

**TO: City Council Special Investigation Committee on JEA Matters**  
**FROM: Christopher Garrett, Assistant General Counsel**  
**SUBJECT: Options for Special Investigation Committee (“SIC”) to Obtain Testimony**  
**DATE: April 17, 2020**  
**CC: Jason Gabriel, General Counsel**  
**Peggy Sidman, Deputy General Counsel**  
**Jon Phillips, Deputy General Counsel**

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### **Options for Obtaining Testimony**

There are three options available to the SIC to obtain the relevant sworn testimony of persons while conducting its investigation:

1. The SIC may invite any person to appear voluntarily and testify before it, provide a sworn interview outside of a SIC meeting, or both. For example, Mike Brost voluntarily provided a sworn interview and appeared before the SIC.
2. With respect to employees of the City and JEA, the SIC may request the supervisor of that employee voluntarily direct that employee to appear before the SIC or for a sworn interview.<sup>1</sup> If the employee fails to appear, it would then be the decision of the agency whether to discipline the employee for not appearing as requested.
3. The SIC may have a subpoena issued to compel any person to appear before it and provide sworn testimony. Notably, this option would not include the ability to conduct a deposition or sworn interview outside of a SIC meeting. This option is discussed in more detail below.

### **Authority to Compel Testimony**

The SIC’s authority to conduct its investigation into matters concerning JEA stems from the City Charter, Council Rules and Ordinance Code. The Charter provides authority to any duly appointed committee of the Council to make investigations into the affairs of the consolidated government and to subpoena witnesses, administer oaths, take testimony and require the production of evidence. Charter § 5.09, Charter; see also Charter § 18.01 (power to compel attendance of witnesses and productions of records pertinent to investigation). Council Rule 2.207 authorizes all Council committees to conduct such investigations.

The specific powers of a special committee are enumerated in Council Rule 2.208, which includes the power “[t]o issue subpoenas to compel the attendance of witnesses before such committee, in accordance with the procedures specified in Chapter 134 of the Ordinance Code.” Chapter 134 provides that when authorized by a standing committee, the Council Secretary will

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<sup>1</sup> Note: A public employee compelled by his/her employer to provide sworn testimony is entitled to Garrity Rights and such testimony may not be used in subsequent criminal proceedings.

“issue subpoenas to compel the attendance of witnesses before the Council or other board, body or standing committee.” Ord. Code § 134.101.

### **Place and Manner of Testimony**

Any testimony compelled by the SIC’s subpoena power, must be taken before the committee itself. This is based on the plain language of the Charter, Council Rules, and Ordinance Code providing that the subpoena power granted to the SIC is for the purpose of compelling the appearance of a witness to testify before it as the investigating body.<sup>2</sup> The authorizing laws and rules do not provide a mechanism for the SIC to obtain a compulsory sworn statement or deposition by delegating its authority to receive testimony to OGC or special counsel.<sup>3</sup>

However, it is within the discretion of the SIC to determine who may ask questions of the witness during the session, including SIC members, OGC, special counsel, or other council members. The one exception is where the witness refuses to answer, in which case the chairman or vice-chairman must repeat the question to the witness before the enforcement process may begin. See Ord. Code § 134.108 and Council Rule 2.213

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<sup>2</sup> See Council Rule 2.208 (“To issue subpoenas to compel the attendance of witnesses before such committee”); Ord. Code § 134.101 (“the Council Secretary shall issue subpoenas to compel the attendance of witnesses before the Council or other board, body or standing committee.”); Ord. Code § 134.102 (“The presiding officer or, in his absence, any other member of a board, body or committee may administer oaths and affirmations, in the manner prescribed by law, to a witness who appears under subpoena.”); Council Rule 2.208(c) (provides that the chair or member of committee “administer oaths and affirmations to witnesses who appear before such committee for the purpose of (Ord. Code § 134.104 (“A witness summoned before any board, body or committee mentioned in the foregoing sections shall receive five dollars for each day’s actual attendance and ten cents per mile for actual distance traveled to and from the place required to appear and give such testimony.”)); Ord. Code § 134.108 and Council Rule 2.213 (providing a procedure to force compliance with a subpoena in which the chairman or vice-chairman repeats the question to the witness, and may take other steps to obtain an order from Council compelling the witness to appear to testify at “the time and place where the committee will next meet.”). This interpretation is also consistent with the language of Section 18.01 of the Charter which provides the power to “compel the attendance of witnesses.” As noted by the Arizona Supreme Court, “Webster defines attendance as the fact of being present.” Long v. Dick, 87 Ariz. 25, 27, 347 P.2d 581, 583 (1959) (internal quotations omitted). More recently, the district court of Kansas explained that “[a]ttendance means to appear in person.” Turner v. Young, 205 F.R.D. 592, 595 (D. Kan. 2002).

<sup>3</sup> See e.g., Barry v. Garcia, 573 So. 2d 932, 936 (Fla. 3d DCA 1991) (Finding investigative body consisting of nonelected officials lacked subpoena power and stating, “[w]hen a municipal charter or special act grants the use of subpoena power and prescribes, if any, its manner of delegation, the specific delegation authorized is the only means available by the governing authorities to the exclusion of any general grant of power or authority.”) See also, Fla. AGO 2001-61 (absent specific statutory authorization, city could not substitute written interrogatories for personal interrogation).