

**R. Paul Frasier**  
**District Attorney for Coos County**



**Office of the District Attorney**

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September 26, 2016

Mr. Roger Craddock  
City Manger  
City of Coos Bay  
500 Central Avenue  
Coos Bay, Oregon 97420

Chief Gary McCullough  
Chief of Police  
City of Coos Bay  
500 Central Avenue  
Coos Bay, Oregon 97420

Re: Complaint of City Council Member Mark Daily

Greetings:

On September 7, 2016, Coos Bay City Council Member Mark Daily sent an email with an attachment to Mr. Fred Boss who is the Deputy Attorney General for the Oregon Department of Justice (hereafter DOJ). Mr. Boss then referred the email to Mr. Michael Slauson, who is the head of the Criminal Section of the DOJ, who then referred the matter to me. It was referred to me because while the DOJ in some cases may investigate certain matters, when it comes to prosecuting a crime only the elected district attorney for the county where the alleged offense occurred has the authority to decide whether or not a case is prosecuted. DOJ does not have that authority.

Upon my receipt of the complaint, I sent a copy to Mr. Craddock and Chief McCullough because if a crime occurred it would have occurred within the jurisdiction of the City of Coos Bay. I asked for background information on the situation and I asked specifically that certain things be done to assist me in deciding what should be done. Mr. Craddock orally briefed me on such information and later provided to me a memorandum with the information I requested along with information pertaining to a City Council Meeting that occurred on August 16, 2016. I have also taken into account the events that occurred in the recent city council meeting that occurred on September 20, 2016.<sup>1</sup>

I would first note that the allegations I will be addressing concerns the current discussion if not controversy within the City of Coos Bay regarding the need for a replacement wastewater treatment plant. I do not live in the Bay Area and I am not personally affected by whatever the City decides to do on this issue. Nothing in my further discussion should be construed as me expressing an opinion on how this issue should be resolved.

As I read Mr. Daily's complaint, I see four potential issues:

1. Mr. Daily's complaint that Mr. Hudson is criminally and illegally influencing Mr. Daily as to how he should vote on the matter;
2. That Mr. Daily is complaining about meetings conducted by Mayor Shoji with council members and Mr. Hudson;
3. Mr. Daily's complaint that Mr. Hudson is engaging in the unlawful practice of law; and
4. Mr. Hudson's charges that Mr. Daily has somehow been improperly influenced by outside entities in making his decisions about the wastewater plant issue. To put it another way, Mr. Hudson alleges that Mr. Daily is "on the take."

In the course of my reviewing Mr. Daily's allegations, I discovered information that causes me to be concerned about the Coos Bay City Council and the public meetings law and public contracting laws. I have set forth a time line of events below that along with other information has caused me concern in these areas. For example, I was informed that on September 15, 2016, DEQ had received a phone call from Mr. Beetham, the head of DB Western Texas, which is the business entity championing the idea of a privately operated new waste water treatment plant idea and which desires to have the contract to build and operate such a plant. In that phone call Mr. Beetham told DEQ that he believed that the Council would be voting on September 20, 2016 for an RFP to build a plant in conformance with DB Western's proposal. Mr. Beetham requested that DEQ cooperate with that plan if DB Western was awarded the contract. In addition to this phone call, I was informed that employees of DB Western were involved in the drafting of a motion voted on by the City Council on September 20 to issue the RFP and that the RFP issued by the City on September 23, 2016 basically mirrors the motion passed on September 20. I will address each issue below.

### **1. Allegation the Mr. Hudson is improperly influencing Mr. Daily**

I would first note that it would be very hard to pursue any type of criminal case for improper influence based solely on public statements made about the public official. No matter who the public official is there will always be someone who does not think the official is doing a proper job and who will publically accuse the official of all kinds of nefarious things. It is part of the job of being a public official that all kinds of bad things will be said about the official. Freedom of Speech was placed in the First Amendment to our Constitution to guarantee the rights of citizens to criticize and complain about the government or government officials. While not all speech is protected, there is a very

high standard that must be overcome before speech directed at the conduct of a public official actually becomes criminal.

While slander or libel is not protected speech under the First Amendment, Oregon does not have criminal slander/libel statutes. If a person believes they have been slandered or libeled, they need to hire their own lawyer and file a civil lawsuit. Neither the DOJ nor my office is involved in such matters.

As I understand this allegation, Mr. Daily believes that Mr. Hudson, by claiming Mr. Daily "is on the take", is trying to put improper influence on Mr. Daily to change his mind/vote on the wastewater treatment plant. Mr. Daily does not claim he actually changed his vote because of the actions of Mr. Hudson. If Mr. Daily has not changed his mind on the subject because of the statements of Mr. Hudson, it cannot be said that Mr. Daily has been improperly influenced.

In looking at Oregon Law, while ORS 260.655 does make it a crime to attempt to improperly influence a vote, that statute applies to votes being cast in an election and not by votes being cast in a City Council Meeting.

In reviewing the criminal code in general, I cannot find a crime that would fit these facts and circumstances. This is proper given the First Amendment right of citizens to publically criticize public officials. While freedom of speech is not absolute, there is a very high burden that needs to be met for the government to criminalize the speech of someone who is critical of a public official. In this case, it is my opinion that Mr. Daily's only recourse, if he believes he is the victim of slander or libel, is to file a civil suit against Mr. Hudson.

Therefore, I find there is insufficient evidence to prosecute Mr. Hudson for "improperly influencing" Mr. Daily.

## **2. Allegations as to Mayor Shoji and Meetings with Council Members**

As I understand the complaint of Mr. Daily, he is upset that Mayor Shoji had meetings or attempted to have meetings with Council Members Brick, Leahy and Vaughn with Mr. Hudson present in an attempt to "intimidate" them into changing their votes on the wastewater treatment plant. Again, the alleged intimidations were the comments by Mr. Hudson that Mr. Daily was "on the take" and if they did not change their votes that they would be "going down" with Mr. Daily.

No one has alleged that any Council Member has actually changed their vote because of the perceived threats made by Mr. Hudson. As stated above as to allegation #1, if no one has changed their vote, no crime has been committed.

### 3. Public Meeting Laws and Public Contracting Laws

I am concerned about the timing of certain motions by the Council in conjunction with the phone call by Mr. Beetham to DEQ and DB Western's participation in the drafting of the actual motion used to for the request for proposals. My concerns are centered on the public meetings laws and the public contracting laws. I note the following:

1. May 3, 2016, the City Council approves a loan for the waste water treatment plant project which already has been approved by DEQ;
2. May 17, 2016 Council Member Daily announces there is different proposal other than the DEQ approved plan for the waste water treatment plant from DB Western. Council passes a motion to entertain a presentation by DB Western. Council Members Vaughn, Brick and Daily vote yes on the motion. Council Member Leahy declared a conflict of interest and abstained from the vote. The other three council members vote no. Under council rules, Council Member Leahy's abstention is counted as a yes vote and the motion passes;
3. June 10, 2016, the Council holds a work session to hear DB Western's proposal. City staff respond to the proposal in writing in a report dated June 20, 2016 (with a revision made on June 23, 2016). Staff reports that the DB Western plan will cost \$27,000,000 more at net present value over the DEQ approved plan;
4. June 21, 2016, Council Member Daily made a motion to create a Council Wastewater Committee for purposes of hiring an attorney to evaluate the proposal for private waste water treatment operations. An attorney was hired. In reading that report I note that the law firm found that the DEQ plan (referred to as the status quo plan) would produce a net present value cost that is \$27,485,798 less than the DB Western plan. The City paid \$115,000 for this opinion. I note that both the City Staff and the outside lawyer conclude that the DB Western plan is more expensive than the DEQ plan by \$27,000,000;
5. August 16, 2016: Despite two sources indicating that DB Western plan is more expensive than the DEQ plan by \$27,000,000 million, Council Member Daily makes a motion to direct the City's consulting attorneys to draft a request for proposal to privatize the waste water treatment plant. The motion fails. Council Member Brick then makes a motion to hire consultants to conduct a cost-benefit analysis between the DEQ plan and the treatment process proposed by DB Western. The motion passes. Staff prepares an RFP (request for proposals) to have the analysis done and three responses were received by businesses interested in doing the work;
6. September 9, 2016: The Council meets to review the RFP's received to do the cost-benefit analysis;

7. September 13, 2016: The Council meets for purposes of awarding the contract for the cost-benefit analysis. The Council apparently decides to not award the contract for the cost-benefit analysis. Instead, Council Member Brick states that the money should be spent for an RFP to design, build, operate and finance the Empire treatment plant. Private ownership was not mentioned. As the meeting had not been advertised for such a decision, no action was taken;

8. September 15, 2016: Mr. Beetham calls DEQ that there was going to be a motion going forward at the City Council for an RFP based on the DB Western proposal (which includes private ownership) and asks for DEQ cooperation if DB Western is awarded the contract;

9. September 20, 2016: At the Council meeting, Council Member Brick then said he had changed his mind stating that going out for an RFP for the plant being under city ownership had too many issues. He then changed his proposed motion to request an RFP for a privately owned system for the proposed Empire plant, which is coincidentally the DB Western proposal. This motion was written with the assistance of DB Western employees. A committee of city council members only is designated by the Council to draft the RFP. Normally on a project of this size and cost, the RFP would be drafted by consulting attorneys and staff for the City to make sure the project is properly described, expectations are properly set forth, appropriate timelines are in place, etc. I note that Council Member Daily apparently knows this procedure as his initial motion which failed on August 16 asked that the RFP he proposed at that time be drafted by the City's consulting attorneys; and

10. September 23, 2016: The RFP is issued by the committee which basically mirrors the motion made by Council Member Brick which DB Western helped to draft.

I am concerned as these latter allegations suggest that members of the council may have reached a decision to award the contract to DB Western outside of a properly noticed public meeting. I am also concerned that the process as outlined above shows a bias in favor of DB Western in obtaining this contract, rather than having an open and level playing field where multiple businesses, if they choose to bid, can participate in the process, which is required by the public contracting laws.

Having private meetings between members of the City Council is a potential problem. The intent of the public meetings law is to require that decisions of a governing body, such as the Coos Bay City Council, be openly arrived at. See ORS 192.620. Hence, any votes taken by a governing body need to be held in a properly noticed public meeting. When a quorum of the governing body meets outside a properly noticed public meeting it must avoid any discussion of official business. See Oregon Attorney General Public Meetings Manual, 2011 edition, page 123.

Having a discussion of government issues by members of a governing body in a number less than a quorum is interpreted by some as not being a public meeting requiring that the public be informed and allowed to be present and where decisions can actually be made. I would caution against that idea. While there is no specific law or Oregon Appellate case on point, there is a decision in the Lane County Circuit Court, Dumdi et al v. Hardy et al, Lane County Circuit Court Case #16-10-02760, that public officials should be aware of. (I should point out that the opinion was rendered by the Honorable Michael Gillespie, recently retired Coos County Circuit Judge.) In that opinion, the Circuit Court held that one on one meetings between members of a governing body who in that meeting are deciding how they will vote and who then go to other members of the governing body and have the same discussion can be a violation of the public meetings law because it goes against the intent of the law to have the public's business openly arrived at.

I do not have authority to prosecute violations of the public meetings law or the public contracting laws. Only the Government Ethics Commission may do so. If anyone believes that a public meetings law violation has occurred, they should report it directly to the Commission. Further, if an improper meeting took place, or if a contract is improperly granted, a civil lawsuit can be brought against the offending members of the governing body and the governing body itself. If an improper meeting did in fact take place, penalties that could be imposed could become the personal obligation of the offending governing body member, meaning they would pay it out of their own pocket and the City would not indemnify them. I would counsel that Council Members be very careful in having a meeting with less than a quorum of the governing body being present and where individual members will actually decide how they will vote on the public's business. I would strongly advise the Council to seek advice from the City Attorney on this issue and follow it accordingly.

I would also counsel that the RFP put forward last Friday and the process used to adopt it be reviewed by legal counsel for the City to make sure that the public contracting laws are being complied with. If there is any question as to whether the public contracting laws have been complied with, it would be advisable to withdraw the RFP and start the process over from the beginning.

### **3. Unlawful Practice of Law by Mr. Hudson**

I would note that generally neither the DOJ nor my office investigate the unlawful practice of law by any person. That is the responsibility of the Oregon State Bar and specifically their Unlawful Practice of Law Committee. If Mr. Daily believes that is the case, he should report it directly to the Bar.

I would note the following. No one has alleged that Mr. Hudson has been retained to offer lawyer services. No one has alleged that Mr. Hudson is representing the City of Coos Bay or any other private party. No one claims that Mr. Hudson is doing his work on behalf of another pro bono. I understand that Mr. Hudson is offering his advice on what he perceives to be going on. He can base his own personal advice on his past experience as a lawyer. As far as I can tell, he is doing this on his own and for

his own benefit. He is not representing another person or entity. To represent one's self does not require you be a licensed attorney.

#### **4. Mr. Hudson's Allegations that Mr. Daily is "on the take"**

I requested that Mr. Craddock, the City manager and former police chief for Coos Bay, to investigate whether Mr. Hudson has any evidence showing that Mr. Daily is "on the take." Mr. Craddock informs me that Mr. Hudson has admitted he does not have any evidence to back up that claim.

My understanding is Mr. Hudson thinks that Mr. Daily has routine contact with DB Western and its employees. Because Mr. Daily is supporting the proposal of DB Western, Mr. Hudson believes that DB Western has "bought" the vote of Mr. Daily. That in and of itself is not evidence that anything nefarious is happening.

Our society has recognized the right of private interests to "lobby" public officials to vote in favor of what the private interest desires. Private interests are allowed to contribute to campaigns and so forth in hopes that the public official will go along with what the private interest wants. The vote of the public official could be extremely financially lucrative for the private interest. Under our present system there is nothing illegal in that situation.

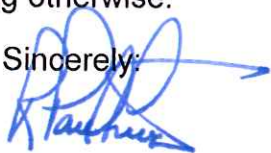
I find that there is no evidence to support that Mr. Daily is "on the take."

#### **5. Conclusion**

I find that as to each area discussed above that falls under my jurisdiction that there is insufficient evidence to suggest a crime has been committed by any of the parties to this dispute. I will not file any criminal charges based on this evidence against anyone mentioned above.

I do reserve the right to change this decision if evidence is properly brought to me suggesting otherwise.

Sincerely,



R. Paul Frasier

cc by email: Mr. Daily  
Mr. Hudson  
Nate McClintock, Coos Bay City Attorney  
The World Newspaper

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<sup>i</sup> In reading The World article about the September 20, 2016 City Council meeting, I took note of the passage of a motion to request proposals to build a waste water treatment plant in conformance with the design suggested by DB Western. I have had one citizen

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complaint that I look into this matter. I noted the council was informed before the motion was approved that the motion was drafted in such a manner that there is only one business entity that would be able to comply with the request within a specified time span. I am concerned about information given to me that DB Western assisted in drafting the motion. I would caution the Council to review the public contracting laws in regards to this motion. I am by no means an expert on the matter, but the purpose of the public contracting laws is to insure that when a public contract is granted that it is done with the least expense to the taxpayer. Usually that requires that the government agency seek proposals or bids from multiple sources. As the article noted, this will be the largest "single capital project the city will undertake." That being the case, the process for issuing the RFP and the RFP itself should be drafted to allow more than one business to make a proposal (if they choose) so the city may make an informed choice. I would urge the Council to seek and follow the advice of the City Attorney on this issue.

A violation of the public contracting laws is outside of my jurisdiction. However, it can be investigated by the Oregon Government Ethics Commission and may also subject the City to a civil lawsuit.