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October 11, 2019

ACLU of Alaska Foundation
c/o Stephen Koteff & Joshua Decker
1057 West Fireweed Lane, Suite 207
Anchorage, Alaska 99503

Via U.S. Mail and email to
JDecker@acluak.org and
SKoteff@acluak.org

Re: Clarice Hardy and the City of Nome
Our File No. 9015-0001

Dear Mr. Koteff and Mr. Decker:

We represent the City of Nome with respect to your claims that the City of Nome deprived Clarice Hardy of her equal protection rights, intentionally inflicted emotional distress and violated the covenant of good faith and fair dealing. This letter is a response to your letter of September 24, 2019, demanding \$500,000 on behalf of Ms. Hardy in exchange for Ms. Hardy releasing the Nome Police Department and the City of Nome from any liability.

As an initial matter, the City of Nome will not resolve any legal claims Ms. Hardy believes she has in the manner proposed in your September 24, 2019 letter. The City of Nome is sensitive to Ms. Hardy's situation, but disputes liability for the emotional distress and trauma you described in your letter.

The City of Nome is immune from an action for damages from Ms. Hardy because any failure to investigate Ms. Hardy's allegations is, at most, a failure to exercise or perform a discretionary function or duty of its agents, officers, or employees. AS 09.65.070(d)(2).

The City of Nome and the Nome Police Department reject the assertion that the Police Department disregarded and failed to investigate claims of sexual assault because of deliberate indifference to the civil rights of Alaska Native women. The Nome Police Department administers police services in a nondiscriminatory manner, without regard to gender, race, or any other classification. For purposes of this response, the City of Nome is only going to address potential claims from Ms. Hardy and not other potential claimants who are not represented by the ACLU of Alaska.

ACLU of Alaska
October 11, 2019
Page 2

The City of Nome objects to your assertion that the decision not to submit sexual assault kits to the Alaska State Crime Detection Laboratory (SCDL) over the past decade is in anyway connected to Ms. Hardy's claims. The City of Nome is participating in the statewide sexual assault kit inventory and submission for DNA analysis. In November 2017, the inventory revealed that forty-eight police departments across the state have not submitted 3,484 sexual assault kits going back to the 1980s. Police departments cited the following reasons for not previously submitting the sexual assault kits to the SCDL:

- The identity of the suspect was known, and the suspect claimed that the sexual acts were consensual.
- DNA results would not aid in the investigation or prosecution.
- The case had already been adjudicated.
- There was a lack of understanding or training about DNA and the Combined DNA Index System (CODIS).
- There were inadequate criminal justice resources.

Recent developments in forensic science, including but not limited to the expansion of CODIS as an investigative tool, have led law enforcement agencies across the country to testing all sexual assault kits to connect suspects in multiple cases. Additionally, the State of Alaska has received federal and state funds to test previously untested sexual assault kits. The submission of previously untested sexual assault kits by the Nome Police Department to the SCDL is a positive step for public safety in the City of Nome and its surrounding communities, but it does not provide a basis to conclude that the Nome Police Department has systemically violated the civil rights of Alaska Native women.

The City of Nome disputes the claim that a Snapchat video would have provided corroborating evidence of Ms. Hardy's claims. A Snapchat video of the encounter between Ms. Hardy and Mr. Johnson may have existed on Snapchat in March 2017. If such a video ever existed, City of Nome disputes the contention that it would have been possible for the Nome Police Department to recover the video of the alleged assault.

ACLU of Alaska
October 11, 2019
Page 3

Snap Inc. provides a Law Enforcement Guide for Snapchat at <https://www.snapchat.com/lawenforcement>. Snap Inc. ("Snap") provides the following relevant information in its Law Enforcement Guide:

- Snapchat is a mobile application which allows its users to take photos or videos using the Snapchat app which may be shared with the user's friends.
- Snap's servers are designed to automatically delete a "Snap" after it has been reviewed by all intended recipients.
- Snap's servers are designed to automatically delete most user content and cannot retrieve user content, i.e. photos or videos, except in very limited circumstances.
- Snap will disclose its users' account records, information and content only in response to subpoenas, court orders, and search warrants.

Based on the information provided by Snap, it is highly unlikely that any law enforcement agency in the United States could have recovered the purported Snapchat video of the encounter between Ms. Hardy and Mr. Johnson.

The City of Nome disputes the claim that if a video of the encounter between Mr. Johnson and Ms. Hardy still existed, it would depict a sexual assault. You have not alleged that Mr. Johnson engaged in sexual acts with Ms. Hardy by force.¹ Rather, you have alleged that Ms. Hardy was unaware that a sexual act had been committed.² In order for a sexual assault to have occurred, Mr. Johnson must have known that Ms. Hardy was incapacitated and/or unaware that a sexual act was being committed at the time the sexual acts took place.³ It is the understanding of the City of Nome that there are witnesses who can testify that it would not have been possible for Mr. Johnson to have

¹ AS 11.41.470(8).

² AS 11.41.420(a)(3).

³ AS 11.41.420(a)(3); AS 11.41.470(2).

ACLU of Alaska
October 11, 2019
Page 4

been aware that Ms. Hardy was incapacitated and/or unaware that a sexual act had taken place.

The City of Nome contends that the currently available evidence of the interaction between Mr. Johnson and Ms. Hardy does not support a determination that Mr. Johnson sexually assaulted Ms. Hardy. The City of Nome also contends that any additional evidence that could have been developed in March 2017, also would not support a determination that Mr. Johnson sexually assaulted Ms. Hardy. The absence of evidence that Mr. Johnson sexually assaulted Ms. Hardy diminishes Ms. Hardy's claim that the Nome Police Department caused her debilitating emotional distress.

The City of Nome disputes the claim that it violated the covenant of good faith and fair dealing in connection with Ms. Hardy's employment. The City of Nome engaged, in good faith, with Ms. Hardy in a process to determine if an appropriate accommodation would allow her to return to work. Ms. Hardy refused to participate in this process. Consequently, the City of Nome disputes any liability related to the end of Ms. Hardy's employment with the City of Nome.

On behalf of the City of Nome, we are in the process of gathering additional information about the incident involving Mr. Johnson and Ms. Hardy as well as her interactions with Mr. Harvey. We encourage you to provide any additional information that supports the assertions you have made on behalf of Ms. Hardy. We welcome the opportunity to discuss this matter with you in more detail.

Sincerely,

SEDOR, WENDLANDT, EVANS & FILIPPI, LLC


Clinton M. Campion