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**Comments on Grand Jury Report Issued June 5, 2002
(Pen. Code §933 et seq.)
July 17, 2002**

To: Hon. Christian F. Thierbach, Presiding Judge
Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

Your Honor,

Pursuant to Penal Code Section 933 (c) and 933.05, this constitutes the comments and response of the City of Moreno Valley City Council, and its Mayor, to the above-referenced Report.

The City Council recognizes and respects the time-honored and honorable role of the Grand Jury and its statutory authority to examine and make recommendations regarding the conduct of local government. Likewise, the Council supports the principles of open government represented by the Brown Act. It has always been the policy of the City to comply with the Brown Act. Because of that, the City accepts, as a continuation of its present policies and practices, recommendations 1 through 3 of the Report concerning compliance with the Brown Act at all times, proper posting of agendas and proper disclosures regarding closed sessions, and conducting all meetings under Brown Act requirements. The Council has, and will continue to, implement these three recommendations.

However, while respecting the Grand Jury's role, the City is highly disappointed with the inaccuracies contained in the Report and strongly disagrees with any finding that a violation of the Brown Act occurred in the events outlined in the Report. Several of the findings contained in the Report are simply wrong. Other portions of the Report seem to imply violation of the Act, when the Act is simply not at issue. Section 933.05 (e), in the interest of fairness, provides that the Grand Jury "shall meet" with the subject of its investigation unless the court determines that it would be "detrimental". Only one council member was invited to meet with the Grand Jury on this matter. None of the other individuals who would have first hand knowledge of the events relevant to the Report was interviewed on this subject. Because the Report has the potential to unjustly damage the reputation and credibility of the Council, the City feels compelled to issue a detailed response, pointing out the errors and inaccuracies contained in the Report so that the public may properly gauge its credibility.

While each finding will be addressed specifically below, it is instructive to note that the Grand Jury did not get several basic background facts about the City right. The Report states that "the City of Moreno Valley is a charter city established in 1984." It is a matter of public record that the City is a general law city, not a charter city.

Likewise, the Council holds regular study sessions on the 3rd Tuesday of each month, not merely "as needed" as stated in the Report, another matter of public record. Furthermore, at the time of the incidents subject to the Report, the Council held regular study sessions on the 1st and 3rd Tuesdays. The reservation of 1st Tuesdays for closed session items did not begin until October of 2001.

In fact, the Report was not even directed to the correct person. The Report was delivered to the attention of "Mayor Bonnie Flickinger." Bonnie Flickinger is not the Mayor of Moreno Valley. Charles White is the Mayor. This is another matter of public record that could have been easily verified.

These may appear to be insignificant errors and differences not relevant to the Brown Act issues, but they are disturbing evidence of lack of care in the investigation and reporting process. Such inaccuracies call into question the credibility of the secret basis for the Report's findings.

Even more disturbing and unfair are the factual inaccuracies and false assumptions presented in the Report's findings. In that regard, the City makes the following point by point response to the findings of the Report:

Finding 1: "The Moreno Valley City Council Initiated release actions for the City Clerk, a long-term appointee, in 2000. No record of these initial actions are documented in agendas or reports from closed sessions."

The City disagrees with this finding as set forth below.

This finding assumes that the City Council took action in closed session terminating Ms. Chavez' employment or accepting her resignation in 2000. It implies that a closed session sometime in late 2000 should have been agendized, notifying the public of the Council's intent to dismiss or accept the resignation of Ms. Chavez in closed session, and that a public report should have been made upon the conclusion of that closed session. The simple fact is that neither a dismissal nor an acceptance of a resignation took place in closed session. What actually occurred is that the Council conducted properly noticed performance review closed sessions. A conclusion to her employment was negotiated by Ms. Chavez' attorney with the City's special legal counsel within a range of authority previously provided. That process was not final until February 2001. There simply was no action to report in 2000. Furthermore, the final resolution was concluded by and under authority given to, the City's special legal counsel and was not finalized in closed session. Therefore, there was no failure to agendize the matter and no failure to report closed session actions even at the later date.

However, in addition to the basic factual inaccuracy, the finding implies duties on the part of the Council that simply do not exist under the Brown Act. This finding implies that the Council must agendize and report initial actions related to the "release" of an employee at the first time they might have been discussed. It also implies that there is a duty to disclose which employee those initial discussions were about. This is simply not the law and would be incredibly bad public policy if it were.

If that were the law, city councils would be caught in an impossible legal and administrative bind. They would be unable to even begin discussion of an employee's release until they were sure that release would actually be their ultimate decision. Otherwise, the employee's usefulness to the organization would be severely damaged or destroyed by merely revealing that release might be discussed. Since even hearing evidence and arguments for or against release without publicly revealing information about the employee would be illegal under that reading of the Brown Act, a council would have to choose between destroying the employee's morale and reputation in order to hold a "properly" noticed and reported preliminary discussion, releasing an employee it may then conclude during the meeting it shouldn't have, or not even discussing releasing an employee that it ultimately should have released in the public interest. Under such a system personnel decisions in the best interest of the public would become impossible. Such an interpretation of the law is an absurdity. That is why the law is in fact to the contrary.

Section 54954.5 provides a so-called "safe harbor" for agenda descriptions. It clearly states that the only agenda listing required for a closed session to discuss dismissal or resignation of an employee is "PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE." It specifically states that no other information is required. Neither the employee nor the position need be disclosed. Therefore, even if the Council had taken "release actions" in 2000, an agenda description would not have "documented" anything in relation to the City Clerk. Nor are preliminary discussions of a potential personnel action that may be taken in the future required to be reported under § 54957.1. In fact, that section

specifically provides for the reporting of "action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session . . ." It does not require disclosure of preliminary discussions or performance review discussions. It also states that a report of a dismissal decision, even if there had been one, "shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any." Therefore, even if the Council had taken initial actions toward a dismissal, they would not have been reportable until after the dismissal was final and all administrative remedies exhausted.

With respect to acceptance of a resignation, § 54957.1 only requires the reporting of action taken in closed session to accept a resignation. Ms. Chavez' resignation occurred by her signature on an agreement in February 2001 and no action was taken in closed session to accept that agreement, since it was negotiated over a period of time on terms within the special legal counsel's previously granted authority. There is no requirement that the Council report the granting of negotiating authority on either a personnel issue or a matter of potential litigation.

Finding 2: "Subsequently, the council contracted for a 'City of Moreno Valley City Clerk's Office Performance Review.'"

The City disagrees with this finding as set forth below.

It is curious, indeed, that the Grand Jury even included this in its findings. There is no apparent allegation of a violation related to it. There is no law that regulates City Councils' ability to ask for or consider a consultant's performance review of an appointee. Its inclusion seems to imply that such an independent review is somehow illegal or improper when it clearly is neither. This finding is simply irrelevant.

With respect to the factual basis of the finding, the Council did authorize an independent performance review of the City Clerk. However, the implication of the word "subsequently," inferring that the performance review was contracted for after starting the "release actions" alleged in Finding 1 is utterly false, and frankly, nonsensical. There would be no purpose in contracting for such a review if such a decision had already been made. In fact, since the City Clerk was an "at will" appointee, no performance review would have been needed to support a release in any case.

The Council does annual performance reviews of its appointees. In order to assure fairness under special circumstances, the Council asked for an independent performance review for the City Clerk before issuing her annual evaluation. As discussed above, all closed sessions at which this review was discussed were listed on the Council agenda under Government Code § 54957 and with the "safe-harbor" language set forth in § 54954.5 as Public Employee Performance Evaluation for the City Clerk. Performance reviews are not subject to disclosure under the Brown Act.

Finding 3: "In December 2000, although there was no official appointment, an 'Acting City Clerk' began signing council meeting minutes."

The City disagrees with this finding as set forth below.

This finding is simply inaccurate and is clearly shown to be inaccurate by readily available public information. The Acting City Clerk did not sign any council meeting minutes in December of 2000. There was no person acting in the role of "Acting City Clerk" in December of 2000. Council meeting minutes are not signed until after the City Council has reviewed them and voted to approve them. The public records of the City clearly show that the minutes of the various December City Council meetings were not approved by the Council until January 23, 2001 and February 13, 2001 and therefore were not signed in December 2000.

Furthermore, even if it had been true, or minutes were signed by such a person at a later date, as was the case, there is no law, Brown Act or otherwise, requiring a formal appointment of a person before signing council minutes. Therefore, this finding is both inaccurate and irrelevant.

Finding 4: "In January of 2001, the City Manger issued a memo to the City Council stating the following:

- * **'It is my understanding that I have been appointed as the City Clerk for the time being'.**
- * **The long-term appointee was notified that personal effects were to be removed from the office at 6:00 pm on January 3, 2001.**
- * **The City Manager/City Clerk appointed an 'Interim City Clerk' effective as of January 4, 2001.**

The City disagrees with this finding as set forth below.

In and of itself, this finding is merely an assertion of alleged facts. However, the context of the finding, particularly in relation to Finding 5, warrants a detailed response to both the assertions of fact and the corresponding legal assumptions regarding the Brown Act.

The Brown Act applies only to the actions of legislative bodies, not to the actions of City Managers. The actions of the City Manager are simply not governed by the Brown Act. Thus, clearly, the final two bullet points are completely irrelevant to the Brown Act. The Manager's notification regarding personal belongings was an action of the Manager and not the Council, and is a common practice with an employee who is on administrative leave under the circumstances that existed at the time. Likewise, the City Manager's assignment of duties to a city employee, whether he styles it as an appointment or otherwise, is not governed by the Brown Act.

The only part of this finding that is reasonably related to the Council's Brown Act compliance is the first bullet point, and then only as hearsay evidence with little probative value. The City Manager did send a memo. However, the memo is not a record of City Council actions, but a statement of the Manager's characterization of events at which he was not in attendance. The City Manager did not attend the closed sessions referred to in the response to Finding 1 above. The request for him to temporarily supervise the Clerk's office was neither formal nor communicated directly to him by the Council. Therefore his characterization of his understanding of what did or did not take place in closed session is simply that – his characterization. It is not proof that his characterization is correct in fact or law.

The fact is that the council held no vote and took no action to appoint the City Manager as the City Clerk or the Interim City Clerk. There was no need for an appointment. The City already had a City Clerk and an Assistant City Clerk. There was no vacant position to appoint anyone to. At the time in question, the Assistant City Clerk had serious health problems and was not able to run the office while Ms. Chavez's situation was resolved. Ms. Chavez still held the position of City Clerk, but was on leave. The Manager was simply asked to make sure that the day to day operations of the Clerk's office were taken care of during the City Clerk's leave and the Assistant City Clerk's health problems.

It should also be remembered that the statutory duties of "the City Clerk" are very limited. Most functions carried out in, and most employees of, the City Clerk's office are not under the City Clerk's independent statutory authority, but are administrative matters overseen by the City Manager in any case. He, in turn, on his own authority, assigned an existing city employee, Alice Reed, to handle the day to day operations of the office due to her experience, education, knowledge of the Clerk's functions, and leadership skills. The City Manager designated her as "Acting City Clerk" in order to provide a title descriptive of her assignment. Since the Moreno Valley Municipal Code makes it clear that the Clerk's functions are not incompatible with the Manager's functions (MVMC 2.10.010), this was simply a reasonable and practical approach to an unusual set of circumstances in order to assure the smooth continuity of the office's operations. Ms. Reed's assignment and participation was open and public, and she identified herself and her title at each council meeting she attended.

That arrangement remained in place, essentially by default, after Ms. Chavez employment concluded until the Council, after an open recruitment and interview process, appointed Ms. Reed as City Clerk in June 2001. That action was both noticed on the closed session agenda and reported at the public meeting as required by the Brown Act.

Finding 5: Actions precipitating Items 3 and 4 above failed to comply with the requirements of the Brown Act including closed sessions and reconvening with reports of actions taken.

The City disagrees with this finding as set forth below.

As discussed above, Finding 3 is both inaccurate and irrelevant. It is not an indication of any violation.

Finding 4 is also irrelevant to any finding of a Brown Act violation. As already discussed, there was no reportable action taken in closed session.

Finding 6: The Brown Act specifically prohibits other means which may be used to develop a collective concurrence as to actions to be taken. These other means (or type of meetings) included having less-than-a-quorum present.

The City disagrees with this finding as set forth below.

This finding appears to simply be a paraphrase of the law and not a finding at all. It is true that the Brown Act prohibits "other means which may be used to develop a collective concurrence as to actions to be taken." It is not true, however, that the Brown Act prohibits all meetings of less than a quorum as implied in the finding. Rather, such meetings constitute a violation only if they involve "a majority of the members of the legislative body to develop a collective concurrence as to action to be taken . . ." Govt. Code § 54952.2 (b). Moreover, this finding is irrelevant to the City's Brown Act compliance in this matter because no such meetings and no such collective concurrence ever took place. The Grand Jury does not present any finding or evidence that it did, except tangentially by implication in Finding 7, which will be addressed below.

Finding 7: One council member stated, "We didn't have to comply with the Brown Act regarding those meetings; we didn't have a quorum."

The City disagrees with this finding as set forth below.

In the City Attorney's inquiry regarding this matter, each and every member of the City Council emphatically denied ever having made any such statement concerning the subject matter of the Report or participating in any such meetings regarding this subject.

Furthermore, even if a Council member had made such a statement, it would not be evidence of any violation of the Act. The statement on its face could be legally correct. Even a series of private meetings between two particular council members is not a violation of the Brown Act. The Act prohibits private discussions "employed by a majority" to reach "a collective concurrence." A violation would occur only when the subject matter of such a meeting was discussed by one of the two with a third council member. No such meeting took place and there is no such finding in the Report.

July 17, 2002

Summary of Comments and Response:

The City disagrees with Findings 1 through 7 of the Report as detailed below.

The City has implemented Recommendations 1 through 3 of the Report and affirmatively states that it has followed the recommended practices in the past and will continue to do so in the future.

Respectfully Submitted,



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Cc: Hon. Mary Ellen Johnson, Foreperson, Riverside County Grand Jury 2001-2002, P.O. Box 829,
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