney who specializes in local city government law, the IPCA was remiss in his/her advice on discouraging Brown Act violations during both open and closed sessions of City Council meetings. Proper agenda postings of "anticipated litigation" were not properly supervised by the IPCA.

In the SCCG's opinion, the IPCA was a prevaricator upon his/her explanation for not being inside the room when anticipated litigation was being discussed and voted upon. The IPCA said he/she was "right outside the door" during the vote. It seems prudent that

the IPCA inform the City Council that he/she should be inside the closed session of a meeting involving a significant amount of exposure to city litigation - particularly when it is clearly written on the special session agenda. The IPCA said he/she never saw a verified itemization from the landlord/developer or his/her attorney at the time of the closed session vote on October 26, 2009. (Refer to attachment 1). Additionally, the IPCA failed to advise on the negligent action that the City Council took by voting to reimburse while he/she was not present.

After his/her claim that he/she would have to testify against the city due to a conflict of interest, the IPCA, wrote he/she was upset because he/she was not consulted about the zoning issue and said the first he/she heard about the incident was from Council member A. According to the IPCA, he/she wrote, "you will remember that I gave an opinion, both CDD and IPCM wrote dissenting opinions indicating they knew the subject better than I did." The IPCA told city manager that his/her legal research into the zoning appeal would cost the city "several thousand dollars." The IPCA wrote, "The CDD and IPCM were extremely stubborn in accepting my opinion even to the point of independently asking outside Counsel whether my response to his/her opinion was correct. The CDD could have avoided all the problems if he/she had asked for my opinion before approving the permit for the Health Care District or even during an appeal to the Planning Commission."

§ 2.16.120 Removal—Written notice. (Patterson City Ordinance)

> *The removal of the city manager shall be only upon a majority vote of the whole council in **regular council meeting**, (emphasis added) all five members being present, subject, however, to the provisions of Sections 2.16.130 through 2.16.160. In case of his intended removal by the city council, the city manager shall be furnished with written notice stating the council's intention to remove him, at least thirty days before the effective date of his removal, which shall be shown upon the written notice. If the city manager so requests, the city council shall provide in writing, reasons for the intended removal, which shall be provided the city manager within seven days after the receipt of such request from the city manager, and at least fifteen days prior to the effective date of such removal. (Ord. 220 Art. 1 § 7 (part), 1972).*

On April 20, 2010, Council members A, B and the IPM voted to terminate the IPCM during a closed session of a City Council special meeting.

Item six on the agenda states, "City Manager Evaluation." During the closed session, IPM mentioned that he/she wanted the IPCM terminated. The IPCA was asked to leave the closed session and ask if the IPCM would be willing to resign. The IPCM said, "No." When the IPCA entered the closed session, he/she had a piece of paper (the back of an

agenda) on which a handwritten note was made. The handwritten note read, *"(IPCM: Pursuant to P.M.C. § 2.16.120 you are hereby given notice of intent to remove you as City Manager effective May 24, 2010."* (Refer to attachment #2). Two Council members stated that this was a predetermined action since the note was already written when the IPCA entered the room and they were concerned that the removal of a City Manager must be done during a regular council meeting as stipulated in the City ordinance. The IPCA failed to notify the City Council that the termination of a City Manager can only be done during a regular/open session of a Council meeting.

The contract for the IPCA was obtained by the SCCGJ under the Public Records Act. The contract indicates "City shall pay Attorney fees within thirty (30) days of receipt of billing from Attorney. Attorney shall bill monthly, with an **itemized bill,** sufficient to show services performed, person performing them, and charges, in the form specified by the City." The SCCGJ made several attempts via certified letters, emails, and personal telephone calls to obtain itemized billing statements due to the extensive legal expenses in the City of Patterson that have been paid.

Payments made directly to the IPCA for the time period of January 10, 2008 - September 2, 2010, total $425,495.55. Therefore, the IPCA received an average of $13,296.74 each month of employment. The IPCA is a part-time contractual employee whose sole obligations are to work a minimum of ten (10) hours per month and attend both the Planning Commission and City Council meetings. The contract mandated submission of itemized statements. Finally, on April 28, 2011, the interim City Attorney sent the SCCGJ an email indicating the following:

> *"I am writing on behalf of my client, the City of Patterson concerning your latest records request. In that regard, I have advised my client to not provide any further records regarding the prior City Attorney's bills because they are subject to the Attorney-Client Privilege."*

The IPCA violated his/her own admonition and ignored a conflict of interest when he/she came with Council member B to the SCCGJ interview. The IPCA had tendered his/her resignation approximately one year prior to this interview. The IPCA said he/she told Council member B that he/she was a previous witness in the "City of Patterson" investigation but chose to accompany and represent Council member B. This act represents a perceived conflict of interest on the part of the IPCA. The IPCA informed Council member B not to testify unless the IPCA was physically in the room. The SCCGJ provided the IPCA with the following statutory law.

California Penal Code § 939

> *No person other than those specified in Article 3 (commencing with Section 934), and in Sections 939.1, 939.11, and 939.21, and the officer having custody of a prisoner witness while the prisoner is testifying, is permitted to be present during the criminal sessions of the*

> *grand jury except the members and witnesses actually under examination. Members of the grand jury who have been excused pursuant to Section 939,5 shall not be present during any part of these proceedings. No persons other than grand jurors shall be permitted to be present during the expression of the opinions of the grand jurors, or the giving of their votes, on any criminal or* ***civil matter before them.*** (emphasis added).

The IPCA chose to ignore California Penal Code § 939 and told members of the SCCGJ that Council member B "is not testifying today."

Case Law supporting attorneys be excluded from Civil Grand Jury testimony under § 939 of the California Penal Code

Farnow v. Superior Court (San Mateo County Grand Jury)(1990) 226 Cal.App.3d 481; 276 Cal.Rptr. 275

Opinion of court in summary:

> *Despite the apparent import of the addition of the word "criminal" to § 939, however, the effect of a literal interpretation of this statute-to make civil sessions of the grand jury open to the public-would work so profound a change in the nature of grand jury proceedings that we must hesitate to adopt it. As our Supreme Court stated in considering an issue regarding disclosure of evidence reviewed by a grand jury, the secrecy of all grand jury proceedings is "deeply rooted in our traditions."*

Subsequent Testimony:

The IPCA was later provided with the case law as outlined above. The IPCA accompanied Council member B to the second (subpoenaed) request and remained outside of the room. This is another example of a perceived conflict of interest on the IPCA. Council member B was allowed to leave the room and consult with the IPCA during this interview.

INVESTIGATION METHODOLOGY

- Reviewed submitted complaints.
- Requested documents (emails and correspondence) through the Public Records Act.
- Reviewed voluntarily submitted memorandums and correspondence by interested witnesses.

- Reviewed thousands of emails - some of which were not included in our Public Records Act request but brought forward by witnesses and media sources.
- Attendance at City of Patterson Council meetings.
- Direct testimony was received by numerous witnesses. The testimony was under oath and recorded with their knowledge.
- Itemized billing statements of the IPCA were never provided to the SCCGJ as requested.

FINDINGS

F-1: The IPCA neglected to advise the City Council of Brown Act violations.

F-2: The IPCA should have recused himself/herself from providing legal advice to Council member B after having previously testified about evidence contained within this report.

F-3: The IPCA violated the Stanislaus County Civil Grand Jury Oath and Admonition when he/she informed Council member B of his/her exposure to this case.

F-4: The IPCA admitted that the IPCM and CDD most likely lost their jobs due to the zoning issues surrounding the HCD.

F-5: Based upon investigative functions, it is clear that the IPCA should have recused himself/herself from any discussions, legal advice, or guidance concerning the landlord/developer situation. This is based upon the testimony that the IPCA had declared himself a hostile witness to his client, the City of Patterson.

RECOMMENDATIONS

R-1: Based on this report, the City Council of Patterson file a complaint with the California State Bar Association.

REQUEST FOR RESPONSES

Patterson City Council.

REFERENCES

- California Fair Political Practices Commission http://www.fppc.ca.gov/.
- California Government Code.
- California Penal Code.

- City of Patterson. (2007). City of Patterson - *City Council Handbook.* Approved February 20, 2007 by City Council Members of Patterson.
- City of Patterson, California. http://ci.patterson.ca.us/.
- City of Patterson, Municipal Code.
- Correspondence voluntarily submitted by witnesses.
- Correspondence acquired from certified letter to commercial developers.
- Documents obtained via the Public Records Act.
- *Farnow v. Superior Court (San Mateo County Grand Jury)(1990) 226 Cal.App.3d 481; 276 Cal.Rptr. 275.*

Reports issued by the Civil Grand Jury do not identify individuals interviewed. Penal Code § 929 requires that reports of the Grand Jury not contain the name of any person, or facts leading to the identity of any person who provides information to the Civil Grand Jury. The California State Legislature has stated that it intends the provisions of Penal Code § 929 prohibiting disclosure of witness identities to encourage full candor in testimony in Civil Grand Jury investigations by protecting the privacy and confidentiality of those who participate in any Civil Grand Jury investigation.

RECUSAL ADVISEMENT

This report of cases 11-01C through 11-08C and 11-18C are issued by the 2010/2011 Stanislaus County Civil Grand Jury with the following exception: One (1) member of the grand jury volunteered to recuse his/her self due to a perceived conflict of interest. This grand juror was excluded from all phases of the investigation, including interviews, deliberations, voting, and in the writing and approval of this report. None of the information included in this report was obtained from the excluded grand juror as a means of mitigating a potential bias to the integrity of this report.

ATTACHMENT #1

NOTICE IS HEREBY GIVEN that a special meeting of the City Council of the City of Patterson will be held on Monday, October 26, 2009, commencing at 6:00 p.m. in the City Council Chambers, 1 Plaza, Patterson, California.

Said special meeting shall be for the purpose of holding a <u>Closed Session:</u>

- City Manager Evaluation/Potential Action (Pursuant to Government Code Section 54957).

- Conference with Legal Counsel, Anticipated Litigation. Significant exposure to Litigation pursuant to subdivision (b) of Section 54956.9: (1 case).

The special closed session meeting of the City Council of the City of Patterson was called to order in the City Council Chambers, Closed Session Room at 6:00 p.m. by Mayor Campo.

PRESENT: Councilmember Smith, Councilmember Farinha, Councilmember Cuellar, Councilmember Shelton and Mayor Campo (5)

STAFF: City Attorney Logan and City Manager Morris (2)

At 8:25 p.m. after Closed Session, Mayor Campo announced the following:

In regards to the Item of City Manager Evaluation/Potential Action (Pursuant to Government Code Section 54957). There was no action taken by Council.

In regards to the Item of Conference with Legal Counsel, Anticipated Litigation. Significant exposure to Litigation pursuant to subdivision (b) of Section 54956.9: (1 case). The City Council voted 3-2 to reimburse John Ramos $27,101.74 for legal fees incurred in his appeal of the Health Care District zoning issue, subject to verification of cost. Councilmembers Smith, Farinha and Mayor Campo voted yes. Councilmembers Cuellar and Shelton voted no.

There being no further business, the special closed session meeting of the City Council of the City of Patterson of October 26, 2009 was adjourned at 8:30 p.m.

Approved by the Patterson City Council on November 3, 2009.

ATTACHMENT #2

Pursuant to P.M.C. § 2.16.120
you are hereby given notice of intent
to remove you as City Manager
effective May 24th, 2010.