

# Office of the City Council



September 13, 2012

Honorable Thomas J. Borris, Presiding Judge  
Orange County Superior Court  
700 Civic Center Drive West  
Santa Ana, CA 92701

Re: Response By The City of Tustin to the July 2, 2012 Grand Jury Report

Your Honor,

The following response is provided by the City of Tustin ("City ") to the July 2, 2012 Grand Jury Report entitled "The Use of Government Influence on a Private Educational Institution" (referred to herein as the "Report").

Pursuant to California Penal Code Section 933.05, the City responds that it "disagrees wholly" with findings F1, F2, F3, and F4, and reports that recommendations R1, R2 and R3 will not be implemented because they are not warranted. These responses are based upon following reasons:

The Tustin City Council members have carefully read and considered the Report and its findings and recommendations. Unfortunately, the City Council is unable to provide an informed response to the findings and recommendations because the Council does not have evidence that would provide a basis for such findings or actions. The Report discusses the alleged activities of, and statements made by, individuals in their personal interactions with local university personnel. Some of those individuals are said by the Report to be affiliated with another agency or a non-profit organization, and none of the individuals involved in the alleged discussions was acting with the knowledge or authorization of the City Council or City staff.

Put another way, because the Report is not about the City or its programs or activities, the City doesn't have the evidence to support or refute the statements in the Report. When a grand jury report addresses the "operations, accounts and records of the officers, department functions, and the method or system of performing the duties" of the City as authorized by California Penal Code Section 925a, then the City and its staff and City Council are generally in a position to provide an informed response. That is not the case here.

In providing this response and deciding what, if any, corrective action is appropriate, the City Council is also mindful that the communications the Report states were directed at the university personnel were allegedly made by one or more individuals, and that expressive activity of individuals (even elected individuals) may be protected under the First Amendment of

the State and Federal Constitutions, and thus beyond the authority of the City Council to punish. (See, e.g., *Kucinich v. Forbes* (1977) 432 F.Supp.1101, 1112 [holding that a city violated the First Amendment when a city council suspended a councilman for violating an adopted city council rule that prohibiting impugning a motive of another councilmember during a council meeting]); see also *Bond v. Floyd* (1966) 385 U.S. 16.). What an individual council member does outside the scope of his or her official role as a council member is his or her individual decision, and the City's authority to limit or control individual speech and expression is very narrow.

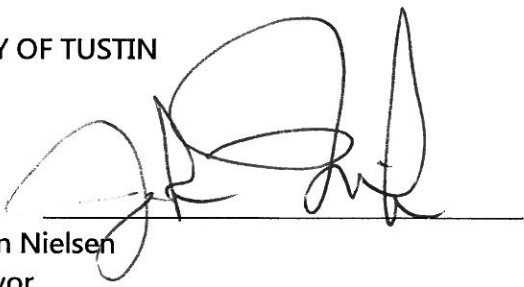
The City Council does not take lightly the circumstances alleged in the Report. In that regard, the City Council acknowledges that, if it were aware of evidence of wrongdoing by a Tustin City Council member and if such conduct was of a nature that was within the authority of the Council to correct, then the City Council would recommend additional ethics training be undertaken over and above that required by State law, or might consider a censure, for instance. However, as noted above, the City Council is not privy to testimony or other evidence that a Tustin City Council member attempted to exert the influence that the Report alleges. In fact, many allegations in the Report seem to suggest that the alleged emails and verbal statements may have been made by an individual not even affiliated with the City of Tustin.

On a separate note, although this Council is not aware of evidence that anyone has ever stated or implied that involvement in the preparation of the City Manager Compensation Report might adversely affect an individual's employment opportunities at the City of Tustin, the Council nevertheless takes this opportunity to state, unambiguously, that such involvement *will not be a factor in any employment decisions in this City.*

In summary, given the absence of evidence about what any Tustin Council member said or did that might be regarded as improper, it is not possible for the Council to conclude whether inappropriate communications by a Tustin Council member: (a) occurred, (b) were or were not Constitutionally protected, or (c) were so egregious as to warrant corrective action or sanction.

This letter was approved by the City Council of the City of Tustin on September 4, 2012, and is respectfully submitted on behalf of the City of Tustin, California.

CITY OF TUSTIN

By:   
John Nielsen  
Mayor