

**OFFICE OF THE CITY COUNCIL**

**RESEARCH DIVISION**

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**CITY COUNCIL SPECIAL INVESTIGATORY COMMITTEE ON JEA**

**MEETING MINUTES**

**Virtual meeting via Zoom – no physical location**

**August 24, 2020**

**8:00 a.m.**

**Location:** Virtual meeting via Zoom – no physical location

**In attendance:** Council Members Brenda Priestly Jackson (Chair), Randy DeFoor, Rory Diamond and Scott Wilson

**Also**: Council Members Michael Boylan, Al Ferraro, Joyce Morgan, Ron Salem, Garrett Dennis; Jason Gabriel, Peggy Sidman, Paige Johnston, Chris Garrett, Sean Granat, Jody Brooks – Office of General Counsel; Kim Taylor, Jeff Rodda, Heather Reber – Council Auditor’s Office; Steve Cassada, Melanie Wilkes and Eric Grantham – Council Support Services; Jeff Clements and Yvonne Mitchell – Council Research Division; Steve Busey – Smith, Hulsey and Busey law firm; Kurtis Wilson – JEA; Carla Miller – Ethics Office

**Meeting Convened**: 8:00 a.m.

Chairwoman Priestly Jackson convened the meeting and the attendees were introduced for the record. Council Member DeFoor gave the invocation and led the Pledge of Allegiance.

Outside Counsel Update

Steve Busey of Smith, Hulsey and Busey reported that document review continues and is substantially complete. The depositions of Brian Hughes, Alan Howard and Kevin Hyde have been completed and depositions of Michael Munz and Sam Mousa remain to be taken. Mr. Busey said he will begin drafting a final report by the end of September. An email status report was sent out last week. Council Member DeFoor said that it appeared from that summary that Alan Howard’s deposition was very enlightening. Mr. Busey agreed and said that it was Mr. Howard’s feeling that the JEA board was not well served by the senior leadership team during Aaron Zahn’s tenure as CEO. Mr. Busey said he had two requests of the committee. First was a need to increase the budget for subcontractor KLDiscovery for their assistance with document review from $10,000 to $20,000 to complete the task.

**Motion** (Diamond): increase the KLDiscovery contract cap to $20,000 – **approved 4-0**.

Mr. Busey said his firm has identified a consultant, eDiscovery CoCounsel, that specializes in reviewing large numbers of documents and proposes to hire that company for $35,000 to review remaining documents provided to the FBI at a lower cost than using Smith, Hulsey and Busy attorneys. This would require approval of a third party contract with eDiscovery.

**Motion** (Diamond): approve a third party contract with eDiscovery CoCounsel for document review in an amount not to exceed $35,000 – **approved 4-0**.

General Counsel Update

General Counsel Jason Gabriel said his office continues to work closely and well with special counsel on the project. In response to a question from Chairwoman Priestly Jackson, Mr. Gabriel reviewed his office’s “separation of powers” memo released last week in regard to a claim of executive privilege by CAO Brian Hughes during his deposition. He reviewed the history of the claim of executive privilege in the context of the proposed sale of JEA going back to a Special Council Committee on the Future of JEA in 2018. He said that executive privilege has nothing to do with impairing the public records law in Florida, which trumps any claim of privilege. He also said the privilege being discussed relates to a small set of conversations within the executive branch related to developing policy at the city/county level, which is determined on a case-by-case basis. There are two ways to overcome the executive privilege claim: 1) ask the Mayor to waive it on a case-by-case basis or across-the-board; or 2) determine the legislative prerogative that requires the Council to have the information for a legitimate legislative purpose and pose it to the executive branch for further consideration.

In response to a question from Council Member DeFoor about who asked the General Counsel’s Office to draft the executive privilege memo in July, Mr. Gabriel said it was requested by Brian Hughes in preparation for his testimony to Mr. Busey. Ms. DeFoor asked about application of the privilege to non-governmental third parties. Mr. Gabriel said it would have to be analyzed on a case-by-case basis for outside advisors advising the mayor on some policy. It depends on the circumstances. Ms. Defoor asked about the best process for asking the Mayor to waive executive privilege. Mr. Gabriel said he recommended having the committee take a vote to respectfully request, via letter to the Mayor, that executive privilege be waived, either across the board or for testimony on particular subjects. Council Member Dennis asked Mr. Gabriel to please forward the executive privilege memo to all council members and asked if Mr. Gabriel would convert that memo to a binding legal opinion. Mr. Gabriel said it would not be prudent to convert it into a binding legal opinion at this point because there are alternatives to resolve the issue through mutual agreement first. A binding opinion should be a last resort to resolve an intractable problem. Mr. Dennis asked for a description of the difference between a legal memo and a binding legal opinion. Mr. Gabriel said a binding legal opinion is the most formal way to settle a conflict among City agencies once and for all. Advisory legal memos reflect the guidance of the Office of General Counsel and should inform action on an issue, but are not binding.

Chairwoman Priestly Jackson said she wished the Special Committee had been informed of the executive privilege claim when it was made because it may have caused the Committee to make other decisions about what information was being sought and perhaps how else to get it. She asked for a description of the policy decisions being made by the administration about which the executive privilege claim is being made by Mr. Hughes. Council Member DeFoor said that administration has previously claimed that a policy decision about whether to sell JEA was not coming from the Mayor’ Office and that’s precisely what the committee is trying to find out. Mr. Gabriel said that’s exactly the exercise that needs to be gone through to determine if privilege applies or not. What question/subject matter generated the privilege claim? That’s where you need to investigate if the legislative prerogative applies to the information being sought. Chairwoman Priestly Jackson asked the OGC to identify the policy decisions upon which the administration claimed the privilege in Mr. Hughes’ interview transcript because otherwise there could be 4 individual council member opinions on the committee. When the committee has that information from the OGC it can determine if it wants to make the request to the mayor to waive the privilege. Mr. Gabriel said his staff would review the Hughes deposition transcript and identify where the executive privilege was asserted. Council Member DeFoor asked Mr. Gabriel to identify policy areas relating to the charge of the committee that that could be covered by claims executive privilege going forward. Mr. Busey said that in the future the General Counsel could be asked to resolve any claims of executive privilege based on the legislative prerogative of the Council in this area.

Mr. Gabriel noted that the judge’s final order in the NextERA case should be received this week and then the company’s bid information for JEA can be disclosed.

Council Member Disclosure Form

The form as approved by the Special Committee at its last meeting will be distributed to all council members today by email with a request for return by September 4th. Council members with questions can pose them to OGC, the Ethics Office or Steve Busey.

Council Members’ One-On-One Meetings with Outside Counsel

Mr. Busey said he has met with about half of the council members thus far and is available to meet, discuss and answer questions at any time. Council Member Salem asked that any information sent to the Special Committee be sent to all council members as a standard practice. Chairwoman Priestly Jackson said she would make that a general rule. She asked that information not be sent out late on Friday afternoons, with a noon deadline for distribution. Council Member Ferraro asked for hard copies of the most important Special Committee documents that have been distributed electronically to date.

In response to a question from Council Member DeFoor, Chairwoman Priestly Jackson said that a special meeting could be called if necessary to discuss how to respond to future claims of executive privilege.

Next meeting: September 28, 5:00 p.m.

**Meeting adjourned:** 8:56 a.m.

Minutes: Jeff Clements, Council Research Division

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8.28.20 Posted 9:00 a.m.