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MEMORANDUM

TO: The Honorable Council Member John Crescimbeni
Chair, Special Committee on the Potential Sale of JEA

FROM: Office of General Counsel

RE: Council Authority regarding Administering Oaths and Subpoena Power

DATE: March 14, 2018

I. Background and Scope

The Council President has established the Special Committee on the Potential Sale of JEA. In the initial meeting questions arose as to the power of the Committee to administer oaths to those appearing at the meeting, or if necessary to subpoena employees. The brief answer is that the Committee has the authority to administer oaths or issue subpoenas, so long as it follows Charter and Ordinance Code procedures for administering such oaths or issuing such subpoenas. This power is not without limits. The inquiry must be: (1) within the Council President's directive (and purpose) to the Committee, and (2) within the scope of inquiry permitted for the legislative branch.

Administering oaths and issuing subpoenas, particularly to employees and officers is a power which the Council has very rarely used in the past for policy related matters. In that vein such a power should be thoughtfully utilized and judiciously exercised. It is intended to be invoked within the legislative body's "investigative" role (much like a Senate Committee at the federal level) with a specified scope that is commensurate with the identified purpose. The power of administering an oath is usually reserved for purposes of obtaining or preserving evidence for potential judicial proceedings. For example, administering an oath to witnesses is routinely used in quasi-judicial hearings such as appeals of orders from the Planning Commission to the City Council, or in zoning matters that are before either body.

The boundary of inquiry is marked by the boundary of the power to legislate. The City Council does not possess the power of making inquiry into the private affairs of the witness; the inquiry ends where the jurisdiction of the body ends.

Since Consolidation (for almost 50 years) employees and officers have attended hundreds of Council or Committee meetings on their own prerogative or at the request of Council Members. Since issuing a subpoena suggests that the only way to compel testimony or provide documents is through force, such power should be reserved as a last resort, used only when requests for information or attendance have been declined or neglected. To do otherwise may create questions in any judicial proceeding instituted to enforce the subpoena.

The Committee need not issue a subpoena in order to administer an oath to any witness and may, as it has done for almost 50 years, rely on the integrity and good faith of its officers and employees. In this context, the administration of an oath very well may be perceived as a strong statement of distrust. While perhaps intended to elicit the free flow of factual evidence, administering an oath may very well have the opposite effect and in fact stymie witness testimony or information because it will almost certainly encourage witnesses to be extremely cautious, or seek legal counsel as to what they may say, fearing that any word or utterance might cost their freedom with the potential penalties of imprisonment and fines hanging in the backdrop.

II. Issue Presented

What are the processes for issuing and enforcing a subpoena?

III. Short Answer

Subpoenas may be issued by the Council or standing or special committee of the Council. Rule 2.208. The Council Rules provide that the issuance of the subpoena be in accordance with the provisions of Chapter 134, *Ordinance Code*. However, neither the Ordinance Code nor the Council Rules allow for one individual Council Member to issue subpoenas.

First, the Committee must vote to issue a subpoena. The Council Secretary then issues the subpoena (drafted by the Office of General Counsel) to be served by the Sheriff on the witness. If the witness refuses to appear, the Committee may request the Council to re-subpoena the witness through order of the Council. If the witness again refuses to appear, the Council may request the State Attorney to impose penalties against the witness.

IV. Discussion

Introduction

Section 5.09, Charter, grants power to the Council and its committees to administer oaths and issue subpoenas. This Section also provides for penalties, authorized by Council but not a committee, for refusal to comply with "lawful order[s]." Council Rules and the Ordinance Code

contain provisions that implement Section *5.09*. The Charter limits penalties to refusal to comply with "lawful order[s]" of the Council.

Process for Administering the Oath

The Council or its authorized committee may request that a witness take an oath before testifying. When a witness is under oath, the witness is subject to potential penalties of perjury, which is, in this context, a Class D misdemeanor per Section 134.106, *Ordinance Code*. Any answer given must be truthful and as such should be thoughtfully conditioned. If an accurate answer is not readily known right then, the witness should notify the questioner. When in doubt, an "I don't know" or "I cannot recall" would be appropriate.

Process for Issuing Subpoenas

As a precondition to the exercise of the power, Council Rule 2.208 requires that the issuance of the subpoena and the nature of the inquiry must be within and in furtherance of carrying out the duties assigned to the committee by the Council Rules, the Council or the President. Pursuant to §134.101, *Ordinance Code,* upon majority vote of the City Council or standing or special committee, the Council Secretary shall issue the subpoena to compel attendance before Council or a standing or special committee. The notice requires service of the subpoena seven days in advance of the meeting unless a shorter time is established by majority vote of Council. Accompanying the subpoena shall be a general statement informing the individual of the subject matter of the inquiry. Additionally, notice shall be provided to the individual that he/she has the right to bring the counsel of his/ her choice with him.

Enforcement

Section *134.108*, *Ordinance Code*, governs the process of enforcement of a lawful committee order to answer a particular question or refusal to produce documents pursuant to a subpoena *duces tecum*. Given that Section *5.09*, Charter, only authorizes punishment for violation of a Council order and given that the Council has not created procedures specific to refusal to comply with a subpoena nor procedures specific to refusal to take an oath, the Council and the committee should follow the same procedures for enforcement of such orders.

If a witness refuses to: (i) comply with a subpoena, (ii) comply with an order to take an oath, or (iii) comply with an order to answer a particular question, the committee chair, upon vote of the committee shall report the refusal to the Council. A resolution attaching a City Council order which provides instruction to the witness shall be introduced to the City Council. Upon enactment of the legislation, the order shall be served upon the witness in accordance with Section 134.103, *Ordinance Code.*

If the witness refuses to comply with the Council's order, the Council may request that the State Attorney charge the disobedient witness with a misdemeanor under Section 5.09 of the Charter.

The State Attorney has absolute discretion to decide whether or not to prosecute any contempt of Council violations.

Penalties

On the other hand, given that penalties under Section 5.09 of the Charter include fines up to $1000 and imprisonment of up to 60 days, separation of powers concerns, as well as statutory construction that penal laws be narrowly construed, the Charter should be interpreted no broader than its plain language. Under Section 5.09 of the Charter, penalties are imposed by Council action, not action by committees.

Limits to Subpoena Power.

The United States Supreme Court has recognized the right of legislative bodies to issue subpoenas. In a case concerning the investigative power of the Florida Legislature, the Court held:

> [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. As this Court said in considering the propriety of the congressional inquiry challenged in *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273: 'The power * * * to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.' 354 U.S., at 187, 77 S.Ct., at 1179. And, more recently, it was declared that 'The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.' *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115. It is no less obvious, however, that the legislative power to investigate, broad as it may be, is not without limit.

Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544–45, 83 S. Ct. 889, 893, 9 L. Ed. 2d 929 (1963). The Florida Supreme Court recently upheld the subpoena power of local governments. *D'Agostino v. City of Miami*, 220 So. 3d 410 (Fla. 2017).

While recognizing the power to investigate, the Supreme Court has noted that such power is not unlimited, cautioning more than once that a committee's subpoena power is limited to its charge. In *Watkins v. United States*, Chief Justice Warren cautioned that "[b]roadly drafted and loosely worded . . . resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent house of Congress." *Watkins v. United States*, (354 U.S .178 (1957)). In *Gojack v. United States*, the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the

inquiry and neither had the full committee specified the area of inquiry. *Gojack v. United States*, (384 US 384 U.S. 702 (1966)).

Separation of powers concerns also provide broad limits to legislative inquiry. The Office of Legal Counsel, in the United States Justice Department, has applied separation of powers principals to subpoena power:

> The constitutional role of Congress is to adopt general legislation that will be implemented "executed" by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress broad rein to investigate. Both Houses of Congress have broad power, "through their own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See also, McGrain v. Daugherty*, 273 U.S. at 177 (inquiry must pertain to a subject "on which legislation could be had"). This sphere of legitimate legislative activity "is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). *See also, Watkins v. United States*, 354 U.S. at 187. The power of investigation can be delegated by either House of Congress to committees, subcommittees, or even individual legislators, *see, Eastland v. United States Servicemen's Fund*, 421 U.S. at 505; *Watkins v. United States*, 354 U.S. at 200-01, as long as "the instructions to an *74 investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." *Id.* at 201. The scope of judicial inquiry on these matters is narrow, and "'should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. at 506, (quoting *Tenny v. Brandhove*, 341 U.S. 367, 378 (1951)).
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> Nonetheless, the investigative power of Congress is not unlimited. Congress cannot, for example, inquire into matters "which are within the exclusive province of one of the other branches of Government . . . . Neither can it supplant the Executive in what exclusively belongs to the Executive." *Barenblatt v. United States*, 360 U.S. at 111; *see also Kilbourn v. Thompson*, 103 U.S. 168, 192 (1881) (Congress cannot exercise judicial authority). Congress must be able to articulate a legitimate legislative purpose for its inquiry; if Congress lacks constitutional authority to legislate on the subject (or to authorize and appropriate funds), arguably Congress has no jurisdiction to inquire into the matter. . . .

Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 U.S. Op. Off. Legal Counsel 68, 73–74 (1986)

Consequently, the Council's subpoena power must be interpreted in light of Article 4 of the Charter. This Article enshrines separation of powers in the Consolidated Government. The Supreme Court of Nevada has explained the importance of separation of powers as follows: "This court has recognized that separation of powers is probably the most important single principle of government." *Commission on Ethics v. Hardy*, 125 Nev. 285, 125 Nev. 1027, 212 P.3d 1098 (2009) (internal quotation omitted). A Louisiana appellate court explained the significance of separation of powers with regard to municipal government as follows: "This separation of powers provided for in the city charter is designed to ensure an orderly process in the operations of the city government." *Plaisance v. Davis*, 868 So. 2d 711 (La.App. 1 Cir.2003), *writ denied*, 867 So.2d 699 (La. 2004). Separation of Powers prohibits the Council from investigations outside its sphere, i.e., adopting ordinances (1) creating public policy and (2) appropriating money. Likewise, Separation of Powers prohibits the Council from engaging in or interfering with the day to day operations of the executive branch.

This memorandum need not reach a conclusion as to the authority of the Council to itself engage in contract negotiations. Little doubt exists, however, that "[n]either the city council, nor its members, can mandate their participation in negotiations conducted by the mayor and employees under the mayor's supervision." Mississippi Attorney General Opinion 2012-00013, 2012 WL 679170, at *2 (Miss. A.G. Jan. 27, 2012). And while the Mayor may, or perhaps even should keep Council Members apprised of negotiations (being ever cognizant to avoid a violation of the Sunshine Law), "the mayor has the authority to recommend a contract for approval by the city council without interference, or input, from the city council." Mississippi Attorney General Opinion 2016-00078, 2016 WL 1566504, at *2 (Miss. A.G. Mar. 18, 2016). In other words, the Mayor has independent authority to negotiate or discuss any contract.

As the Committee proceeds, it should bear in mind these separation of powers issues.

V. Conclusion

The Charter and Ordinance Code allow the Council to investigate any matter over which it has legislative authority. In doing so, the Council may use both subpoenas and oaths. Please let me know if you have any other questions.

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