

April 8, 2022

Via Email

Kevin McDonald
Interim City Attorney
City of Ann Arbor
301 E. Huron Street, 3rd Floor
Ann Arbor, MI 48104

Re: **Cease and Desist the Unjustified Defamation of Mr. Crawford**

Dear Mr. McDonald:

Tom Crawford, former City Administrator for the City of Ann Arbor, retained me to intervene on his behalf regarding the false and defamatory statements made by the City against him in recent months. It is unfortunate that Mr. Crawford, an employee highly respected by the City for 17 years, was subjected to this unjustified course of action by the City, and I respectfully insist that the City immediately cease and desist from making further defamatory statements about Mr. Crawford's intentions (implicit or otherwise), which accuse him of violating state and federal employment discrimination laws. In point of fact, Council bears responsibility for publicly releasing a report in January 2022 (months after Mr. Crawford's employment with the City ended) (referred to hereafter as the "**Salvatore Report**" or "**Report**") that is false and defamatory in its conclusions and then, subsequently, in an attempt to validate and justify the conclusions of that Report, City officials made errant statements such as, "this is only the tip of the iceberg," as if more were to be revealed about Mr. Crawford's conduct. These defamatory statements have severely harmed Mr. Crawford's reputation and they should be retracted.

Equally troubling is how some on Council have questioned the legitimate and well-founded concerns raised by a few Council members and the public regarding the investigation that led to the Salvatore Report, even suggesting these concerns are nothing more than "political theater." This comment trivializes Council's failure to properly vet and question its own investigation and shuts down legitimate debate after the conclusions drawn in the Report. Conclusions that have seemingly become fact in the public domain.

As several of you know, I have been a litigator for most of my professional career, and I have represented plaintiffs, defendants, individuals, companies, and even non-profits in various commercial and employment matters. I have conducted numerous internal investigations and commissioned others. I consider many involved here to be my friends and professional colleagues, even when we were adversaries in the pursuit of justice. I have also been a life-long citizen of this town, and my opinions are not forged in malice or inspired by a political agenda. I

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have arrived at my opinions based on my consideration of the facts and my experience as an attorney. My motives, as well as Mr. Crawford's, are focused on setting the record straight with respect to Mr. Crawford's conduct during his employment with the City.

As a citizen and volunteer of the City (having served for several years, along with Mr. Crawford, as a board member on the City's Employee Retirement System), I was stunned to see how quickly the City pivoted in forcefully removing Mr. Crawford from his position as City Administrator. When Mr. Crawford approached me after the City Council released Ms. Salvatore's Report in January 2022, my professional identity as an attorney was stirred by what I felt was an injustice to Mr. Crawford based on significant shortcomings in the Report and the rush to release it. As I watched Council grapple with this Report in its aftermath, I wondered to myself why Council did not exercise this same energy prior to releasing a Report that is based on circumstantial evidence, by its own admission, and represents the conclusion of only one – the investigator. In fact, it appears in this matter that the City allowed the investigator to play not only the role of investigator, but prosecutor, judge, and even jury when it adopted these conclusions without any qualification.

According to the timeline that has emerged from various citizenry investigations, it is clear that from the date Ms. Salvatore completed her Report in December 2021 and until her Report was released to the public in early January 2022, Council never discussed, debated, or even questioned the conclusions of Ms. Salvatore, essentially abdicating its role to consider whether Ms. Salvatore's conclusions were justified in light of all of the evidence. Even outside observers have recognized that the Report focuses only on the case to prosecute Mr. Crawford for wrongdoing. In other words, you have only heard one side of the story. Mr. Crawford's defense, his intensions, and the role of others within the City has never been told, clearly was not considered, and has either been ignored or disregarded in the investigation of Mr. Crawford. Council essentially endorsed a Report, without questioning any aspect of it, then published it (even though Mr. Crawford was no longer employed with the City) as if it were Council's own conclusions. Put simply, you adopted the investigator's conclusions, then defended those conclusions, without even considering Mr. Crawford's defense or questioning whether all the facts had been considered. Now this Report has gone viral, and its false conclusions are those of Council.

Therefore, while Mr. Crawford can only put forth his side of the story after your judgment has been rendered and the damage done, one purpose here is to present additional facts that City officials either knew or should have known before endorsing the Report as if its' conclusions were those of your own.

Discrimination is a serious allegation. Make no mistake; when the Report concludes that Mr. Crawford acted with "implicit bias" in specific employment actions, the investigator is actually accusing Mr. Crawford of intentional and illegal employment discrimination (*i.e.*, violating someone's civil rights under both state and federal employment laws). Therefore, accepting any conclusions in this regard, as you did, and then releasing those conclusions to the

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public requires deliberate and thoughtful consideration. The law and professional decency demands nothing less than due process. Unfortunately, that was not done here.

In any discrimination case that is built on “circumstantial evidence,” as this case is, it is up to a fact finder to weigh all the evidence – a conclusion cannot legitimately be reached after solely considering only one side of the case, as Council did in this situation when it accepted, at face value, the Salvatore Report and then publicly released it so that it could cause maximum damage to Mr. Crawford’s reputation.

There is another legal precept that should have been applied here, but was not explained to you in the Report. When the investigator refers to “circumstantial evidence” in her Report, she is referring to a very specific legal standard that is applied **when there is no direct evidence of discrimination in the case**. In this case, that means the investigator could find no direct evidence that Mr. Crawford discriminated against anyone. Therefore, to find wrongdoing, she must rely on “circumstantial evidence.” In such cases, the test for proving discrimination is based on a U.S. Supreme Court decision dating back to 1973 and commonly referred to as the “McDonnell Douglas burden-shifting test.” In adopting this test, the high court recognized that, when there was no direct evidence of discriminatory intent, the court must give both the plaintiff and defendant an opportunity to offer evidence that supports their case and the burden of proving fault shifts through the analysis. Here, the Report simply offers the case against Mr. Crawford, without any meaningful consideration of Mr. Crawford’s evidence or the extensive burden that comes with trying to prove someone had discriminatory intent in their actions.

To prove discrimination under the McDonnell Douglas test in a court of law, a complainant must establish a *prima facie* case of discrimination. To do this, the plaintiff must show that: (i) s/he belongs to a protected class (e.g., race and gender are protected classes); (ii) s/he was qualified for the position or benefit; (iii) s/he suffered an adverse employment action; and (iv) *s/he was treated less favorably than others outside her protected class*. If the plaintiff meets this burden, the burden then shifts to the employer (*i.e.*, Mr. Crawford in this case) to prove he had a legitimate, nondiscriminatory reason for his decisions. ***If the defendant does, the burden shifts back to the plaintiff, who has the ultimate burden to show by a “preponderance of the evidence” (i.e., greater than a 50% chance) that [Mr. Crawford’s] reason was a “pretext” for his real intent to discriminate based on that person’s status in one of the protected classes.*** In other words, to reach the conclusions that the investigator and you draw in the Report, you must have determined that Mr. Crawford actually intended to not hire or not compensate the candidates “because of” their gender or race. In addition, you must also find that Mr. Crawford treated these candidates less favorably than others outside of these protected classes.

While the Report does not strictly apply the full breadth of the legal standard to the facts, the investigator skips to the last prong of the test and concludes, based on the facts in her Report, there was a “preponderance of evidence” that Mr. Crawford operated with discriminatory intent in the two instances referenced in the Report. Yet, in reaching this conclusion, neither the Report

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nor you consider Mr. Crawford's 17 years of service on behalf of the City, Council's full endorsement of Mr. Crawford's promotion to City Administrator, his numerous stellar employee feedback reviews, his handling of other hiring decisions, including his record of hiring or promoting minority candidates, and his instrumental leadership in the City's Diversity, Equity and Inclusion initiatives, all of which become relevant to his motives and the question whether he truly did act with discriminatory intent on the two occasions described in the Report. In essence, the law recognizes that a person does not usually wake up one day and become something they have never been; a person who acts with discriminatory intent in their employment practices.

This legal standard and the evidence that explains Mr. Crawford's full employment history with the City, however, were obviously never presented to you in the Report you published, never considered by you in weighing the merits of the Report or judging for yourself whether the two isolated instances cited in the Report were different from the numerous other instances where Mr. Crawford hired or promoted minority candidates, or chose not to hire male Caucasian candidates. In fact, Mr. Crawford's entire employment history was wiped from this investigation, not offered to weigh and evaluate Mr. Crawford's intentions and, amazingly, absent from the record altogether.

Consequently, with this backdrop, I offer into evidence that which was either ignored or missed in the Salvatore Report. These facts are not only relevant to Mr. Crawford's character, his intentions, and his record, but they disprove the conclusory and unfounded assumptions that Mr. Crawford intentionally discriminated against two employees referenced in the Salvatore Report:

1. Crawford's Record: In Mr. Crawford's nearly 17 years with the City and until this incident, there is not a single instance wherein Mr. Crawford was disciplined, written-up, or counseled for any inappropriate conduct, including harassment or discrimination. During his tenure, Mr. Crawford faithfully served the City as Chief Financial Officer, Interim City Administrator on three occasions (by three different Councils) and, ultimately, was chosen by the third to serve as the permanent City Administrator in September 2020. When Mr. Crawford was interviewed for the position of City Administrator, Council was fully supportive of his hiring, commenting:

- *"The process was a robust and thorough one."*
- *"No one Council member said they wouldn't recommend Tom."*
- *"When Howard left, Tom not only took the job but reminded us all why we should all still be excited to work here. Why we should be excited about Ann Arbor. That sounds like leadership to me."*
- *"Extremely important we move forward with someone who can be straight forward and honest and above board and above the political fray in this position."*
- *"Complete confidence in Crawford fulfilling the role of City Administrator."*
- *"One of the most profoundly kind and honest people I've ever met. He's smart, he's excited, but he really believes in this community and this organization."*

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- *“He is a person who has an earned reputation for decency, an earned reputation for caring. He knows the city, and he’s eager to achieve great things for everyone who calls Ann Arbor home.”*

2. Crawford’s Diversity, Equity, and Inclusion Record: The Report concludes that Mr. Crawford’s conduct in two instances evidenced discriminatory intent based on the applicant’s gender and race. Yet, completely absent from the Report, is Mr. Crawford’s full and recent record of hiring/promoting diverse candidates. While Mr. Crawford served as City Administrator (both interim and permanent), 70% of the people he hired/promoted/recruited to the executive team were women and/or persons of color. This fact was never discussed in the Salvatore Report. In fact, Mr. Crawford hired/promoted/recommended seven individuals including:

One employee who is a Black male
 Two employees who are Caucasian males
 One employee who is a Hispanic male
 One employee who is a Caucasian female
 One employee who is a Caucasian female - not yet completed prior to his departure
 One employee who is an Asian female - not completed prior to his departure

3. Crawford’s employee feedback: An area noticeably absent from the Salvatore Report is Mr. Crawford’s employee feedback reviews while serving the City. While the Report concludes he exhibited intentional bias and discriminatory intent, his documented employee feedback exhibits no evidence of any inappropriate conduct. The absence of any blemishes in his employment record are remarkable in light of the conclusions drawn in the Report; one would think that an employee of 17 years in Mr. Crawford’s leadership positions could not have hidden so quietly and yet exhibited such heinous intent as that leveled in the Report. In point of fact, Mr. Crawford’s 2020 feedback demonstrated that as CFO he had prioritized DEI and was proactively making improvements within his work area.

4. Crawford’s commitment to Diversity, Equity, and Inclusion: The Salvatore Report concludes Mr. Crawford intentionally discriminated against a former employee and a candidate for employment during the hiring process while Mr. Crawford was the Chief Financial Officer of the City, a position he served in prior to his appointment to City Administrator. The irony is that Mr. Crawford had the opposite situation arise less than a year later when he promoted a female candidate for the Chief Financial Officer position over two male candidates. This fact was not referenced by, but was known by, the investigator and City Attorney’s Office before the Report was published.

5. The Contextual Importance of the two reports involving Mr. Crawford: Unfortunately, the manner in which the City performed its investigations of Mr. Crawford have led to a profound misunderstanding of Mr. Crawford’s conduct, his choice to voluntarily resign, and the City’s decision to voluntarily publish a second Report regarding Mr. Crawford that

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accuses him of illegal discriminatory conduct, not simply a violation of the City's internal policy. As you hopefully know, Ms. Salvatore's initial report regarding Mr. Crawford, issued in July 2021, was based on anonymous witnesses who claimed Mr. Crawford's statements were unprofessional. Importantly, this initial report did not conclude Mr. Crawford acted with discriminatory intent or illegally harassed an employee and, despite public perception, did not conclude that Mr. Crawford should be terminated, but merely that he made some careless and insensitive remarks. Nonetheless, when the Council body determined that it wanted Mr. Crawford to resign, he complied, believing that this was the best route for him, his family, and the City. His intent in doing so was motivated by his belief that this would conclude this chapter.

Some within the City, however, were not satisfied and after Mr. Crawford's resignation, the City chose to further investigate Mr. Crawford, despite the fact that no employee claimed they had been harmed by Mr. Crawford's alleged discrimination. Threading together unsubstantiated evidence, relying primarily on the statements of a very small group of employees who may have taken issue with Mr. Crawford for other reasons, and not considering all of the evidence related to Mr. Crawford, Ms. Salvatore concluded that *she believed* Mr. Crawford demonstrated discriminatory intent. While Ms. Salvatore can draw her own conclusions, it is the responsibility of the City and this Council to determine whether those conclusions have merit based on your own, informed, understanding of Mr. Crawford's record, especially when you have knowledge of facts left out of the Report. In addition, there are clearly questions that should have been raised by Council in challenging assumptions made by the investigator, the lack of witnesses, and the incompleteness of the record. This, unfortunately, was not done. Furthermore, the Salvatore Report was published to the public for no legitimate reason, since Mr. Crawford was no longer employed by the City and no constructive outcome was gained. It is particularly disappointing because those of you reading this letter know Mr. Crawford very well, and you know what kind of person he is. To ignore this background is to ignore key evidence of Mr. Crawford's character and his intent in certain situations.

6. The Salvatore Report: As has been publicly discussed over the last two months, the Report is surprisingly light on evidence, misstates key assumptions, and lacks the rigor necessary to evaluate whether Mr. Crawford truly harbored discriminatory intent in taking or not taking certain actions. A significant hole in the Report is that the Human Resource Department, the department in the City whose primary charge is to prevent discrimination in the workplace, gets a pass in the events associated with Mr. Crawford, as if it did not exist or did not know its role. This is particularly alarming in light of the public and serious allegations of discrimination and wrongful conduct leveled by Tom Guajardo, the former Director of Human Resources and Labor Relations, against John Fournier, who was the City's Assistant City Administrator and oversaw all Human Resource functions in 2019 (the period of time involving the relevant allegations in the Salvatore Report about Mr. Crawford). While Ms. Salvatore also investigated these allegations by Mr. Guajardo against Mr. Fournier, the outcomes of the two Reports are extremely disconnected, causing many to wonder why. Notwithstanding these incongruities, it is clear that many of those facts that support Ms. Salvatore's conclusions against Mr. Crawford were under the purview of Mr. Fournier's HR duties, but there are no conclusions or

recommendations for any other part of the organization except Mr. Crawford. If the City's top official was implicated in discriminatory hiring practices, after having all of these checks and balances in place to prevent such conduct, why was no further examination conducted of the institution in this regard? Why was Mr. Crawford singled out? Why was the HR Department not questioned by its failure to prevent these alleged illegal hiring practices?

7. Other Inadequacies in the Investigation:

- a) **Report Says:** Mr. Crawford passed over two female candidates recommended by employee panels in order to hire a male candidate.

Report Does Not Mention: While the characterization of this situation is incorrect, the Report does not say that, in another instance, Mr. Crawford passed over two male candidates recommended by employee panels and recommended hiring a female candidate. This is an important fact when weighing whether someone's decision making is clouded by discriminatory intent based on gender.

- b) **Report Says:** "Mr. Crawford instead pushed for the selection of the male candidate who had previously applied for [redacted] role. [Redacted] did not agree, noting that this candidate had not interviewed particularly well, had no public sector experience, and had little supervisory experience."

Report Does Not Mention: The Report does not acknowledge that Mr. Crawford told the investigator that he gave some weight to the fact that the male candidate was a top choice for a higher-level position within the City on a prior occasion and, therefore, he felt comfortable that the candidate's experience and the employee hiring panel's prior recommendations were important factors in Mr. Crawford's consideration.

Report Does Not Mention: The Report also does not say that Mr. Crawford told the investigator that he valued the male candidate's non-governmental experience because it would increase the diversity of professional experiences on the team. Mr. Crawford felt that having people on the team with both municipal and private sector experience would only strengthen the core competencies of the department. In fact, Mr. Crawford himself had no prior local government experience when he began employment with the City, and he believed his private sector experience was an asset to the City.

- c) **Report Says:** "After offering \$86,000 [to the top female candidate], the City was unwilling to go higher. As a result, Mr. Crawford told [redacted] that the City needed to move on to the next candidate."

Report Does Not Mention: The Report does not mention that in recent years, the City performed a non-union salary study to update employee pay bands. At least two female employees reporting to Mr. Crawford were paid above their newly recommended salary range, reflecting Mr. Crawford's advocacy for these female employees' pay.

- d) **Report Says:** "We'll hire the person you want to hire, but you are hiring a lot of white men and you need to find a way to cultivate more diverse candidates."

Report Does Not Mention: The primary area in the City tasked with cultivating more diverse external candidates is the recruiting area within Human Resources. Nonetheless, the Report seems to ignore that this statement and its objective, attributed to Mr. Fournier, were squarely within Mr. Fournier's sphere of influence as the person overseeing human resource functions. And, if Mr. Fournier felt there was inequity in the hiring process, it was incumbent on Mr. Fournier to address the problem, not explain that he deferred to the "hiring manager."

Report Does Not Mention: Succession planning was an area of focus in the finance area, and these activities included developing diverse internal candidates to ensure they were prepared for promotional opportunities. The Report does not mention that Mr. Crawford supported and engaged in the cultivation of a diverse internal candidate for the [redacted] position (though the candidate withdrew their candidacy due to personal reasons). This fact was shared with Ms. Salvatore and, for some unexplainable reason, left out of the Report.

Report Does Not Mention: The Report does not say that during this same time in 2019, and while serving as the Chief Financial Officer, Mr. Crawford promoted a female candidate to a management position in a finance-related department similar to that of the complainant.

- e) **Report Says:** "Because his approach as Interim HR Director was to let the hiring manager make the actual decision absent a policy/process issue, Mr. Fournier said that he let Mr. Crawford ultimately make the decision."

Report Does Not Mention: If Mr. Fournier did not feel that Mr. Crawford's decision was clouded by discriminatory intent, and Mr. Fournier had oversight over HR matters and was familiar with the entire process, it is questionable why the Salvatore Report would conclude that Mr. Crawford's actions were motivated by discriminatory animus.

Report Does Not Mention: Beyond the Interim HR Director, there are multiple HR employees involved with the hiring process, including the HR Liaison (who

consults with the hiring manager), HR Recruiting Specialist (who solicits and interviews candidates), and the Compensation Specialist (who determines salary offers are consistent with job responsibilities and experience). None of these employees who were actively involved with the hire were interviewed or included in the Report. In addition, the Report ignores the fact that there were multiple checks and balances to Mr. Crawford's hiring decisions and yet none of these individuals spoke of Mr. Crawford's wrongdoing. It raises the question of whether the investigator was told of these multiple levels of engagement in this process by those she interviewed or simply chose to ignore them.

- f) **Report Says:** “[Redacted] relented and told Mr. Crawford to go ahead and hire the male candidate, but noted he would be upset if he was offered more than what had been offered to the female candidate.”

Report Does Not Mention: The Report does not include any information about the hiring and supervisory experience (or lack thereof) of the complainant. While the complainant may have been disappointed that Mr. Crawford felt another candidate would be the best hire, the complainant's disappointment does not mean that Mr. Crawford's opinion was incorrect, not to mention discriminatory.

- g) **Report Says:** “Mr. Crawford tried to revoke the retirement benefit that [Mr. Guajardo] had been offered.”

Report Does Not Mention: One role of the City Administrator is to question existing practices, and Mr. Guajardo was Mr. Crawford's first executive hire with the higher retirement benefit. In this case, the recently increased retirement benefit for executives was higher than comparable cities, and Mr. Crawford questioned the richness and appropriateness of it. Mr. Crawford's questions were not an attempt to revoke the benefit.

In summary, we believe the City, and Council by its actions in releasing an inadequate and incomplete Report, have unjustifiably defamed Mr. Crawford's character and potentially ruined any opportunity for him to obtain employment in the public sector (or any reasonably comparable employment for that matter). By omitting key facts and alternative explanations, the City rushed out a Report that has destroyed the professional reputation of a previously valued employee and City Administrator. These actions leave one wondering, what was to be gained by defaming an employee in this manner months after he was terminated? Any shred of legitimacy in conducting a post-employment investigation is wiped away by the fact that there were no complainants here, no harms to be remedied, and not a single recommendation or outcome was offered in the Report or by the City to remedy the failings by the City in allowing Mr. Crawford to act as alleged.

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The City's actions as it relates to the Salvatore Report demonstrates that it is either unwilling or unable to perform a competent and professional investigation of the matter and, given the politicized nature of its current rhetoric, we believe that the only proper course at this late stage is for the City and Council to cease and desist any further actions that seek to defame or cause additional harm to Mr. Crawford's reputation. Mr. Crawford left the employ of the City months ago and desires to move on with his professional career. By needlessly doubling down on its actions, by making careless statements intimating there is more behind the curtain, you only continue to stir a negative public perception around Mr. Crawford's actions.

Prior to sending this letter, I reached out to the City Attorney's office by phone to raise, and hopefully address, Mr. Crawford's concerns without needless attention. In light of there being no meaningful response from the City, we can only conclude that the City does not share our interest to correct the record. While we are disappointed, Mr. Crawford remains interested in resolving this matter without formal legal action and encourages the City to consider this more complete record of Mr. Crawford's conduct and motivations during his tenure with the City. After doing so, we believe that a reasonable fact finder would conclude that Mr. Crawford did not act with discriminatory intent and, consequently, Council should rectify its unfortunate mistake by retracting the Salvatore Report published in January 2022. Further, statements by certain Council members that state the Report's conclusions are "100% accurate" and "only the tip of the iceberg" should be retracted as they, too, are false.

Finally, Mr. Crawford encourages the City to adopt policies and standards that ensure future Administrators and other employees are treated fairly and given the level of professionalism they deserve as public servants.

Very truly yours,



Mark V. Heusel