

From: Stephen D. Busey

Sent: Tuesday, November 3, 2020 12:16 PM

To: 'Jackson, Brenda' <BPJackson@coj.net>; 'SWilson@coj.net' <SWilson@coj.net>; 'RDefoor@coj.net' <RDefoor@coj.net>

Cc: 'thazouri@coj.net' <thazouri@coj.net>; Gabriel, Jason <JGabriel@coj.net>; 'Sidman Martin, Margaret' <PSidman@coj.net>

Subject: Rules Committee Meeting

To the Special Investigatory Committee:

Committee Chair Priestly Jackson requested we address four questions in preparation for the City Council Rules Committee meeting Wednesday, November 4, 2020 at 2:00 p.m. The Chair's questions and our responses follow.

1. *What will it cost to pursue the Rules Committee's six subpoenas to Timothy Baker and his five entities (the "Subpoenas")?*

The Subpoenas were prepared and issued by the Office of General Counsel, and we understand OGC will, if authorized by the Council, pursue litigation necessary to enforce the Subpoenas. We do not anticipate OGC will hire additional lawyers to do so. If OGC allocates its lawyers' time internally in the City's budgeting process, OGC is better positioned to explain any net incremental expense to the City resulting from the enforcement proceedings.

2. *Whether another source could provide the same information sought by the Subpoenas?*

The information the Committee has requested, and that Mr. Baker and his companies have declined to provide, is described in our August 12, 2020 request for documents (attached as Exhibit 1) and in Mr. Baker's September 8, 2020 interview transcript in which he declined to answer fourteen questions.

We asked NextEra on October 12, 2020 to provide the Committee NextEra's December 21, 2017 consulting agreement with Mr. Baker. In spite of NextEra's May 15, 2020 pledge of "full cooperation with the Committee's investigation," NextEra has declined to provide us the agreement "unless the City issues a subpoena."

At this point, with the Baker Subpoenas already issued and served by the Rules Committee, it makes no sense from an economic perspective, or from time efficiency, to start the same request over against NextEra, a non-resident third party, or any other third party, who may have some but not all of the information in the possession of Mr. Baker and his companies.

3. *Are the privileges asserted by Mr. Baker valid?*

Privacy rights provided by the Florida Constitution protect only natural persons (Art I, § 23, Fla. Const.). This is why we recommended subpoenaing the Baker companies in addition to Mr. Baker. The “associational privileges” asserted by Mr. Baker do not protect communications for the purpose of the “advancement of his own commercial interests.” *Jacoby & Meyers v. The Presiding Justices, etc.*, 852 F.3d 178, 186 (2d Cir. 2017). The proper legislative purpose of the Subpoenas is supported by both the City’s Code of Ordinances and judicial precedent, as more fully addressed in our October 8 memorandum to the Committee (attached as Exhibit 2). Moreover, Florida law will not protect an asserted privilege of confidentiality in the face of a legitimate legislative inquiry: “. . . that information may be considered confidential by [a subpoenaed party] does not render it off limits to a legitimate legislative inquiry.” *Metz v. Mar Media, LLC*, 290 So. 3d 622, 628 (Fla. 1st DCA 2020).

4. *Is the information requested by the Subpoenas necessary to the Committee’s investigation?*

At the Rules Committee meeting on October 20, 2020, a number of Council Members questioned whether the information requested in the Subpoenas was necessary in light of what “we already know,” or that the Committee should be able to rely on “inferences,” rather than obtaining the direct evidence sought by the Subpoenas.

The Committee has gathered a great deal of data which show incontrovertible facts regarding the purposeful lack of transparency leading to JEA’s 2019 Invitation to Negotiate, and JEA’s senior leadership’s purposeful misrepresentations regarding the financial health of JEA and the details and consequences of the ill-conceived Performance Unit Plan. Nevertheless, if additional direct evidence regarding these circumstances *is* available, our recommendation is that the Committee attempt to obtain that evidence rather than rely on inferences.

The requests the Committee has made to Mr. Baker, who simultaneously assisted JEA in designing the ITN and assisted NextEra in responding to the ITN, appear material and relevant to the Committee’s investigation.

Stephen D. Busey
Chairman

SMITH HULSEY & BUSEY

One Independent Drive | Suite 3300 | Jacksonville, Florida 32202
904-359-7700 | Direct 904-359-7777
busey@smithhulsey.com | www.smithhulsey.com