

Independent Review of Fesser v. City of West Linn: Findings and Recommendations

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I. Introduction

In February of this year, the City of West Linn was rocked when an *Oregonian* article reported on the impending settlement of a lawsuit for \$600,000. Michael Fesser v. City of West Linn involved allegations that the plaintiff's arrest by West Linn Police authorities had been the product of an illegal, racially motivated investigation. The initial "best evidence" of Mr. Fesser's case against the City was a string of text messages between the lead West Linn investigator in the case and Eric Benson, Fesser's employer, who had persuaded the then-Chief of Police to investigate allegations of employee theft. In those text messages, written and received over several hours as the investigation proceeded, Benson made a string of racially derogatory comments about Fesser to the handling investigator.

Publicity from the article brought a swift backlash against the City and its representatives. The employer's racial comments, and profane comments made by both him and the investigator, reflected poorly on all concerned. City officials apologized for the conduct of the investigator, who was relieved of duty and ultimately terminated. And the next City Council meeting was converted into a "town hall" of sorts in which community members were able to air their grievances and City representatives expressed atonement.

As the discussion continued, the larger questions related not only to the investigator's acquiescence toward racially biased remarks and his own unprofessionalism, but also to the complicity of the Police Department's leadership in initiating the investigation against Fesser. As significantly, City officials were subject to both external and internal inquiry about failures to probe the problematic details of the case during the twenty-month course of the litigation.

The controversy prompted the City to turn inward and examine the health of its relationships with communities of color. Residents were reminded of a troubling earlier incident involving racially charged social media posts by a West Linn police officer. (That officer had ended up being fired – but only after the media had brought the public's attention to posts that were well-known, unaddressed, and in some cases even

condoned within the Police Department's leadership.) A larger reckoning clearly seemed warranted, and that important discussion continues as the City works to improve its relationship with all of its residents.

Early on, elected City leadership also recognized its own need to adapt in response to shortcomings exposed by the controversy. One goal was to identify potential structural reforms that could prevent similar circumstances from occurring. Accordingly, City officials framed an inquiry that was meant to address not only deficiencies in the Police Department's accountability mechanisms, but also to pursue vehicles for City leadership to react more effectively when serious allegations emerge.

As a result, the Council commissioned OIR Group, a team of independent experts in police practices, to review the matter. Council identified a number of questions and issues intended to provide a better understanding of what had occurred, why it had occurred, and what systemic reforms might keep it from occurring again. The product of that review is this report.

II. Methodology and Mechanics

As part of our review, we examined scores of internal and public documents.¹ We also interviewed numerous individuals, including West Linn elected officials, City leadership and Department heads, Police Department leadership, the attorney assigned for the City, Mr. Fesser and his legal representative, and former City and Police officials.

With one key exception, we received unfettered access to relevant documents and witnesses and appreciated the perspectives offered by each of them.² Unfortunately,

¹ To Council's credit, by the time we received this assignment, it had waived its right to confidentiality regarding key documents, including transcripts of the Executive Sessions in which the Fesser litigation was discussed. And we were also provided access to attorneys who represented the City in the litigation or otherwise, despite any potential attorney/client privileges that might have existed.

² Tony Reeves, the lead West Linn investigator in the Fesser investigation, also declined to talk with us. Since he is no longer employed by the City, there was no way to compel cooperation with the review. However, as detailed below, the investigator's role in the case was well documented and has already been the focus of detailed external review by the Clackamas County District Attorney. See, Brady v. Maryland Report Concerning the West Linn Police

the Citycounty Insurance Services (“CIS”) representative assigned to the Fesser litigation declined our request for an interview, despite entreaties by us and the City. His decision not to participate left a significant gap in our review of the matter. And, in our view, his stated wariness about harms to possible litigation issues in the future should not have taken precedence over the City’s overarching – and similarly future-focused – interest in structural reform. It is also difficult to see how cooperating in this independent review could have somehow compromised the City’s future litigative position. In this situation, a declination from CIS that was based on speculative future concerns did a disservice to the larger risk management issues that are deserving of study and reform.³

III. Factual History

Michael Fesser, a Black man, worked at a towing company in Portland. His employer Eric Benson believed that Fesser was about to sue him or his company alleging racial discrimination. In an apparent effort to head off the lawsuit, Benson alleged that Fesser had been engaging in theft from the company. Benson approached the West Linn Police Department (“WLPD”) then-Chief Terry Timeus and requested a criminal investigation into Fesser. Since the company was located in Portland, WLPD first asked the Portland Police Bureau to initiate an investigation. But when it declined, West Linn opened a case and assigned it to Detective Tony Reeves.

The investigation resulted in the eventual arrest and termination of Michael Fesser, who then filed suit against Benson and the towing company. However, the criminal case against Fesser was eventually dismissed after the prosecutor was advised of evidence that showed racial animus on behalf of Benson. That evidence consisted of racially derogatory text messages by Benson to Detective Reeves while the detective was conducting the investigation.

The text messages then emerged as part of the discovery process during the civil litigation that Fesser had initiated against his former boss. As a result of Detective Reeves’ apparent condoning by his silence the racist texts of Benson, the personal

Department’s Investigation of Michael Fesser:
<https://dochub.clackamas.us/documents/drupal/e1cc88fb-cd61-41b5-9b39-0007a7b26aa5>.

³ To its credit, CIS did not object to participation in this review by the attorney assigned to represent West Linn’s interest in the Fesser litigation. But it would have been extremely helpful to have had an opportunity to talk with the CIS representative as well.

relationship between Chief Timeus and Benson, and other troubling actions regarding the WLPD investigation that were learned during the lawsuit filed against Benson, Fesser filed a tort claim notice against the City of West Linn.

Within a few days of receipt of the tort claim, newly selected West Linn Chief Terry Kruger “recused” himself from any involvement in the matter, citing his prior personal relationship with Benson. WLPD conducted its own investigation into Detective Reeves’ conduct, found some violations of policy, and issued him a letter of reprimand – the lowest level of formal administrative discipline.

Meanwhile, the litigation against West Linn continued over several months, with its City Council being advised at several Executive Sessions about the case. Eventually, in February 2020, Council was advised in Executive Session of a proposed settlement of \$600,000. Within hours, the *Oregonian* published an article about the case, highlighting the racially charged text messages that were a centerpiece of the evidence against the City.

Subsequently, Reeves was relieved of duty by the City. As part of its obligation under Brady v. Maryland to prevent police officers with credibility issues from vouching in future cases, the Clackamas County District Attorney also conducted a review of the West Linn criminal investigation and found a “troubling pattern of deceit by omission” and that:

Detective Reeves and Chief Timeus failed to adhere to their Brady obligations in this case. Their conduct was not merely negligent, inadvertent or the result of a momentary lapse of judgment. It continued throughout the course of the investigation. It reflects negatively on their honesty, judgment and sense of fair play that every suspect and victim deserve.

The District Attorney found that Detective Reeves:

- Intentionally deleted exculpatory and impeachment evidence in the form of text messages including racial epithets/slurs, a motivation to fabricate the theft allegations, and an appearance of improper collusion to defeat the civil claims.
- Unlawfully recorded statements during an auction without the parties’ consent.
- Seized potentially privileged legal paperwork from Mr. Fesser that discussed his legal intentions and provided the documents to Benson in violation of attorney-client privilege.

- Failed to document that Benson feared that Fesser would file a racial discrimination suit.
- Failed to include information about Chief Timeus' relationship with Benson in investigative reports.

The District Attorney concluded:

The weight of the evidence is that these omissions were not merely negligent, inadvertent or due to a lack of experience. The effect was to mislead, as a reasonable investigator would be aware that this information is relevant and material in a criminal investigation.

The District Attorney indicated that as a result of these findings, it would not call Reeves as a witness in any future case. The District Attorney also found that Chief Timeus committed the following misconduct:

- Chief Timeus was aware of and therefore complicit in the disclosure of legal paperwork seized from Mr. Fesser and provided to Mr. Benson. Chief Timeus and Detective Reeves' actions were inappropriate and a violation of Mr. Fesser's attorney-client privilege.
- Chief Timeus, Detective Reeves and Benson colluded throughout the investigation.
- Chief Timeus was responsible for initiating a criminal investigation outside the City of West Linn based on a personal relationship, which is highly improper. This investigation was initiated despite the absence of evidence that Mr. Fesser was engaging in criminal conduct.
- Chief Timeus' failure of leadership created a culture that allowed this to happen.

Based on the additional evidence developed by the District Attorney review, West Linn terminated then-Sergeant Reeves⁴ from employment.⁵

⁴ Reeves had been promoted to Sergeant in the months between the Fesser investigation and receipt of the Tort Claim Notice.

⁵ West Linn then-detective Michael Stradley was assigned to assist in the Fesser investigation. Stradley left WLPD and is currently employed by the State of Oregon Department of Justice. There is an ongoing investigation into Stradley's role in the criminal investigation of Mr. Fesser. There is also an ongoing investigation by the United States Department of Justice into related matters.

IV. West Linn's Response to the Fesser Litigation: Analysis and Recommendations

As noted above, when details of the litigation appeared in Oregon's largest-circulating newspaper, West Linn residents were dismayed as they learned the details of the Police department's ill-advised investigation and eventual arrest of Michael Fesser. The racial overtones and cronyism that infected the West Linn investigation undermined public confidence in the character of the City and its Police Department. In addition to concern about the actions themselves, residents openly wondered about failures by City leadership to acknowledge and address the circumstances as they became known. To their credit, the City's elected officials raised the same questions and commissioned this independent review. They sought an unvarnished account of what happened and, more significantly, what had not happened in the months during which the litigation progressed.

To be clear, this report is not intended to relitigate the Fesser lawsuit; that matter has resolved, and its details will be featured here only when relevant to examine the City's response to it. Nor is this report intended to fully re-examine the misconduct by former Chief Timeus and former Sergeant Reeves. Those misdeeds are set out in detail in the Clackamas County District Attorney's report and will be referenced here only when important to consider the City's response to them.

Instead, the intent of this report is to focus squarely on how the City and its leadership responded to the lawsuit and the attendant claims of misconduct made against its police department. The report provides recommendations designed to improve future responses when the City is faced with allegations of comparable severity. Ideally, the recommendations will contribute to shifts in protocols and culture that will better situate West Linn to address malfeasance within its work force in the future.

Receipt of the Fesser Tort Claim and the City's Response

On June 4, 2018⁶, the tort claim notice was delivered to West Linn City offices. The ten-page tort claim set out Mr. Fesser's case against the City. The claim advised the City that former Chief Timeus, Sergeant Reeves, and Sergeant Boyd abused their police power and in so doing violated the civil rights of Mr. Fesser. Specifically, the notice alleged:

- Acting on the basis of a personal friendship, Chief Timeus ordered West Linn officers to undertake an unlawful surveillance operation into alleged employee theft by a Portland resident at a Portland business.
- Sergeant Reeves "happily engaged" in explicitly racist, sexual, homophobic, and highly unprofessional banter in text messages while surveilling Mr. Fesser.
- Sergeant Reeves devised an arrest to occur prior to when Mr. Fesser could formally complain of employment-related racial discrimination.
- After arresting Mr. Fesser, Sergeants Reeves and Boyd seized his personal items, including his smart phone and an attorney-client privileged letter addressed to Fesser's attorney.

Copies of the tort claim were received by Mayor Russ Axelrod⁷, City Manager Eileen Stein, and Chief of Police Terry Kruger (on his first day in Office). Other individuals alerted to the receipt of the claim included City Attorney Tim Ramis, the City Director of Human Resources, Dian Rubanoff (an attorney who often represents the City's interests in labor matters), CIS Adjuster Jon Stouffer (the City's insurer), former West Linn Sergeant Michael Boyd; Sergeant Reeves, and former Chief Timeus. Meetings were soon convened by the City Manager in person or telephonically among some of these individuals to discuss the City's next steps.

⁶ A timeline of relevant dates is attached as an Appendix to this Report.

⁷ The Mayor expressed concern that the Tort Claim Notice was served on him individually as well as Chief Kruger. He forwarded the Notice to City Manager Stein expressing concern that he and the Chief were on the distribution and not her. The Mayor was advised by City Attorney Ramis that the matter would be discussed with elected officials at a subsequent Executive Session.

The Decision Not to Assign the Investigation into the Tort Claim Notice Allegations to an Outside Investigator Caused the City to Forfeit the Opportunity for an Independent, Robust and Fully Scoped Investigation.

One day after receipt of the tort claim notice, City Manager Stein wrote to City Attorney Ramis, stating: “On the internal side of things, [Chief Kruger] and [Captain Hennelly] reported that Sgt. Rollins is doing a cursory look into the matter to determine if an internal investigation into Sgt. Reeves’ actions is warranted.”

Later that day, Dian Rubanoff, who had been copied on City Manager Stein’s email to City Attorney Ramis, wrote an email to Stein and Ramis that the City “would probably need to know” the outcome of any investigation interviews with Reeves and Boyd in order to evaluate the case. Rubanoff further asked Chief Kruger and then-Captain Hennelly (who were copied on the email) whether there were criminal implications to the investigation that should be turned over to another law enforcement agency. Finally, Rubanoff indicated that the City may also want an administrative investigation of Reeves and Boyd to be conducted by an outside investigator and if so, that the investigator should be carefully selected and that the issue should be discussed with the CIS attorneys.

The next day, City Attorney Ramis sent an email to then-City Manager Stein suggesting a call with CIS counsel. The email further noted the need to coordinate with CIS as the City engaged an outside investigator, “which appears likely based on the face of the allegations.”

That same day, Chief Kruger emailed Rubanoff that Acting Lieutenant Oddis Rollins had been assigned “to conduct an initial review of the available information, in order to determine if criminal implications are apparent.”⁸ If so, the email said, the Police Department would request an outside law enforcement agency investigation. After taking this step, but within a week of receiving the tort claims notice⁹, Chief Kruger

⁸ It is unclear what is meant by “if criminal implications are apparent.” Certainly, an illegal surveillance or arrest could have “criminal implications.” For the decision whether or not to outsource the investigation to rest on whether the allegations were “criminal” is an artificial distinction and misses the point; as detailed above, the nature of the allegations in the tort claim notice (investigation motivated by a personal connection with the Chief and infused with racial overtones) and the individuals implicated therein (former Chief of Police) inherently meant that the case did not lend itself to an effective “in-house” investigation.

⁹ The exact date is unclear.

recused himself from the internal investigation based on his own personal relationship with Benson. However, Chief Kruger's initial decision to have Lieutenant Rollins conduct an initial review of the "available information" rather than have it sent to an outside investigator was not modified, nor apparently was the limited scope of the initial inquiry ever enlarged.

On June 14, 2018, Captain Hennelly wrote an email to CIS, City Attorney Ramis, and Rubanoff providing an update on the Fesser investigation. Captain Hennelly advised the recipients that the Police Department had opened an investigation to look at potential policy violations, and that if it found criminal conduct, the Department would stop and request an outside agency to conduct a criminal investigation. In the email, Hennelly advised that he would be conducting the internal investigation¹⁰ and keeping the recipients of the email updated weekly on its progress.¹¹ Hennelly further indicated that he would be interviewing Reeves within the week about the apparent failure to book Fesser's cell phone into evidence.

While there is no apparent documentation of this process, Captain Hennelly did not follow through on his initial claim that he would be conducting the investigation; instead, he delegated it to Acting Lieutenant Rollins. We were advised that this reassignment may have occurred after Chief Kruger recused himself from the matter, since this meant that Captain Hennelly would need to be the decision-maker for purposes of accountability and discipline. Despite Captain Hennelly's written commitment to the other City officials, there were no apparent weekly updates by either him or Rollins to the group as the investigation progressed.

On July 12, 2018, Captain Hennelly again wrote an email to Rubanoff indicating that Acting Lieutenant Rollins was about to interview Reeves regarding potential policy violations and indicated that "the question came up again if we should refer the entire investigation out."

Rubanoff's response regarding the question of an outside investigator was that if there was "potentially criminal conduct" or a "conflict of interest in using an internal

¹⁰ In the email, Hennelly also sought advice on how to handle the allegations against former Chief Timeus and former Detective Boyd, as the Chief and Detective were no longer employed with the organization. We did not receive any information to indicate that any such advice was provided.

¹¹ In this same email, Hennelly advised that Chief Kruger had recused himself from the investigation due to a personal relationship with Benson.

investigator” such as allegations against a high-ranking member of command staff, then sending the case to an outside investigator would be warranted – but that it did not sound like either scenario was present.¹²

There was no evidence of any further consultation with regard to the issue of an outside referral, and Acting Lieutenant Rollins completed the internal investigation.

The decision by the Police Department to retain the internal investigation had serious consequences for accountability and deleteriously delayed the City’s actual knowledge about the gravamen and credibility of the allegations. Whenever allegations of police misconduct are brought through the vehicle of civil litigation, a resulting investigation must address a range of components to be effective. The fact-gathering will ideally allow for an assessment as to violations of law and policy – and will also examine whether there was insufficient guidance through policy or training that led to performance issues. The resulting evidence should also provide those defending the lawsuit with a means to better evaluate litigative risk. Finally, it should serve as a basis for issue-spotting that can guide City leadership toward necessary interventions in a timely manner.

It is apparent from the email communications identified above that the internal inquiry did not commence with that sort of holistic, comprehensive mindset. Instead, in City Manager Stein’s words, Chief Kruger and Captain Hennelly initially assigned an Acting Lieutenant just to conduct a “cursory look,” as if an internal investigation might not be needed at all. While the Police Department did decide to proceed with an investigation, it failed to heed initial suggestions made by attorney Rubanoff and supported by City Attorney Ramis as to whom should conduct it.¹³

As a result, Acting Lieutenant Rollins was left to conduct the investigation into the myriad of allegations raised in the tort claim notice but eventually chose to investigate only a small subset of them. One particularly concerning result of the delegation of the

¹² This conclusion is a curious one, since the listed premises had, in fact, both been satisfied: the tort claim *had* made allegations against a high-ranking member of command staff (namely the former Chief of Police), and the allegations *could* be construed as implicating criminal conduct.

¹³ From the email that Stein wrote to Ramis, it is apparent that Chief Kruger advised her that the Police Department was intent on conducting an initial review of the allegations. This conclusion is supported by the Chief’s email to Rubanoff that the initial review would be an in-house inquiry, despite her suggestion to engage an outside investigator. The decision to proceed without the assistance of an outside investigator was maintained after the Chief recused himself and Captain Hennelly took over the oversight of the investigation.

investigation to Rollins is that – given his “acting” status at the higher rank – an actual Sergeant ended up investigating the actions of another Sergeant. Best practices disapprove of peers investigating each other and uniformly recommend that a superior officer do so. An outside investigator would not have had the challenges that any peer naturally has in investigating an officer of equal rank, particularly in small police agencies such as West Linn.

Moreover, even if Chief Timeus was no longer employed by the City of West Linn, it was incumbent upon the City to thoroughly plumb the allegations against him as part of the internal investigation. While Timeus may not have cooperated with any internal investigation, there were other leads from the allegations and witnesses who could have been interviewed to either corroborate or disprove the charges regarding Timeus. But even if the investigation had properly incorporated these issues, expecting the acting lieutenant to pursue the alleged past misdeeds of the former Chief was inherently ungainly. It would have been far better to have called upon an outside investigator to perform this fact collection and assessment; doing so would have better situated the City to assess the extremely wide-ranging and troubling allegations and determine how to proceed with the litigation and begin to address broader concerns. Instead, as detailed below, Rollins’ investigation was narrow, and it was left to the litigation process to develop the facts that should have emerged during the City’s internal investigation.

For all of the above-stated reasons, the decision not to assign this investigation outside the Police Department was a serious misstep. When allegations of this magnitude are received, it is vital for a police agency to effectively address every allegation and collect sufficient facts to make informed decisions about accountability, systemic reform, and litigative risk. When the allegations point to the very top of the organization, the need for an outside investigator is imperative.

RECOMMENDATION ONE: The City should develop written protocols to ensure that when allegations of misconduct are lodged against a current or former Department head, any subsequent investigation should be assigned to an outside investigator.

RECOMMENDATION TWO: The City should develop written protocols to ensure that whenever a legal advisor suggests that an investigation be assigned outside the Department of origin, a meeting of relevant stakeholders will occur prior to any decision to disregard this advice and the decision is documented with supporting rationale.

The Internal Investigation Conducted by the West Linn Police Department Failed to Meet the Needs of the City Because of Its Narrow Scope, Disregard for Several Allegations from the Tort Claims Notice, and Limited Factual Record – all Factors that Restricted the City’s Ability to Address Issues of Accountability and Reform

As set forth above, Acting Lieutenant Rollins conducted the West Linn administrative investigation into this matter. Rollins interviewed Sergeant Reeves and former Sergeant Michael Boyd as part of his investigation. The fourteen-minute interview of Reeves focused on whether Reeves had used racial, sexual, or homophobic slurs in his communications with Benson. Reeves admitted to using the word “p***y” in response to Benson indicating his concern about being sued. Reeves also admitted to advising Benson that he should not allow Fesser to play the “race card” and escape criminal liability for his acts of thievery. While Reeves admitted receiving racist text messages from Benson, he indicated that he had ignored them.

During the interview, Reeves also admitted to seizing Fesser’s cell phone and other papers relating to Fesser’s own business as well as a legal document addressed to Benson. Reeves said he returned that property to Fesser several days after the arrest. Reeves admitted not booking the cell phone into evidence and not having Fesser sign a property release when he returned the phone to him.

Rollins reported that two days after his interview of Reeves, he received multiple pages of text messages between Benson and Reeves. Rollins wrote that he observed multiple text messages from Reeves to Benson that could easily be considered lewd, obscene, inappropriate, and unprofessional given that Reeves was on duty and acting as a West Linn detective at the time the text messages were written and sent. While Rollins cited examples of the profane, lewd, and sexual nature of the text messages sent by Reeves, he chose not to re-interview Reeves in order to ask about them.

Upon the conclusion of the investigation, Rollins determined that the following West Linn Police Department policies were violated by then Detective Reeves:

- Discourteous, disrespectful, or discriminatory treatment and/or use of obscene, indecent, profane, or derogatory language
- Failure to follow property booking procedure
- Failure to follow release of property procedure

Rollins determined that Reeves did not violate West Linn Police Department policy regarding discrimination, oppression, or favoritism.

Captain Hennelly accepted the determinations of Reeves and issued a written reprimand as discipline for the policy violations.

It is unclear what additional materials Rollins reviewed as part of his investigation. Standard investigative practice is to specifically list any documents relied upon by the investigator rather than simply providing references to categories of materials. But that practice was not followed in this case.

While Rollins indicated that he obtained and read “all submitted reports regarding the case, along with all submitted orphan documents, evidentiary documents, and court documents”, it is not entirely clear what materials he was referencing. Beyond the tort claim notice (and eventually the text messages), it does not appear that Rollins reviewed any materials developed as a result of the lawsuit that Fesser filed against Benson.

As noted above, Rollins had not reviewed the text messages between Reeves and Benson when he conducted his interview of Reeves. Given the crucial nature of this evidence in Fesser’s claims against the City, it is baffling that the interview of the subject officer – in an administrative investigation prompted by those claims – would have occurred prior to the investigator reviewing the texted exchanges. And this flawed approach was compounded by the decision by Rollins (*after* digesting forty pages of evidence and identifying messages that were “lewd, obscene, inappropriate, and unprofessional) not to re-interview Reeves when he had finally seen the new material.

More significantly, Rollins wrote in his report that his inquiry into the matter was restricted to the “limited scope” of WLPD policy violations, and not civil complaints raised within the body of the tort claim. It is unclear what is meant by this limiting language or why the inquiry was so “restricted.” In fact, in another part of his own investigative report, Rollins wrote that Fesser made claims of actions taken against him that “may in part, or in whole, be violations of West Linn Police Department policy.” Certainly, as the Clackamas County District Attorney report found, the allegations made in Fesser’s claim against the City constituted egregious violations of expected police officer conduct. Moreover, after the City of West Linn had an opportunity to review the District Attorney’s findings, it found numerous violations of West Linn Police Department policy that supported the decision to terminate Reeves.

As a result of the Police Department’s extremely narrow scoping of the investigation, Rollins did not pursue with Reeves or otherwise assess the following allegations of misconduct:

- That the initiation of the investigation against Fesser was improperly motivated by the friendship between Chief Timeus and Benson.¹⁴
- That Reeves had failed to properly document the existence of the personal relationship between Timeus and Benson.
- That the surveillance of Mr. Fesser and the recordings that had occurred therein were nonconsensual and likely illegal.
- That Reeves acknowledged counseling Benson not to allow Fesser's threat to initiate a lawsuit as a reason to stop pursuing criminal charges.
- That the criminal investigation constituted collusion to try to defeat Fesser's legal claims.
- That Reeves improperly failed to document that Benson's underlying fear that Fesser would file a racial discrimination suit.
- That Reeves improperly seized legal papers from Fesser that discussed his litigation intentions, and whether Reeves provided copies of them to Benson.
- That Reeves improperly deleted the text messages he received from Benson in spite of their potential as exculpatory and impeachment evidence.
- That Reeves' lack of response to the racist text messages repeatedly sent him by Benson amounted to a condoning through silence of those messages and official tolerance of racist motivations or conduct.¹⁵

Critical witnesses were also not interviewed by Rollins. Most fundamentally, there was no effort to interview Michael Fesser, the complaining witness and victim of the alleged misconduct.¹⁶ Basic investigative precepts demand that every effort should be made to

¹⁴ This was not pursued even though Reeves volunteered in the administrative interview that Benson and Timeus were friends.

¹⁵ In July 9, 2020 correspondence addressed to Interim City Manager John Williams, Chief Kruger wrote that he was informed that the WLPD internal investigation had determined that probable cause existed to suspect that Fesser had embezzled money from his employee, Fesser's arrest was lawful, and no one at the Police Department conducted illegal surveillance or violated the law. Kruger's assertions notwithstanding, the investigative report did not even consider – let alone make – such findings. In that correspondence, Kruger further wrote that he had read the Reeves' investigative report. But a reading of that report should have caused Kruger to recognize that the above-noted determinations were *not* addressed by the internal investigation.

¹⁶ We were advised that shortly after the tort claim notice, the CIS broker contacted Fesser's attorney and indicated the City was interested in interviewing his client. However, there was no apparent follow up to this interest by either CIS or West Linn. Fesser's personal account of his experience was not captured by West Linn until near the end of the litigation, when he was deposed.

interview the complaining party. The fact that Mr. Fesser was represented by counsel and involved in active litigation provided no actual or legal impediment to the investigator's ability to request an interview with the complainant (through his attorney). Had Rollins interviewed Fesser, he would have learned significantly more information and obtained additional leads to pursue. The failure to attempt to obtain an audience with Fesser was a serious shortcoming of the investigation.

Moreover, Rollins did not endeavor to interview former Chief Timeus about the allegations surrounding his involvement in initiating and pursuing the criminal investigation against Fesser. While Chief Timeus was no longer employed by the City of West Linn, this was not a barrier to at least making the request.¹⁷ Had he undertaken that interview and pursued any leads from Fesser, Rollins could have learned more about the following allegations:

- Whether former Chief Timeus was aware of and therefore complicit in the disclosure of legal paperwork seized from Mr. Fesser and provided to Mr. Benson in violation of Mr. Fesser's attorney-client privilege.
- Whether former Chief Timeus, Detective Reeves and Benson colluded throughout the investigation.
- Whether former Chief Timeus was responsible for initiating a criminal investigation outside the City of West Linn based on a personal relationship.
- Whether former Chief Timeus lacked a sufficient evidentiary basis for initiating a criminal investigation against Mr. Fesser.

Rollins also failed to interview former West Linn Lieutenant Mike Stradley about the Fesser investigation and arrest. While the initial tort claim notice did not expressly allege any misconduct against Stradley, a November 2017 West Linn police report detailed Stradley's involvement in contacting the Portland Police Bureau and alleged that "in the past Fesser had made threats to Eric Benson, his employees and to damage his business." Accordingly, the investigation should have at least interviewed Stradley as a witness.

Stradley later revealed during the civil litigation proceedings that when he was a Portland Police Bureau officer and Fesser was a youth, Stradley decided that Fesser was just a "bad guy" whom he would like to have go to jail. Again, Rollins decision not

¹⁷ In fact, as set out above, that is precisely what Rollins did in interviewing Sergeant Boyd, who was no longer employed by West Linn. And there was reason for the former Chief to cooperate, since he was being represented in the lawsuit by the City's insurance company.

to interview Stradley left it to the civil litigation process to uncover Stradley's involvement in the Fesser matter and identify potential acts of misconduct.¹⁸

Instead of a full and thorough investigation of the serious allegations lodged by Fesser, the actual investigation produced a limited amount of evidence and a gap-riddled review. Neither the attorneys defending the City's position nor the City leadership got a full accounting of the magnitude of the offenses by Reeves and its former police chief; accordingly, they were precluded from representing the City's interests effectively and remedying that conduct in more holistic ways.¹⁹ And, significantly but not surprisingly, the extremely cursory investigation resulted in minimal discipline for Reeves.²⁰

While then-City Manager Stein was advised of the result of the investigation, there is no evidence that the Police Department either sought or received input from her as to who should conduct the investigation, what its scope should be, or what remedial measures were appropriate. For Police leadership to reserve such decisions to itself is not an unusual circumstance. And here, the fact that Chief Kruger, the City Manager's appointee and direct subordinate, was himself not involved in the case determination presumably added to the insulated nature of the decision-making.

Moreover, as the litigation progressed and key witnesses were deposed, no one in the Police Department kept significantly apprised of the litigation to learn what new information was being developed and whether it suggested a need for further Department scrutiny as to the conduct of its personnel. A supervisor could have been assigned to either attend those depositions or review their transcriptions for purposes of accountability or issue-spotting. But no one was assigned that role, and therefore no

¹⁸ Stradley's current employer has announced an investigation into his actions, and this report is not intended to prove or disprove the allegations that have been lodged against him. Instead, the point here is that West Linn's own internal investigation could and should have uncovered more about Stradley's involvement in the Fesser matter.

¹⁹ On February 11, 2020, the day after the *Oregonian* article appeared, the Police Department issued a statement on the West Linn City website announcing the settlement amount and stating, "This settlement is not an admission of liability; it seeks to avoid additional expense, uncertainty, and drain on public resources. The City of West Linn and the West Linn Police Department do not tolerate any acts of discrimination or disparate treatment by its employees. In 2018, when the allegations were first reported, an internal investigation was conducted, and swift and appropriate disciplinary personnel action was taken." [emphasis added.] As explained above, the reality of the Department's accountability measures belied the italicized assertion.

²⁰ And since, until the Fesser allegations came to light, WLPD had no apparent issues with the way then Detective Reeves carried out the investigation, he had been promoted to Sergeant three months before the Tort Claim Notice was received.

one in the police department was intimately acquainted with information being developed through the civil litigative process.

The inadequate internal investigation abdicated the fact-gathering process to the civil litigants, and the Department compounded this deficiency by failing to at least make appropriate use of the available – and concerning – new information as it emerged. For all that the \$600,000 settlement reflected poorly on the Department and the City, it was the seeming obliviousness that magnified the damage to public confidence. Indeed, it was left to the District Attorney months later to set out the full panoply of misdeeds by Reeves and former Chief Timeus in their endeavor against Mr. Fesser.

During our review, it was suggested that the reason that West Linn's investigation was not able to identify the serious transgressions that were ultimately identified and catalogued by the District Attorney was because those offenses were only learned through the subsequent civil deposition process. But the logic behind this explanation is faulty. It ignores the control that West Linn had over the framing of its original investigative efforts, and the lack of rigor that it brought to that framing and its subsequent analysis. In our experience, a robust internal investigation has the potential to be *more* timely and effective than the civil discovery process; the fact that this did not happen here is not mere happenstance but a product of the Department's flawed approach.

RECOMMENDATION THREE: The City should develop written protocols to ensure that internal police investigations are conducted by officers of higher rank than the subject employee(s).

RECOMMENDATION FOUR: When internal investigations are initiated in response to lawsuits or claims, the attorneys representing the City and the Director of Human Resources should participate in scoping the investigation so that each allegation raised by the complainant is thoroughly pursued.

RECOMMENDATION FIVE: In significant lawsuits, police leadership should assign a supervisor to review information developed in that forum, with a focus on learning of and responding to performance and conduct issues developed during that process.

Interactions with City Leadership Regarding the Case

The Mechanisms Devised To Advise Elected City Leadership of the Nature and Progress of the Fesser Litigation Were Haphazard, Poorly Facilitated and Ineffective.

As noted above, when the Fesser Tort Claim Notice was served on the City, a copy of the notice was delivered to the Mayor. While the Mayor raised concerns with the City Manager about receiving the claim directly, he has indicated publicly that he did not read the nature of the allegations contained in the notice itself.

According to City Manager Stein, on the day after the tort claim notice was received, she emailed City Council that the notice had been received but did not apparently send Councilors the actual notice.

On June 25, 2018, City Manager Stein emailed City Attorney Ramis suggesting that an executive session of the City Council would be needed to discuss the Fesser Tort Claim Notice. The first executive session in which the Fesser matter was discussed occurred on July 2, 2018. At that session, City Attorney Ramis informed Councilors that the City had been served with a tort claim alleging that a Portland man lost his job after an inappropriate investigation by WLPD. Ramis described the claim as “substantial” but indicated that he had been advised by an employment attorney not to be specific about the claim because the matter was under investigation.

Mayor Axelrod asked about the date of the allegations and was advised that they occurred in early 2017. City Manager Stein cautioned Council that the claim at that juncture was only an unproven allegation. City Attorney Ramis noted that the claimant had requested \$3,000,000 in damages and added that the allegation indicated that the WLPD investigation was initiated as a result of a personal relationship with the owner of the claimant’s business. City Manager Stein noted that of the three WLPD officers accused of illegally investigating the man, one was still employed by WLPD, which is why it was a personnel matter.

Mayor Axelrod indicated that he had been personally served with the tort claim notice, which prompted a question about whether that fact had made “it” public. City Attorney Ramis responded as follows:

I don't think it does at this point. We are only discussing in the context of an Executive Session we will then have further conversation about it with our

counsel. At this point I think its lawyer client privileged and let's proceed and once we peel a couple layers off the onion then we'll be back.

It is unclear what was meant by this exchange. Clearly, the tort claim notice itself is not an attorney-client privileged document, though the discussion in Executive Session about receipt of the claim was confidential.²¹ In any event, there was no further discussion about the claim in this session; nor was the actual tort claim notice apparently shared with Council.

On July 23, 2018, the West Linn *Tidings*, a local weekly newspaper, published a story entitled "Former WLPD Chief, Two Officers Named in Lawsuit."²² The article wrote that Fesser's lawsuit asserted that Detectives Boyd and Reeves had conducted illegal surveillance on Fesser while he was working. The article also referenced a text message from Reeves: "It's better that we arrest him before he makes the complaint (of race discrimination). Then it can't be retaliation."

The article included the allegation that Reeves used the word "p*ssy" in a text message when an individual expressed doubt about continuing to participate in the investigation. The *Tidings* article also included references to the allegation that Timeus had a close relationship with Benson.

The Fesser case was next discussed in Executive Session on September 4, 2018. Even though attorney Andrew Campbell had been assigned by CIS to represent the City in the Fesser litigation, he was not present at the session. City Manager Stein started the Executive Session indicating that Campbell would not be available for up to an hour, so she suggested that City Attorney Ramis begin the discussion.²³

²¹ Subsequently, and as noted above, Council authorized release of the Executive Session transcripts in which it discussed the Fesser litigation.

²² On July 16, 2018, Fesser had filed a lawsuit which included and expanded upon the allegations in the initial tort claim notice. The article included a link to that complaint.

²³ On September 4, 2018, City Manager Stein advised Campbell that City Attorney Ramis would explain the Fesser case "to the best of his ability" and that if Council seemed to want more, Campbell could travel to West Linn later that day or another Executive Session could be scheduled. Campbell subsequently texted City Manager Stein that he could travel to West Linn for Executive Session that day if need be. However, as detailed above, Campbell did not appear that day and did not meet with Council until February 19, 2019.

City Attorney Ramis advised that Campbell would know a lot more about the case than him and suggested that Council had seen the complaint that had been filed.²⁴ Ramis indicated that the complainant asked for \$2.5 million. Ramis added that the WLPD investigation and arrest of the complainant was illegal and motivated by racial animus as well as “many many claims” that flowed from those allegations.

City Attorney Ramis reported that the City had conducted an internal investigation and had not identified facts that would bear out the claim. Ramis said that the evidence suggested that there was a reasonable basis for the actions taken by the police, as demonstrated by the grand jury authorizing five counts against the complainant.

Ramis reported that the District Attorney chose not to pursue the case because the matter was resolved as a result of a settlement between the employee and the employer. Ramis acknowledged that there were emails where the employer was not very careful about his own attitudes and about political correctness in those communications, which caused the District Attorney to conclude that it was not the sort of information that one would want to put in front of a jury. Ramis further acknowledged that the dismissal “opens the door” to a claim that the investigation was done improperly and with bad motive with which the City disagreed. Ramis then asked Chief Kruger if he had reasonably summarized the case and Kruger said it was as he understood it.

Councilor Perry then asked why WLPD was even involved in the matter in the first place, given the apparent jurisdictional issues. At the specific request of City Manager Stein, Chief Kruger attended the Executive Session²⁵, and offered an explanation of the investigation’s origins. Kruger noted that he had inherited the matter but advised that the business owner came to Chief Timeus complaining about this suspected theft. Kruger advised that the Police Department called to the Portland Police Bureau and talked to the commander of the investigation’s unit about the potential theft. Kruger said that the employee had worked for the company an extended time, and that the dollar amounts were very small and involved a couple of incidents. Kruger reported that, as a result, Portland police declined to assign detectives to the case, and then WLPD assigned detectives to look into it.

²⁴ In our review, we found no evidence that Council had been provided a copy of the Fesser complaint.

²⁵ Despite the fact, as detailed above, that Chief Kruger had recused himself from the matter. The problematic nature of this is discussed below.

Kruger told Council that the WLPD detectives saw that there were “many, many instances of theft” and were able to establish probable cause of criminal activity. Kruger said that WLPD notified the Portland Police Bureau, had them make the arrest, and interviewed Mr. Fesser. Kruger noted that the matter resulted in five felony counts of theft.

When asked again by Councilor Perry about why West Linn PD was involved, Chief Kruger said that police officer powers were state-wide and that it was not uncommon for police agencies to conduct investigations outside of their areas. As Councilor Perry continued to press, Kruger advised that the owner of the company was a resident of West Linn and provided tow services to the City. Mayor Axelrod suggested that the owner’s connection with the City made “some kind of sense”.

When asked by Councilor Sakelik whether the investigation by WLPD was standard procedure, Chief Kruger said it was not out of the ordinary for a resident who has business dealings within the city, who looks to be a victim of a crime, and who cannot get investigative resources in the jurisdiction he is in due to overload, to then have another agency assign detectives to look into it and see if there is criminal behavior.²⁶

Chief Kruger added that WLPD did not conduct an illegal investigation, illegal surveillance or illegal arrest, and asserted that there had not been a violation of Fesser’s civil rights.

²⁶Contrast Chief Kruger’s assertion with the following passage in the District Attorney’s Brady report:

It is highly unusual for a law enforcement agency to undertake a criminal investigation outside of its jurisdiction without either being invited by another agency, starting an investigation in its own jurisdiction that ultimately leads to another county, or being part of a multijurisdictional task force. It is not inherently inappropriate for a police department to perform a service and investigate a case for a resident who could not get the police agency in the appropriate jurisdiction to evaluate an allegation of theft of hundreds of thousands of dollars.

However, in the rare instance where this might occur, one would expect the investigative reports to reflect why an agency was investigating allegations of criminal activity that is not even prosecutable in that agency’s home county. The impropriety is compounded when that resident/alleged victim is the Police Chief’s friend, yet there is no mention of this personal relationship in the police reports. It then becomes even more concerning when the investigation is almost complete before the option of referring the case to a more appropriate agency—like one without such a conflict—had been fully vetted. It also bears mentioning that during the civil litigation, the WLPD could not identify a single case where it investigated a case of employee theft outside of its jurisdiction.

On August 9, 2018, Campbell traveled to West Linn, ostensibly to appear before Council for an Executive Session; however, but a meeting was not held that day. On November 28, 2018, Campbell emailed City Manager Stein (cc'ed to Chief Kruger) providing an update on the civil litigation and expressing confidence in the defense of the case based on legal theories (that eventually did not pan out) – as opposed to a substantive defense of the factual allegations.

The next time the Fesser case was discussed was at an Executive Session on February 19, 2019, when Andrew Campbell appeared before Council for the first (and only) time. At the session he disclosed the existence of the texts, saying, "There's some text messages that I wish didn't exist ... but frankly I don't think any of that is really strong evidence that any of the officers did anything wrong."

Campbell did not quote from the texts or provide copies to Council but noted that the "colorful language" used by witnesses and others involved in the case may be a challenge for the defense:

In this case, we've heard about these text messages. I'll tell you, I've read them. And the only fault I can think of for the West Linn officers is the offensive words are coming in and the West Linn officers aren't saying, "Whoa, Whoa, Whoa, that's inappropriate." The West Linn officers aren't saying things, I can't say unqualified, but for the most part, they're not volunteering inappropriate things. For the most part, they're dealing with a witness who has a colorful vocabulary, but they're continuing to deal with the witness. And sometimes when you deal with a witness, you get colorful vocabulary, but they are continuing to deal with the witness.

And sometimes when you deal with the witness, you get colorful vocabulary. And if you as a police officer say, "You can't talk like that to me." Guess what? That witness is not going to work with you anymore. It's going to become a very difficult relationship. It's going to come up very difficult criminal investigation. [sic] So yes, the texts were there, we will deal with them. But I don't think it's enough to go seeking out a settlement.

CIS representative John Strouffer advised Counsel that the "big parts" of the case were the texts. He added that he believed that judges were good at understanding what the real issue was and would not be distracted by those texts; nor would a jury. Both Campbell and Stouffer expressed optimism about the City prevailing at the summary judgment stage.

Chief Kruger advised Counsel that WLPD had conducted a legitimate criminal investigation where real criminal conduct was uncovered, and it was submitted to the Multnomah County District attorney's office, and ultimately Fesser was indicted on five counts of theft and that the law enforcement team was "doing their job."

There was a suggestion raised by Councilor Sakelik that it might be helpful to again hear from Campbell in July. Campbell indicated that visits to Council were expensive and, accordingly, he tried to limit his in-person visits to one per case but offered to have another visit if another in-person update became prudent. Nonetheless, Mayor Axelrod said that Campbell should plan on coming back when something notable occurred. Despite this discussion, Campbell never returned to brief Council about the Fesser litigation.

It was not until December 5, 2019 that the Fesser case was next discussed at Executive Session.²⁷ In a very brief discussion, City Attorney Ramis advised Council that the City was going to attend a settlement conference. Ramis advised Council that CIS felt that it was an appropriate time to settle the case given its stage and before there would be more expense preparing for trial.²⁸

At the settlement conference held on December 14, 2019, City Manager Stein became acutely aware of the text messages as they were presented and discussed at that conference. However, City Manager Stein was separated from employment as City Manager soon after the conference on January 6, 2020.

The next time the Fesser case was discussed in Executive Session was on February 10, 2020. In that session, City Attorney Ramis informed Council of the intent to settle the lawsuit for \$600,000. He said the City would also agree to a face to face meeting between Mr. Fesser and City officials. Ramis explained that the meeting would be an opportunity for Mr. Fesser to describe his contributions to the community and his concern about how he feels he's been treated, and an opportunity for the City's

²⁷ We were advised that the initial plan was for Campbell and CIS to brief Council in November 2019, but the session was canceled at the last minute by the City Manager.

²⁸ A settlement conference was held on December 14, 2019, and in attendance for West Linn was Campbell, Stein and Captain Rollins, who had been promoted. However, as evidence of the confusion and ambiguity regarding Chief Kruger's role, Campbell initially suggested that Kruger attend the conference as a representative of the City. To the Chief's credit, he begged off on attending the conference and had Captain Rollins attend as the WLPD Police Department's representative.

leadership to acknowledge they heard his concerns. Ramis said that the City had rejected the request by Fesser for a written letter of apology because doing so would essentially buy into his theory.

At the Executive Session, Councilor Walters was assured by Captain Mahuna²⁹ that whatever happened would not happen again. He also informed her that only one individual involved in the matter was still with the Police Department.

"While \$600,000 is a lot of money and it's unpalatable in many ways, there's also good reason to avoid going to trial on the issue and exposing all of the evidence that there is on the case," said Ramis. Others who participated in the discussion also mused about ways to try to keep the matter secret.

This history of sporadic, limited communication shows that the elected officials were significantly under-informed. There is no evidence that the actual tort claim notice or subsequent lawsuit Complaint was ever directly provided to Council. When the matter was discussed in Executive Session, there was only one instance in which individuals most knowledgeable about what was being learned during the litigation process were present. As a result, information about the issues in the case were largely transmitted by the City Attorney, City Manager, and Police Chief,³⁰ none of whom were sufficiently versed in the information being learned through the litigation. Beginning with the aforementioned lack of rigor, depth, and appropriate scope in the original internal investigation conducted by WLPD, and continuing through a series of briefings that were optimistic at best and misleading at worst, the City's elected leadership was not fully aware of the degree of WLPD misconduct that had occurred during the Fesser investigation.

Those who did provide information to Council reported, for example, that the internal investigation did not corroborate many of the allegations raised in the lawsuit. And, as

²⁹ Chief Kruger was not present at the February Executive Session because he was on vacation. But instead of Captain Rollins reprising his role as the WLPD representative at the settlement conference, the responsibility was delegated to Captain Mahuna because he had been designated as Acting Chief. It would have been helpful to have Captain Rollins attend the session, since he had been part of the December settlement meeting and no other individual that had attended the settlement conference was present at the February 2020 Executive Session.

³⁰ As we discuss in a subsequent section, Chief Kruger's participation in the discussion about the propriety of WLPD actions was particularly problematic in light of his early decision to recuse himself from the case based on his personal relationship with Benson.

detailed above, Chief Kruger advised Council that WLPD did not conduct an illegal investigation, did not conduct illegal surveillance, and did not conduct an illegal arrest and there were no violations of Fesser's civil rights. However, the scope of the internal investigation had not even begun to delve into those issues; when the District Attorney's Brady inquiry did so, it reached contrary conclusions on each of those matters. In short, what the Council was not in a position to realize was that the lack of corroboration for different allegations was more a function of inadequate investigation than blamelessness on the part of the accused WLPD personnel.

In the sole Executive Session appearance by the lawyer who was assigned to the litigation, Campbell conveyed optimism about prevailing in the case and only made indirect references to some of the weaknesses of the City's position – such as the text messages. But Campbell's assessment of the case had also been impacted by the shortcomings of the internal investigation conducted by the Police Department and its failure to fully identify the misconduct when it had an opportunity to do so.³¹

As detailed above, after Campbell expressed confidence about prevailing in the litigation, and after the lapsing of almost a year, Council was then informed third-hand that the advice from their legal representative was to settle the case, and that a conference to achieve that purpose had been scheduled. There was no explication provided to Council about what happened in the intervening months (legal ruling, newly discovered evidence, or otherwise) to weaken the City's position. A settlement conference was held and then, two months after that, Council was again indirectly advised of a proposed settlement agreement for \$600,000. Again, no substantive information was provided about why settlement was then recommended or what had transpired during the year to shift the prognosis from a likelihood of prevailing to a risk of "drama" at trial that rendered a costly settlement the more prudent course of action.³²

Viewed in retrospect, it seems clear that the way information was conveyed to Council about the Fesser case was infrequent, superficial, and ineffective. On at least one occasion, the lawyer assigned to defend the case came to West Linn mistakenly expecting to brief Council and did not; other times he did not come to West Linn even

³¹ Fesser's attorney advised us (and Campbell himself acknowledged) that during much of the discovery phase of the Fesser litigation, he had delegated the lion's share of the work to a junior member of the law firm.

³² Nor was there anyone at the February 2020 Executive Session present to advise Council about the settlement conference proceedings from December; of the three individuals who had attended the conference, Eileen Stein was no longer City Manager and neither Andrew Campbell nor Captain Rollins were at the Session.

though he was expected to appear. That disconnect left it to others – less suited in terms of knowledge or their own potential conflicts of interest – to provide updates about the litigation on those infrequent occasions they occurred.

As noted above, shortly after the lawsuit was filed, the Fesser lawsuit received media attention from its local news outlet in a way that presumably could have put Councilors on notice who came across the article. However, by then Council had already been given a truncated version of the claim that presumably shaped its impressions. More significantly, it is the responsibility of City administration to fully and objectively advise its Council of allegations of wrongdoing rather than relying on media outlets to so inform. Certainly, the *Tidings* article could have triggered further inquiry by a Councilor who happened to read it; the fact that this did not occur was potentially a missed opportunity, but it does not absolve those responsible for keeping elected leadership sufficiently apprised of allegations lodged against the City.

West Linn’s Past Practice and Culture Defined a Limited Role for Council in Evaluating Litigation and Allegations of Employee Misconduct.

As noted above, the haphazard and incomplete way West Linn’s Council was apprised of the allegations of misconduct lodged against its police department resulted in the elected body not being fully informed of the gravamen and ultimate legitimacy of those allegations. However, even if Council had been fully informed, its ability to act would have been circumscribed by the City’s past practice and culture in terms of evaluating litigation and responding to employee misconduct issues.

One fact that contributes to this limited role is that the City is largely insured for liability that attaches as a result of employee misconduct. However, with that insurance comes less control over when and whether to settle any litigation, the assignment of attorneys to the litigation, strategies about how to address the allegation, and most other litigation decisions. In this case, the request by Mr. Fesser for a meeting with City leadership as a component of the settlement was virtually the only decision that the City controlled. While tacit approval of the settlement in Fesser was provided by Council, in actuality, the decision of whether to settle and how much to pay plaintiff largely rested with the City’s insurance company.

An additional significant factor for the seemingly “hands off” approach to allegations of misconduct can be attributed to the policy, culture, and practice of deference to the City Manager with regard to personnel matters.

In 2013, a provision to the City's Charter was added:

No City Council member may directly or indirectly, by suggestion, or otherwise, attempt to interfere, influence or coerce the City Manager in the award of a public contract or the hiring, discipline, or termination of any personnel decision.

The import of the provision is clear in its insulation of these sensitive personnel matters from Council influence. In 2017, the above provision was softened by additional language to the Charter:

This shall not prevent a City Council member from providing input to the City Manager relating to City business or the performance of an employee or department.

This change did provide some latitude for Council member influence. But it still left the ultimate authority for personnel decisions solely to the City Manager.

In the Fesser case, the insurance company's dominant role in determining when and whether to settle the litigation and the City's "hands off" role for Council in personnel decisions were both factors in the Council's relative passivity. One consequential cost to this approach is that, for matters that involve legal and/or personnel concerns, the Council is impeded from playing its proper leadership role in addressing larger policy and systemic concerns.³³

While the Fesser case and the allegations therein directly impacted both liability and personnel, it also pointed to a pattern of misconduct as well as serious policy and systemic concerns which needed to be addressed by Council. But it was not until the *Oregonian* article presented the public with a stark expose of some of that misconduct that Council began to confront those issues.

To be fair, and as detailed above, Council was not served well by the cursory personnel investigation conducted by the Police Department – in short, it had no reason to be aware of what it did not know. And, as we explain above, Council was also not served well by the halting and incomplete flow of information during the litigation process.

³³ And in this case, the decision about who was to conduct the investigation, its scoping, and the outcome was entirely delegated to the Police Department, with the then-City Manager playing no actual supervisory role in any of those decisions.

However, the seeming passivity that affected both situations can be attributed to Council's history of refraining from substantive engagement in these realms.

To be clear, we recognize (and have experienced) the pitfalls of the obverse situation: excessive meddling into decisions that should remain delegated to the relevant administrators. Achieving the correct balance between involvement and overreaching can be difficult. There is, however a "happy middle" that the City's elected leadership should seek to occupy in the future.

In the Fesser case, the allegations raised (and eventually corroborated in large part) were of a different magnitude than the garden variety "personnel matter." The claim suggested the initiation of unprecedented criminal process motivated by a personal friendship between the Chief and complaining party. It alleged a series of investigative decisions based on already suspect motivations by the complainant and illegal activity in the conduct of the investigation. And it alleged and produced documentary proof of racist text messages (exposing improper motives of the alleged victim) to the lead detective as he was conducting the actual investigation.

Yet, as detailed above, the City and particularly the Police Department repeatedly referenced the age of the incident and the fact that most of the actors were no longer employed by the City as suggestive that the problematic issues and personnel were somehow behind them. However, at the time these assertions were made, a primary wrongdoer was still working at the Police Department and in fact had been promoted since the Fesser investigation. Moreover, as the City learned in February, the issues that led to the investigation and arrest of Michael Fesser could not easily be attributed to a distant past; nor did the settlement "resolve" the matter satisfactorily in the eyes of West Linn's citizenry. To the contrary, the failure to address the misconduct issues through a timely and objective investigation, as well as to identify and respond to the broader issues identified by the allegations, significantly increased the community's dismay when it learned how those warning signs had not been effectively heeded.

As Council recognized *after* the account was published in the *Oregonian*, the allegations demanded a further response by its elected officials. In the ensuing weeks, the City and Council worked to repair the damage and distrust created when the information became widely public.³⁴ These are positive steps. However, they also reinforce the extent to

³⁴ On February 18, 2020, at a public City Council meeting, the Council held a "Listening Session" to hear community concerns about the Fesser case. Mayor Axelrod formally apologized to Mr. Fesser and issued a public statement of contrition. And since that time, within constraints

which earlier vigilance and intervention were warranted. This case (like others of recent vintage in West Linn³⁵) illustrates how “personnel” matters that emerge through civilian complaints, internal concerns, and civil litigation can also be symptomatic of farther-reaching deficiencies. Civil litigation and the City’s complaint system must be cognizant of that potential and ensure that when allegations point to potential liability (or culpability), that any broader issues also be addressed and that elected officials are able to perform their key role as guardian of the City’s character.

As with most cities, West Linn currently has no apparent entity to ensure effective performance of this role. While we have been advised that, to its credit, Council has recently demanded more from its assigned CIS attorneys regarding briefing on outstanding litigation, there are no written requirements setting out those expectations. We recommend that the City take that step. More significantly, though, an advocate assigned to represent the City’s short-term interests in court may not be in the best position to objectively evaluate the implications of that civil litigation with regard to organizational health, reputation, responsiveness, community trust, and larger policy issues.

Accordingly, we recommend the City consider creating an independent police auditor position to ensure that when allegations of misconduct are received, they are appropriately assigned, properly scoped, and thoroughly and objectively investigated. The auditor would further ensure that any disposition is evidence-based, and that remedial action is proportionate to any misconduct or performance issues proven. Finally, the auditor would be tasked with ensuring that larger systemic, supervisory, or policy issues are addressed through all processes available to the City, and that problematic conduct committed by City personnel is dealt with forthrightly. A contracted auditor position could effectively fill the important roles of progressive risk management, accountability, and transparency.

caused by the pandemic, the City has increased its efforts to begin to address the broader concerns raised by the litigation.

³⁵ The Newberry case provides another example of a phenomenon of defining the scope of remedial action and interest too narrowly. In that case, an officer was found to have repeatedly posted troubling, racially tinged materials on his social media platform. To its credit, when a media account made the activity known to the public, West Linn took action and moved to terminate the officer. However, the investigation also revealed that command staff, including then-Chief Timeus, were well aware of the postings and may have “liked” some of them, prior to the expose. Yet, there was no apparent “action plan” by the City to address the apparent tolerance of this activity by Police Department leadership – an issue that was in some ways more concerning than the misguided posts themselves.

RECOMMENDATION SIX: The City should establish in writing its expectations for briefing its Council on outstanding litigation, including requirements that the briefing be conducted by a suitably knowledgeable party and that relevant written materials are provided in advance.

RECOMMENDATION SEVEN: Consistent with the City Charter, the City Manager should routinely solicit feedback from Council on the performance of Department heads.

RECOMMENDATION EIGHT: Prior to any settlement or following any adverse judgment in civil litigation, City leadership should develop a “corrective action plan” that identifies any challenges that were presented in defending the litigation and includes a plan to address and remediate those challenges.

RECOMMENDATION NINE: The City should consider contracting with an Independent Police Auditor to ensure that allegations of misconduct are appropriately investigated, the review of the investigation is evidence-based, offending employees are properly held accountable, and larger systemic issues are remediated.

The Police Chief’s Self-Recusal, Though Appropriate, Was Flawed in Execution

As detailed above, within days of the original receipt of the allegations, Chief Kruger advised the City Manager that he had decided to “recuse” himself from further involvement in the Fesser allegations because of his personal relationship with Benson – the former employer who had prompted the criminal case. As a result, while Captain Hennelly was initially assigned to conduct the investigation, he delegated the investigation to Acting Lieutenant Rollins so that he himself could serve as the decision-maker with regard to the pending internal investigation.³⁶

³⁶ The recusal of the Chief provided yet another justification for enlisting an outside entity to handle the investigation. For even the decision to have Captain Hennelly oversee the internal investigation and assume the role of decision-maker on outcome and consequence was problematic as there is some evidence that he performed some general oversight of the Fesser investigation which was the intended focus of the administrative inquiry. Moreover, Captain Hennelly’s impending retirement also undermined his suitability as a choice, given that he was not subsequently available as a resource to provide insight into the case as the litigation progressed.

While the decision to recuse was appropriate, it proved to be flawed in its application to further developments in the matter. It is apparent that, consistent with the purpose of recusal, the Chief had no involvement in determining the disposition or the consequence of the Police Department's investigation into Detective Reeves (though he was advised of its outcome and read the investigative report). However, Chief Kruger *did* have significant involvement in two other important aspects of the matter: managing the responses to discovery requests and advising Council on aspects of the case in Executive Session. Both of these seriously compromised the efficacy of any attempt to "wall off" Kruger from inappropriate influence.

As a normal element of civil litigation, significant requests for documents and responses to interrogatories are frequent, particularly for the department that maintains many of the relevant records. During the course of discovery, Chief Kruger was the apparent coordinator of the response to those requests, whether it was searching for and acquiring requested documents or responding to interrogatories.³⁷ Chief Kruger explained he viewed his role as ministerial and intended to ensure timely and complete compliance with such requests. However, by assigning himself even this "coordinator" responsibility, it unnecessarily confused his "recusal" status. And there is no evidence that others could not have as effectively performed this role, which would have allowed the Chief to absent himself from the litigation altogether.³⁸

More concerning was Chief Kruger's subsequent role in advising Council on developments in the litigation. While the Chief did apparently advise City Manager Klein that he had recused himself, it was *not* apparent that Council was ever directly advised of this action. More significantly, and as detailed above, Chief Kruger actively participated at the Executive Sessions in briefing Council on various aspects of the allegations and defending decisions made by the Police Department and its personnel. If Chief Kruger had effectively recused himself from all aspects of the litigation, he obviously would not have had sufficient knowledge to brief Council on the facts. And a "recused" individual who opines on the appropriateness of the Police Department's response defeats the whole purpose of recusal: the avoidance (through non-

³⁷ Kruger has maintained that he performed this role at the request of Andrew Campbell, the attorney representing the City in the Fesser litigation.

³⁸ Moreover, the evidence suggests that Chief Kruger was being regularly advised on the progress of the Fesser litigation in order to be kept "in the loop". As noted above, while he did not attend the settlement conference as a City representative in December 2019, email records show that he had no such hesitation about offering to participate in conference calls that were designed to provide briefings as to the litigation's status.

participation) of inappropriate influence over an issue about which someone lacks the necessary objectivity.

Kruger's admitted conflict can and has been used to question the information that he did provide to Council. For example, as detailed above, he told Council several things in support of the criminal inquiry: that the WLPD detectives involved in the criminal case saw that there were "many, many" instances of theft, that they were able to establish probable cause of criminal activity, and that the matter resulted in five felony counts of theft. However, he did *not* advise that body that a Deputy District Attorney had informed the Department that he could not proceed with the prosecution of Fesser because of the racially charged text messages Benson had sent Detective Reeves. In short, nothing about this paradigm suggests that the Chief was well-suited to override his own recusal and offer advice on the merits of the litigation.

We have been advised that the Chief may have raised these potential concerns with City Manager Stein when she asked him to participate in the September 4, 2018 briefing of Council, after it was learned that Campbell was unavailable to attend. However, while the extent and vigor of any protestations by the Chief are unclear, it is established that he ultimately did participate that day as well as a subsequent Executive Session as a defender of Police Department activity.

Finally, Chief Kruger's address to officers at a briefing in February 2020 regarding the case also caused confusion and concern, especially considering his "recused" status. It was reported that, at one of the briefings, Chief Kruger referred to Sergeant Reeves as a "victim" of circumstances as well, leading some to interpret the comment as defending Reeves' actions. Regardless of the intent of the comment or context, any comment to the line officers coming from the Chief about Reeves' status was ill-advised and again raised questions about Chief Kruger's impartiality in the soon-to-be-settled Fesser lawsuit.

We are informed that upon recusing himself, Chief Kruger neither sought nor received guidance from the City's legal advisors on how recusal should be defined and conducted. The result of Chief Kruger's "partial" recusal was a poorly defined role for the Chief in the ensuing litigation and related processes. Once he had decided to recuse himself from the matter, he should have remained an arm's length distance from all involvement, including assigning management of discovery to other personnel and absenting himself from Executive Sessions. His "half-way" recusal was not effective and resulted in confusion and potential influence on the process by a person who had himself decided he could not be impartial.

RECOMMENDATION TEN: The City should develop a clearly defined “recusal” policy that sets out the conditions and implications for non-participation by an employee in a particular process.

V. Analysis of Additional WLPD Functions and Opportunities for Additional Community Engagement

In addition to specifically examining City and Police Department policies through the lens of the Fesser litigation, we were also asked to provide a primer on how hiring, promotions, and employee evaluations were carried out by WLPD. Following is a description of those important activities. Starting with former President Obama’s Task Force on 21st Century policing and amplified since the George Floyd murder and subsequent national narrative, progressive policing has increasingly suggested a greater role for community in each of these functions traditionally and largely reserved to the police. We provide recommendations designed to increase the level of engagement by the West Linn community for each of these responsibilities.

Hiring Within the Police Department Could Benefit from Community Input

In West Linn, when there is a vacancy in the Police Department, the City’s Human Resources Department posts the listed position and solicits applicants. Human Resources performs a basic screening of the applications to determine whether the candidate has the basic age and education requirements and whether the applicant has any criminal convictions.

The Police Department then assembles an interview panel composed of the Captain or a Sergeant a line officer, and a representative of Human Resources. The Police Department also endeavors to include panel members from other police departments.

The panel then puts each suitable applicant through a fifteen-minute “speed interview,” including a basic scenario and hypothetical questions about decision-making. The interview also focuses on personal knowledge and the ability to define terms such as “integrity.” There are no “correct” answers in the battery of questions. Each evaluator

has a score sheet to track and rank the candidates. Human Resources manages the score tabulation and assigns the requisite preference points for veterans. The WLPD uses the ratings to identify who will move on to the next stage of interviewing.

Candidates who advance to the next phase are scheduled for a longer, unstructured interview with the Chief of Police. The Chief then refers selected candidates to a background investigation, followed by a conditional offer of employment (contingent on a successful medical/psychological evaluation) and then a permanent employment offer.

Newly hired officers go through a field training evaluation period (“FTEP”), which encompasses a year for lateral hires from other police departments and eighteen months for recruits. Each is assigned a field training officer or “coach” during FTEP. A coach is responsible for a trainee for five or six weeks and prepares a daily written evaluation which is forwarded to the Training Sergeant and then to the Captain. After the initial period, the trainee rotates to another coach. At the end of the FTEP, the Training Sergeant writes a final evaluation, or, if necessary, the training period can be extended. Upon the Captain’s approval, Human Resources is notified of the impending end of probation for the newly hired officer so they can activate the salary increase that accompanies the new post-probation status.

The above-described hiring process is not dissimilar from industry standards in similarly sized and situated police agencies. However, missing from the process is any community involvement in the selection process. Increasingly, cities and their police departments have found value in involving community voices in the process and invite non-police officers to participate on the interview panels. Additionally, the community can and should provide input on the type of background that would be desirable for both new and experienced officers, such as diversity, prior life experiences, and public safety approaches.

The involvement of the West Linn community in hiring decisions is not new to the City – in fact, its residents were solicited to provide input for the most recent Chief’s vacancy in 2018. The recognized value of that input should similarly be exported to candidates seeking entry level positions.

RECOMMENDATION ELEVEN: West Linn should involve its community in discussions about desirable experiences and backgrounds for incoming police officers.

RECOMMENDATION TWELVE: West Linn should integrate community involvement in its hiring interview process of police candidates.

West Linn Could Benefit from Community Input Into the Performance Fields Used to Evaluate Police Officer Performance.

In the West Linn Police Department, performance evaluations (“PE”s) are completed annually by the direct supervisor of each employee. The Chief’s PE is completed by the City Manager. There is a PE template for each evaluator that cues him or her to an extensive list of topics such as officer safety, policy knowledge, and interaction with the public.

All performance evaluations are reviewed by the Captain or the Chief and then input into an internal tracking program. In addition to PEs, the program tracks all training, community commendations, comments from peers, and monthly statistics. The program includes early warning system capabilities, but these have not yet been exploited. A comprehensive PE form or tracking program does not guarantee accurate evaluations. According to the Acting Chief, he and the Captain are conscious of this fact and place a priority on improving deficient PEs.

The Department also uses performance improvement plans for employees who exhibit specific deficiencies. A sergeant is assigned to oversee the remedial plan, which typically lasts for 90 days but can be extended. The sergeant documents missteps and reviews the officer’s reports and field performance and reports on how effectively the officer is responding to the plan.

The performance evaluation process is an important tool in incentivizing officer performance. If used effectively, it can reward officer activity that is consistent with the vision of optimal public safety in a City. As more jurisdictions are reconsidering and reimagining the traditional role of policing in their community, they should also determine a way for those new precepts to be the bases for evaluating performance of its officers. Providing an avenue for community input on performance metrics can synch community expectations and the assessment of officer conduct.

RECOMMENDATION THIRTEEN: West Linn should provide an opportunity for its community to provide input on the appropriate metrics for evaluating police officer performance.

West Linn Should Include Community Input on All WLPD Promotion Panels.

In West Linn, there are no written guidelines for promotion panels. As with hiring, Human Resources posts the job, schedules interviews, and tabulates scores, but the Police Department assembles the interview panel. The Police Department has occasionally included line officers in order to gain their particular point of view and to provide a broader experience of the organization to those officers. A Human Resources representative also sits on each panel.

Following the screening interview, the Chief and Chief's assistant conduct a longer, more informal interview with the leading candidates. The Chief of Police is the ultimate decision-maker for promotions of WLPD employees. The promotional process for Sergeant has not traditionally involved community members or City officials outside the police department, but the most recent panel included a Director from another City Department. The panels for promotion to Captain have recently included a Director from another City Department and supervisors from neighboring police departments.

The Police Department should modify its promotional process to include community members on its interview panels. Instead of relying strictly on other City employees, it should reach out to its larger community to serve in this role. The City should particularly seek involvement from diverse representatives as participants in the process.

RECOMMENDATION FOURTEEN: West Linn should enhance its promotional panels to include diverse community members as part of the interview process.

V. Conclusion

In a year of national stories that show the importance and fragility of public confidence in the police, and that have spurred communities all over the country to re-imagine their relationship with law enforcement, the saga of the Fesser case offers several representative lessons. Some of these are disappointing in the most basic way: that our officers can use their authority to mistreat people, and that bias and unprofessionalism still pervade the justice system.

Some of the lessons are more complex. They relate to systemic limitations that can seem subtle, but they are potentially far-reaching in their implications. Here, the City's sluggish reckoning with the scope and severity of the problems in the Fesser matter – a dynamic with several different facets – shows by omission the value of confronting difficult situations robustly and keeping elected officials engaged.

In fact, but for the *Oregonian* article, it is unclear that the mechanisms then in place would have ever ensured any systemic remedial work in addressing the serious issues identified in the litigation. As this report has described in detail, the mistreatment experienced by Mr. Fesser was both inherently problematic and avoidably delayed in coming to light. Much of this can be traced to the flawed initial decisions about addressing the allegations when they first emerged. Accordingly, the report recommends policy “guard rails” and written guidelines intended to ensure that future allegations of misconduct are fully investigated, carefully vetted, and decisively addressed by appropriate City officials.

The report further explores the culture and protocols that undermined any ability by the City's elected officials to understand, engage, and act. While some of this was meant to ensure that the administrative arm of the City could perform its function effectively as the manager of its employees, an unfortunate corollary was the lack of a mechanism for the leadership to play a role that *is* appropriate: the identification and resolution of systemic flaws that affect the City more broadly. For that reason, the recommendations also encourage a reexamining of the City leadership's culture. And they highlight the need for an independent counterweight to emphasize principles of accountability, structural remediation, and transparency.

We are gratified to close by noting that West Linn has already taken responsive steps to learn from this episode in its history. The City has engaged with Mr. Fesser himself and gained further insight from hearing his narrative and perspective. The City has also formulated a Police Accountability Task Force to further examine how public safety in the City can be improved and has given that group the latitude to consider those issues in a post-George Floyd environment. Lastly, the publication of this report – the product of the City's commitment to an unvarnished reckoning with past missteps – is itself a sign of West Linn's interest in constructive change.

The City's recent progress suggests a final lesson to be drawn from the events detailed in this report. It is an encouraging one: that governmental self-scrutiny in the face of

shortcomings can be a force for worthwhile reform – even when it is slow to begin. We extend best wishes to City leadership, other stakeholders, and West Linn residents as the process continues.