

OREGON GOVERNMENT ETHICS COMMISSION
INVESTIGATION

CASE NO: 18-148XMT

DATE: January 16, 2019

RESPONDENT: WAHLKE, Susan, Councilor, Lincoln City

COMPLAINANT: WERNER, Justin

RECOMMENDED ACTION: Make a Preliminary Finding of 1 Violation of ORS 192.660

1 **SYNOPSIS:** Susan Wahlke was a City Councilor for the City of Lincoln City and
2 participated in an executive session relevant to this investigation. The focus of this
3 investigation was to determine if there was a preponderance of evidence to indicate that
4 a representative of the news media was impermissibly excluded from attendance at the
5 executive session, in violation of ORS 192.660(4).

6
7 A review of information indicates that on 6/4/18, a representative of an online publication,
8 lincolncityhomepage.com, was excluded from attending the City Council's executive
9 session. The City has a policy containing criteria and timelines for an entity to be
10 recognized as "media" by the members of the City Council. The City determined that the
11 individual in this case did not formally apply in advance to attend the executive session,
12 although he was known in advance to several City staff members who corresponded
13 regularly with him as a representative of the publication. It appears that he and his
14 publication were also known to several members of the governing body.

15
16 ORS 192.660 does not define "news media", but the Attorney General issued an opinion

1 in answer to questions from the Commission concerning its enforcement responsibilities
2 under the statute. The Commission must follow the AG's Opinion in enforcing ORS
3 192.660(4). According to the AG Opinion, a public body is allowed to have a media policy,
4 but if enforcement of that policy's definitions or requirement of advance notice of
5 attendance would result in the exclusion of a representative of the news media from an
6 executive session, then the exclusion is a violation of ORS 192.660.

7
8 There is sufficient evidence to indicate that Susan Wahlke participated as a City Councilor
9 when a representative of the news media was excluded from attendance at an executive
10 session in violation of ORS 192.660(4).

11
12 **RELEVANT STATUTES:** The following Oregon Revised Statutes are applicable to the
13 issues addressed herein:

14
15 **192.610 Definitions for ORS 192.610 to 192.690.** As used in ORS 192.610 to 192.690:

16 (1) "Decision" means any determination, action, vote or final disposition upon a motion,
17 proposal, resolution, order, ordinance or measure on which a vote of a governing body is
18 required, at any meeting at which a quorum is present.

19 (2) "Executive session" means any meeting or part of a meeting of a governing body
20 which is closed to certain persons for deliberation on certain matters. ***

21 (5) "Meeting" means the convening of a governing body of a public body for which a
22 quorum is required in order to make a decision or deliberate toward a decision on any
23 matter.***

24 **192.660 Executive sessions permitted on certain matters; procedures; news media**
25 **representatives' attendance; limits.** (1) ORS 192.610 to 192.690 do not prevent the
26 governing body of a public body from holding executive session during a regular, special
27 or emergency meeting, after the presiding officer has identified the authorization under
28 ORS 192.610 to 192.690 for holding the executive session. ***

29 (2) The governing body of a public body may hold an executive session: ***

30 (d) To conduct deliberations with persons designated by the governing body to

1 carry on labor negotiations.

2 (e) To conduct deliberations with persons designated by the governing body to
3 negotiate real property transactions. ***

4 (h) To consult with counsel concerning the legal rights and duties of a public body
5 with regard to current litigation or litigation likely to be filed. ***

6 (4) Representatives of the news media shall be allowed to attend executive sessions
7 other than those held under subsection (2)(d) of this section relating to labor negotiations
8 or executive session held pursuant to ORS 332.061(2) but the governing body may
9 require that specified information be undisclosed.

10 (5) When a governing body convenes an executive session under subsection (2)(h) of
11 this section relating to conferring with legal counsel on current litigation or litigation likely
12 to be filed, the governing body shall bar any member of the news media from attending
13 the executive session if the member of the news media is a party to the litigation or is an
14 employee, agent or contractor of a news media organization that is a party to the litigation.

15 (6) No executive session may be held for the purpose of taking any final action or making
16 any final decision. ***

17 (10) Notwithstanding ORS 244.290, the Oregon Government Ethics Commission may not
18 adopt rules that establish what entities are considered representatives of the news media
19 that are entitled to attend executive sessions under subsection (4) of this section.

20
21 **192.685 Additional enforcement of alleged violations of ORS 192.660.** (1)
22 Notwithstanding ORS 192.680, complaints of violations of ORS 192.660 alleged to have
23 been committed by public officials may be made to the Oregon Government Ethics
24 Commission for review and investigation as provided by ORS 244.260 and for possible
25 imposition of civil penalties as provided by ORS 244.350.

26
27 **244.350 Civil penalties; letter of reprimand or explanation.** (1) The Oregon
28 Government Ethics Commission may impose civil penalties not to exceed: ***

29
30 (2)(a) Except as provided in paragraph (b) of this subsection, the commission may

1 impose civil penalties not to exceed \$1,000 for violation of any provision of ORS
2 192.660.

3 (2)(b) A civil penalty may not be imposed under this subsection if the violation
4 occurred as a result of the governing body of the public body acting upon the
5 advice of the public body's counsel.
6

7 **INVESTIGATION:** The Oregon Government Ethics Commission (Commission) initiated
8 a preliminary review based on information in a signed written complaint from Justin
9 Werner on 6/6/18 (#PR1). The complainant alleged that Susan Wahlke, a member of the
10 Lincoln City Council (Council), along with other Council members, may have violated
11 executive session provisions of Oregon Public Meetings law when participating in an
12 executive session on 6/4/18. The Commission found cause to investigate on 8/10/18
13 after considering the information developed in the preliminary review. The focus of the
14 investigation was to determine if there is sufficient evidence to indicate that Susan Wahlke
15 participated in the 6/4/18 executive session from which a representative of the news
16 media was excluded in violation of ORS 192.660(4). Respondent and complainant have
17 been notified of the Commission actions in this matter. Both have been invited to provide
18 any information that would assist the Commission in conducting this investigation.
19

20 **COMPLAINANT ALLEGATIONS**

21 The complainant attended the Council's 6/4/18 public work session, which was followed
22 by an executive session. The complainant alleges that the City Recorder, Cathy Steere,
23 informed him that he could not sit in on the subsequent executive session because he did
24 not apply beforehand. According to the complainant, he asked Ms. Steere if the Newport
25 News Times or The News Guard had applied and was told by Ms. Steere that "they were
26 considered institutional news media before the statute went into effect." The complainant
27 alleges that Ms. Steere told him that he did not meet the criteria for institutional
28 news/media. The complainant states,
29

30 "Don Williams, Mayor of Lincoln City,*** said we can just let Justin sit in as long as
31 he's not disruptive. Then four council members, Dick Anderson, Susan Wahlke,

1 Susan Wahlke and Diana Hinton ***voiced loudly 'No!' That's when Dick Anderson
2 said 'Or we don't have a meeting.' Then the city manager, Ron Chandler, said 'We
3 have informed Mr. Werner that he does not meet the criteria to be considered news
4 media *** Mr. Werner you have to leave.' ***[Councilor] Riley Hoagland***was also
5 in attendance but he didn't say anything. The city attorney, Richard Appicello, was
6 there and should have advised his clients that they can't vote or discuss the issue
7 in this meeting.***" (#PR1)

8
9 The complainant states that he showed everyone who was present the Oregon Attorney
10 General opinion (AG Opinion), #8291. The AG Opinion, published on 4/18/16, specifically
11 answers the questions asked by the Commission concerning the Public Meetings Law
12 requirement that representatives of the news media be allowed to attend executive
13 session meetings. (#PR2)

14
15 After the initial complaint, during the preliminary review period, Mr. Werner supplied the
16 following information via email on 6/20/18: (#PR3)

17
18 "****[T]his incident occurred after the regular meeting. I walked with the Mayor, Don
19 Williams, down the hall and entered the conference room that holds the executive
20 session. Williams told me, 'media sits in those chairs.' I sat down next to Jeremy
21 Ruark, the News Guard Editor. The City Recorder, Cathy Steere said, "You can't
22 sit in on this session because you didn't apply first.' I showed her the 2016 Attorney
23 Genreal's opinion and said I should be allowed to sit in. She said 'You do not meet
24 the criteria for news media.' Again I showed her the AG's opinion and tried to
25 explain why I qualified. I told her I had staff***and gather news and give it to the
26 public via website, print and Facebook.

27
28 She sat down and Williams said, 'I don't have a problem with Justin being here as
29 long as he's not disruptive, we can get this meeting started.' That's when the
30 council said 'No!' in unison. Dick Anderson said, 'Or...we don't have a meeting.'
31 Then City Manager Ron Chandler said, '***[W]e have informed Mr. Werner he does

1 not meet the criteria for news media. Mr. Werner you have to leave.’ I asked what
2 would happen if I stayed anyway. Chandler said, ‘Then we will have the police
3 remove you from the building.’
4

5 So I left. On my way out I left the conclusion from the AG on the table and told
6 them I thought it was wrong and illegal and why punish us for doing a good job?”
7

8 COMPLAINANT INFORMATION

9 The complainant is with LincolncityHomepage.com, a web based publication, which has
10 advertisers, and covers local news in the Lincoln City area including sports, public interest
11 stories, local government, and Letters to the Editor. The complainant states,
12

13 “I clearly do meet the criteria as I have staff, publish regularly, cover the city council
14 meetings, high school events/sports, city events. ... I told them they all know that
15 I am news/media and provide better coverage than any other news source in
16 Lincoln City and couldn't understand why they didn't want me to attend given the
17 depth of coverage our news organization provided.” (#PR1)
18

19 In a 6/20/18 email to Commission staff, the complainant states the following:

20 “lincolncityhomepage.com has been around since 2015. We cover Taft High 7-12
21 sports, student council, feature articles on the students and everything else. We
22 cover the city council in depth with highlights and links to the YouTube page that
23 we created. ***We cover the Visitors Convention Bureau and all that entails. ***We
24 cover Lincoln City, Depoe Bay and Otis.
25

26 We hired Jim Fossum as a Senior Reporter and Sports Editor. He covers the
27 NFL's Raiders and all Taft High Sports. Steve Walker from the Oregon School
28 Activities Association issued me a press pass for 2017-18 and added our feed to
29 their “Media” section on OSAA.ORG.
30

31 Advertisers come and go but most stay. During the election we had Thomas

1 Branford for Judge, Russel[] Baldwin for Judge, Kaety Jacobson for County
2 Commission and Lincoln County Sheriff's Office. Robben Heating has been with
3 us for close to a year. Lil Sambos has been with us since the first day we went
4 live. Gerber Tire has been with us for a couple months. I just landed a year-long
5 contract with Samaritan Health Services from Corvallis to advertise the Samaritan
6 North Lincoln Hospital. Game Over Arcade has been with us since we started
7 also. We have been running a free ad for a local charity shop ***because they
8 have a great cause. Subway just signed up with us ***."(#PR3)

9
10 Records obtained from the Oregon Secretary of State's Business Registry shows that
11 Lincoln City Homepage is currently registered as an assumed business name in the state
12 of Oregon. The filing occurred on 6/20/18, the business activity shows as "reports local
13 Lincoln City news," and the owner and agent is Justin Werner. (#INV4)

14
15 During the investigation, Commission staff requested that Mr. Werner provide evidence
16 of articles published through lincolncityhomepage concerning the Lincoln City Council
17 prior to filing this complaint. He provided links to 29 articles published between 2015 and
18 June of 2018, revealing that his coverage of the Lincoln City Council rose over that period:
19 In 2015 – 1 article, 2016 – 2 articles, 2017- 8 articles, and during the first 6 months of
20 2018 – 18 articles. (#INV5)

21
22 The first article published in 2015 concerned allegations of criminal official misconduct
23 lodged by Richard Appicello, the city attorney, against Mayor Don Williams and the article
24 linked to the Department of Justice records that had been released concerning those
25 allegations. A 5/18/18 article published by Mr. Werner was entitled "Dick Anderson
26 Running for Mayor of Lincoln City". This article describes Mr. Anderson's prior positions
27 with the City, his other interests such as golfing, and his future plans if he gets elected.
28 (#INV5)

29
30 On 12/11/17 the City Council held a public meeting. Video of the public meeting shows
31 that, during the public comment period, Justin Werner addressed the City Councilors,

1 after identifying himself as “Justin Werner with lincolncityhomepage.com, a local news
2 outlet”, and spoke of safety concerns at a recent event on City property, noting that they
3 did not have a permit. The City Manager stated that he had spoken with Mr. Werner and
4 asked him “to send me an email with his questions because I was not sure if he was
5 making a statement or asking as a reporter for his blog, and I haven’t heard from him, so
6 I am just waiting.” The written meeting minutes identify him as “Justin Werner, Lincoln
7 City Homepage”. (#INV3)

8
9 On 1/22/18 the City Council held an executive session at 3pm and a public meeting at
10 6pm. Video of the public meeting shows that, during the public comment period, Justin
11 Werner addressed the City Councilors and read a list of questions concerning a recently
12 lodged complaint against the City Attorney, filed by a City employee. He identified himself
13 as “Justin Werner, senior reporter with the local news outlet, LincolnCityHomepage.com”.
14 The written minutes for that 1/22/18 meeting also identify Justin Werner as “Senior
15 Reporter for Lincoln City Homepage.com”. Aside from Councilor Riley Hoagland, all of
16 the current City Councilors were in attendance at these two meetings. (#INV3)

17
18 LINCOLN CITY’S EXECUTIVE SESSION NEWS MEDIA ATTENDANCE POLICY

19 On 3/8/10, the Council adopted Resolution 2010-09 entitled: A Resolution of the City of
20 Lincoln City Adopting Executive Session News Media Attendance Policy, which is
21 excerpted below:

22
23 Whereas, because at the time state law relating to media attendance at executive
24 session was adopted “news media” consisted of entities that were institutionalized
25 and structured to support compliance with the requirements of ORS 192.660(4),
26 and the law includes no express mechanism for enforcing those requirements; and

27
28 Whereas technological advances since the time the public meetings law was
29 initially adopted have resulted in development of communication mechanisms
30 allowing virtually any individual or entity to disseminate information widely; and

31

1 Whereas the City of Lincoln City finds that in that absence of a statutory definition
2 of “news media” as that term is used in ORS 192.660(4) it is necessary to adopt a
3 policy that implements the intent of the public meetings law relating to executive
4 session attendance without precluding attendance by Internet-based or other “non-
5 traditional” information disseminators that are institutionalized and committed to
6 compliance with ORS 192.660(4); *****
7

8 1. Currently Recognized News Media Organizations.

9 The following entities are hereby recognized as news media organizations
10 eligible to attend executive sessions because they have an established
11 history of meeting the requirements of this policy: [The News Guard, News
12 Times] No other entity shall be permitted to attend an executive session
13 unless it is recognized through the process described in Section 2 below.
14

15 2. Recognition of Other News Media Organizations.

16 a. The following entities are recognized as news media eligible to attend
17 executive sessions:

18 (1) A general or associate member newspaper of the Oregon Newspaper
19 Publishers Association, a broadcast member of the Oregon Association of
20 Broadcasters or a member of the Associated Press; or

21 (2) A newspaper that the City of Lincoln City uses for publication of public
22 notices and that meets the requirements of ORS 193.020; or

23 (3) An entity recognized by the City Council as being a news source that:

24 A. is organized and operated to regularly and continuously publish,
25 broadcast, transmit via the Internet or otherwise disseminate news
26 to the public, and that regularly reports on activities of the City of
27 Lincoln City or matters of the nature under consideration by the City
28 of Lincoln City; and

29 B. is determined by the City Council to be a business entity that is
30 institutionalized [defined in footnote as “long-established or well-
31 established”] and that is committed to, and is structured to support,

1 the terms of ORS 192.660(4). In making this determination, the City
2 Council may consider and weigh any factors that it deems to be
3 relevant, including, without limitation, the existence of any of the
4 following factors:

5 i. the entity has multiple personnel with defined roles within its
6 organizational structure;

7 ii. the names of news-reporting personnel, and responsible
8 entity management personnel, together with addresses and
9 contact telephone numbers, are readily available;

10 iii. the entity has an available process for correcting errors,
11 including violations of executive session statutes, by a person
12 with authority to take corrective measures.

13
14 b. It shall be the entity's burden to persuade the City Council by substantial
15 evidence that it should be recognized as a news media organization
16 meeting the criteria in Section (2)(a) of this policy. Such evidence must be
17 submitted at least thirty (30) days in advance of the first executive session
18 that the entity desires to attend. The City Council shall make a
19 determination within twenty-one (21) days of receiving the evidence
20 submitted by the entity. The City Council may elect to forgo this procedure
21 in cases where the City Council, in its sole discretion, determines that it can
22 immediately recognize that an entity qualifies under this policy, or in cases
23 where the City Council, in its sole discretion, determines that other good
24 cause exists for making an expedited determination. A determination that
25 the entity is not recognized shall be based upon written findings addressing
26 the criteria in Section 2(a).

27
28 Section 3 of the policy states that if a news media organization is "recognized pursuant
29 to Sections 1 and 2", a representative of such a recognized entity, in order to attend an
30 executive session, must meet further requirements to prove that they are a bona fide
31 representative of that news media organization, such as a press badge, or a recently

1 published news article with the person's byline, or a letter on letterhead from an editor of
2 a recognized news media organization confirming that the reporter is representing that
3 organization, plus personal identification. Finally, the City may require that a
4

5 "request to attend an executive session be made in writing on a form provided by
6 the City. The form shall require disclosure of the person's name and the entity for
7 which he or she is a news reporter, and shall require submission of
8 evidence***described [above]. The form shall also include a signature line
9 whereby the person certifies that he or she is gathering news for a recognized
10 news media organization, that the information given is true, and that he or she
11 agrees to comply with ORS 192.660(4)." (#PR4)
12

13 ATTORNEY GENERAL OPINION 8291, issued April 18, 2016

14 The Oregon Government Ethics Commission requested and received an opinion from the
15 Oregon Attorney General as to the provisions in ORS 192.660 regarding the attendance
16 of representatives of the news media at a governing body's executive session meetings.
17 Below are excerpts relevant to the issues in this matter:
18

19 This opinion addresses several issues pertaining to the commission's duty to
20 investigate and enforce the requirement that representatives of the news media be
21 allowed to attend executive sessions. *****[p. 1]
22

23 ***[A] governing body may not lawfully enforce a policy that permits it to exclude
24 from executive session a representative of the news media who would be
25 permitted to attend under ORS 192.660(4) and (5).***** [p. 2]
26

27 "Institutionalized news media" means an entity that is formally organized for the
28 purpose of gathering and disseminating news.***** [p. 3]
29

30 QUESTION 4

31 When evaluating alleged violations of ORS 192.660(4), what is the significance of

1 policies adopted by governing bodies to implement the statutes? Specifically, what
2 would be the legal significance of a policy to exclude a person who:

- 3
- 4 1. Does not meet adopted screening criteria to determine who qualifies as
5 a "representative of the news media";
- 6 2. Does not gain preapproval of media credentials in advance of executive
7 sessions;
- 8 3. Fails to give advance notice of attendance; or,
- 9 4. Is believed to have unlawfully reported on a prior executive session or to
10 represent a news media organization that did? [p. 3-4]

11 12 SHORT ANSWER

13 Public bodies are required to comply with the statute. They cannot modify the
14 statutory requirement by adopting a policy. In evaluating allegations that an
15 individual was wrongly excluded from executive session, the commission must
16 assess compliance with that statute regardless of a governing body's policies.

17
18 With respect to the specific types of policies the commission asks about (numbered
19 1 through 4 above) we answer as follows:

- 20 1. If enforcement of the policy definition results in the exclusion of a representative
21 of the news media, that exclusion would violate ORS 192.660(4).
- 22 2. To the extent that a credentialing requirement simply requires an individual to
23 demonstrate that he or she is a representative of the news media, its enforcement
24 would be consistent with the law. But if a policy requires specific credentials, and
25 an individual offering different credentials that are sufficient to demonstrate that he
26 or she is a representative of the news media is excluded based on that policy, that
27 exclusion would not be consistent with ORS 192.660(4).
- 28 3. Advance notice of attendance is not required by Oregon Public Meetings Law.
29 Excluding a representative of the news media for failure to comply with a policy
30 requiring advance notice of attendance would violate ORS 192.660(4).
- 31 4. The Oregon Public Meetings Law does not authorize any mechanism for

1 enforcing the requirement that representatives of the news media refrain from
2 reporting designated information discussed in executive session. Enforcement of
3 a policy excluding representatives of the news media on this basis would violate
4 ORS 192.660(4). [p. 4]

5
6 LINCOLN CITY RECORDS IN RESPONSE TO SUBPOENA

7 The records provided by Lincoln City in response to the subpoena include
8 correspondence between Justin Werner of Lincolncityhomepage and employees of
9 Lincoln City during the period between 1/1/18 and 6/6/18.

10
11 City employees corresponded with Justin Werner frequently during the first 5 months of
12 2018. Justin Werner's publication received numerous press releases of City events and
13 other information from individuals with City email addresses. These correspondents
14 included the City Manager's office, the Public Library staff, the City Community Center
15 staff, the HR Department, the Planning Department, the IT Department, and the City
16 Visitor and Convention Bureau. (#INV1)

17
18 During 2018, Mr. Werner also received several emails from administrators about
19 upcoming meetings of the City Council and the Planning Commission. Mr. Werner was
20 also noticed by City staff when a meeting was cancelled due to lack of a quorum, or when
21 late additions were made to the agenda. It appears that the meeting notices were sent
22 and agendas were usually available about 4 days prior to the meeting. (#INV1)

23
24 Set out below are some exchanges pertinent to this case. (Sender/recipient Justin
25 Werner or Lincolncityhomepage are referred to as JW below.)

26
27 1/5/18 from JW to City Attorney asking for comment on an article which was to be
28 be published concerning a complaint against the City Attorney.

29
30 1/5/18 and forwarded on 1/12/18 from JW to City Recorder asking to be added to the City
31 lists to receive all meeting notices, press releases, and announcements.

1 1/24/18 from JW to City Recorder and cc'd to Mayor and City Manager.

2 "On January 5, 2018, I sent you a request to add me to your list of media
3 representatives. Unfortunately, my records indicate I didn't receive a reply.***
4 Perhaps the problem is on my end, so let me supersede my Jan. 5th request with
5 the following request: I am a media representative, and an "interested person" and
6 respectfully request the City of Lincoln City, its employees,***send me all
7 communications regarding meetings, and all other communications provided to
8 other media representatives and/or "interested persons***" Included in this email
9 was the desired email address for these notifications and his telephone number.

10
11 1/30/18 - Email above was forwarded by the City Recorder to the City Attorney.

12
13 1/31/18 –from City Recorder to JW (cc'd Mayor, City Attorney, City Manager):

14 "[P]lease be advised that we included you in the media group at your first request
15 as an 'interested person'.***You might want to check your trash or junk mail to see
16 if it was sent there. As you have indicated in the second request, we have again
17 changed the contact information to the gmail address provided as you requested.
18 Please note, however, that most of the City's notices and information for the public
19 is posted on our website***[w]e don't send out notices as to when the information
20 is uploaded to the website."

21
22 4/26/18 –from JW to City Recorder and others:

23 "Is it possible to add Lincoln City Homepage to the list here
24 [<http://www.lincolncity.org/community> links] ?"

25
26 4/26/18 –from City Recorder to JW:

27 "Thank you for your email. During the past few weeks the City staff has embarked
28 on a review of our media, social media and web page policy.***After receiving your
29 email, our City Manager looked at the links page and found that some "for profit"
30 links were incorrectly added. He therefore removed this page from our webpage
31 while we complete the policy review and correct any links that were incorrectly

1 added.***”

2
3 4/27/18 –From JW to City Recorder:

4 “I would like to attend Executive sessions. How would I go about doing that
5 exactly? I understand I can’t write about what I hear in the sessions.”

6
7 4/30/18 – email above forwarded by City Recorder to City Attorney.

8
9 4/30/18 –From JW to City Recorder:

10 “I’m curious as to when the Community Links page will be back live on the city
11 website and if your [sic] going to add lincolncityhomepage.com to it.***The only
12 reason I asked to be put on the list is because I saw The News Guard, Newport
13 News Times, and newslincolncounty.com on that page.” (NOTE: As of 1/11/19 the
14 Community Links tab on the City webpage is still down due to policy review.)

15
16 (Subsequent pertinent emails are described below under the TIMELINE heading.)

17
18 In response to the Commission’s request for a copy of the statutory authority for “work
19 sessions” as distinguished from “public meetings,” the City responded that they do not
20 have any “any documents (i.e. statutes) responsive to your request.”

21
22 A 10/17/18 letter from the City Attorney, Richard Appicello, which was delivered along
23 with the City Recorder’s response to the subpoena, is excerpted below:

24
25 “Work Session designation is part of the subject of the noticed public meeting. A
26 meeting designated as a work session on a specific subject indicates that the City
27 Council will not take any action at this noticed public meeting but instead will
28 discuss the matter informally.***The work session on June 4, 2018 was to
29 discuss/ask questions about items on the City Attorney’s project list. The fact that
30 no action can be taken at such noticed public work session meetings is reflected
31 in the Order of Business in the Lincoln City Municipal Code***” (#INV1)

1 2.04.020 Order of Business.

2 "In the conduct of the business of the council, the order of business shall be substantially
3 as follows, except as otherwise provided in LCMC 2.04.027 for time certain agenda items:

4 A. Roll Call;

5 B. Pledge of Allegiance;***

6 L. Actions, if any, based on work session, executive session or citizen comment;***

7

8 NOTE: On 2/12/18, LCMC 2.04.020 was amended by Ordinance No. 2018-04 to add the
9 portion underlined above. (#INV6)

10

11 SUBMISSIONS ON BEHALF OF RESPONDENT AND FOUR OTHER COUNCILORS

12 The respondent, along with four other members of the governing body, is represented by
13 attorney Andrea D. Coit of the law firm, Hutchinson Cox. The sixth member of the
14 governing body, Mayor Don Williams, is represented by a different attorney.

15

16 On 6/15/2018 the Commission received a written response from Ms. Coit, the entirety of
17 which was provided to the Commission with the preliminary review report, and will be
18 provided again with this investigation report.

19

20 Ms. Coit concedes that any of the guidance provided by the AG opinion that was in conflict
21 with the previously adopted Lincoln City Resolution would control. Based on the
22 information contained in the complaint, along with the AG opinion, Ms. Coit states,

23

24 "Lincoln City is permitted to create and enforce a screening process for the
25 purpose of determining whether a specific entity qualified as institutional media
26 entity. Per ORS 192.660(10), Lincoln City is also permitted, within the bounds of
27 the Opinion's guidance, to establish the criteria for evaluating what entities qualify
28 as media for purposes of attending executive session." (#PR4)

29

30 Ms. Coit asserts that the Resolution's requirement that an applicant submit evidence
31 relating to his or her status as a member of the news media prior to being approved to

1 attend an executive session is permissible under the circumstances. Ms. Coit states that
2 the complainant was notified on 5/10/2018 that he would need to submit an application
3 for review by the City Council at its next regularly scheduled City Council meeting on
4 6/11/2018, and this application would need to be submitted by 6/4/2018.

5
6 Ms. Coit's letter continues:

7
8 "To comply with both ORS 192.610 and Lincoln City's Resolution, the City Council
9 was required to consider Mr. Werner's application for media recognition at a
10 properly noticed public meeting. The City Council had convened a work session
11 prior to going into executive session on June 4. It had not been in a public session."
12 (#PR4)

13
14 During the investigation phase, Ms. Coit supplied a letter dated 1/3/19 in response to
15 questions asked by Commission staff, which will be provided to the Commissioners in its
16 entirety, and is excerpted below:

17
18 I would just like to clarify that at no time during the interlude between the end of
19 the public meeting work session and the commencement of the executive session
20 did any of my clients participate in a "conversation as to whether Mr. Werner would
21 be able to attend the executive session as a representative of the media."****

22
23 On June 4, 2018, the Councilors participated in the work session City Council
24 Meeting. As a public meeting, it was attended by various members of the public.
25 None of my clients took any particular note of Mr. Werner's presence. He did not
26 speak at the meeting or otherwise do anything to indicate that he was at the
27 meeting as a member of the media.

28
29 When the work session concluded, the Councilors walked to the executive session
30 room. Some of my clients noticed Mayor Williams walking with a young man.
31 None of them recognized Werner by sight. None of them spoke with Werner,

1 walked with him, or asked any other person who he was.

2
3 In response to the Commission staff's question: *You said a few times [in oral presentation*
4 *to the Commission] that three of your clients did not know who Mr. Werner was and that*
5 *two of your clients did know him. Could you identify the 2 who did know Mr. Werner and*
6 *the 3 who did not? Does this mean that the three who did not know Mr. Werner were*
7 *unfamiliar with him personally (i.e. his name and face meant nothing to them) or were*
8 *unfamiliar with his publication, so that identifying himself as the editor/writer of*
9 *LincolnCityHomePage would have had no meaning whatsoever to the 3?*, Ms. Coit
10 replied:

11
12 Councilor Anderson knew Mr. Werner as the writer of the blog called
13 LincolnCityHomePage. Councilor Hinton had heard of Mr. Werner's blog, but had
14 never met him and did not recognize him on June 4, 2018. ***

15
16 On this particular issue, though, I would like to submit my opinion that any
17 individual Councilor's knowledge that Mr. Werner wrote a blog should be of no
18 relevance to the complaint raised here. On June 4, 2018, Mr. Werner had never
19 previously been recognized by the Lincoln City Council as a member of institutional
20 media such that he could legally be permitted to attend an executive session
21 meeting. Regardless of the process required to obtain that recognition, giving the
22 recognition itself would require a decision by the Council. For example, if the
23 request was made in accordance with the City's written policy requiring the
24 submission of an application or other evidence, a decision on that application
25 would need to be made. Alternatively, if it is argued that perhaps some of the
26 Councilors knew that Mr. Werner wrote a blog and, therefore, the Council should
27 have just accepted his oral statement that he was media, a decision to ignore or
28 override the City's policy on recognizing media and instead just allow him to attend
29 would have been required. Those are final decisions that cannot be made in
30 executive session. That is why the City Attorney advised my clients that they could
31 not act one way or the other on his request. They followed his advice.***

1 Attorney Coit also provided other material, including an affidavit from Lincoln City's legal
2 counsel, Richard Appicello, a City employee. Appicello's 1/3/19 affidavit is excerpted
3 below. (#INV2 and #INV2a)

4
5 A work session meeting is a public meeting***. Work session meetings are
6 informal and no action can be taken – they are intended for discussion only.***

7
8 On June 4, 2018, the work session was adjourned and Council members headed
9 down the hall to the executive session meeting room for an advertised stand-alone
10 executive session meeting***.

11
12 The City Council did not recess a Regular Council meeting to go into executive
13 session. The work session, which is not a regular meeting, was adjourned. Unlike
14 a recess where the Council could return to the Regular Meeting for action, there
15 was no ability to return to a public meeting for action.

16
17 Contrary to Mr. Werner's complaint, Mr. Werner did not attend the executive
18 session; after the work session, he walked down the hall with the Mayor and
19 entered the executive session meeting room and took a seat. He was asked
20 numerous times to leave the meeting room by the City Recorder and City Manager
21 prior to the start of the executive session.

22
23 Although Mr. Werner entered the meeting room, Councilors did not engage him.***

24
25 Weeks earlier, the City Recorder had sent Mr. Werner the 2016 Attorney General
26 Opinion on media, together with the City's 2010 Media policy***identical to the
27 Model Policy developed in 2009 by a Task Force consisting of representatives of
28 Open Oregon, Lake Oswego City Attorney, League of Oregon Cities, Lake
29 Oswego Mayor, Clackamas County Counsel, the Oregonian, the Oregon
30 Newspaper Publishers Association and the Oregon Association of Broadcasters.

31 *****

1 In response to the Recorder and Manager, Mr. Werner began soliciting the Council
2 members directly to recognize him as media***.

3
4 Councilors were not engaging with Mr. Werner. Staff engaged him.***Council had
5 adjourned its work session and had not yet opened executive session. Frankly,
6 Council was caught off-guard, most of them did not know who this person was or
7 why he was here in their meeting room blustering at staff; Councilors had not been
8 given any evidence (because none had been submitted) although Council had
9 received the AG opinion on media from me on May 10, 2018.

10
11 I specifically advised Council on June 4, 2018 that they could not act on the request
12 being made by Mr. Werner to be recognized at this time. Council cannot legally
13 act in the moments between public meetings or in an executive session.

14
15 Contrary to Mr. Werner's statement in his complaint that I said nothing, I stated *at*
16 *least three times* that no decision could be made by Council and that such decision
17 needed to be made in open session "down the hall".*****

18
19 I specifically stated that "the one thing we know for sure" is that the decision on
20 whether or not Mr. Werner is or is not media, cannot be made now and needed to
21 be made "down the hall" at a regular meeting. The Manager and Recorder made
22 the decision to exclude Werner, not the Council.***

23
24 Contrary to my statements and the actions of the Recorder and Manager telling
25 Werner to leave because Council could not act on his request, Mayor Don Williams
26 suddenly and unilaterally declared that Werner could stay if he was not disruptive.
27 This elicited a response of "WHAT!" and "NO!" from some Councilors present. The
28 exclamations***by Councilors were not votes on a motion of whether to admit
29 Werner, but rather exclamations of frustration with the Mayor appearing to attempt
30 to take action***.

1 In sum, as a factual matter, Mr. Werner was asked to provide evidence to address
2 how he met the standard expressed in the 2016 AG opinion, using the City's 2010
3 policy as a guide so that Council could take action at a public meeting on his
4 request. He refused to do so. He appeared and solicited Council to make a
5 decision at a time they could not act under public meetings law, and without
6 submission of any evidence. I advised the Council members that they could not
7 act on Werner's solicitation to them to be recognized***and they followed my legal
8 advice. Werner's actions can be viewed as Solicitation of Official Misconduct I.
9 Councilors refused to commit a crime and violate public meetings law for Werner's
10 benefit. The Council did not make a decision to exclude Werner, the Manager and
11 Recorder excluded him. (#INV2a)
12

13 NOTE: In 2016, the City was being sued by Mr. Smith, in a lawsuit unrelated to Public
14 Meetings Law. A court filing was made on behalf of the City in that case which argued
15 that the AG's opinion on media supported a finding that plaintiff Smith did not have
16 standing to sue because he was not a member of the news media. "[Smith] is not
17 connected with any institutional news media. He is simply an individual who maintains a
18 personal website where he posts his opinions about local politics and posts articles written
19 by others about local politics." On 5/10/18, Mr. Appicello provided the City Councilors
20 with the AG's Opinion on media, as well as this court filing. (#INV2a)
21

22 TIMELINE OF EXECUTIVE SESSION COMMUNICATIONS:

23 4/27/18 (Friday) 8:13pm Email from Justin Werner to City Recorder, with the subject
24 line "Re: meetings Scheduled for Monday, April 30, 2018" stating, "*I*
25 *would like to attend Executive sessions. How would I go about doing*
26 *that exactly?***"* (#INV1)
27

28 4/30/18 (Monday) 11:39am 4/27/18 email above from Justin Werner was forwarded by
29 City Recorder to City Attorney.
30

31 5/1/18 (Tuesday) City Attorney sent the full 2016 AG opinion on media attendance at

1 executive sessions to the City Manager and the City Recorder,
2 together with a court filing from the Smith v. Lincoln City case in
3 which the attorney representing Lincoln City argued that the plaintiff
4 was not "media" under the standard in the 2016 AG opinion, but
5 rather an individual blogger. (#INV1 and #INV2a)
6

7 5/2/18 (Wednesday) 3:46pm Email from City Recorder to Justin Werner, with the
8 subject line: "Re: attending Executive Sessions and City Web Page"
9 stating, *"***With regard to your request to attend an Executive*
10 *Session Meeting, Council cannot make a decision in executive*
11 *session so if you believe that you qualify as a representative of the*
12 *news media under Oregon law, you must make application to City*
13 *Council to be admitted to executive session meetings. The Council's*
14 *decision will be based on the April 2016 Oregon Attorney General*
15 *Opinion on the subject."* (#INV1)
16

17 5/3/18 (Thursday) 8:35pm Email from Justin Werner to City Recorder, with the subject
18 line: "Re: attending Executive Sessions and City Web Page", stating,
19 *"I'll be attending the next Executive Session Meeting. Thank you for*
20 *pointing me in the right direction."* (#INV1)
21

22 5/7/18 (Monday) 6:00pm Special Meeting of the City Council held. (#INV3)
23

24 5/10/18 (Thursday) 3:36pm Email from City Attorney Appicello to the City
25 Councilors (and City Manager) with the subject line "Media AG
26 opinion from 2016 court filing", stating *"The attached is something*
27 *Jens Schmidt filed in the Smith case. It is a Supplemental*
28 *Memorandum discussing the 2016 Oregon Attorney General's*
29 *opinion regarding the meaning of "members of the media" for*
30 *purposes of the Public Meetings Law. There is nothing on this*
31 *Agenda regarding this as we anticipated but did not receive any*

1 application (or evidence) from an individual who indicated he wished
2 to be recognized as "media" and attend executive sessions. Cathy
3 had informed him Council could take no action in executive session
4 so he would need to bring up the issue so Council could act – prior
5 to showing up. I am sending you the full AG opinion (attached to the
6 motion) in case you wish to read it all. We have a policy as well, but
7 to the extendt [sic] they are inconsistent this AG opinion will control.
8 I will summarize the pertinent points in the opinion for Council prior
9 to the meeting." (#INV1 and #INV2a)

10
11 5/10/18 (Thursday) 5:03pm Email from City Recorder to Justin Werner, with the
12 subject line: "Re: Attendance – City Executive Session Meetings",
13 stating, "Justin, with regard to attending an Executive Session
14 meeting, as stated below an application is required in advance for
15 Council's consideration. Council then reviews the application at a
16 regularly scheduled City Council meeting. Attached is Resolution
17 2010-09 (Executive Session News Media Attendance Policy), as a
18 guide for making application. Also attached is the 2016 Attorney
19 General opinion on what constitutes news media that would control
20 over anything inconsistent in the Resolution. If you wish to be
21 considered, you must apply in advance. The next available City
22 Council meeting date for consideration is June 11th. The agenda
23 deadline to receive your completed application (addressing the
24 required criteria to be met as stated in Resolution 2010-09), is noon
25 Monday, June 4, 2018 for the June 11, 2018 City Council
26 meeting.***" (#INV1)

27
28 5/14/18 (Monday) 6:00pm City Council Regular Meeting (#INV3)
29 8:24pm-9:00pm Executive Session

30
31 5/28/18 (Monday) 6:00pm City Council Regular Meeting cancelled (#INV3)

1 6/4/18 (Monday) 6:00pm City Council Work Session

2 6:45pm Executive Session (#INV3)

3
4 A review of the 2018 City Council meetings posted on Lincoln City's website shows that
5 the Council routinely held executive session meetings as "stand alone" meetings prior to
6 their regular council meetings. Also, it appears that the Council held five distinct types of
7 meetings during this period: Regular Meetings, Executive Sessions, Work Sessions,
8 Special Sessions and Training Sessions. The executive session meetings were
9 scheduled at 3pm, 4pm, 4:30pm, or 5pm, preceding the 6pm regular meetings. Only the
10 May 14, 2018 6pm regular meeting was recessed into executive session a few hours after
11 it commenced. The City Council held 8 executive session meetings in the first six months
12 of 2018. The Council has not held an executive session since the 6/4/18 executive
13 session at issue in this case. (#INV6)

14
15 **CONCLUSIONS:** Susan Wahlke was a member of the Lincoln City Council during the
16 period relevant to this investigation and was a public official. The City of Lincoln City is a
17 public body and the City Council is its governing body [ORS 192.610(3) and (4)]. As a
18 member of the governing body of a public body, Susan Wahlke is required to comply with
19 the executive session provisions of Oregon Public Meetings law found in ORS 192.660.
20 Under ORS 192.685(1), complaints concerning violations of ORS 192.660 alleged to have
21 been committed by public officials may be made to the Oregon Government Ethics
22 Commission for review and investigation as provided by ORS 244.260.

23
24 An executive session is a meeting or part of a meeting held by a governing body which is
25 closed to certain persons for deliberation on certain matters. [ORS 192.610(2)]

26
27 ORS 192.660 states that members of the media shall be allowed to attend executive
28 sessions except under three circumstances: when labor negotiations are the topic; when
29 matters concerning expulsion or medical records of a student are the topic under ORS
30 332.061(2); and when the topic is current or pending litigation and a member of the news

1 media is a party to the litigation or is an employee, agent or contractor of a news media
2 organization that is a party to the litigation. [ORS 192.660(4) and (5)]

3
4 Based on the evidence, there is no indication that the Council was relying upon any of
5 the three permitted exceptions to exclude the complainant from the executive session.

6
7 The Commission is prohibited by law from making a rule defining “representative of the
8 news media,” but it is imperative in order to enforce ORS 192.660(4), that the Commission
9 make judgments on a case by case basis, guided by the application of the statute and
10 AG’s Opinion to the relevant factual circumstances.

11
12 Mr. Appicello, the City’s in-house legal counsel, advised the members of the City Council
13 that when the City’s policy on media conflicts with the AG’s opinion, the AG’s opinion
14 controls. Also, Ms. Coit, the attorney representing five of the City Councilors in this matter
15 has also stated the same. There seems to have been some hedging on this point by both
16 the City’s attorney and Ms. Coit since their initial positions, with the argument that
17 because Lincoln City is a home rule jurisdiction, they need not defer to the AG’s opinion.

18
19 One difference between Resolution 2010-09 (City Policy) and the AG’s opinion is the
20 definition of “institutionalized” media. The City Policy defines “institutionalized” as “long-
21 established or well-established”, whereas the AG’s Opinion states that “[i]nstitutionalized
22 news media’ means an entity that is formally organized for the purpose of gathering and
23 disseminating news.”

24
25 Addressing the changes in delivery of the news between 1973 when ORS 192.660(4)
26 was first adopted and today, the AG’s Opinion’s notes the following:

27 [W]hether an online publication or broadcast qualifies [as news media] depends
28 on the same criterion for existing mediums: the entity must be institutional.
29 “Blogs,” for example, come in two general varieties. The first is “an online personal
30 journal with reflections, comments and often hyperlinks, videos, and photos
31 provided by the writer.”***The second is a “regular feature appearing as a part of

1 an online publication that typically relates to a particular topic and consists of
2 articles and personal commentary by one or more authors[.]” The first type of
3 “blogger” is an individual rather than a representative of a news media
4 organization. But the second type of blogger might qualify as a representative of
5 the news media depending on whether the particular facts demonstrated that the
6 blogger represented an institutional news medium. Indications that an entity is
7 institutional might include its business structure, the nature of its overall operations,
8 regular public dissemination of news, and similar factors that demonstrate that it is
9 formally organized for the purpose of gathering and disseminating
10 news.***[I]ndications that a blogger represents institutionalized media might
11 include the existence of staff (rather than a single individual), a formal business
12 structure within which the blog operates and regular publication. [AG Opinion p.
13 15-16]

14
15 Based on the evidence available, it appears that Lincolncityhomepage falls into the
16 second category of “blog” and qualifies as “news media”. It is formally organized for the
17 purpose of gathering and disseminating news. The business was registered with the
18 Secretary of State as an assumed business name by Justin Werner on 6/20/18, but it was
19 formally organized and operational during the period relevant to this case, and for at least
20 a few years prior. The publication regularly covers local government, entertainment,
21 events, sports, and includes letters to the editors. The site has several advertisers, and
22 at least two staff members. Anyone may access the site on the internet to see the 18
23 articles published during the first 5 months of 2018 concerning local government. The
24 Oregon School Activities Association has recognized the entity as news media, has
25 issued it a press pass and hosts the entity’s news feed.

26
27 On 4/18/16, the Oregon Department of Justice published an Oregon Attorney General
28 opinion (AG Opinion), #8291, specifically answering questions presented by the
29 Commission concerning the Public Meetings Law requirement that representatives of the
30 news media be allowed to attend executive sessions. The AG Opinion expressly states
31 that there are no permissible grounds other than those identified in ORS 192.660(4) and

1 (5) for excluding representatives of the news media from attending executive sessions.

2 [AG Opinion, p. 3]

3
4 As pertinent to ORS 192.660(4) and a governing body enacting a policy that can exclude
5 a representative of the news media, the AG Opinion states:

6
7 “Public bodies are required to comply with the statute. They cannot modify the
8 statutory requirement by adopting a policy. In evaluating allegations that an
9 individual was wrongly excluded from executive session, the commission must
10 assess compliance with that statute regardless of a governing body’s policies.”

11
12 “If enforcement of the policy definition results in the exclusion of a representative
13 of the news media, that exclusion would violate ORS 192.660(4).

14
15 To the extent that a credentialing requirement simply requires an individual to
16 demonstrate that he or she is a representative of the news media, its enforcement
17 would be consistent with the law. But if a policy requires specific credentials, and
18 an individual offering different credentials that are sufficient to demonstrate that he
19 or she is a representative of the news media is excluded based on that policy, that
20 exclusion would not be consistent with ORS 192.660(4).

21
22 Advance notice of attendance is not required by the Oregon Public Meetings Law.
23 Excluding a representative of the news media for failure to comply with a policy
24 requiring advance notice of attendance would violate ORS 192.660(4).” [AG
25 Opinion, p. 4]

26
27 There seem to be several arguments made by the respondent’s attorney as to why Mr.
28 Werner’s exclusion from attending the 6/4/18 executive session does not constitute a
29 violation of ORS 192.660(4) by her clients.

30 ///

1 First, the respondents argue that Mr. Werner did not comply with the requirements of
2 Resolution 2010-09 (City Policy). He did not supply “substantial evidence” of why he
3 should be recognized as a representative of the news media to the Councilors at least 30
4 days in advance of the first executive session he wished to attend. The City Policy states
5 that upon such application, the City Council will make a determination within 21 days of
6 receipt of this evidence. However, the City Council may

7
8 “forgo this procedure in cases where the City Council, in its sole discretion,
9 determines that it can immediately recognize that an entity qualifies under this
10 policy, or in cases where the City Council, in its sole discretion, determines that
11 other good cause exists for making an expedited determination. A determination
12 that the entity is not recognized shall be based upon written finding addressing the
13 criteria in Section (2)(a).”

14
15 From the perspective of the Lincoln City Council, Mr. Werner did not make application to
16 the City Council to be recognized as media prior to the 5/14/18 or 6/4/18 executive
17 session. However, Mr. Werner’s email to the City Recorder on 5/3/18 that he was going
18 to attend the “next executive session” can easily be considered an “application” to be
19 recognized as news media. Upon receipt of that email from Mr. Werner, which was
20 forwarded to the City Attorney, no reply is sent to Mr. Werner until 5/10/18 and at that
21 time, Mr. Werner was given a copy of the City Policy and the AG Opinion. However, he
22 was still not given any specific form to submit or told how he would provide substantial
23 evidence that his internet based publication should be recognized as media. It is obvious
24 that his site was well known to City staff at that point, and any information needed to
25 evaluate his publication was readily available by visiting his internet site. In fact, it is not
26 clear exactly what would constitute an “application” other than informing the City staff that
27 you wished to attend the next executive session. He was not given any help to aid him
28 in how “exactly” he could go about being recognized as a representative of the news
29 media, as he had initially asked in his 4/27/18 email to the City.

30 ///

1 However, even if there had been a formal application process or form, which there does
2 not appear to have been, when he first informed the City staff on 5/3/18, that he would be
3 attending the next executive session, he would not have had time to be recognized by the
4 City Council before the 5/14/18 executive session. A week after his email stating that he
5 would be at the “next executive session”, Mr. Werner was first provided with the City
6 Policy and the AG’s Opinion by the City staff and informed that “an application is required
7 in advance for Council’s consideration” which will be reviewed “at a regularly scheduled
8 City Council meeting.” He was also informed that any “completed application” he submits
9 would not be considered until 6/11/18, which would be too late for him to attend the
10 executive session on 6/4/18, which turned out to be the last executive session held by the
11 City Council that year.

- 12
- 13 • On 4/27/18, Werner asked the City Recorder how “exactly” he would go about
- 14 attending executive sessions.
- 15 • On 4/30/18 City Recorder forwards Werner’s email to City Attorney.
- 16 • On 5/1/18 City Attorney sends City Recorder the AG’s Opinion.
- 17 • On 5/2/18, the City Recorder tells Werner he must apply to the City Council, but
- 18 does not supply him with the City Policy which outlines the criteria and timeline,
- 19 rather she instructed him that “the Council’s decision will based on the April 2016
- 20 Oregon Attorney General Opinion on the subject”.
- 21 • On 5/3/18, Werner responds that he will be attending the next executive session.
- 22 [The “next” executive session occurred on 5/14/18, but it doesn’t appear that the
- 23 agenda showing an executive session was available at that time.]
- 24 • On 5/7/18 Special Meeting of the City Council held.
- 25 • On 5/10/18, the City Recorder responds that he must apply in advance by 6/4/18
- 26 to get on the agenda for the next regular meeting of the Council on 6/11/18. She
- 27 also supplies Mr. Werner, for the first time, with the City Policy and the AG’s
- 28 Opinion.
- 29 • 5/14/18, the Council holds a regular meeting and an executive session. Werner
- 30 apparently does not attempt to attend the executive session.
- 31 • 5/28/18, regular meeting cancelled.

- 1 • 6/4/18, Werner attends the Council's Work Session and attempts to attend the
2 following executive session, but is told to leave.

3
4 It is clear from the record that Mr. Werner was well known to numerous members of the
5 City staff as a representative of his publication, including the City Manager, the City
6 Recorder, and the City Attorney. The City staff supplied him with regular notices of
7 events, council meetings, and press releases, which seems to undermine the statements
8 alleged by complainant that the City Manager and City Recorder told him on 6/4/18 that
9 he did not meet the criteria to be considered a representative of the news media. It also
10 appears that he and his publication were known to some of the City Councilors. On
11 5/10/18, the City's attorney sent all of the current City Councilors copies of the AG's
12 opinion as well as an analysis (in another matter) arguing that an individual was a blogger,
13 and did not qualify as news media. Mr. Werner appeared in person and gave public
14 testimony during at least two City Council meetings, identifying himself as a
15 representative of his publication. Also, he had published numerous articles about the City
16 Council, individual City Councilors, staff members, and local government in general.

17
18 The requirement that a representative of the news media submit "substantial evidence"
19 to the City Council "30 days in advance of the first executive session that the entity desires
20 to attend" is impractical, as one does not know until an agenda is published, usually a few
21 days prior to a meeting, when an executive session is planned and for what purpose. The
22 Lincoln City agendas are available approximately four days in advance of a meeting. This
23 requirement would also result in the exclusion of persons who applied and were "news
24 media" from executive sessions that took place before the next scheduled public meeting.
25 And, because the City routinely held "stand alone" executive sessions prior to the next
26 public meetings held later on the same date, this policy would foreclose any newly
27 recognized member of the news media from attending that executive session.

28
29 The only two entities recognized as "news media" by Lincoln City are the News Guard
30 and News Times. As applied to the facts in this case, although he had emailed the City
31 Recorder on 5/3/18 that he would be attending the next executive session, Mr. Werner

1 was told on 5/10/18 that it was already too late for him to be recognized by the City Council
2 in time to attend the 5/14/18 executive session or the 6/4/18 executive session. There is
3 nothing in the City Policy that states the actual steps to be followed when one wishes to
4 "apply" to the City Council, there is no specific form that was provided to Mr. Werner.
5 There is nothing in the City Policy that states that the City Council's determination must
6 be made in a "regular" meeting of the City Council, as opposed to a "work session" or a
7 "special session" meeting. Reporters are not privy to when an executive session will be
8 scheduled and the topic for the executive session until a few days prior when an agenda
9 is made public, so it is important that any determination that needs to be made under the
10 City Policy is done swiftly to ensure compliance with ORS 192.660(4). There is no
11 requirement in the City Policy that the City Council must take a formal vote in a regular
12 meeting to make the determination that an entity should or should not be recognized as
13 news media. Thus, it appears that the City's Policy in this instance acted to frustrate the
14 spirit and letter of ORS 192.660(4).

15

16 According to the AG Opinion, excluding a representative of the news media from
17 attending an executive session for failure to comply with a policy requiring advance notice
18 of attendance would violate ORS 192.660(4). Also, the AG Opinion states that if an entity
19 "does not meet adopted screening criteria", and "enforcement of the policy definition
20 results in the exclusion of a representative of the news media, that exclusion would violate
21 ORS 192.660(4)".

22

23 Second, the respondents argue that the City Councilors did not exclude Mr. Werner, the
24 City staff did.

25

26 Information indicates that the City staff did exclude Mr. Werner prior to the executive
27 session. According to the City Policy, however, it is within the sole discretion of the City
28 Council as to whether or not to allow a person who claims to be the media to attend an
29 executive session. The respondents seems to be arguing that the Council did not
30 exercise their sole discretion in this instance, but sat by and allowed the staff to exclude
31 Mr. Werner on 6/4/18 from attending the executive session.

1 The Mayor, at one point, did suggest that Mr. Werner be allowed to attend and four others
2 responded "No" to that suggestion. It is argued by respondents that this did not constitute
3 official action on their part. It appears that Mr. Anderson went even further, stating that
4 they should not hold the executive session at all if Mr. Werner was allowed to attend.
5 Members of the governing body voiced opposition to the suggestion by one member that
6 Werner be allowed to attend the executive session, they abdicated their sole discretion in
7 allowing the City staff to exclude Mr. Werner, they declined to exercise their option to
8 override the City Policy to immediately recognize Mr. Werner as a representative of the
9 news media, and they all participated in the executive session once Mr. Werner had been
10 excluded. Thus, it appears that the members of the governing body, either through their
11 action or inaction, did exclude Mr. Werner from the executive session on 6/4/18.

12
13 Third, the respondents argue that the City Councilors could not and did not make a
14 decision to exclude Mr. Werner from the executive session on 6/4/18 because they were
15 advised by their attorney that they could not legally make a decision that day in either the
16 public work session or in the executive session, or in the interim between the two
17 sessions. The fact that they were advised by their attorney not to make a decision on Mr.
18 Werner's attendance at the executive session on 6/4/18 prevents the assessment of a
19 monetary penalty under ORS 244.350(2), which states that the commission may impose
20 civil penalties up to \$1,000 for any violation of ORS 192.660, unless the violation occurred
21 as a result of the governing body of the public body acting upon the advice of the public
22 body's counsel. However, acting under the advice of counsel does not prohibit a finding
23 of violation of ORS 192.660(4) and the imposition of a non-monetary sanction.

24
25 ORS 192.660(4) states that representatives of the news media shall be allowed to attend
26 executive sessions held by the governing body of a public body, except in a few specific
27 circumstances, none of which apply in this case. A public body is allowed to have a media
28 policy, but if enforcement of that policy's definitions or requirement of advance notice of
29 attendance would result in the exclusion of a representative of the news media from an
30 executive session, then the exclusion is a violation of ORS 192.660. The City Policy
31 permits the City Council, in their sole discretion, to override their policy and immediately

1 recognize a person as a representative of the news media. They chose not to do so,
2 even though Mr. Werner had been corresponding with staff and the attorney about his
3 media status for months and information about his media status was readily available.
4

5 The City Council had options to ensure that they did not violate ORS 192.660(4). For
6 example, it could have deferred the executive session until they could determine whether
7 or not Mr. Werner's publication qualified as a news media. It appears that deferring the
8 executive session was an option, as Councilor Anderson suggested not holding the
9 executive session at all if Mr. Werner was allowed to attend. The Council could have
10 considered Mr. Werner's email on 5/3/18 that he would attend the "next executive
11 session" as an application and followed up immediately with the form with which to do
12 that. As stated above, it is unclear exactly what an "application" would entail for an
13 internet based operation, and considering that the City staff had access to
14 lincolncityhomepage.com site, it does not seem that any more of an "application" was
15 necessary.
16

17 In conclusion, there is a preponderance of evidence that a representative of the news
18 media was excluded from attending an executive session held by the Lincoln City Council,
19 in violation of ORS 192.660(4), and that Susan Wahlke was participating as a member of
20 the governing body when the violation occurred.
21


22 **RECOMMENDATIONS:** The Commission should make a preliminary finding of 1
23 violation of ORS 192.660(4) by Susan Wahlke. [Motion 10]
24

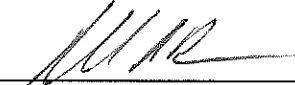
25 **ASSOCIATED DOCUMENTS:**

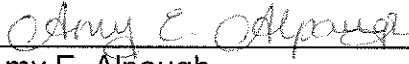
- 26 #PR1 Complaint submitted by Justin Werner, received on 6/6/2018.
27 #PR2 Oregon Attorney General opinion #8291, published on 4/18/2016,
28 concerning media and executive sessions.
29 #PR3 Additional information via email from Justin Werner received on 6/20/2018.
30 #PR4 Response from attorney Andrea D. Coit, received on 6/15/2018.

31 ///

- 1 #INV1 Records received 10/22/18 from Lincoln City's custodian of records in
2 response to Commission subpoena.
- 3 #INV1a Letter from Lincoln City attorney, Richard Appicello, in response to
4 Commission's subpoena.
- 5 #INV2 Letter from attorney Andrea D. Coit, received via email on 1/3/19, with
6 attachments.
- 7 #INV2a Affidavit from Lincoln City Attorney Richard Appicello, received 1/3/19 with
8 attachments, via email attachment from attorney Coit.
- 9 #INV3 Records printed from <https://www.lincolncity.org/>, a website maintained by
10 the City of Lincoln City, obtained 1/9/19.
- 11 #INV4 Records from <https://sos.oregon.gov/business/Pages/default.aspx>,
12 a website maintained by the Oregon Secretary of State, obtained 1/10/19.
- 13 #INV5 Correspondence and records from Justin Werner.
- 14 #INV6 Lincoln City Ordinance No. 2018-04, Lincoln City Council Rules, and
15 meeting records obtained from website maintained by City of Lincoln City.
16

PREPARED BY  1/16/19
Diane Gould Date
Investigator

APPROVED BY  1/16/19
Ronald A. Bersin Date
Executive Director

REVIEWED BY  1/16/19
Amy E. Alpaugh Date
Assistant Attorney General