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## INVESTIGATIVE REPORT

**To:** Matthew Morton, City Manager  
**From:** Jeffrey E. Mandel, Esquire  
**Date:** June 29, 2020  
**Subject:** EthicsPoint Case Nos. 43, 53, and 60;  
Compliance Manager Jay Maher's May 6, 2020 email

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The following is the report of my investigation into the allegations raised in (a) EthicsPoint Case Nos. 43, 53, and 60; and (b) Compliance Manager Jay Maher's May 6, 2020 email.

### **Background**

On December 20, 2019, Compliance Manager Jay Maher opened EthicsPoint Case No. 43 to investigate concerns raised by City Manager Matt Morton about employees searching through City emails and then releasing them to the media in violation of City policy. In February 2020, Mr. Maher closed EthicsPoint Case No. 43, and opened EthicsPoint Case No. 53 to investigate potential violations of Chapter 119, Florida Statutes discovered during the investigation of EthicsPoint Case No. 43. Mr. Maher closed EthicsPoint Case No. 53 on March 6, 2020. On March 27, 2020, Mr. Morton reopened EthicsPoint Case Nos. 43 and 53. I was assigned to review EthicsPoint Case Nos. 43 and 53. I was also asked to address any process issues I observed during the course of my investigation and make recommendations regarding any such issues.<sup>1</sup>

Thereafter EthicsPoint Case No. 60 was opened. As the allegations in that case are similar to those raised in EthicsPoint Case No. 53, my investigation was expanded to include EthicsPoint Case No. 60. In an effort to investigate EthicsPoint Case No. 60, which was an anonymous complaint, I sent a message through the EthicsPoint system asking the complainant if he/she would

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<sup>1</sup> It has been both stated and implied that I was asked to reopen the investigations in EthicsPoint Case Nos. 43 and 53 to keep Mr. Maher's investigations from becoming public record and hide his findings of potential wrongdoing by City officials. Nothing can be further from the truth. I was asked to take a fresh look at these cases from the standpoint of my 30 years of legal experience interpreting and advising municipal and county governments on public records matters, and my 34 years of experience with public sector investigations. Mr. Morton has made clear to me since day one that I was to reach whatever conclusions the evidence led me to, even if they implicated City elected and/or appointed officials (including him). I have taken that charge very seriously.

Speak with me. I never received a reply to my message and therefore was never able to interview the reporting individual and determine the factual basis for the complaint.

On May 6, 2020, Jay Maher sent an email to Mr. Morton raising a number of allegations, including ones touched on in EthicsPoint Case Nos. 43, 53, and 60. At the direction of Mr. Morton, my investigation was expanded to include those allegations as well. I met with Mr. Maher on May 28, 2020 to interview him regarding the allegations in his email. (I previously had two meetings with Mr. Maher regarding Case Nos. 43, 53, and 60, one telephonic and one in person.) Mr. Maher informed me that he was uncertain whether he could meet with me in light of the Ethics Commission and State Attorney General's Office investigations that were purportedly initiated based on his complaints. Mr. Maher represented that he would contact the investigators with both entities and let me know if he could speak with me about his May 6, 2020 email allegations. On June 16, 2020, I followed up with Mr. Maher regarding whether he could speak with me about his May 6, 2020 email allegations. On June 17, Mr. Maher responded that he had reached out to the investigator from the Ethics Commission and was attempting to locate the second investigator from a different agency that part of the case has been referred to, and would let me know as soon as he head back from them. To date, I have not received any follow-up from Mr. Maher.

During the course of my investigation the following individuals were interviewed: Mr. Morton, City Attorney William Reischmann, Mayor Milissa Holland, City Clerk Virginia Smith, Director of Finance Helena Alves, Director of Information Technology Doug Atkins, Chief Innovations Officer Don Kewley, Mr. Maher, and Compensation Analyst Laura Bukolt. Additionally, I reviewed all of the documents and electronic files associated with EthicsPoint Case Nos. 43, 53, and 60. I also reviewed a number of other cases in the EthicsPoint system from a process standpoint. Lastly, I reviewed the City's policies regarding Fraud, Waste, Abuse and Whistleblower Protection.

## **Investigation Findings and Conclusions**

### **A. The City's Fraud, Waste, Abuse and Whistleblower Protection Policy**

1. In November 2015, the City implemented a Fraud, Waste, Abuse and Whistleblower Protection Policy which was subsequently incorporated into the City's Personnel Policies and Procedures Manual as Section 3.31. The stated intent of the Policy "is to provide a mechanism for Reporting Individuals to provide information or complaints, even when the information or complaint may not rise to the level of an illegal activity." Under the Policy, Reporting Individuals can report suspected fraud, waste, abuse, and other violations of the Code of Ethics for Public Officers and Employees (Chapter 112, Fla. Stat.) by one of the following methods: (a) providing a written, signed statement to the City's Internal Controls Investigative ("ICE") Team; (b) using the City's Fraud & Waste Hotline or the City's website; or (c) reporting the suspected violations to the City management or elected officials. The Policy allows Reporting Individuals to submit complaints anonymously and to remain anonymous during the investigation of their complaints.

2. Investigations into complaints brought under the City's Fraud, Waste, Abuse and Whistleblower Protection Policy are conducted by a team of City employees who are part of the

broader ICE Team. This investigative team is headed by Mr. Maher, and includes a Human Resources Department member and a Finance Department member. Mr. Maher has been primarily responsible for conducting the investigations, with the other team members normally serving in support roles.

3. Complaints brought under the City's Fraud, Waste, Abuse and Whistleblower Protection Policy are tracked through NAVEX Global's EthicsPoint on-line reporting tool. Each complaint, regardless of the method in which it is raised, is assigned an EthicsPoint case number, and all pertinent information related to the complaint and the investigation thereof is recorded in EthicsPoint under the corresponding case number. The status of each EthicsPoint case is tracked as well, normally denoted as New, In Progress, or Closed. Under the City's Fraud, Waste, Abuse and Whistleblower Protection Policy, complaints are to be fully investigated and evaluated. If an investigation results in a recommendation to discipline an individual employee, the recommendation and disciplinary action are to be handled in accordance with the City's Personnel Policies and Procedures. Decisions to prosecute or refer the investigative results to the appropriate law enforcement and/or regulatory agencies for independent investigation are to be made by the City Manager, as are final decisions of disposition of the investigation.

4. While the City's Fraud, Waste, Abuse and Whistleblower Protection Policy provides that final decisions of the disposition of investigations are to be made by the City Manager, in practice, the investigation results are not provided to the City Manager. In this regard, at some point the decision was made that the City Manager and the Human Resources Director should not be informed of the complaints, investigations, and investigation results as they would be involved in the review of any resulting discipline. To comply with the Policy, the investigation results were provided to the Assistant City Manager. Since October 2019 and the resignation of the Assistant City Manager, the City Manager's office has been excluded from the process.

5. The City's Fraud, Waste, Abuse and Whistleblower Protection Policy does not contain any processes or procedures for conducting investigations. Instead, such matters are by default left to the discretion of the ICE investigation team. Thus, the ICE investigation team, primarily through Mr. Maher, determines how long an investigation will last, what complaints fall within the ICE investigation team's jurisdiction, whether determinations as to the merits of the complaint are made, whether determinations as to policy violations are made, and whether cases are ever closed. Moreover, the ICE investigation team decides whether to inform employees that they are under investigation, and whether to take the steps necessary to ensure that employees' statutory and constitutional rights are being protected.

6. While the vast majority of EthicsPoint cases involve alleged employee misconduct, there are some raised through the Hotline that involve allegations raised against citizens. This is contrary to the intent of the City's Fraud, Waste, Abuse and Whistleblower Protection Policy, which is to address concerns over the actions/inactions of "the City, its officers and its employees." For example, three cases were opened based on anonymous allegations that certain named members of the public are dangerous criminals and should be arrested. All three remain open in the EthicsPoint system with no investigatory activity and no listed resolution. There is no indication in the EthicsPoint system that these citizens are aware that these allegations have been

raised against them, that these allegations are memorialized in the EthicsPoint system, or that no determination has been made as to the merits of the allegations against them.

7. Additionally, a number of cases exist in which the case was closed, but no resolution of the complaint is identified in the system. As a result, allegations of wrongdoing against City employees are in the public record without any specific findings as to the validity of the allegations or any evidence that the employees involved were ever made aware of the allegations against them. Additionally, while small in number, there are EthicsPoint cases that have been open for long periods of time with no resolution. For example, two cases are still open from March 2016 alleging that someone ate an employee's salad at work and implicating the former City Human Resources Director as a witness or perpetrator. There is no indication in the system that the compliant was investigated, or that the former City Human Resources Director was interviewed and/or given an opportunity to respond to the allegations. Similarly, there is a case of alleged theft by a City employee that is being intentionally held open just in case more information is discovered in the indeterminable future. Lastly, there is at least one case in which a finding of violation of City policy exists for which there is no evidence that the employee was even aware of the investigation, much less the documented finding, and the City Manager was never informed of the finding.

8. There is no doubt that the City's Fraud, Waste, Abuse and Whistleblower Protection Policy was well intended. However, the lack of any written processes for conducting investigations has rendered the Policy seriously flawed in its application.<sup>2</sup> As it currently exists, the Policy allows anyone to anonymously place allegations against employees and members of the public, regardless of how slanderous, into the public record without their knowledge and without an opportunity for rebuttal. And, it allows members of the ICE investigations team to make determinations that employees have violated the law regardless of whether they have any expertise in interpreting or applying the law at issue. Moreover, the Policy as it currently exists allows investigations to be conducted without due process protections or without fundamental fairness, such as letting employees know they are under investigation before questioning them, or having formal interviews with witnesses instead of speaking with them in the hallway or contacting them without indicating why they are being questioned. This potentially exposes the City to liability.

9. Further, the current practice of not sharing allegations with the Human Resources Director or the City Manager is contrary to the principles of good government. First, the fact that the Human Resources Director or the City Manager are aware of the allegations in the investigatory phase does not compromise their role in the appeal of any disciplinary action – it is common in the public sector for individuals in their positions to be aware of issues that may give rise to discipline before discipline is taken. Second, under Article V of the City Charter, the City Manager is the City's Chief Executive Officer and the City Manager is responsible for all City employees except

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<sup>2</sup> While I recognize that the members of the ICE investigations team, particularly Mr. Maher, will likely view this as an indictment of their handling of investigations under Policy 3.31, I am not accusing any ICE investigation team member of any intentional wrongdoing. And, I recognize that they were operating without any written guidelines. Instead, I am detailing the concerns I have with the Policy and current process so that the City can address them. Whether there has been any intentional wrongdoing in the investigation of any complaint is beyond the scope of my investigation, and I am not making any findings either way on the subject.

for the City Attorney. The City Manager cannot properly execute his/her functions if, for example, the City Manager is not made aware that an employee with control over the City's finances is under investigation for defrauding the City. Those and similar circumstance may warrant that the employee be suspended pending the investigation; however, the City Manager is deprived of the ability to make that decision as he/she is not made aware of the allegations or the investigation. If the City intends to continue the current process, which it is not legally required to do (and is out of the ordinary for municipalities in Florida), I recommend that the current process be suspended and revamped prior to being reinstated. I also recommend that the City conduct a review of the EthicsPoint cases in the system to correct any of the issues raised above.

**B. Case No. 43**

10. On November 20, 2019, Brian McMillan of the Palm Coast Observer submitted a public records request to City Clerk Virginia Smith stating in pertinent part:

Can you please send me the Gartner report that was commissioned by the City Council?  
And can you tell me the price the city paid for the report?

On November 25, 2019, after returning from vacation, Ms. Smith conducted a comprehensive search for a Gartner report, but found none. As such, Ms. Smith responded to Mr. McMillan as follows:

Brian, I have attached the contract with Gartner for their consulting services. I do not have a document responsive to your request for a report.

11. During her search for the "Gartner report," Ms. Smith found a four-page PowerPoint slide deck prepared by City staff. Ms. Smith did not provide that document to Mr. McMillan as she interpreted his request as asking for a report prepared by Gartner, Inc. Ms. Smith's interpretation of this request, and her determination that the PowerPoint slide deck was neither a report nor a document prepared by Gartner, Inc., are both reasonable. In fact, it would have been unreasonable for Ms. Smith to assume that Mr. McMillan was requesting a document prepared by City staff as he also asked Ms. Smith for the price the City paid for the report he was requesting. Undoubtedly, Mr. McMillan is aware that the City doesn't charge itself for City staff to prepare reports, and, therefore, he was referring to an externally prepared report that the City paid for.

12. On Sunday, December 15, 2019, Mr. McMillan submitted a public request to Ms. Smith for copies of emails sent by Mayor Milissa Holland on October 24, 2017, January 29, 2018, and February 1, 2018. Ms. Smith responded to Mr. McMillan by email on December 16, 2019 stating as follows:

I will do my best to get through the emails today. If you have a topic it may assist me in processing quicker.

Ms. Smith often requests topics when running email searches as it normally speeds up the search process, and her request of Mr. McMillan was not intended to keep documents from being

produced. Mr. McMillan responded that same day: “Sure, if you can start with anything mentioning Costal Cloud, that would be good.”

13. Thereafter, on December 16, Ms. Smith did a search of the City’s email archiver for any emails sent from Mayor Holland’s City email address that mentioned Costal Cloud on the specified dates. The search results included the following emails mentioning Costal Cloud:

a. A January 29, 2018 email from Mayor Holland to Sherry Gutch (Business Development Manager for the City of Orlando), subject “Thank You!”, sent from Mayor Holland’s City email and containing her City signature block.

b. A February 1, 2018 email from Mayor Holland to Rosa Akhtarkhavari (Chief Information Officer for the City of Orlando), subject “Sherry Gutch meeting,” sent from Mayor Holland’s City email and containing her City signature block.

Ms. Smith was unsure whether these emails were public records as they appeared personal in nature. Thus, she reached out to City Attorney William Reischmann for legal guidance as was her practice in such situations.

14. After his initial communications with Ms. Smith, Mr. Reischmann reached out to Mayor Holland to ask about the context of the two emails in question. Mayor Holland, who was out of town at the time and had not seen Mr. McMillan’s request, confirmed that the emails were not related to City business. However, she did not weigh in on whether the emails should be produced, and did not instruct Mr. Reischmann to withhold them. Mr. Morton also contacted Mayor Holland that day to let her know that a request had been made for her emails. Mayor Holland did not ask or direct Mr. Morton to withhold the emails, and Mr. Morton never asked or directed Ms. Smith to withhold the emails. To the contrary, it was Mr. Morton’s position that if the emails were public records they should be turned over.

15. On December 16, after researching the matter, Mr. Reischmann advised Ms. Smith by phone that the emails in question were not public records as they did not reflect City business and were personal in nature. Mr. Reischmann also provided Ms. Smith citation to an Attorney General Opinion (“AGO 04-33”) supporting his position. Mr. Reischmann was not influenced in his decision by Mayor Holland, Mr. Morton, or Ms. Smith – he made the decision that he believed was legally correct.

16. Later in the day on December 16, Ms. Smith sent Mr. McMillan an email that stated in pertinent part:

I verified the emails. There is only one responsive to Coastal Cloud, which is what I have attached. There were two identified that are personal in nature and therefore are not responsive to your request.

Prior to sending this email, Ms. Smith had informed Mr. Morton that she had received a request from Mr. McMillan for the Mayor’s emails. This was Ms. Smith’s standing practice. Mr. Morton did not instruct Ms. Smith to withhold any emails, and Mr. Smith relied solely on Mr.

Reischmann's legal advice in not providing the emails in question to Mr. McMillan. There is no evidence that Mr. Morton, Mr. Reischmann, Ms. Smith, and/or Mayor Holland conspired to withhold the emails in question from Mr. McMillan.

17. Mr. McMillan responded to Ms. Smith in pertinent part by asking her to send him the emails that were personal in nature. Ms. Smith replied, consistent with Mr. Reischmann's legal advice, in pertinent part:

Those personal in nature do not relate to the City and therefore are not City emails to be released.

Mr. McMillan replied back on December 20, 2019 asking Ms. Smith to "share with me the Florida Statute that says why they can't be released." Ms. Smith responded that same day with the following excerpt she found in her research from the Florida Government in the Sunshine Manual:

**Personal records not made or received in the course of official business**

As noted in AGO 04-33, the broad definition of "public record" makes it clear that the "form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business." *See s. 119.011(12), F.S.*, defining the term "public records" to mean materials "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." *See also Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), stating that in order to constitute "public records" for purposes of Ch. 119 disclosure requirements, the records must have been prepared "in connection with official agency business" and be intended to "perpetuate, communicate, or formalize knowledge of some type."

Mr. Reischmann reviewed a draft of this response prior to Ms. Smith sending it to Mr. McMillan.

18. Thereafter Mr. McMillan spoke with City Attorney William Reischmann about not being provided records that were on the City's email server. During the conversation, Mr. McMillan detailed the contents of the emails that had not been provided to him. Mr. Reischmann responded that the emails were not public records. That night, Mr. McMillan sent Mr. Reischmann a text message which led Mr. Reischmann to believe that Mr. McMillan was going in a different direction with his story and that he was no longer seeking the emails in question.

19. Similar to Mr. Reichsmann, Mr. Morton had a conversation with Mr. McMillan that led him to believe someone at the City had provided the emails in question or the contents thereof to Mr. McMillan in contravention of the City's established processes. In this regard, the City's Policies and Procedures Manual includes policies regulating Release of Information (Policy 3.08) and Statements by City Employees (Policy 3.09) intended to make sure that information being provided to the public is truthful and accurate, and is legal to disclose.

20. On the morning of December 20, 2019, Mr. Morton sent Mr. Maher an email asking to discuss a matter and attaching highlighted City Policies 3.08, 3.09, and 3.31. Later that morning, Mr. Morton visited Mr. Maher's office and relayed concerns he had about employees searching

through emails and then releasing them to the media. After discussing the matter with Mr. Maher and Human Resources Director Debbie Streichsbier, who had joined the meeting, Mr. Morton told Mr. Maher it was up to him to investigate or not. Mr. Maher did not believe that he should be opening what he viewed as an investigation into the motives behind a public records request. However, Mr. Maher opened EthicsPoint Case No. 43 as a result of this conversation. The scope of the investigation was “to determine if there has been a violation of City policy 3.08- Release of Information, 3.09- Statements by City employees or 3.31- Fraud Waste Abuse and Whistleblower policy.”

21. That same day, Mr. Maher interviewed Director of Information Technology Doug Akins. Mr. Akins informed Mr. Maher that while the City’s email archiver system had an auditing option to track users, that option was not turned on until the week prior. Therefore, there was no way to determine who had accessed the emails in question. I have verified this with Mr. Akins. Additionally, I had Mr. Akins perform an email archiver search to determine if anyone had forwarded the emails in question to someone outside of City government. The search determined that the emails in question had not been forwarded to anyone outside City government or to anyone who did not have a legitimate purpose in reviewing the emails in question.

22. On January 2, 2020, Mr. Akins provided Mr. Maher a list of then-current City employees who had full access the City’s email archiver, and thereby the emails in question. This list consisted of 14 individuals, including Mr. Maher. However, as Mr. Akins indicated to Mr. Maher, a number of former City employees also had access to the emails in question during their employment with the City. These individuals were not questioned by Mr. Maher as to whether they provided the emails in question, or the information contained therein, to the media as he did not believe it was appropriate to investigate the reasons behind public records requests. I disagree with Mr. Maher’s position on this – just because a document is a public record does not mean that it can be provided to anyone who wants it outside of the City’s public records request process. As such, there was nothing inherently wrong with investigating whether an employee violated City policy in this regard. However, I also have not questioned those individuals about the disclosure of the emails as I do not believe it would be productive or fruitful at this point trying to track down and interview every individual who potentially had access to the emails in question.

23. On February 12, 2020, Mr. Maher queried the City’s email archiver for emails from Mr. McMillan to determine what information may have been “leaked” to him. The query results disclosed Mr. McMillan’s November 20, 2019 request for the “Gartner report that was commissioned by the City Council,” as well as Mr. McMillan’s December 15, 2019 request for copies of emails sent by Mayor Holland on October 24, 2017, January 29, 2018, and February 1, 2018.

24. During the course of the investigation in Case No. 43, Mr. Maher discovered the following documents in the City’s possession that had not been provided to Mr. McMillan in response to his requests detailed above:

- a. The January 29, 2018 email from Mayor Holland to Sherry Gutch (Business Development Manager for the City of Orlando), subject “Thank You!,” sent from Mayor Holland’s City email and containing her City signature block.



b. The February 1, 2018 email from Mayor Holland to Rosa Akhtarkhavari (Chief Information Officer for the City of Orlando), subject “Sherry Gutch meeting,” sent from Mayor Holland’s City email and containing her City signature block.

c. An October 24, 2017 email from Mayor Holland to Councilmember Robert Cuff, subject “What I learned from Hurricane Irma,” sent from Mayor Holland’s personal email to Councilmember Cuff’s City email.

d. An October 24, 2017 email from Mayor Holland to Councilmember Nick Klufas, subject “What I learned from Hurricane Irma,” sent from Mayor Holland’s personal email to Councilmember Klufas’ City email.

e. A July 2019 30-page PowerPoint slide deck entitled “Technology Assessment Gartner Best Practices Driven” prepared by the City’s Information Technology Department.

Mr. Maher concluded that each of these documents were responsive public records that should have been provided to Mr. McMillan pursuant to the Florida Public Records Act, Chapter 119, Florida Statutes. Mr. Maher has no expertise in Florida’s Public Records Law and did not conduct any legal research into the matter.

25. On February 25, 2020, Mr. Maher closed Case No. 43, stating as follows:

This case is being closed at this time. Based upon issues discovered during this case a new case has been opened (#53) related to violations of FS 119 in the denial of public records that appear to have been inappropriately withheld from release based upon FOIA requests from a reporter Brian McMillan. This case is being closed and referred.

No findings were made as to the matters under investigation in Case No. 43. And, contrary to City Policy 3.31, Case No. 43 was not presented to the City Manager for final disposition of the investigation. Thus, while Mr. Maher identified Case No. 43 as being closed in the EthicsPoint system, it technically was never closed. Moreover, Mr. Morton was not informed by the ICE investigations team of any concerns that Chapter 119 may have been violated. Aside from failing to satisfy the notification requirement in City Policy 3.31, it is problematic that the City’s Chief Executive Officer was not informed of a possible violation of the law by the City Clerk.

26. While the foregoing facts led to the conclusion that someone either provided Mr. McMillan with Mayor Holland’s emails in question or disclosed their existence to him, I am unable to determine that any identifiable City employee provided Mr. McMillan with emails or other information in violation of City Policy 3.08, 3.09, or 3.31. Thus, the complaint in Case No. 43 is not sustained. I recommend that Case No. 43 be closed without further action.

### C. Case No. 53

27. On February 12, 2020, Mr. Maher opened Case No. 53 to address what he believed to be the public records law violations he discovered in Case No. 43. Mr. Maher specifically identified Ms. Smith as the “person engaged in this behavior.”

28. In the February 25, 2020 case notes in Case No. 53, Mr. Maher details the following:

During a subsequent interview of an employee related to Coastal Cloud it came to light that the employee was aware of a conversation between Matt Morton, Mayor Holland, City Clerk and the former communications manager Michael Schottey. The conversation was subsequent to a flurry of public records requests regarding Coastal Cloud. It was reportedly decided at this meeting that the participants would tailor future communications so to not be discovered by future public record requests. The decision was to only communicate by phone or text message.

During my interview of him, Mr. Maher identified the unnamed individual in the foregoing case notes as the Chief Innovation Officer “Don,” who I later discovered to be Chief Innovation Officer Don Kewley. In my interview with Mr. Kewley, he stated that the conversation he overheard was not about Coastal Cloud, but instead was about whether an invoice for Salesforce (a cloud-based system used by the City) that had not yet been paid was responsive to a public records request. Moreover, the conversation he recounted was not about tailoring communications, although he has heard a comment made that communications should be over the phone and not by text or email.

29. Mr. Morton in my interviews of him verified that the conversation Mr. Kewley overheard was about whether an unpaid invoice was responsive to a public records request for documents reflecting what had been paid to Salesforce. The unpaid invoice was not responsive as it did not reflect what had been paid, and did not even necessarily reflect what would be paid in the future as the City was determining how many licenses it would need in the future. As to what Mr. Kewley heard about conducting communications over the phone and not by text or email, Mr. Morton explained that the comment was made in the context of the Tech Beach Hackathon, and the need to communicate by phone for more immediate responses due to the timing of the issues they were dealing with.

30. On February 26, 2020, Mr. Maher sent Neysa Borkert, an attorney in Mr. Reischmann’s office who works on City matters, an email asking whether AGO 04-33 (the AGO cited in Ms. Smith’s December 20, 2019 email to Mr. McMillan) applies to the Mayor’s emails in question. Ms. Borkert responded that she did not render the initial opinion, and copied Mr. Reischmann on her response. This led to a phone call between Mr. Maher, Ms. Bukolt, and Mr. Reischmann on February 26, 2020.

31. During the phone call, Mr. Reischmann asked Mr. Maher why they were asking about an old public records request. Mr. Maher explained that “it was based upon an investigation that we were given from Matt Morton.” Mr. Maher did not disclose that the investigation initiated by Mr. Morton had been closed, that he was conducting a newly opened investigation into whether

the emails in question had been illegally withheld, or who were the targets of the investigation. Later in the conversation Mr. Reischmann specifically asked if Ms. Smith was being investigated. Mr. Maher responded that they were investigating whether a public records request was properly handled, even though they were actually investigating what Mr. Maher had already concluded was a potential public records law violation by Ms. Smith.

32. The February 26, 2020 case notes in Case No. 53, detail the phone conversation with Mr. Reischmann in pertinent part as follows:

Bill states he recalled the request for the emails were problematic. He stated that his initial response was that they should be released. He further states that he is always conservative when it comes to public records requests and believes barring specific exemptions they should always be released. He was asked to take a closer look at the content of the emails. Bill states he found several potential exemptions in the public records handbook that he provided to Virginia Smith. Bill stated he thought two of the four emails in question had been released. He was advised that they do not appear to have been released. Bill said he could not give a yes or no answer to whether AGO 04-33 applies because it is an extremely grey area. Jay inquired specifically about the emails sent from the Mayors City of Palm Coast used her city title in the subject and identifying herself in the body. Bill responded that the business she was discussing was related to coastal cloud so it could possibly be construed as being personal in nature. Bill stated that if he was asked about writing these emails beforehand, he would have cautioned against doing so, as he stated these emails are problematic. .... Bill stated just like he, Virginia is just doing as she is told. Bill added that there was very little push back from Brian McMillan regarding his request for public records being rejected. Bill stated that had Brian pushed back he probably would have told Virginia to release the emails.

Mr. Reischmann's statement reaffirmed Mr. Maher's belief that the emails in question were public records that should have been provided to Mr. McMillan.

33. In my interviews of him, Mr. Reischmann recognized that in having what he thought was a conversation with Mr. Maher and Ms. Bukolt and not an investigatory interview, he was not as precise in his statements as he could have been. This resulted in a number of his statements being misconstrued. While he may have said that the two emails in question – the January 29, 2018 email from Mayor Holland to Sherry Gutch, and the February 1, 2018 email from Mayor Holland to Rosa Akhtarkhvari (Mr. Reischmann was not aware of the October 24, 2017 emails) – were problematic, he was referring to the fact that Mayor Holland identified herself as the Mayor of Palm Coast in the emails, thereby opening the emails up to debate on whether they were public records. Mr. Reischmann further stated that he did not say he was asked to take a closer look at the content of the emails, but instead stated that after initially viewing them he took a closer look at their context to determine if they were public records. And, while Mr. Reischmann did say that the issue was not black and white (which was interpreted as him saying it was gray), and that the question whether AGO 04-33 applied to the two emails in question was not a simple "yes" or "no," Mr. Reischmann never meant to imply that AGO 04-33 did not apply. Instead, after weighing all the factors, Mr. Reischmann determined that AGO 04-33 did apply and the two emails in question were not public records. Mr. Reischmann denies ever saying that he was doing what

he was told, especially as he was never told to do anything, and further denies saying that if Mr. McMillan had pushed back, he probably would have told Ms. Smith to release the emails.

34. On March 4, 2020, Ms. Smith was asked by Mr. Maher to come down for what she thought was going to be a friendly conversation. Ms. Smith did so, and a meeting ensued between Mr. Maher, Ms. Bukolt, and Ms. Smith. Ms. Smith was told during the meeting that Mr. Maher and Ms. Bukolt had some questions regarding the response to Mr. McMillan's public records; however, she was never informed that she was being questioned as a target of an investigation. And, despite the fact that Ms. Smith was being questioned about her suspected violation of Chapter 119, which carries potential criminal penalties, Ms. Smith was never provided a Garrity warning to protect her Fifth Amendment rights.

35. The March 4, 2020 case notes in Case No. 53 detail the phone conversation with Mr. Reischmann in pertinent part as follows:

Virginia stated she received the request and located two emails that appeared to be responsive to the request. Both emails were sent from the mayors email address, were signed as the mayor of Palm Coast and stated that she was the Mayor of Palm Coast. Virginia explained that when she receives record requests of concern she contacts our city attorney. Virginia stated that there was a meeting with herself Bill Reichmann and Matt Morton the city manager in the city manager's office related to the records request. She recalls there may have also been several call that took place but cannot remember for sure. Virginia stated that she received an AGO opinion regarding personal emails and was instructed to use that as an exemption to withhold the emails. Jay went over the email with Virginia pointing out that it was sent on the day requested by the reporter from the Mayors city email using the title of the Mayor of Palm Coast and even included the words Coastal Cloud so that a common person might believe that this clearly fits the parameters of the public records request. Virginia stated that she felt so as well but the city attorney had provided her with an AGO that allowed us to keep it from being released. Virginia added that it was the first time she had done this in 12 years. Jay asked for a clarification from Virginia. She stated she does not believe she has ever withheld a complete document before as she was told to do in this case. Virginia states usually the information that is personal in nature is redacted and the rest of the document is released but in this case she was told to withhold the entire email. Jay questioned why the entire email would be withheld and Virginia stated she did not know other than the email itself is a problem and could be considered an issue. Jay asked if she meant possibly evidence of misuse of her office to which Virginia responded yes.

Ms. Smith was not questioned during this meeting, or at any time during the investigation, about the October 24, 2017 emails from Mayor Holland or the June 2019 30-page PowerPoint slide deck.

36. Similar to my interview with Mr. Reischmann, Ms. Smith stated during my interview of her that a number of the statement's attributed to her by Mr. Maher and Ms. Bukolt were either taken out of context or were untrue. Ms. Smith asserts that she never stated that there was a meeting with herself, Mr. Reichmann and Mr. Morton in the City Manager's office related to the records request at issue. Ms. Smith also denied that she stated that she felt that the emails

in question were public records, but that the City Attorney had provided her with an AGO that allowed the City to keep them from being released. Ms. Smith did say that this was the first time in 12 years that she had withheld complete documents, and that usually the personal information is redacted and the remainder of the email is released. However, what Ms. Smith was referring to was the redacting of social security numbers, home addresses of certain classes of employees, etc. in documents that are otherwise public records. The distinction in this case is that the documents themselves were not public records subject to disclosure per Mr. Reischmann. Lastly, Ms. Smith denies ever saying that the emails in question were possibly evidence of the Mayor misusing her office. Instead, she was conveying that the emails could be a problem from the standpoint of sending personal emails through the City's email system. (Under City policy, the use of the City's email system for personal reasons is discouraged, but not prohibited.)

37. Regarding the two October 24, 2017 emails from Mayor Holland, those emails did not come up in Ms. Smith's December 16, 2019 search of the email archiver for emails sent from the Mayor's City email account as they were sent from Mayor Holland's personal email account. However, those emails did come up in a search for emails responsive to a later public records request and were turned over when discovered by Ms. Smith. As to the June 2019 30-page PowerPoint slide deck, Ms. Smith never saw it and was never made aware of its existence by IT. Having now become aware of it, Ms. Smith does not believe it is responsive to Mr. McMillan's November 20, 2019 request for the Gartner report that was commissioned by the City Council, and would not have produced it if she was aware of it.

38. On March 26, 2020, Mr. Maher concluded his investigation in Case No. 53, writing: "Based upon this investigation it appears that there may have been violations of the public records laws FS 119 committed by the city clerk's office on behalf of Coastal Cloud and the Mayor of Palm Coast." In rendering this conclusion, the ICE Investigations team never spoke to Mayor Holland to determine the context of her emails at issue. Moreover, the ICE investigations team never spoke with Mr. Morton regarding any of the issues in Case No. 53. And, as previously mentioned, the ICE investigations team never asked Ms. Smith about the October 24, 2017 emails from Mayor Holland or the June 2019 30-page PowerPoint slide deck. Contrary to City Policy 3.31, Case No. 53 was not presented to the City Manager for final disposition of the investigation. As such, while Mr. Maher listed Case No. 53 as being closed in the EthicsPoint system, it technically was never closed. Moreover, Mr. Morton was once again not informed by the ICE investigations team of any concerns that the Florida Public Records Act, Chapter 119, Florida Statutes, may have been violated.

39. While the Florida Public Records Act, Chapter 119, Florida Statutes, is liberally construed in favor of access to public records, not all written communications sent or received by public officials or employees of a government agency are public records subject to disclosure upon request under the Act. *State v. City of Clearwater*, 863 So.2d 149, 150 (Fla. 2003). The mere fact that an email is a product of the City's email system does not automatically make it a public record. *City of Clearwater*, 863 So.2d at 154; *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633 (Fla.1980). Instead, "[t]he determining factor is the nature of the record, not its physical location." *City of Clearwater*, 863 So.2d at 154. "Based on the plain language of section 119.011(1), ... "private" or "personal" e-mails "simply fall[] outside the current definition of public records.'" *City of Clearwater*, 863 So.2d at 153; citing *Times Publishing Co. v. City of*

*Clearwater*, 830 So.2d 844, 848–49 (Fla. 2d DCA 2002). The real question, therefore, is whether the email was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind. *City of Clearwater*, 863 So.2d at 154.; *Butler v. City of Hallandale Beach*, 68 So.3d 278, 281 (Fla. 4<sup>th</sup> DCA 2011); AGO 04-33.

39. Concerning the January 29, 2018 email from Mayor Holland to Sherry Gutch, and the February 1, 2018 email from Mayor Holland to Rosa Akhtarkhavari, I agree with Mr. Reischmann’s assessment that the issue of whether they are public records is not black and white. Following the court decisions referenced above, these emails are not public records merely because they are on the City email server, identify Mayor Holland as the Mayor of Palm Coast, or include Mayor Holland’s City signature block (which automatically populates on her City emails). Instead, a closer look must be made of the content and purposes of the emails. The emails in question were not prepared in connection with official City business – the City does not have any official business with the City of Orlando, and Mayor Holland’s emails do not reflect any prospective or potential City business with the City of Orlando. Moreover, the emails clearly were not intended to perpetuate, communicate, and formalize knowledge of some kind. Weighing this against the factors supporting the conclusion that the two emails are public records (e.g., the fact that the Mayor identified herself as the Mayor of Palm Coast in the emails), I agree with Mr. Reischmann’s conclusion that they are not public records.

40. Regarding the June 2019 30-page PowerPoint slide deck, I disagree with the conclusion that the City may have violated Chapter 119 by not providing it to Mr. McMillan in response to his November 20, 2019 request for the Gartner report that was commissioned by the City Council. The PowerPoint slide deck is not a report and it was not commissioned by the City Council. As such it is not responsive to Mr. McMillan’s request. Contrary to Mr. Maher’s belief, the City is under no legal obligation to interpret a request by giving words something other than their plain meaning or to provide records other than what has been requested.

41. For the reasons stated above, I conclude that neither Ms. Smith nor the City violated Chapter 119 or engaged in any other wrongdoing with respect to Mr. McMillan’s November 20 and December 15, 2019 public records requests. Thus, I recommend that Case No. 53 be closed without further action.

42. As a final note, the issues identified herein with respect to Case No. 53 further highlight the need for the City to revamp its investigatory process. It is beyond dispute that Ms. Smith relied upon and followed the legal advice of the City Attorney in not producing the January 29, 2018 email from Mayor Holland to Sherry Gutch, and the February 1, 2018 email from Mayor Holland to Rosa Akhtarkhavari. Thus, to the larger extent, Case No. 53 was an investigation into the appropriateness of Mr. Reischmann’s legal advice. An ICE team investigation is not the proper forum for determining whether the City’s legal position is correct.

#### **D. Case No. 60**

43. On March 31, 2020, an anonymous complaint was entered through the City’s website stating as follows:

The City Manager, Matthew Morton, the City Clerk, Virginia Smith, and the City Attorney, William Reischmann, all conspired together about withholding a few emails related to a public records request. They were discussing this in the City Managers conference room. The public records request was in regards to the Mayor Holland emails promoting Coastal Cloud and salesforce. Records were found by Virginia Smith. Morton specifically asked the Attorney if they are considered personal in nature. The City attorney was hesitant, but cited a statute that may allow them to exclude these specific emails from public records. Since then an investigation has been opened, the investigation concluded that these emails should not have been excluded and they are in fact public record. The investigation was closed early March and then the City Manager insisted that the lead investigator Jay Maher, re-open this case and one other case. Jay Maher referred to his Director, Helena Alves at this time and explained that the only reason an investigation is to be re-opened is to prevent the entire investigation from public records.

44. The anonymous Reporting Individual has not responded to my request for an interview, and has not provided any factual support for his/her allegations. Thus, I am left to assume that no basis exists for these claims other than what has been addressed with respect to Case No. 53 above. As previously stated, there is no evidence that Mr. Morton, Ms. Smith, and/or Mr. Reischmann conspired about withholding documents responsive to a public records request for Mayor Holland's emails.

45. Regarding the claim that Mr. Maher told Ms. Alves that the only reason these investigations were being re-opened was to prevent the investigations from becoming public records, Mr. Maher stated during my interview with him that he does not recall making that statement to Ms. Alves. Moreover, that statement is not true. As discussed above, Case Nos. 43 and 53 were never truly closed under Policy 3.31 as they were not presented to the City Manager for final decisions of disposition. And, as addressed in footnote 1 above, my investigation was not initiated to prevent Mr. Maher's investigations from becoming public records.

46. Based on the foregoing, the complaint in Case No. 60 is unfounded. Thus, I recommend that Case No. 60 be closed without further action.

#### **E. Mr. Maher's May 6, 2020 email**

47. On May 6, 2020, Mr. Maher sent Mr. Morton what he identified as a complaint under Section 112.3187, Florida Statutes (the Florida public sector Whistle-Blowers Act). Therein, Mr. Maher raised a number of concerns, including those related to public records requests. Therein, Mr. Maher stated:

I am requesting a full investigation of these concerns and objections. I am prepared to present to you documents, meeting notes, public records requests, agendas and meeting minutes, and related accounts and reports fully supporting these allegations including the complaint I filed with the Florida Ethics committee on April 1st 2020 and the Complaint filed with the State Attorney General's Office on April 1st 2020.

I was assigned to conduct an investigation based on Mr. Maher's request. However, as detailed above, despite the assertions in his email to Mr. Morton, when I met with Mr. Maher to question him about his concerns and objections, Mr. Maher declined to speak with me about them or to provide me any of the documents, etc. that he told Mr. Morton he was prepared to present. And, as detailed above, my subsequent follow-up with Mr. Maher yielded the same result.

48. Given Mr. Maher's failure to provide me with any of the specifics regarding, or factual support for, the "concerns and objections" raised in his May 6, 2020 email to Mr. Morton, or any of the documents, etc. that he claims to have in support of his "concerns and objections," I am unable to investigate them. As such, I will not be taking any further action with respect to Mr. Maher's May 6, 2020 email to Mr. Morton.