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MEMORANDUM OPINION

October 8, 2020

To the Jacksonville City Council's Special Investigatory Committee:

The Special Investigatory Committee requested this firm, as the Committee's Special Independent Counsel, provide our opinion regarding the legislative authority for the Committee (through the Council) to issue subpoenas to Timothy Baker and entities owned or controlled by Mr. Baker. The memorandum addresses (i) the entities to receive subpoenas, (ii) the information requested by the subpoenas and (iii) the legislative purpose for the subpoenas.

I. The Requested Subpoenas.

The Committee (through its Special Counsel) interviewed Timothy Brooks Baker on September 8, 2020. Mr. Baker provided consulting services in recent political campaigns of the Mayor and several members of the Jacksonville City Council. Mr. Baker also was a consultant, through one or more entities owned or controlled by him, for Florida Power & Light Company (FPL), a private utility that participated in the 2019 Invitation to Negotiate (ITN) process established by JEA for its sale by the City of Jacksonville.

Mr. Baker, at the request of Aaron Zahn, attended an off-site meeting at the Club Continental conference facility in Orange Park, Florida on July 10, 2019. The meeting included JEA's senior leadership team (SLT), mortgage bankers and lawyers, and was convened for the purpose of designing and implementing both the ITN process for the sale (privatization) of JEA, and the proposed performance unit plan (PUP). Mr. Baker was under contract with FPL when he attended that meeting.

Because of the apparent conflict of interest in Mr. Baker's participation in structuring JEA's sale process, while at the same time consulting with a potential bidder in that sale process, the Committee determined it should inquire into Mr. Baker's relationship with FPL. Prior to his interview, the Committee requested Mr. Baker provide documents relating to FPL's engagement of him or entities controlled or owned by him (the Committee's request, Exhibit 1).

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By a letter from his counsel prior to the interview, Mr. Baker objected to providing most of the documents requested by the Committee (Mr. Baker's objection, Exhibit 2).

Further, during his interview on September 8 (posted to the Committee's COJ website), Mr. Baker declined to answer questions about his relationship and communications with FPL.

For these reasons, and to advance the Committee's investigation into the 2018-2019 efforts to privatize JEA, the Committee determined it should compel by subpoena the production of documents requested from Mr. Baker, and the answers to its questions to Mr. Baker. The Committee proposes subpoenas directed to five entities owned or controlled by Mr. Baker that may have been involved in the 2018-2019 privatization of JEA, and Mr. Baker:

1. BCSP, LLC—On December 20, 2017, the City issued a request for proposals from financial advisors for “strategic initiatives” (the RFP). The City did not publish the RFP on its procurement website, and the Council Auditor's Office did not discover the RFP until February 2018. Nonetheless, the day after the issuance of the RFP, BCSP entered into a consulting contract with FPL. BCSP remained a FPL consultant from December 21, 2017 through July 31, 2019, while the City and JEA explored privatizing JEA through the RFP and ITN. NextEra's May 15, 2020 response to the City's subpoena stated that BCSP was “employed by NextEra in connection with the JEA ITN.”
2. Conventus, LLC—While BCSP served as an FPL consultant, Mr. Baker formed Conventus with Sam Mousa on July 10, 2019. That same day Mr. Baker attended the Club Continental meeting, at which JEA's SLT and consultants developed the process for selling JEA by March 2020. Conventus also paid for a trip to an Atlanta Braves game attended by Mr. Baker, Mayor Curry, Mr. Mousa, Scott Wilson, and Aaron Zahn in October 2019, while the ITN's cone of silence was in effect. Mr. Mousa's company, Mousa Consulting Group, Inc., also had a consulting contract with FPL at the time of the baseball trip.
3. Data Targeting Research, LLC—Mr. Baker was the managing member of a polling company, Data Targeting Research, in 2018 and 2019. Kerri Stewart, JEA's Chief Customer Officer, described Mr. Baker's presentation at the July 10, 2019 Club Continental meeting as “a view of the community through a

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pollster's eyes." Mr. Baker testified during his September 8 interview that DTR "had poll questions related to JEA," but Mr. Baker declined to answer further questions regarding the polling, or on whose behalf the polling was conducted.

4. Timothy Baker Consulting, LLC—Aaron Zahn testified JEA consulted with Mr. Baker regarding "policy advice on how to run constitutional ballot initiatives" and "how would we manage City Charter changes." Kerri Stewart also testified that "Aaron relied a lot on Tim's opinion." The Committee wants to be sure it has all of Mr. Baker's consulting communications regarding JEA.
5. Baker Law Group, PLLC—Aaron Zahn sent an email to Mr. Baker at his BLG email address on July 22, 2019 (the day before the July 23 JEA Board meeting) attaching confidential JEA rating agency presentations. Mr. Baker testified he wanted to see the information to help "determine whether the Mayor was going to participate in, you know, their communications plan." Mr. Zahn also blind-copied Mr. Baker's BLG email account on an email announcing the site selection for JEA's new downtown headquarters. A theme of JEA's SLT's privatization advocacy was that JEA had to privatize to keep its headquarters downtown. Mr. Mousa also blind-copied Mr. Baker's BLG email account on Mr. Mousa's communications with FPL regarding his consulting services.
6. Mr. Baker individually—Because of the breadth of Mr. Baker's connections with JEA, JEA's SLT and City of Jacksonville officials, current and former, the Committee needs to subpoena him to assure we obtain all of the relevant JEA-related information and documents he may possess.

II. The information requested in the subpoenas.

The information requested by the subpoenas generally relates to:

1. The events leading to JEA's pursuit of privatization.
2. JEA's decision-making process in pursuant of privatization.
3. JEA's PUP authorized at the JEA Board meeting on July 23, 2019.

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The six proposed subpoenas are substantially the same. The proposed subpoena to BCSP is attached as Exhibit 3 as an example. If authorized by the Committee, the final form of the subpoenas will be prepared in coordination with the Office of General Counsel.

III. The legislative purpose for the subpoenas.

The President of the Jacksonville City Council created the Committee on February 4, 2020 to investigate circumstances relating to the “recent pursuit...to privatize JEA, including matters that could be prevented in the future through legislative action.” Council President Wilson’s February 4, 2020 memorandum. President Hazouri reaffirmed the Charge on September 25, 2020.

The President’s Charge to the Committee to conduct an investigation, including issuing subpoenas, is expressly authorized by the Jacksonville’s Code of Ordinances:

The council or any duly appointed committee of the council may make investigations into the affairs of the consolidated government and the conduct of any department, office, or agency of the consolidated government and for this purpose *may subpoena witnesses, administer oaths, take testimony, and require the production of evidence.*

Jacksonville, FL Code of Ordinances,
Section 5.09. – Investigations (emphasis
added).

The United States Supreme Court has recognized the right of legislative bodies to issue subpoenas:

[T]his Court’s prior holdings demonstrate that there can be no question that the State has power adequately to inform itself—through legislative investigation, if it so desires—in order to act and protect its legitimate and vital interests.

*Gibson v. Fla. Legislative Investigation
Comm.*, 372 U.S. 539, 544, 83 S. Ct. 889,
893, 9 L.Ed.2d 929 (1963).

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In Florida, legislative power to investigate is broad and far reaching, and includes probes into governmental corruption, inefficiency and waste:

The Legislature's power to investigate is necessarily broad. "It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes," "[i]t includes surveys of defects in our social, economic or political system" for the purpose of seeking a legislative remedy for them, and "[i]t comprehends probes into [governmental] departments ... to expose corruption, inefficiency or waste." In sum, the scope of legislative inquiry is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."

Metz v. MAT Media, LLC, 290 So. 3d 622, 627 (Fla. 1st DCA 2020) (citations omitted).

Metz also observed that judicial review of a legislative subpoena is limited:

Quite simply, courts may not second-guess the legitimacy of a legislative inquiry so long as it is not "plainly incompetent or irrelevant to any lawful purpose [of the Legislature] in the discharge of [its] duties." To do so would entangle the judicial branch in matters involving the exclusive prerogative of another branch [legislation] in violation of Florida's strict separation of powers requirement.

Id. at 628.

The failed efforts to auction JEA, the ITN itself and the PUP implicate broad public policy concerns that are appropriate for legislative investigation and action. The legislative efforts include:

- Ethics laws – Ethics reform and legislation including conflicts of interest, disclosure requirements, gifts, lobbying activities, limitations

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on city employee employment after leaving the city, and limitations on board member contracts with the agency after board service.

- Procurement laws – Public procurement of professional services. The failed JEA sale involved millions of dollars paid to professionals for investment banking, advertising, legal, political consulting, public relations and marketing, and a broad range of other services that appear to have had little oversight or parameters. Law firms engaged by JEA subcontracted with other professionals, avoiding procurement restrictions.
- Sunshine and public records laws – Although these laws are controlled by a state statutory floor, Jacksonville has a public records ordinance that adds to that floor, which the ITN demonstrated needs reform.
- Appointed officials – Reform of laws governing the selection, term, duties, and other requirements for board members of independent authorities as well as over forty other boards and commissions.

The subpoenas on their face seek information within the scope of the President's Charge to the Committee. *Metz*, pgs. 628-629 (judicial review of legislative subpoenas should be limited to a facial review). The subpoenas seek information relating only to JEA's efforts to privatize and the PUP.

The Florida Supreme Court has stated:

The sum and substance of the whole matter is the right of the citizen to know,...for this right instills confidence in government,

Hagaman v. Andrews, 232 So. 2d 1, 9 (Fla. 1970).¹

The initiative to sell JEA with less than transparency has been a concern to Duval County citizens. Full disclosure of what happened, together with recommended legislative or Charter remedies, will help restore the citizens' confidence in government.

¹ None of the parties being subpoenaed in *Watkins*, *Gibson*, *Metz* and *Hagaman* were government employees.

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The subpoenas do not inquire “into matters which are within the exclusive province of one of the other branches of the Government” nor “supplant the Executive in what exclusively belongs to the Executive.” *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). JEA is an independent agency that does not “belong” to any branch of the consolidated government. The subpoenas therefore do not create a separation of powers issue.

Should the Committee choose to proceed with the subpoenas, they are a lawful exercise of the Committee’s investigative authority, within the scope of the Charge, and comply with Jacksonville’s Code of Ordinances.

SDB/maj
Enclosures

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