

Memorandum

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TO: Honorable Mayor and City Council
City of San Jose

FROM: Joan L. Cassman, Esq., Kurt A. Franklin, Esq., M. D. Moye, Esq.

DATE: January 11, 2005

RE: **Supplemental Report - Independent Investigation Regarding the Request for Proposals Related to the Converged Network for the New San Jose Civic Center**

The purpose of this supplemental memorandum is to provide additional information relevant to the findings and conclusions set forth in our report dated January 7, 2005.

NEWLY DISCOVERED FACTS

As we were preparing our report of investigation, we discovered three additional events that had not previously been disclosed in the prior investigations or in the course of our inquiry. These events related specifically to matters addressed in all of the investigations and appeared to be relevant to the question of “who knew what and when” regarding concerns raised about the CN RFP. In addition, the discovery of these facts at this time called into question responses that had been given in the prior investigations, why certain documents had not been disclosed in the prior investigations, and whether the newly disclosed documents shed further light on the question of who had knowledge of concerns about the CN RFP before the June 22, 2004 City Council session.¹

- **The City Manager’s Office Disclosed An E-Mail Message From Wandzia Grycz To Kay Winer That Demonstrates First-Hand Knowledge Of The Doyle E-Mail, A Fact That Had Not Been Disclosed In The Prior Investigations.**

On the afternoon of January 6, 2005, we learned for the first time of a conversation between the CIO, Wandzia Grycz, and Deputy City Manager Terry Roberts concerning an April 6, 2004 e-mail that Deputy City Attorney Brian Doyle (“Doyle E-mail”) sent to Grycz. The Doyle E-mail outlined a number of concerns related to the CN RFP that was issued on March 15, 2004. Grycz related that she spoke to Roberts about the substance of Doyle’s e-mail. At Roberts’ request, Grycz sent a copy of the e-mail to Roberts (via e-mail).

In the late afternoon on January 6, 2005, we questioned Roberts concerning this claim by Grycz. Roberts stated that he did not recall a conversation with Grycz concerning the Doyle E-mail and

¹ These new documents also raised questions as to the adequacy of disclosure and documents that were made available to respond to a Public Records Act request that sought documents relevant to the RFP process.

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that he never received a copy of the e-mail from Grycz. Roberts recalled that he first saw the Doyle E-mail sometime in June when he was reviewing documents to be produced in response to a Public Records Act request. Roberts reiterated that he did not discuss the e-mail with Grycz at any time.²

On the morning of January 7, 2005, as we were preparing our report of investigation, Roberts contacted us and reported that he had a copy of an e-mail message dated June 30, 2004, from Grycz to Deputy City Manager Kay Winer. The e-mail message to Winer consisted of a message, "Here is Brian's email, annotated with my comments" and included the Doyle E-mail with Grycz's comments incorporated into the body of the earlier email. ("Winer E-mail")(**Exhibit P**)

This message appeared to be significant for several reasons. First, although we had access to the City Auditor's investigative file and had reviewed the documents that were submitted in conjunction with the Personnel Investigation, we had not seen the Winer E-Mail before Friday. Along the same lines, it was our understanding, based on interviews conducted with personnel from the City Manager's office that they were not privy to the concerns raised by the Doyle E-mail message until July 2004 or after the first investigation of the CN RFP process (CAO/CA Investigation Report of Investigation released August 9, 2004). Finally, we had just conducted an interview with Winer, in which we questioned her concerning her relationship with Grycz and her involvement with the CN, and the fact of this e-mail message never came up. In the earlier interview we specifically asked Winer about her knowledge of circumstances surrounding the CN RFP. In responding, she stated that she had worked with Grycz and the IT Department on a number of issues through the end of 2003 and into early 2004, but she had not been involved in the development of the CN RFP or the evaluation/selection process. Winer did not disclose that she had knowledge of any issues related to concerns about the RFP. Winer did not disclose that she had received Exhibit P.

We addressed the issues concerning this e-mail to Winer. First, she said that she thought that we had a copy of Exhibit P and that we had not asked her about it during our interview with her. She stated that she had given a copy to Alex Gurza, or that he had a copy of the message, when he questioned her as part of the Personnel Investigation and so assumed that we had access to the message. We spoke to Gurza, however, and he denied that he had a copy of this e-mail or that he had obtained a copy of it from Winer.³

Winer told us that she contacted Grycz after the City Council meeting in which questions about concerns over the RFP were raised. She said that she sought to determine from Grycz the nature of Brian Doyle's concerns and in response Grycz forwarded the e-mail to her. Although the

² We have found no evidence, other than the statement of Grycz, that shows Roberts received the Doyle E-mail from Grycz or discussed it with her.

³ Gurza conferred with Gina Donnelly, who assisted him in the Personnel Investigation. She confirmed that Winer was not included in the Personnel Investigation and this document had not been disclosed.

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Council's concern over issues related to the CN RFP piqued Winer's interest, upon receipt of the e-mail setting forth Grycz's version of events, she stated that she did not do anything in particular with the e-mail – she did not talk to Grycz further; she did not talk to Brian Doyle. She said that she did not give it to the City Manager and after further questioning acknowledged that she gave a copy to Roberts.⁴

- **In The Course Of Conducting Further Investigation Regarding The Winer E-Mail, We Discovered That Grycz Had Also Forwarded A Similar E-Mail To Mark Linder (“Linder E-Mail”).**

On January 7, 2005, we contacted Grycz to confirm the circumstances surrounding the Winer E-mail.⁵ In conjunction with explaining this event, we learned from Grycz that she had sent a similar e-mail to Assistant City Manager Mark Linder.

We contacted Linder and he confirmed that he received an e-mail from Grycz that related her responses to the Doyle E-mail (the content of this e-mail message is identical to the Winer E-mail). Linder stated that he received this e-mail from Grycz on May 21, 2004. He related that Grycz had advised him that Doyle had concerns about the CN RFP and that he had sent her an e-mail setting forth those concerns. Linder asked her to forward the e-mail, which Grycz did on May 21. **(Exhibit Q)**

Linder states that the following week he spoke with Grycz and she advised that Doyle's concerns had been resolved. Linder states that at that time he did not give a copy of the e-mail to anyone and did not discuss the e-mail with anyone. Linder did not produce the e-mail in the course of the response to a Public Records Act request or the CAO/CA Investigation, but he did provide a copy of the e-mail to Gurza.⁶

- **We Then Discovered That Shikada Had Also Received A Copy Of Grycz's Response To The Doyle E-Mail, But That E-Mail Had Not Surfaced In The Prior Investigations.**

On January 10, 2005, we contacted Shikada again to confirm Winer's statement that she had given him a copy of the June 30, 2004 e-mail from Grycz. Shikada denied that he had received a copy of that e-mail from Winer at that time,⁷ but stated that he had received from Grycz an e-

⁴ She gave it to Roberts because of his position as project manager for the NCC. She also states that she gave a copy to Deputy City Manager Ed Shikada. We spoke with Shikada and he denied receiving a copy of the Winer e-mail at that time. He said that he received a copy of the e-mail from Winer for the first time this past week.

⁵ We contacted Grycz's attorney late in the day on Friday, January 7. We followed up on this contact on the morning of January 10, 2005.

⁶ Gurza confirmed that he received a copy of the e-mail from Linder. He did not reference it in the Personnel Investigation as his focus in that inquiry was on the events that preceded issuance of the RFP and the statements made by employees concerning communication with Cisco in the course of investigating that process.

⁷ Shikada stated that he received a copy of the Winer e-mail in the past week.

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mail similar to the Winer E-mail and Linder E-mail in early July 2004. Shikada related that after Grycz's interview in the CAO/CA Investigation he asked her to clarify the issue of "standardization" about which she had been questioned.⁸ In response, Grycz forwarded to him a copy of the Doyle e-mail interlineated with her responses to his comments (the same type of e-mail that she provided to Linder and Winer). Shikada did not have a copy of this e-mail.⁹

Shikada says that upon receiving this e-mail from Grycz he did not share it with anyone. We specifically asked him about:

- 1) why he did not share this with the City Manager as this was a significant issue that the Council had asked to be investigated;
- 2) whether this was a specific inquiry of the just concluded interview with the City Attorney/City Auditor;
- 3) the extent that he was present at Grycz's CAO/CA investigation as her "advocate," why he did not disclose this e-mail to the City Attorney or City Auditor to corroborate her statements in the course of that interview.

Shikada denied that he had given the e-mail to the City Manager. He states that he discussed with the City Manager the issues raised by the e-mail (i.e., the substance of the questions asked of Grycz in her interview with the CAO/CA), but did not specifically reference the e-mail or provide a copy of the e-mail to the City Manager. He also says that he did not provide a copy of the e-mail to the investigators as he felt that it was not "relevant" and that he believed that the questioning by the investigators covered all of the issues addressed in the e-mail and that the e-mail added nothing to Grycz's responses in the interview.

⁸ In our prior discussions with Shikada he stated that he had received a copy of the Doyle E-mail from Grycz. He clarified that the document that he received was the Doyle E-mail with Grycz's comments annotated. While this explanation avoided the conclusion that he had not disclosed this document in our investigation, it did not satisfy the concern that the document he had received from Grycz had not been produced in the earlier investigations. As of this date, Grycz's e-mail to Shikada has not been reviewed as part of any of the investigations.

⁹ We reviewed the messages sent from Grycz's e-mail address and did not find this address. We have not yet been able to review Shikada's incoming e-mail for this period.

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ANALYSIS

We are troubled by this new information.

- **This New Information Demonstrates That Relevant Information Was Withheld From The City Attorney/City Auditor In Their Investigation And From The Personnel Investigation.**

The circumstances indicate these e-mails should have been disclosed in the earlier investigations.¹⁰ The clear purpose of those investigations, which Winer, Linder, and Shikada understood, was to determine what issues had arisen concerning the CN RFP and whether those issues had been adequately addressed. The response of the CIO to the legal issues raised by the City Attorney's Office is obviously relevant to this question; all of them specifically questioned Grycz about the nature of the dispute between the City Attorney's Office and the IT Department and requested a copy of the e-mail.¹¹ By not disclosing, the investigators were left without information that would have addressed a significant issue of their inquiry.¹² Moreover, the early disclosure of this information would have aided in understanding the CIO's rationale for her actions and perhaps precluded the need for this investigation to answer "why" these events occurred.

- **The Non-Disclosure Of The E-Mails Calls Into Question The Extent To Which The City Manager's Office Was Aware Of Problems With The CN RFP Before The June 22 Council Session And The Disclosure Of The Doyle E-Mail.**

In the aftermath of the June 22 Council session and the subsequent investigations, a primary question was the extent to which the City Attorney and City Manager's Offices were aware of problems with the CN RFP and what actions they took to address those problems. The state of the evidence prior to this investigation indicated that the City Manager was not aware of the

¹⁰ We are cognizant of the fact that these e-mail messages could have been disclosed by Grycz in her prior interviews in the CAO/CA Investigation and Personnel Investigation. Similarly, in the many hours that we spent interviewing her and reviewing her statements these messages were not disclosed until late in the day. Although this type of disclosure is often cause to question credibility, we are not inclined to discount the evidentiary value entirely for two reasons. First, Grycz explained that she simply was not focused on these communications during earlier questioning; the fact that these communications would have aided her position if disclosed earlier suggest that the failure to disclose does not undermine their credibility completely. Second, independent evidence (i.e., the documents and the admissions of the recipients) establishes that the communications were made as she states.

¹¹ We note that all of the issues in the Doyle e-mail are not "legal" issues, but that distinction does not excuse bringing forward the response that purported to respond to the issues, whether legal or otherwise.

¹² The City Manager noted that in the course of the investigation of this matter the City Attorney advised that Brian Doyle's concerns regarding the RFP had been resolved. Consequently, he questions the significance of Linder or Winer's failure to disclose the e-mails from Grycz. We emphasize that our analysis in this report focuses on the failure of disclosure and its impact on the Council's desire to understand what happened in this process. Even assuming that the failure to disclose these e-mails did not undermine the RFP process, our concern is the impact on the integrity of the investigative process.

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Doyle e-mail or any of the issues raised by that e-mail (i.e., questions concerning standardization or communications with Cisco). Furthermore, statements made in the early course of our investigation seemed to be consistent with this understanding of the City Manager's office's knowledge.

At this point, the Linder and Winer E-mails cause us to question the City Manager's knowledge of issues related to the CN RFP. The fact that on May 21, 2004 Linder received a copy of the Doyle E-mail indicates that the City Manager's Office was aware of Doyle's concerns. Notwithstanding Linder's denial of having advised the City Manager of this e-mail and the City Manager's denial of conversation with Linder about it, the fact remains that the City Manager's Office had the information. Likewise, on or about June 30, 2004, Winer, and shortly thereafter Roberts, were aware of Doyle's concerns and at some point in early July, Shikada also had specific knowledge of Doyle's concerns.

Although all four of these Assistant/Deputy City Managers deny that they provided a copy of the Doyle E-mail or referred specifically to it in their conversations with the City Manager, and he also denies seeing any version of the Doyle E-mail before it was reported in a newspaper article in August, it is noteworthy that *none* of them brought this to his attention. Given the focus of attention and Council interest in this subject it appears more likely than not that the City Manager was advised of or given a copy of the Doyle E-mail or a copy of the Winer or Linder E-mails. If this did not occur, then the issue is the propriety of these subordinates not advising their superior of the facts related to this important issue.

CONCLUSION

Based on the foregoing, we amend the findings of our initial report to incorporate these omissions from the prior investigations.

We also supplement our earlier findings regarding the City Manager's Office of knowledge of problems concerning the RFP consistent with the facts reported in this supplement. We believe that knowledge as of May 21, 2004 (based on the Linder E-mail) of problems concerning the CN RFP undermines the accuracy of the representations to the City Council by the City Manager's Office. The Council should consider to what extent that the City Manager's knowledge of issues concerning the RFP comports with subsequent actions and representations concerning the RFP.