

- 1) Did Mayor Bailey Breach Attorney-Client Privilege?
- 2) Did Mayor Bailey Violate City Policy?
- 3) Council Discussion.



Individuals who receive attorney-client privilege information from City Attorney

In legal matters pertaining to the City Council

- All Seven Councilmembers
- Mayor
- Charter Officers (City Clerk and City Manager)

Receive Attorney-Client privilege information



1) Did Mayor Bailey Breach Attorney-Client Privilege?

Facts to consider: The initial document by Attorney Michael Colantuono was sent to the Council, Mayor, City Clerk and City Manager by the City Attorney on February 6, 2018.

On February 20, 2018 a final document was requested to be prepared for public release by the City Council and requested to be available within 7 days. This was publicly stated by the Mayor Pro Tem during the Council Meeting.



**Copy of City Attorney email that was received
by Mayor Bailey's office and sent out.**



Hansberger, Cheryl-Marie

From: GEUSS, Gary
 Sent: Tuesday, February 06, 2018 11:00 AM
 To: Gardner, Mike; Mendez, Andy; Soubirous, Mike; Conder, Chuck; MacArthur, Chris; Perry, Jim; Adams, Steven
 Cc: Bailey, Rusty; Nicol, Colleen; Russo, John A.
 Subject: FW: [External] memo re scope of mayor's veto
 Attachments: 20171213100039.cleaned.pdf

Follow Up Flag: Flag for follow up
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Councilmembers,

In the last week, two of you have approached me with regard to the scope of the Mayor's veto and whether it applies to the contract of the City Manager. I was first contacted with this question early December by the Mayor "confirming" that he had the power to veto a charter officer's contract. I told him at that time that the Charter states in Sections 600 and 700 the Charter Officers serve at the pleasure of the City Council (no mention of the Mayor.) Furthermore, the veto provisions of the Mayor are located in Sec. 413 Adoptions of ordinances and resolutions and not in general duties of the Mayor.

The Mayor adamantly disagreed with this interpretation of the Charter so, in an abundance of caution, and in an attempt to ease discord, I asked Michael Colantuono to review our Charter and all recent revisions and legislative history and provide me with an opinion. That four page opinion is attached.

The bottom line is that my opinion, supported by Colantuono's similar opinion, is that the Mayor does not have the authority under the Charter to veto employment contracts for the Charter Officers. Rather, it is the Council and only the Council that has the authority to hire, fire, and approve or disapprove employment contracts for Charter Officers.

Gary

From: Michael G. Colantuono [mailto:mcolantuono@chwlaw.us]
 Sent: Wednesday, December 13, 2017 10:14 AM
 To: Geuss, Gary <GGeuss@riversideca.gov>
 Subject: [External] memo re scope of mayor's veto

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As you asked.

Michael G. Colantuono

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MEMORANDUM

TO: Gary Geuss
 Riverside City Attorney
 FROM: Michael G. Colantuono, Esq.
 Lindsey F. Zwicker, Esq.
 RE: Mayor's Authority to Exercise Veto Power over City Manager's Amended Employment Contract
 DATE: December 11, 2017

INTRODUCTION AND SUMMARY OF CONCLUSION

As you asked, we write to opine on the scope of the Mayor's veto power: May he veto a decision of the City Council to renew and amend the employment contract of a charter officer (City Manager, City Attorney, City Clerk)?

We conclude he may not. Section 600 of the City Charter states the "City Manager serves at the pleasure of the City Council," and Section 700 states the same as to the City Clerk and City Attorney. These sections indicate that decisions regarding all aspects of the employment of a charter officer fall within the province of the Council's — and not Mayor's — authority. Although section 413 of the Charter empowers the Mayor to veto certain formal actions of the City Council, interpreting that power to reach employment actions as to charter officers contradicts the apparent intent of Sections 600 and 700.

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Gary Geuss
 Riverside City Attorney
 December 11, 2017
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DISCUSSION

I. THE CITY CHARTER ESTABLISHES CITY COUNCIL'S AUTHORITY TO APPOINT CERTAIN CHARTER OFFICERS

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Section 413 of the Charter provides, in relevant part:

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An award of a contract by a public agency, and all acts leading to the award, are legislative. (E.g., *Mike Moore's 24-hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 ("Mike Moore").) Generally, a legislative act is any that establishes a policy or procedure to be applied to future cases. (*Strumsky v. San Diego County Employees Retirement Ass'n* (1974) 11 Cal.3d 28, 34, fn. 2.) A decision requiring a legislative body to exercise discretion is a legislative act and is deferentially reviewed by courts. (*Mike Moore, supra*, 45 Cal.App.4th at p. 1303.) Contracting by a governmental entity "necessarily requires an exercise of discretion guided by considerations of the public welfare." (*Joint Council of Interns & Residents v. Board of Supervisors* (1989) 210 Cal.App.3d 1202, 1211.) The City Council's approval of an employment contract for a charter officer, as well as decisions regarding its financial terms, amount to legislation.

However, for the reasons stated below, we conclude this is not the intent of the framers of the Riverside Charter and the Mayor may not veto an action to appoint, reappoint, terminate, or compensate a charter officer, including an action regarding an employment or re-employment contract.

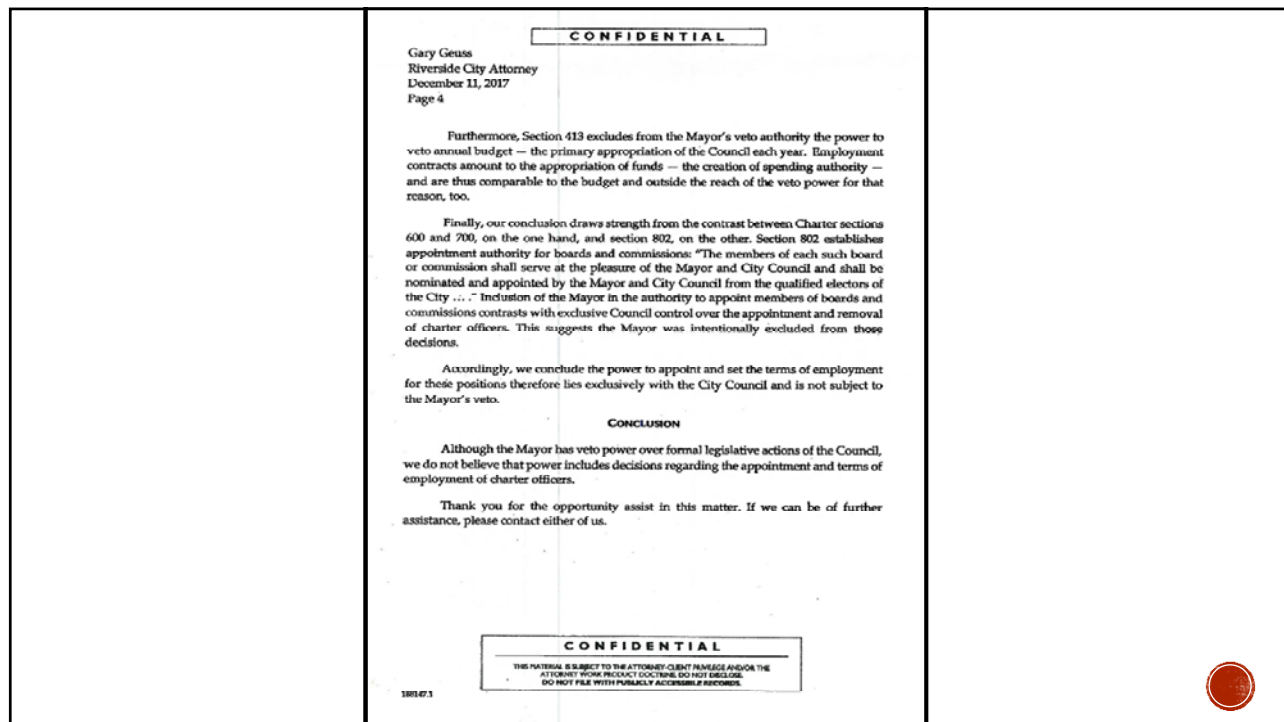
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In a newspaper article dated April 11, 2018 by the Press Enterprise Mayor Bailey indicated that "he didn't notice Confidentiality Warnings on Attorney Colantuono's letter" (Press Enterprise, April 11, 2018).

The article stated "Colantuono's email to Geuss and the letter itself contain confidentiality warnings, which Bailey said he didn't notice" (Press Enterprise, April 11, 2018).

PE **Riverside City Council to decide if Mayor Rusty...**

Councilman Andy Melendrez on Tuesday night, April 10, withdrew his earlier request for an investigation into the question. Melendrez said he now has the information he'd wanted the city to spend \$10,000 to \$25,000 probing, but wants a public discussion of the issue — and what to do about it if there were violations.

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The folder included a letter from attorney Michael Colantuono that backs City Attorney Gary Geuss' opinion that the city charter does not give the mayor power to veto the city manager's contract. The letter was addressed to Geuss, who had sent the letter directly to Bailey. The mayor said that led him to conclude he was free to distribute it.

"I don't specifically remember including that — there was a lot of information in that packet — but looking at it now, it looks like I'm the client," Bailey said Wednesday. "I'm glad we're going to have this discussion in public."

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Melendrez also said it was important for all the facts to be public.



Riverside Councilman Andy Melendrez wants a review of the city's rules on attorney-client privilege. File photo

"I'm not prejudging anything, but I think this is probably the most reasonable way and the fairest way to determine whether there was a violation or not," he said. "I hate the word 'investigation' — I would much prefer 'look into' — but there were a few red flags that came up."



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RE: Mayor's Authority to Exercise Veto Power over City Manager's Amended Employment Contract

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Furthermore, Section 413 excludes from the Mayor's veto authority the power to veto annual budget — the primary appropriation of the Council each year. Employment contracts amount to the appropriation of funds — the creation of spending authority — and are thus comparable to the budget and outside the reach of the veto power for that reason, too.

Finally, our conclusion draws strength from the contrast between Charter sections 600 and 700, on the one hand, and section 802, on the other. Section 802 establishes appointment authority for boards and commissions: "The members of each such board or commission shall serve at the pleasure of the Mayor and City Council and shall be nominated and appointed by the Mayor and City Council from the qualified electors of the City ..." Inclusion of the Mayor in the authority to appoint members of boards and commissions contrasts with exclusive Council control over the appointment and removal of charter officers. This suggests the Mayor was intentionally excluded from those decisions.

Accordingly, we conclude the power to appoint and set the terms of employment for these positions therefore lies exclusively with the City Council and is not subject to the Mayor's veto.

CONCLUSION

Although the Mayor has veto power over formal legislative actions of the Council, we do not believe that power includes decisions regarding the appointment and terms of employment of charter officers.

Thank you for the opportunity assist in this matter. If we can be of further assistance, please contact either of us.

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	<p>PE Riverside City Council to decide if Mayor Rusty...</p> <p>Councilman Andy Melendrez on Tuesday night, April 10, withdrew his earlier request for an investigation into the question. Melendrez said he now has the information he'd wanted the city to spend \$10,000 to \$25,000 probing, but wants a public discussion of the issue — and what to do about it if there were violations.</p> <p>Bailey said Wednesday, April 11, that he didn't intend to divulge any legally sensitive information. He gave a reporter a folder of information Feb. 6 to explain his announcement during that day's council meeting that he was vetoing a contract for City Manager John Russo.</p> <p>The folder included a letter from attorney Michael Colantuono that backs City Attorney Gary Geuss' opinion that the city charter does not give the mayor power to veto the city manager's contract. The letter was addressed to Geuss, who had sent the letter directly to Bailey. The mayor said that led him to conclude he was free to distribute it.</p> <p>"I don't specifically remember including that — there was a lot of information in that packet — but looking at it now, it looks like I'm the client," Bailey said Wednesday. "I'm glad we're going to have this discussion in public."</p> <p>Colantuono's email to Geuss and the letter itself contain confidentiality warnings, which Bailey said he didn't notice.</p> <p>Melendrez also said it was important for all the facts to be public.</p> <div data-bbox="457 1545 643 1759"> </div> <p>Riverside Councilman Andy Melendrez wants a review of the city's rules on attorney-client privilege. File photo.</p> <div data-bbox="656 1545 1065 1612"> <p>"I'm not prejudging anything, but I think this is probably the most reasonable way and the fairest way to determine whether there was a violation or not," he said. "I hate the word 'investigation' — I would much prefer 'look into' — but there were a few red flags that came up."</p> </div> <div data-bbox="753 1621 987 1789"> </div> <p>The report from Geuss on attorney-client privilege, as well as any other information related to violations of attorney-client privilege, will be posted online by May 19, because of the city's transparency rules.</p>	
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MAYOR BAILEY EMAILED “LEGALLY SENSITIVE INFORMATION” 6 TIMES AFTER FEBRUARY 6, 2018

Public Records Request Summary

Date	E-mail To	E-mail From	Nature of E-mail	Exhibit No.
February 7, 2018	Craig Marshall cmarshall@tclaw.net	Rusty Bailey	Gary's e-mail with Colantuono opinion attached	1
February 8, 2018	peter.boyd@sbcglobal.net	Rusty Bailey	Gary's e-mail with Colantuono opinion attached	2
February 8, 2018	Rusty (rustybailey9@aol.com)	Rusty Bailey	Gary's e-mail with Colantuono opinion attached	3
February 10, 2018	Rusty (rustybailey9@aol.com)	Rusty Bailey	Gary's e-mail with Colantuono opinion attached	4
February 12, 2018	Rusty Bailey	Rusty Bailey (rustybailey9@aol.com)	Gary's e-mail with Colantuono opinion attached	5
February 22, 2018	Cheryl-Marie Hansberger	Cheryl-Marie Hanberger on behalf of Rusty Bailey	Gary's e-mail with Colantuono opinion attached	6

On March 28, 2018 in an unsolicited conversation with Cheryl-Marie Hansberger the Mayor's Chief of Staff she indicated that the information related to the February 6, 2018 information to the Press Enterprise was sent out on the order of “her boss, we just do what we are told.” “My integrity is important to me”.

Hansberger, Cheryl-Marie

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 Page 3

a common limit to veto powers (Cf. U.S. Const., art. I, § 7; Cal. Const., art. IV, § 10) — case law treats contracting decisions as legislative in character.

An award of a contract by a public agency, and all acts leading to the award, are legislative. (E.g., *Mike Moore's 24-hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 ("Mike Moore").) Generally, a legislative act is any that establishes a policy or procedure to be applied to future cases. (*Strumsky v. San Diego County Employees Retirement Ass'n* (1974) 11 Cal.3d 28, 34, fn. 2.) A decision requiring a legislative body to exercise discretion is a legislative act and is deferentially reviewed by courts. (*Mike Moore, supra*, 45 Cal.App.4th at p. 1303.) Contracting by a governmental entity "necessarily requires an exercise of discretion guided by considerations of the public welfare." (*Joint Council of Interns & Residents v. Board of Supervisors* (1989) 210 Cal.App.3d 1202, 1211.) The City Council's approval of an employment contract for a charter officer, as well as decisions regarding its financial terms, amount to legislation.

However, for the reasons stated below, we conclude this is not the intent of the framers of the Riverside Charter and the Mayor may not veto an action to appoint, reappoint, terminate, or compensate a charter officer, including an action regarding an employment or re-employment contract.

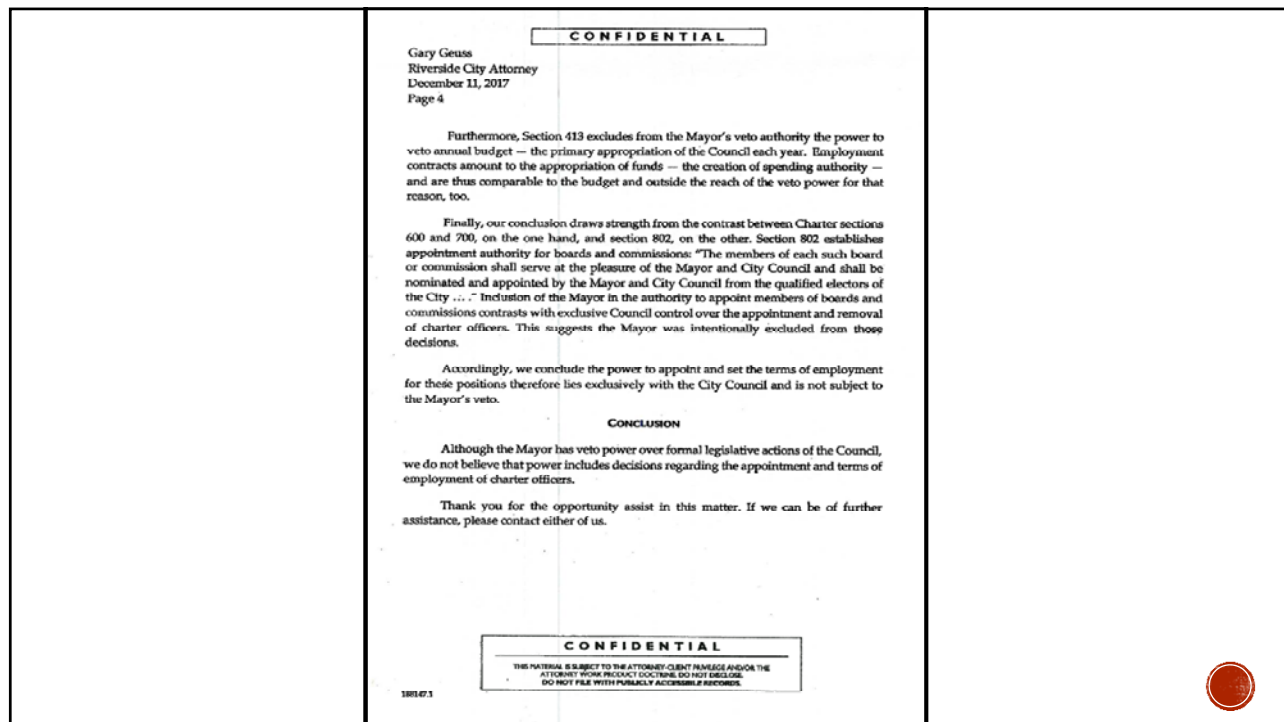
III. SERVICE "AT THE PLEASURE OF THE CITY COUNCIL" IS INCONSISTENT WITH VETO OF CHARTER OFFICER CONTRACTS

If the Mayor could veto a contract for a charter officer, that officer would have an obvious incentive to take direction from the Mayor and to seek his approval. That incentive is in tension with, if not fully inconsistent with, the Charter's statement that charter officers "serve at the pleasure of the City Council." We doubt the framers of the charter would have created two rules at obvious tension with one another on something so vital as the chain of authority in City administration. If they did, we would expect them to do so expressly and not merely by implication. Accordingly, we conclude the statements that charter officers "serve at the pleasure of the City Council" preclude the exercise of the Mayor's veto as to contracts and other employment decisions affecting the three charter officers.

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THIS MATERIAL IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE AND/OR THE ATTORNEY WORK PRODUCT DOCTRINE. DO NOT DISCLOSE. DO NOT FILE WITH PUBLICLY ACCESSIBLE RECORDS.

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Strategy to oppose City Manager contract and Mayor veto attempt with Attorney-Client privilege information began on or before February 12, 2018.

February 20, 2018 was the release date of Attorney Michael Colantuono's Attorney-Client privilege opinion letter regarding the attempted veto by the Mayor.

	<p>From: Rusty Bailey <rustybailey9@aol.com> Sent: Monday, February 12, 2018 11:57 AM To: Bailey, Rusty Subject: [External] Fwd: Draft Letter to City Manager and City Attorney</p> <p>Rusty #iloveriverside</p> <p>Begin forwarded message:</p> <p>From: Craig Marshall <cmarshall@TCLAW.net> Date: February 12, 2018 at 09:46:38 PST To: Rusty Bailey <rustybailey9@aol.com> Cc: John Boyd <jboyd@TCLAW.net>, Gary Montgomery <gmontgomery@TCLAW.net> Subject: Draft Letter to City Manager and City Attorney</p> <p>Dear Rusty,</p> <p>Below please find a draft letter to the city manager and city attorney per our meeting yesterday. John, Gary and I take no pride of authorship – please feel free to make any changes you desire but we would suggest you keep it as short and pointed as possible. This has to look like a real effort to resolve the crisis.</p> <p>One idea we were tossing around is whether to copy all of the Councilmembers on the letter. I imagine it will be circulated anyway, so it probably is fine to copy them. Of course, this is your call. If you have any questions, please let us know.</p> <p><i>Dear John and Gary (put their formal names and titles)</i></p> <p><i>Due to the current climate and what may lie ahead I wanted to reach out and offer a simple solution to the existing situation. This situation is on a fast track that can only result in tremendous expenses to the City and loss of valuable time that should be directed to more pressing City needs.</i></p> <p><i>The way I perceive the current situation is I have exercised lawful authority pursuant to the City Charter and current working rules resolution. The opinion offered by the City Attorney was done after the meeting was adjourned and the veto was entered in the record. That opinion was then validated outside any recognized meeting and apparently not authorized by the full Council. The personnel contract in question was then executed without proper authority granted by the Charter.</i></p> <p><i>We both know our respective opinions will not be binding until either 1) a withdrawal or over-riding of my veto or 2) final binding judgment of the appropriate court. I cannot for reasons I have expressed withdraw my veto. The use of a veto by an elected official is not just focused on the instant situation but is for future Mayors of our City on future issues. The reasons I have stated for this veto were included in my statement.</i></p> <p><i>I also realize that within the current situation there is a very real possibility that my veto will be over-ridden given the present positions of the Council. If that happens this crisis is averted. I pledge that</i></p>	
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2) Did Mayor Bailey violate city policy?

section 702. Eligibility, powers and duties of City Attorney.

Sec. 702. Eligibility, powers and duties of City Attorney.

To become eligible for City Attorney, the person appointed shall be an attorney-at-law duly licensed as such under the laws of the State of California, and shall have been engaged in the practice of law for at least five years prior to appointment.

The City Attorney shall have power and may be required to:

(a) Represent and advise the City Council and all City officers in all matters of law pertaining to their offices.

(b) Represent and appear for the City in any or all actions or proceedings in which the City is concerned or is a party, and represent and appear for any City officer or employee, or former City officer or employee, in any or all actions and proceedings in which any such officer or employee is concerned or is a party for any act arising out of such officer's or employee's employment or by reason of such officer's or employee's official capacity.

(c) Attend all regular meetings of the City Council and give advice or opinion in writing whenever requested to do so by the City Council or by any of the boards or officers of the City.

(d) Approve the form of all contracts made by and all bonds given to the City, endorsing the City Attorney's approval thereon in writing.

(e) Prepare any and all proposed ordinances or resolutions for the City and amendments thereto.

(f) Surrender to the City Attorney's successor all books, papers, files and documents pertaining to the City's affairs.

The City Council shall have control of all legal business and proceedings and may employ other attorneys to take charge of any litigation or matter or to assist the City Attorney therein. (Effective 12/27/1995 and 12/11/1986)

Sec. 703. Powers and duties of City Clerk.

The City Clerk shall have power and be required to:

(a) Be responsible for the recording and maintaining of a full and true record of all of the proceedings of the City Council in books that shall bear appropriate titles and be devoted to such purpose and attend all meetings of the City Council either in person or by deputy.

(b) Maintain separate books, in which shall be recorded respectively all ordinances and resolutions, with the certificate of the clerk annexed to each thereof stating the same to be the original or a correct copy, and as to an ordinance requiring publication, stating that the same has been published in accordance with this Charter; keep all books properly indexed and open to public inspection when not in actual use.

(c) Maintain separate books, in which a record shall be made of all written contracts and official bonds.

(d) Be the custodian of the seal of the City.

(e) Administer oaths or affirmations, take affidavits and depositions pertaining to the affairs and business of the City and certify copies of official records.

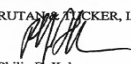


The City Council approved an Attorney vendor list and designated the City Attorney to be the authorized person responsible for contact with contract attorneys.

Mayor Bailey contacted Attorney Philip D. Kohn of the Law Offices of Rutan and Tucker on December 12, 2017 for attorney services without City Council approval or knowledge by our City Attorney.

Rutan and Tucker is on the City Attorney vendor list.



<p>RUTAN RUTAN & TUCKER, LLP</p> <p style="text-align: right;">Philip D. Kohn Direct Dial: (714) 641-3415 E-mail: pkohn@rutan.com</p> <p style="text-align: center;">February 12, 2018</p> <p>CONFIDENTIAL VIA E-MAIL AND FIRST CLASS MAIL</p> <p>Mr. Gary Geuss City Attorney City of Riverside Riverside City Hall 3900 Main Street Riverside, CA 92501</p> <p>Re: <u>Charter Interpretation of Mayor's Veto Power</u></p> <p>Dear Mr. Geuss:</p> <p>Pursuant to your request in follow up to my February 9, 2018 letter with which you were copied, I am writing to provide additional information concerning the Charter interpretation work that I was asked to perform. As evident below, there were very few communications between Mayor Bailey and me from the time of the initial assignment until the completion of the work effort.</p> <ul style="list-style-type: none"> I was first contacted by and spoke with Mayor Bailey via telephone on December 12, 2017. Mayor Bailey requested at that time that I research and prepare an independent, objective and impartial analysis of the provision of the Riverside City Charter empowering the Mayor to veto formal actions of the City Council. Mayor Bailey explained that the requested work should address whether the referenced provision of the Riverside City Charter encompasses a formal action of the City Council to renew or extend the otherwise expiring employment contract of the City Manager. Mayor Bailey understood that an outside attorney had concluded the veto power could not be exercised for this purpose, but he believed that the City Attorney <u>had not as of that time rendered a formal opinion</u>. He added he was told that the City Attorney was not in a position to directly advise the Mayor on the matter. Mayor Bailey expressed a desire to <u>research</u> obtain an unbiased outside review of the issue with no pre-commitment to the outcome of the analysis. <p>611 Anton Blvd., Suite 1400, Costa Mesa, CA 92626 PO Box 1950, Costa Mesa, CA 92628-1950 714.641.5100 Fax 714.546.9035 Franne Piccolo Palo Alto www.rutan.com</p> <p style="text-align: right;">13603487-0001 1198209.1 4/27/17/6</p>	<p>RUTAN RUTAN & TUCKER, LLP</p> <p>Mr. Gary Geuss February 12, 2018 Page 2</p> <p style="text-align: right;">CONFIDENTIAL</p> <ul style="list-style-type: none"> Mayor Bailey indicated that it was within the authority of his independent, separately elected public office to make the request for the research and analysis of the issue, and that the requested services would be compensated through the approved budget for the Mayor's Office. I estimate the duration of the call to be approximately 5-10 minutes. At my requests from time to time, I was subsequently provided with provisions of the Riverside City Charter from and after the date of its original adoption and a summary of the circumstances in which the Mayor's veto power had most recently been exercised. At no time during the course of my research and analysis did Mayor Bailey or anyone else attempt to interfere with or influence my work or direct me to reach a particular conclusion. Following my initial conversation with Mayor Bailey, I did not communicate with him regarding my research results or preliminary analysis until my draft was completed in early February 2018. I personally performed all of the work relating to the requested assignment and did not delegate tasks to other attorneys at the firm or paralegals. <p>I hope that the foregoing is responsive to your request for additional information. Thank you.</p> <p>Very truly yours, RUTAN & TUCKER, LLP  Philip D. Kohn</p> <p style="text-align: right;">13603487-0001 1198209.1 4/27/17/6</p>
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It is only the City Council that has the authority to hire outside council on the attorney vendor list.

It is only the City Council that authorizes payment to attorneys on the vendor list.



3) Discussion.

