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October 2, 2020

City Attorney Michael Haas
City of Madison
City-County Building, Rm 401
210 Martin Luther King Blvd.
Madison, WI 53703

By Email to:
MHaas@cityofmadison.com

RE: Legislative file #62441- Resolution on Steps and Procedures for Removal and Complaint of Shadayra Kilfoy-Flores.

Dear Attorney Haas:

Our firm represents Paul Skidmore, Alder for District 9 on the City of Madison Common Council, with regards to the above proposed resolution and underlying Complaint of Shadayra Kilfoy-Flores, dated September 15, 2020. In our review of this matter, several concerns merit the Council's attention. First, the Complaint of Ms. Kilfoy-Flores does not satisfy the procedural or substantive basis to trigger a hearing for removal under Wis. Stat. Ch. 17. Second, the Open Meetings Law violations that you forewarn of in your memos appear to be very real. All sides in the matter should be able to appreciate that any council action taken – especially those that result in the public smearing of a fellow alder – should comply with the law and carry legal authority.

With regards to the Complaint by Ms. Kilfoy-Flores, as you correctly lay out in your memos dated September 16, 2020 and September 28, 2020, removal of a councilmember may be triggered only by a “written verified complaint by a resident taxpayer”. Wis. Stat. Sec. 17.16 (2). The written and verified Complaint by Ms. Kilfoy-Flores does not meet the technical language of the statute because it does not ask that a councilmember be removed under Sec. 17.16. Her verbal statement that she wants Mr. Skidmore removed is neither verified nor written as required by the statute.

Additionally, the Complaint itself does not provide a sufficient basis to show cause for removal under Sec. 17.12. The verified complaint does not outline any factual

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basis to show Mr. Skidmore was the speaker of the offensive remark during the September 1, 2020 council meeting other than the Complainant's belief that the speaker sounded like Mr. Skidmore. Complainant identifies as a partial basis for this belief her political disagreements with Mr. Skidmore and antipathy towards him. Certainly disagreements arise between individuals and council members when weighty issues are before the body. However, those disagreements and personal feelings should not serve as a basis for an accusation of official misconduct or malfeasance in office. The Complaint lacks substantive facts that the official engaged in misconduct sufficient for removal under the standards of Sec. 17.12.

Finally, with regard to the Complaint, the proposed resolution places the cost and expenses of the hearing, including stenographer, solely on the City. Should any hearing result in non-removal, Mr. Skidmore would certainly be within his rights to seek compensation from the City for the expenses he incurred in defending this accusation. Mr. Skidmore believes these concerns should be weighed against the strength of the factual basis underlying the Complaint when voting whether to approve the resolution.

Related to any resolution by the Common Council to conduct an investigation into the offensive remark made during the September 1, 2020 meeting, Mr. Skidmore questions the validity of any vote to authorize such an investigation in light of the September 3, 2020 Open Letter to the Public jointly issued by fourteen Common Council members. That Open Letter requests "a thorough investigation, including a forensic analysis of the recording" of the meeting. That language is reiterated in the Complaint, where the Complainant demands "a thorough investigation, including a forensic and voice identification analysis". In short, fourteen members of the Common Council have already collectively considered an investigation into the matter and collectively decided to approve such a measure in violation of the Open Meetings Law.

As you identify in your memo dated September 17, 2020, a meeting, subject to the Open Meetings Law, occurs when there are sufficient numbers of public officials engaging in government business. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 102, 308 N.W.2d 154 (1987). There is no question that the content of the September 3, 2020 Open Letter is government business and that it was not the result of a properly noticed and held meeting of the Common Council. As you address in your September

16, 2020 memo to the Council, “the Common Council has the authority to police its members for conduct that occurs on the Council floor during a meeting and that authority includes conducting an investigation”. By requesting an investigation, the Open Letter was addressing an issue within the purview of the Common Council and one that, by the language of the Open Letter itself, was likely going to come before the Common Council. That the Complaint of Ms. Kilfoy-Flores requested the same action by the Common Council only re-iterates that the Open Letter concerned government business as the term is defined under the Open Meetings law.

As you further identify in your memo dated September 17, 2020, a negative quorum exists when enough members communicate regarding government business such that they have the potential of controlling the outcome of a matter that may come before the public body. Fourteen Common Council members signed onto the September 3, 2020 Open Letter requesting an investigation into the offensive remark made during the September 1, 2020 meeting. It is certainly reasonable to conclude that by signing onto a letter requesting an investigation, Common Council members are indicating their collective intent to approve such a resolution before the same body. Fourteen Common Council members serves as a majority of the Common Council and sufficient numbers to authorize such an investigation.

Even if the communication between Common Council members was not deliberative, that the substance of the Open Letter was directly related to a matter likely to come before the Council and was adopted by a majority of the Council without a meeting deprived Mr. Skidmore specifically, and the public at large, of the opportunity to attend and participate in the discussion of the issue. Based upon the Open Letter, it appears that the issue of whether or not to have an investigation has been decided prior to any such resolution being before the body. That appearance flies in the face of the purpose of the Open Meetings law, to provide transparency and an opportunity to comment when discussing matters before the governmental body.

Mr. Skidmore is left in the unenviable position of either one, accepting a Common Council resolution to authorize an investigation approved in violation of the Open Meetings law and based on a legally insufficient complaint and endure the continued public smearing of his name, or two, he can assert the interests of government transparency and legality and appear to be quashing an investigation into his own conduct.

To be clear, Mr. Skidmore denies that he made the offensive statement identified in the Complaint during the September 1, 2020 meeting. Mr. Skidmore is hopeful that an investigation will result in his exoneration but believes that an investigation may ultimately be inconclusive, consistent with the result of the preliminary investigation performed so far since the software used during the meeting did not identify the speaker and the City Staff and IT department could not identify the speaker retroactively. It seems unlikely that further investigation will serve any purpose other than to continue to smear his name at substantial additional cost to the city.

Again, the purpose of the letter is to re-iterate to the Common Council that the consequences you forewarned of are not hypothetical. Any resolution passed by the Common Council to authorize an investigation into the offensive statement made during the September 1, 2020 meeting could be voidable under an Open Meetings challenge. Furthermore, the verified complaint does not meet the statutory standards for removal, opening up grounds for another challenge.

One hopes the Common Council proceeds with these cautions in mind. You may feel free to distribute this letter to members of the Common Council. Thank you for your attention to this matter.

Truly Yours,
GEIER HOMAR & ROY LLP

A handwritten signature in black ink, appearing to read "J. Humphrey". The signature is written in a cursive, somewhat stylized font.

Joseph Humphrey

CC: Paul Skidmore