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VIA HAND-DELIVERY

City of Covington Board of Commissioners
ATTN. Joseph U. Meyer, Mayor (contact per Resolution)
City Hall
20 W. Pike Street
Covington, KY 41011

Re: City of Covington Investigation

Dear Mayor Meyer, Mayor Pro Tem Williams & Commissioners Huizenga, Wells and Downing:

I. Brief Introduction and Context of the Investigation

As noted in the first report submitted on October 18, 2017, the Board of Commissioners of the City of Covington resolved to initiate an investigation triggered by the resignation of three Code Enforcement Officers, including the Manager, on May 23, 2017. The October 18, 2017, Report dealt with the allegations relating to conduct in the Code Enforcement Department.

The other, related, area designated for investigation at the time of engagement concerned allegations that public resources had been used for a non-public purpose.

The initial allegations from the Code Enforcement Officers suggested favoritism and/or targeting of members of the public. Those charges were ultimately unable to be confirmed, but were equally unable to be disproven, for reasons outlined in the previous report. In the course of investigating those allegations, I sought to establish a context for the charges by looking at the broader culture of the City of Covington.

Upon questioning staff, members of the Board of Commissioners, and others about that culture, various allegations were brought to my attention – specifically, city employees had used public resources to support candidates in the contested 2016 election. This was reported to the Commission who then directed that I investigate those allegations. The Commission specifically seeks a determination of: whether this type of activity occurred, the scope of any improper activity, and the person(s) involved in such activity.

Given the complexity and occasionally tangential relationship to the original allegations, I opted to produce a second, supplemental report outlining the conclusions of this phase of the investigation.

I was informed that the Board decided to retain an outside lawyer with specific experience, and so it was requested that I submit relevant *bona fides*. Thus, a brief overview of my specific experience is useful. As a former Assistant Deputy Attorney General with thirty-one years of law practice, I have been involved in election-related “public corruption” cases, both federal and state prosecutions, and—numerous matters involving the analysis and application of Kentucky election and campaign finance law. Specific examples include: participation in the Governor Paul E. Patton campaign finance investigation and prosecution involving violations of campaign finance law; defense counsel in the largest federal RICO case tried in the Eastern District of Kentucky based on hundreds of alleged violations of Kentucky election and campaign finance laws (*The Clay County Eight* prosecution in 2010); counsel to several partisan and non-partisan campaigns in which campaign finance and general election law were dealt with on a regular basis; and, from 1999-2003, general counsel to the Kentucky State Board of Elections while also serving as the Assistant Deputy Attorney General. I have been a panelist, speaker and writer at five election law or campaign finance legal seminars (two in which the University of Kentucky College of Law was the event sponsor). And, I have appeared on panels relating to campaign finance and election related prosecutions on KET and MSNBC.

In addition, I determined that two matters relating to the application of the Kentucky Open Records Act were central to understanding relevant issues under investigation. During my eight year service at the Office of Attorney General, the Open Records and Meetings appeal process was in my portfolio. This means that I personally reviewed and approved every appellate decision of the Attorney General from 1996 through 2003.

Again, as noted in the First Report, the investigation began at the request of the Commission with an introductory meeting with Mayor Meyer on June 20, 2017, in Covington. The purpose was to obtain a clear understanding of the engagement, a general context, and identification of available resources and contact persons. Mayor Meyer stated that the Board of Commissioners, and he as Mayor, expected the investigation to be conducted free of any influence or direction, and that the investigation should follow the evidence where it led regardless of consequences to individuals or City government. Further, he emphasized that there were no predetermined assumptions, only allegations that needed to be investigated and answers determined. The entire Commission

reiterated these instructions prior to moving forward with this phase of the investigation.

The structure here will be slightly different from that used in the Code Enforcement Department Report. I will first present the conclusions reached as a result of the investigation. Next, I will set out a list of recommendations. And, then set out a narrative of the investigation.

It should be noted that under Section 22(C) of the City Personnel Policy, employees are “expected to fully cooperate with” work-related investigations. Even so, the City has no subpoena power or the ability to convene a grand jury to investigate. These are the typical tools used to investigate claims of public corruption. Indeed, Commonwealth’s Attorney Rob Sanders sought just such an investigation to only be rebuffed by Attorney General Andy Beshear and the General Counsel of the Registry of Election Finance.

This means that witnesses who are no longer employed by the City are not obliged to cooperate. Moreover, given the risk of criminal liability, those persons whose conduct is under review are unlikely to submit to an interview, and even to do so could create fatal due process issues if a prosecutor does choose to take action on this Report. Thus, I did not interview former City Manager Larry Klein or Mayor and Mayoral Candidate Sherry Carran.

II. Investigatory Conclusions

As a prefatory matter to provide the Board with context for its reading of this Report I am setting out the Conclusions reached by the investigation.

1. There is sufficient evidence to initiate and pursue an investigation into whether former City Manager Larry Klein and former Mayor Sherry Carran violated the Kentucky penal code in using resources belonging to the taxpayers of Covington to assist the Carran for Mayor Campaign by violating KRS 522.020 “Official Misconduct in the First Degree”¹ and KRS 522.030 “Official Misconduct

¹ KRS 522.020 provides,
(1) A public servant is guilty of official misconduct in the first degree when, with intent to obtain or confer a benefit or to injure another person or to deprive another person of a benefit, he knowingly:
(a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or
(b) Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
(c) Violates any statute or lawfully adopted rule or regulation relating to his office.
(2) Official misconduct in the first degree is a Class A misdemeanor.

in the Second Degree². As misdemeanors, these crimes are prosecuted by Kenton County Attorney Stacy Tapke. However, both are governed by the one-year limitation of actions contained in KRS 500.050(2). For this reason, any prosecution at this time is likely time-barred given the decision of the Attorney General to decline taking any action. See, *KRS 500.050(4), for situations in which the time period can be extended beyond one year (none seem to be present here)*.

2. There is significant evidence indicating that mayoral candidate Carran and City Manager Klein violated KRS 121.150(6) of the Kentucky campaign finance laws by contributing and accepting illegal in-kind contributions from City Manager Klein in excess of \$2,000 in value which were not reported to the Registry.³ A possible prosecution of Candidate Carran and City Manager Klein should have been competently investigated by the Registry of Election Finance and/or Attorney General Andy Beshear to determine if a prosecution should have been referred to the Commonwealth's Attorney for Kenton County or the Attorney General for a violation of KRS 121.150(6).⁴ Carran filed all the necessary reports with the Registry, and those are available for review at the website of the Registry. Since these in-kind contributions from City Manager Klein to Candidate Carran were not reported to the Registry as required, then violations of KRS

² KRS 522.030 provides,
(1) A public servant is guilty of official misconduct in the second degree when he knowingly:
(a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or
(b) Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
(c) Violates any statute or lawfully adopted rule or regulation relating to his office.
(2) Official misconduct in the second degree is a Class B misdemeanor.

³ KRS 121.015 defines "contribution" to a campaign in part as,
(c) Goods, advertising, or services with a value of more than one hundred dollars (\$100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services.

32 KAR 2:070 defines "in-kind contribution" as:
Section 1. Definition. (1) "In-kind contribution" means those contributions established in KRS 121.015(6)(b) and (c).
Section 2. (1) A candidate, slate of candidates, committee, or contributing organization shall not conspire with an individual or other entity to disguise an illegal contribution as an in-kind contribution.

⁴ KRS 121.150 restricts campaign contributions from individuals to:
(6) Except as provided in subsection (22) of this section, no candidate . . . shall accept a contribution of more than two thousand dollars (\$2,000) . . . from any person . . . in any one (1) election. No person . . . shall contribute more than two thousand dollars (\$2,000) . . . in any one (1) election.

121.180 (3) & (6), failure to report those contributions to the Registry, would also be possible violations of the campaign finance laws.

As will be discussed later, Sanders referral to the OAG and Registry was based on his concern that either Klein or Carran, or both, violated KRS 121.045, which prohibits any “[] person [from] contribut[ing], either directly or indirectly, any money, service, or other thing of value towards the nomination or election of any . . . city . . . officer who, in his official capacity, is required by law to perform any duties peculiar to the person not common to the general public, or to supervise, regulate, or control in any manner the affairs of the person” Here, Mayor Carran as a member of the Commission did supervise City Manager Klein, and in that role did perform duties peculiar to Klein. See, *KRS 83A.150(7)(a)*. If it is determined that an in-kind contribution was made by him to the Carran campaign, which in my opinion did occur, then it is also my view that this statute was also violated by Klein. It is a felony.

KRS 121.990(3) provides that each violation of these statutes is a Class D felony. There is no time limitation for the prosecution of felonies per KRS 500.050(1).

Even though both of these agencies declined in writing to pursue an enforcement action, this is not conclusive on Commonwealth’s Attorney Sanders. It is clear under *Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423 (1998)⁵, that Commonwealth’s Attorney Sanders has the authority and discretion to pick up this investigation, bring witnesses and evidence before a grand jury, and seek an indictment independent of the Registry of Election Finance and Office of Attorney General.

The legal principal of prosecutorial discretion is well-established in our jurisprudence. It is arguably *the* most important aspect of an elected prosecutor’s job. Thus, it is not the role of this investigation to encourage or discourage a prosecution – I was not elected by the voters and taxpayers of Kenton County to make those decisions. My role is to simply conduct an independent investigation, analyze those facts, apply the law, and then using my experience render a conclusion.

In my view, quality evidence exists for Commonwealth’s Attorney Sanders to initiate and pursue an investigation into whether mayoral candidate Carran and

⁵ As a senior member of the Attorney General’s senior staff, I was deeply involved in legal analysis of the issues resolved in this case, and participated in the Supreme Court briefing and oral argument.

City Manager Klein violated the campaign finance laws with the requisite intent to be found criminally liable.

3. Neither the Attorney General nor the Kentucky Registry of Election Finance engaged in a competent investigation of the allegations reported separately to each of them by Kenton County Commonwealth's Attorney Rob Sanders.

4. There is probable cause to believe that Mayor Carran and City Manager Klein violated §36.13 of the City of Covington Code of Ethics.⁶ These violations must be brought within one year. §36.48. Thus, it is too late for the Board of Ethics to adjudicate any complaint brought against Mayor Carran or City Manager Klein.

5. Several City of Covington public email accounts were reviewed in relation to this entire investigation. Specifically, for this Second Report I reviewed the accounts of Mayor Carran, City Manager Klein, City Solicitor Warnock, Fire Chief Dan Mathew, Acting Director Allison Hudson, and Assistant City Solicitor Cassandra Zoda. This required working with C-Forward, Inc., a Northern Kentucky information technologies company which provides a wide-range of services to both private and public sector clients. <http://cforward.com/> C-Forward manages and hosts the email and exchange servers for the City of Covington.

C-Forward provided outstanding assistance to this investigation on all fronts. Due to difficulties in locating historical and archived e-mail for the Carran, Klein and Warnock accounts, I requested C-Forward's assistance in either locating emails or determining if emails had been removed from the server.

The email account of Solicitor Warnock has a simple explanation: due to the extremely high volume that Warnock receives and is then required to process, the account was so voluminous that the scope of the date range had to be restricted to May 2016 through July 2017. Warnock retains all email received and sent.

However, strong evidence exists that the Klein and Carran accounts have had emails removed. In its attempts to locate missing emails, C-Forward determined that "based on what I am seeing, I believe that Klein and Carran

⁶ CCE §36.13 provides that,
No officer or employee of the city shall use or permit the use of any city time, funds, personnel, equipment, or other personal or real property for the private use of any person, unless:
(A) The use is specifically authorized by a stated city policy.
(B) The use is available to the general public, and then only to the extent and upon the terms that such use is available to the general public.

archived their emails from the missing time period and took them with them when they left. Both of them had archived emails at one time. I searched their files on the server and Carran's files from her PC, Klein's PC is off, and there are no archives present that contain the desired emails. However, there are temp files that point to a PST being created and removed from Carran's desktop on her last day with the City."

The seriousness of this is two-fold.

➤ First, and the most obvious, is that relevant emails are unavailable to be reviewed and analyzed in this investigation – or, for that matter, any investigation by any entity be it the City itself, a law enforcement agency, or prosecutor/grand jury.

➤ Second, and just as serious, any emails sent or received on these accounts are public records.⁷ KRS 519.060 (1) (b) provides that a person who "intentionally destroys, mutilates, conceals, *removes*, or otherwise impairs the availability of any public records" without the authority to do so is guilty of tampering with public records.

Thus, it is my opinion that some evidence exists that Klein or Carran violated KRS 519.060(1)(b), a felony.

Like the decision of whether to pursue an investigation of a possible violation of Kentucky's Campaign Finance laws, it is up to Commonwealth's Attorney Sanders to determine if this evidence warrants further investigation. However, in my opinion reasonable evidence exists on which an investigation could be initiated and pursued. It will then be up to Commonwealth's Attorney Sanders to determine if the weight and sufficiency of the evidence is such that a true bill from a grand jury is sought.⁸

⁷ KRS 61.870(3), defines "public record" as,

"Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. "Public record" shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded by state or local authority.

See also, KRS 171.410(1).

⁸ It should be kept in mind that email management has been an issue before for Covington. It is not C-Forward's role to set those policies, but only to operate the exchange server and archiving as directed by the Commission as a matter of policy. See 14-ORD-081, <https://ag.ky.gov/civil/civil-enviro/orom/2010/10ORD081.doc>

6. No *current* employee or officer employed by the City of Covington is culpable or otherwise acted inappropriately during the 2016 General Election.

Though these conclusions are based on a lengthy and thorough investigation, particular events were examined in close detail and will be discussed in this Report.

- The preparation of a memorandum for Candidate Carran to use at a campaign forum hosted by Covington Professional Firefighters Local-38 (“Local 38”) on September 8, 2016.
- The processing of a request by the Legal Department to inspect City records made under KRS 61.870 *et seq.* by Local 38.
- Specific incidents of electoral engagement by City Manager Klein in support of Candidate Carran.

There are other concerns which the investigation found and analyzed, but which do not necessitate discussion.⁹

In short, the evidence of the active engagement of City Manager Klein in the campaign of Candidate Carran is evident and pervasive. He certainly is entitled to the protections of the First Amendment to engage robustly in electoral politics. However, it is Public Employee 101 that electoral advocacy must be checked at the door of City Hall. The notion of *actually* using public resources to support a candidate, much less a candidate for a city office, is unethical and illegal.

III. Recommendations

Like in the Report on the Code Enforcement Investigation, it is worth recording that the City does have staffing issues and employees in “acting” positions. For example, a review of the email account of City Solicitor/Assistant City Manager Frank Warnock is telling – he routinely deals with nearly 70-100 emails a day on a variety of subject-matters from administering the City’s self-insured plan to time sensitive requests for information from Commissioners to

“City of Covington did not violate the Open Records Act to the extent that requested e-mails no longer existed; however, premature deletion of e-mails warranted referral to the Department for Libraries and Archives.” Thus, the Commission would do well to assess its retention policies, including costs, and determine if an adjustment needs to be made.

⁹ Two examples. The pay raise for City Manager Klein seemed to be his primary focus in December 2016 which sucked in numerous personnel and time resources from other projects and assignments, and then made demeaning comments to Warnock in response to the advice Warnock gave that the authority for the proposal though gray could be supported by legal analysis but that it was better to await the seating of the new Commission. This was not in my opinion actionable conduct, but only an example of misplaced priorities and an arguable lack of good judgment. Similarly, the claim made by City Manager Klein in an email to Warnock that Mayor-elect Meyer created a “hostile work environment” by requesting information during the transition and engaging on the details of the swearing-in ceremony was similarly absurd but nothing beyond unprofessional conduct.

reviewing work of other attorneys in the Solicitor's Office to assisting with legal advice to other senior employees. I found this typical. This "context" will need to be considered when implementing the recommendations which the Commission chooses to adopt.

1. The City should engage with the State Board of Elections and the Kentucky League of Cities to create a program to be used during every election cycle to make employees aware of what they can and cannot do with respect to engaging in campaign activities. This training will need to be sensitive to the First Amendment speech and association protections of employees. Particular attention must be given to dealing with incumbents who are also candidates as that can cause anxiety on the part of City employees to whom requests are made.

The recommendation is that this be given in mid-Spring in every year in which there are City or County offices on the ballot. The incumbent mayor and Commissioners should be encouraged to attend as well.

2. From my anecdotal review in looking at open records issues during the 2016 General Election, the system used by the City for responding to requests to inspect under the Kentucky Open Records & Meetings Act is solid: protections are in place to insure independence by not involving the City Solicitor substantively in the review unless a consult is needed on a difficult issue; the requests are logged and tickled, and, if applicable, any involved employee is provided a digital copy of what is released. That said, one area I recommend for further review is specific to my task: records requests made during an election season by candidates, campaigns and the press.¹⁰

The issue is not one of transparency, as there already is a City Policy on that topic.¹¹ The issue is a level playing field. A review of several email accounts indicated numerous requests for information from the Mayor and Commissioners, whether or not candidates, ordinary citizens and the press. However, the investigation turned up no requests invoking the Open Records Act from any of the incumbent Commissioners or Mayor – the requests were treated as simple requests for information though the topic was frequently an issue that was "in play" in the election. However, nearly all of the requests from candidates

¹⁰ There also seems to be some confusion or debate about whether email between private persons and City employees or City elected officials is a "public record". The answer is that any document sent to or sent from a public employee/official on an official email account is a "public record". Of course, that does not mean it must be provided to a requestor for inspection. The exemptions to inspection still apply. The scope of the Open Records Act and what constitutes a "public record" may be worthy of including in the City's written policy so there is no mistake by the public or the City.

¹¹ http://www.covingtonky.gov/Portals/covingtonky/Documents/legal_policy_transparency_2014.pdf

who were not incumbents were, as a general rule, made under the Open Records Act.

The best practice would require any person who has filed for an office, whether incumbent or not, to put in writing any request to inspect (or for information which can be treated as a request to inspect) and submit it directly to the designated custodian – here per the Open Record Policy, Solicitor Warnock. It can then be logged and processed as any other request. Of course, the City Manager¹² should exercise his judgement, with input from City Solicitor Warnock on whether particular requests require expediting or follow up with the requestor to ensure broad requests are tailored where necessary and time-sensitive information useful to the public debate in an election be given priority.

Thus, I recommend that the City engage an expert on open records or FOIA to review the Open Records policy of the City to make recommendations on this subject and any others which the Legal Department, City Manager and elected leadership think appropriate. The process should be independently assessed for any efficiencies and implementation of any “election season”-specific changes. In doing so, the City should consider adopting written policies governing requests and responses.¹³

3. The Commission should give serious consideration to adopting a new provision in the Ethics Code that addresses the issue of campaign activities. Efforts were made in 2008, 2010, and 2012. Solicitor Warnock prepared a draft ordinance in January 2008. The only significant substantive change to it that is being recommended is that it includes “Officers” (Commissioners, Mayor, and City Manager).

4. Though the City should formally provide copies of this Report to the two elected prosecutors for Kenton County, the City should neither file a complaint nor recommend that criminal prosecutions be initiated. These are

¹² City Manager Johnston is a member of the International City/County Management Association, the professional organization of city managers with a Kentucky chapter of which he also is member. This binds him to that Association’s ethics code which mandates non-involvement in city elections in addition to other excellent protections for the public, the City and himself. Notably, Mr. Klein was not a member though he continues to participate in a Northern Kentucky senior city official listserv. In future City Manager searches, it is recommended that membership in the ICCMA be a prerequisite for a City Manager applicant to be considered for employment.

¹³ § 30.08 of the Code of Ordinances sets out the policy and process for the public to request and review City records. There is no requirement that the request be in writing. This is an example of something that should be assessed. KRS 61.872(2), provides that the agency “may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency.” The requirement of a written request applicable to all requestors would be particularly useful during election cycles. Of course, requests for information from Commissioners and the Mayor are not requests to inspect under the Act, but rather fundamental to doing their job. The delineation, though, needs to be made during election cycles when those Officers are also candidates for re-election or election to a new office.

independent decisions for Kenton County Attorney Tapke and Commonwealth's Attorney Sanders to make as regards the alleged conduct that is within the scope of their offices.

5. As discussed in Note 9, Covington has already been referred to the Department of Libraries and Archives in 2014 for deficiencies in its record retention policies, the City should reassess those policies in light of this investigation. If the City is going to obtain outside advice on its Open Records Act policy, then it is likely that person would also have expertise in appropriate archiving, record retention, and record keeping. The City would also need to consult at least C-Forward to be informed of the cost of any changes to the policy on digital media (email) archiving.

In my judgment, but for the presence of a corrupt public official, the existence of sound policies, training and vigilance amongst City employees and Officers will avoid the serious issues found by this investigation. In many ways, City Manager Klein and Mayor Carran took advantage of vague policies. They also played on the appropriate desire of others to be responsive to the requests of then Mayor Carran and the four Commissioners. By implementing these recommendations, I believe that what occurred in the 2016 General Election is substantially less likely to occur in future election cycles.

IV. Conduct of the Investigation

This part of the investigation began in earnest following the submission of the First Report, though there were common witnesses and documents between the two so that a significant amount of the work had already been completed.

Witnesses Interviewed:

Joe Meyer, *Mayor*
Michelle Williams, *Mayor pro tem*
Bill Wells, *Commissioner*
Jordan Huizenga, *Commissioner*
Tim Downing, *Commissioner*
David Johnston, *City Manager*
Frank Warnock, *City Solicitor/Assistant City Manager*
Dan Mathew, *Fire Chief*
Allison Hudson, *Director (acting), Operations Department*
Michael Bartlett, *Senior Assistant City Solicitor*
Cassandra Zoda, *Assistant City Solicitor*
Loren Wolff, *City Manager (former acting)*
Buddy Wheatley, *Legal counsel to IAFF Local 38*
Rob Sanders, *Kenton County Commonwealth's Attorney*
Patrick Bitters, *Network Technician, C-Forward (which operates and administers the City's electronic email system and servers)*

Several of these witnesses were interviewed multiple times as the investigation proceeded, a few as many as four times. The Personnel Policies, Section 22(c), requires City employees to cooperate in any investigation.

I did not interview Carran, Klein, or Desmarais.

City Manager Klein resigned his employment per a Separation Agreement approved by the Commission on February 21, 2017; Director of Finance and Operations Lisa Desmarais resigned from employment on December 12, 2016, which became effective on December 31, 2016; and, Mayor Carran's term as Mayor ended December 31, 2016, and she has held no position with the City since.

The City has certain powers which can be delegated for the purpose of conducting an investigation. Subpoena power is not one of those, neither is the authority to act as a "badged" official like a police officer. Thus, the ability to compel persons to an interview is limited. Moreover, given the scope of the investigation, it was likely the investigation could encounter evidence of possible criminal conduct. Thus, the decision was made to not interview Carran, Klein or Desmarais.

In the event that any law enforcement agency or prosecutor decides to move forward with an investigation into the 2016 General Election, then Carran and Klein could be potential targets. Any interview would be circumscribed by constitutionally protected rights to counsel and against self-incrimination. Each would need to be Mirandized before being interviewed. As an agent of the City for purposes of this investigation, if interviews were conducted, then any subsequent investigation or prosecution could be fatally tainted. Inasmuch as Desmarais is no longer an employee, but likely does have relevant information, then she will need to be interviewed.

Documents Reviewed:

Sherry Carran, email account
Larry Klein, email account
Frank Warnock, email account
Lisa Desmarais, email account
Dan Mathew, email account
Allison Hudson, email account
Cassandra Zoda, email account
Complete Local 38 Open Records file on Local 38 request to inspect
Numerous Commission meeting minutes, agendas and video tapes
Correspondence of Kentucky Registry of Election Finance

Correspondence of Office of the Attorney General
Covington Code of Ordinances
Covington Personnel Policies
Covington Code of Ethics
Archival research in *The River City News*
Archival research in *The Cincinnati Enquirer*
Archival research in *The Courier Journal* (Louisville)
Archival research in *WKRC*
Legal Research in areas of Kentucky campaign finance and municipal ethics codes

Election Dates:

May 17, 2016, Primary Election. Top two finishers in Mayor Race and top eight finishers in the Commissioner race proceed to the General Election. Names in order of finish (“*” designates incumbent).

- Mayor Candidates were: Joe Meyer, Sherry Carran*, Mathew Winkler, Alfonse Mele.
- Commissioner candidates were: Jordan Huizenga*, Bill Wells*, Michelle Williams, Tim Downing, Christie Blair, John Flesch, Robert Horine, Stuart Warren, Brandon Mims, and Clayton Shull.

November 8, 2017, General Election. Top four finishers elected Commissioner. Top vote getter elected Mayor *Pro Tempore*. Names in order of finish.

- Mayor: Meyer
- Commissioner: Williams (MPT), Wells, Huizenga, and Downing.

Notable Endorsements in Mayor Race:

- Meyer: Commissioner Steve Frank; Covington FOP, and IAFF Local 38.
- Carran: Commissioners Chuck Eilerman and Bill Wells.¹⁴

Endorsements by Local 38 in Commissioners Race: Blair, Downing, and Williams.

¹⁴ Councilman Huizenga remained neutral. In an email dated November 4, four days before the election, sent to Huizenga, Marilyn Baker, owner of Yankee Doodle Deli, criticized Huizenga for not endorsing Carran along with praising the then current Commission and Klein. Somehow Klein obtained this email (likely via a “bcc” or a forward), and forwarded it onto Carran.

Endorsements by Covington FOP in Commissioners Race: Downing, Wells, and Williams.

V. Specific Issues/Topics

There are two discrete pieces involving IAFF Local 38 ("Local 38"): the processing by the City of its request under the Kentucky Open Records Act for city records made during the General Election; and, secondly, the Candidate Forum that Local 38 held on September 8, 2016 which also encompasses a Press Release issued by Local 38 on November 2 & 3, 2016. A discussion of the Candidate Forum will provide context for the discussion of the request to inspect records, and so that will be discussed first.

The Report will begin referring to persons by their last name only for efficiency's sake. Reference can be made to the list of witnesses interviewed for full name and title, or in the case of non-City employees, their connection to the investigation. One other "reader note", during the relevant time period under investigation Sherry Carran, Bill Wells, and Jordan Huizenga held two roles: City Officer and candidate.

One final reader note: all dates took place in 2016 unless otherwise specifically noted.

IAFF Local 38 – The Candidate Forum

The constellation of issues around the Fire Department and fire protection, generally as a component of public safety, emerged as issues in this election cycle.¹⁵ These issues were not limited to the Fire Department rank and file unionized employees, but were also of interest and concern to the general public. Issues included the administration of a SAFER Grant¹⁶, fire and ambulance response times from the five fire stations (at which ALS ambulances are strategically located), the need for newer or different equipment, the adequacy of the existing number of firepersons and ambulance personnel, mutual aid

¹⁵ The emergence of "fire department" related matters as campaign issues was determined by reviewing a number of articles in the local press from April – November, 2016; emails from neighborhood associations; internal emails between City employees; the application, award and implementation of the SAFER grant; Commission meetings minutes and videos; and, witness interviews.

¹⁶ SAFER stands for "Staffing for Adequate Fire and Emergency Response". It is a grant administered by the Federal Emergency Management Agency to help fire departments "increase or maintain the number of trained, 'front line' firefighters available in their communities." <http://www.fema.gov/staffing-adequate-fire-emergency-response-grants>]

between the Fire Departments of Covington and Newport, and the negotiation of a new contract with Local 38.

It is not an overstatement to say that fire and public safety were major issues in the 2016 General Election. For this reason, these were issues that any candidate would not only need to be well versed on but have some depth of knowledge to even be able to engage on those issues.

This was not lost on first-time Commission candidate Tim Downing. On two separate occasions before the May Primary, Downing requested information, specifically the need for an additional ambulance, from Klein about the South Covington firehouse, Company 5. The same information was requested from Klein by Downing during the General Election. Klein did not provide the requested information to Downing. Neither did Klein refer Downing to some other City employee to obtain the information, nor did Klein suggest that Downing file a request for the information under the Open Records Act.

Klein did provide the requested information to Downing a few days after the General Election in which Downing had won.

Nevertheless, on September 6 and 7, Klein did provide the same information requested by Downing¹⁷, as well as other “fire department” related information, to Carran, Wells and Huizenga in a document titled “Update On Local 38 Topics”, saved by him under the title “Local 38 Questions 2016.docx”. The history of how Klein came to prepare this document follows. There is no doubt that it was intended by him to assist Carran, Wells, and Huizenga in their contested campaigns.

At 1:11 p.m. on August 30, Tyler Cherry of Local 38 emailed all of the candidates for Commissioner and Mayor an invitation to attend a candidate forum to be held on September 8, for Local 38 members. Endorsements by Local 38 would be voted on based on the presentations of the candidates at the Forum. Each candidate was given a scheduled fifteen minute slot during which the candidate would speak for five minutes and take questions for ten minutes. Mr. Cherry also provided a punch-list of thirteen issues “important to the [Local 38] membership.” Thus, in order to help the candidates focus on key issues and avoid becoming mired in lower priorities, Local 38 essentially set out the parameters for the interviews.

Two of the incumbent candidates forwarded the Local 38 packet to Klein on the same day it was sent: Carran at 2:32 p.m. and Wells at 8:22 p.m. Huizenga did not send anything to Klein. In his interview, Wells states that he did not

¹⁷ See, responses to Local 38 List of 13 “Important Issues” Memorandum dated September 7, 2016, specifically topics 2 “Fire Department Staffing”, 3 “Fire Apparatus Condition & Replacement”, and 11 “Increasing Paramedic Staffing”.

specifically recall sending the Local 38 packet to Klein. He viewed the topics as informational. Wells stated that he frequently requested information from Klein, and viewed that under the City Manager form of local government that this was the appropriate avenue to obtain information related to City operations.

Two days later on September 1, Klein sent an email to Mathew, Warnock and Desmarais. The purpose of the email was for them, “to help develop a quick briefing on the subject areas below for Mayor and Commission and any candidate for office who asks, so each are as well informed as they want to be for the Local 38 candidate forum on September 8th, next Thursday. Are you all available to meet on Tuesday at 3?”

On September 4, two days before the scheduled meeting, Klein emailed Desmarais, with copy to Carran concerning another piece of Fire Department information not specifically listed by Local 38. Klein sought an update on the status of obtaining information on “response times” of ambulances and first responders (arrival on scene from time of call-in). This data had been previously requested by Carran. On September 6, at 9:37 am, Desmarais responded by email to Klein, with copy to Carran, stating that Todd Sink¹⁸ was “working with the data and verifying it with Dan [Mathew] for clarity and accuracy. We should have this information by Friday of this week [September 9, after the Forum]. Does that work?”¹⁹

There is no record that Klein responded to Desmarais’ question. However, Carran replied, copying Klein, on September 6 at 9:41 am, via email stating, “Friday works as far as getting the information to the voters when we go door-to-door. We have our candidate forum with Local 38 on Thursday [September 8] but they’re not going to be happy with the answers we give them. Sherry”.

It is patently obvious that Carran was requesting information to be used in her campaign – not just for the Forum but for canvassing voters. It is equally obvious that both Klein and Desmarais were aware of the reason the “response time” information was being requested before the information was provided. Based on the relevant emails between Sink and Mathew, Sink and Desmarais, and Mathew and Klein, the reason for generating this data was not revealed to Sink or Mathew. Yet, Klein and Desmarais directed Sink and Mathew to, essentially, work on the Carran campaign . . . without their knowledge.

¹⁸ Sink was (and is) the Manager of Analytics and Intelligence for the City which is within the Department of Operations. Thus, he reported to Desmarais. He was tasked with answering this information request. There is nothing to suggest he was aware of the identity of the actual requestor (Carran) – indeed, the email reviewed indicates it was needed by Desmarais.

¹⁹ Email regarding the issue of “EMS response time” continued throughout this period. The data was finalized and placed on Covington’s OpenGov site.

On September 6 at 3:00 pm, Klein convened the meeting with Desmarais, Mathew and Warnock for the purpose of preparing a briefing document for the Local 38 Forum issues (this will be referred to as the "Local 38 Topic List"). Again, there can be no doubt but that the Forum was a campaign event. Warnock viewed this as just more work to do on an over-loaded plate. He was also concerned that the political process was intruding into the work of City employees. Though both he and Mathew had concerns about this, and expressed them, Klein allayed them by stating the information was just being gathered so that it could be provided to any candidate who requested the information.

Following the meeting, at 5:11 pm, Klein emailed Desmarais, Mathew and Warnock the Local 38 Topic List highlighting each of their assignments. The document had already begun to be completed with information Klein already possessed or obtained from some other source - the emails that still remained in Klein's account do not make this clear. Desmarais was given three items, Warnock one (the status of the Local 38 negotiations), and the balance to Mathew or handled by Klein himself.

Over the course of that evening and the next day, September 7, Klein engaged in numerous emails with Mathew, to whom the bulk of the topics had been assigned given that nearly all related directly to the Fire Department. Desmarais was included on some of these emails, and received some emails just to her.

Klein did receive some information from Mathew later that evening, September 6. Klein added this information to the Local 38 Topic List he was preparing. He then sent the partially completed Local 38 Topic List by email to Carran, Wells, and Huizenga at 10:12 pm on September 6. In this email, he indicated he was still awaiting information from "[Desmarais] and [Mathew] but thought this would give you a start."

Significantly in this email, Klein states that he was sending this document as "background information for the candidate night questions you asked me for Local 38's event this Thursday." The "you" is not delineated. The investigation leads me to conclude that Huizenga was not included in the "you". I can only infer that he was added to the addressee line since he was also an incumbent candidate, and Klein was already responding to the emails sent from the only other incumbents to him on August 30, Carran and Wells.

In an interview, Wells did not recall requesting that Klein provide him with any information on the Local 38 topics list. He said that frequently he requested information or data from Klein to do his job, that he often forwarded constituent requests directly to Klein for response, and that per the City Manager form of government he believed any such requests should go to Klein as opposed to individual City employees. Wells also indicated that he did not believe Klein was

doing anything to help Carran. In his view, the list of topics was well known in the community and as a former volunteer fireman and Commissioner doing his job that he was already sensitive and knowledgeable about those issues.

In an interview, Huizenga stated he did not send the list of Local 38 topics to Klein *and* did not request Klein to do anything in regards to the Local 38 Forum. He does not specifically recall receiving any email from Klein that attached the Local 38 Topic List document – and had he received it, then it would likely not have made an impression as out of the ordinary as he frequently received informational materials by email from Klein throughout his service as a Commissioner. In my review of the email accounts, though Huizenga emails were reviewed, I found none from Huizenga regarding the Forum or fire issues. Indeed, the only emails relating to this issue were this one and the final one sent on September 7. Thus, I conclude that Huizenga was not involved in any way in this matter beyond Klein choosing to add him as a recipient.

The only response to this September 6 email to the three incumbents was from Carran who said in an email at 7:23 am on September 7, “Thank you Larry for pulling this information together. It is a big help. Sherry”. Carran did not copy either Huizenga or Wells on this. Klein replied at 7:27 am on his iPhone, with a copy to Huizenga and Wells, saying “More to come today”. One can infer from this that Klein was determined to keep Huizenga and Wells on any written communication he had with Carran on the Local 38 Topic List document, and this was intended to provide cover for the work he was engaged in on behalf of the Carran campaign. But, that is an inference that is better developed in a formal criminal investigation.

Wells did respond to the 7:27 am Klein email without a copy to Huizenga or Carran. At 7:42 am, Wells wrote that he could not locate his list of Northern Kentucky cities “Fire Ratings” and asked Klein if he had the list. Klein responded he would check with Mathew. Two hours later, Klein forwarded this request to Mathew, with a copy to Wells, requesting “ISO fire ratings.” This led to yet another series of emails between Klein and Mathew in which Mathew sought to run the information down. ISO Mitigation is a private company which collects data for insurance companies underwriting purposes. ISO evaluates municipal fire-protection efforts in communities throughout the United States to analyse fire risk, and rates a municipality’s fire protection (suppression) from 1 (superior) to 10 (does not meet minimum criteria). Ultimately, Mathew was unable to provide the information since ISO Mitigation does not release that data.

At 2:25 pm on September 7, Klein emailed Desmarais, Mathew, and Warnock that all of Mathew’s information had been received, attached the current status of the Local 38 List document and requested a final item from Desmarais and the Local 38 contract status from Warnock. This email triggered the next significant event in this narrative.

At 2:29 pm on September 7, Warnock emailed Klein, that "I [Warnock] was wanting to talk to you [Klein] about this. I have some concerns." Klein immediately replied at 2:31 pm. "Here I come". Klein's office was on the second floor of City Hall while Warnock was then on the first floor – my timing puts it, at best, at a two minute walk. This discussion between Warnock and Klein lasted only a few minutes, no one else was present.

Warnock was aware of the email sent to the three incumbents the night before since it was included in the 2:25 pm email from Klein. Warnock stated that Klein and Desmarais should not be involved in preparing and disseminating to incumbent candidates information to be used in a campaign event. Klein responded that he appreciated Warnock's concerns, and, as he stated at the meeting on September 6, the information requested was all public, that the Mayor and Commission members were their boss, and that the Local 38 Topic List document would be made available to all candidates. Though Warnock advised that he still believed it to be poor judgment, that since all the candidates – incumbent or not – would be provided a copy then the "picking of sides" had been mooted.

With this assurance, Warnock forwarded an email to Klein from the City negotiator on the status of the Local 38 negotiations. This email dated July 11 had already been provided to Klein and others in City government.

At 5:05 pm on September 7, Klein sent the final Local 38 Topic List document to Carran, Wells and Huizenga, with copies to Mathew, Warnock and Desmarais. The email states,

Sherry, Bill and Jordan,

Attached is the final draft of the background/update information you asked me for about potential Local 38 topics you will be discussing.

Let me know if there is anything else you need at this time or if you want further clarification, information or a sit down meeting.

Please feel free to share this information with any candidate who may also want to review it.

There is nothing confidential in this.

I want to thank Dan, Frank and Lisa for their quick and complete response in helping to provide this information to you all.

Thanks!

The only person who shared the document with any other candidate was Wells. He provided a copy to Commission candidate Flesch.

It is plain that Klein deceived Warnock by stating he would provide a copy of the Local 38 Topic List document to all of the candidates. Klein did not provide the document to any other candidate. And, in this email, he expressly stated that the document could be shared by any of the three – Carran, Wells and Huizenga – with any of the other candidates. There is no evidence to suggest that, beyond Flesch, any other candidate received the document. Candidates Downing and Williams in their interviews expressly state that it was never given to them.

Though Warnock acknowledges that he saw this 5:05 pm email at some point that evening or soon thereafter, he did not believe there was anything further he could do since the document had been sent. Similarly, Mathew acknowledges receiving it, and also believed nothing more could be done.

It is possible to criticize Warnock and Mathew for not taking some immediate action like providing the other candidates with a copy of the document; or, going to the media; or, reporting it to some other agency. But, that, in my judgment, does not appreciate the situation existing at that time, nor does it reflect the actions Warnock and Mathew did take later.

As to Mathew, as will be seen in the next section, he informed the leadership of Local 38 within a week or two of the Forum that a request should be made under the Open Records Act to the City for specific emails that would demonstrate the involvement of Klein in the election. In his interview, Mathew stated that following the transmittal email of Klein, he knew that he had been “used” by Klein.

As to Warnock, he too was manipulated by Klein into providing the information on the Local 38 negotiations. He appropriately raised the issue with Klein at both the initial September 6 meeting and at the September 7 meeting just before the final document was sent. The responses to Warnock’s concerns made by Klein were either deceitful at best or a lie at worst.

If Warnock or Mathew took any further action at that time, then they would interject themselves into the electoral process. And, at that time, since Klein had controlled the project and did not always copy Warnock or Mathew on emails, then neither had all of the relevant information nor could even rule out that there were mitigating facts. This meant that Warnock would himself have needed to engage in an investigation without tipping off Klein, Carran or possibly others who were involved. Given that Klein was their supervisor, given that the Mayor was involved, given that two of the four Commission members were recipients, and that the other two had endorsed competing mayoral candidates, it is hardly clear to whom Warnock or Mathew could even report the conduct.

Given the circumstances as they existed at that time, it is my opinion that any further action then by Warnock or Mathew would have been improvident. Frankly, under the circumstances, the two had already done what was

appropriate by expressing their concerns only to be betrayed by Klein and sucked unwittingly into his scheme.²⁰

Despite Wells' having provided a copy to Candidate Flesch, it was absurd for Klein to have reasonably believed that candidates in an election would share preparation materials for a Candidate Forum with an opponent. It is even more ridiculous to rely upon that statement to absolve himself of his own conduct in using employees and resources of the City to assist candidates for City office regardless of their incumbency.

The seriousness of this conduct is heightened in my opinion by the fact that the City Solicitor, Warnock, on two occasions advised against this activity, and Klein responded to that counsel with deception intended to allay those concerns and counsel.

There is additional proof that Klein had no intention of sharing any of the information contained in the Local 38 Topic List document or the document itself with anyone besides Carran or the two incumbent Commissioners. As noted earlier, then candidate Downing requested information on the need for South Covington, Company 5, to have an ambulance. This information was never provided, despite relevant information on this request being included in the Local 38 Topic List.

The deceitful nature of this conduct is seen also in how Klein orchestrated the press response of the City to accusations by Local 38 that City resources and personnel had been used to improperly assist incumbent candidates in the Local 38 Candidates Forum.

On November 2, Local 38 issued a Press Release, amended on November 3, disclosing that in response to its request to inspect under the Open Records Act, the City had produced four "troubling emails" indicating that "[t]he emails concern preparation materials the city manager prepared, or had other Covington public officials prepare, for Mayor Carran, and current city commissioners Jordan Huizenga and Bill Wells for the September 8, 2016 candidates' night organized by

²⁰ The frustration that Warnock felt towards Klein is corroborated by Michael Bartlett, the First Assistant Solicitor, and Buddy Wheatley, the attorney for Local 38. Both confirm that Warnock expressed his frustration that Klein had been engaged in inappropriate conduct regarding the Local 38 Forum. Bartlett also stated that Warnock expressed concerns not just with the Local 38 Forum, but about Klein's efforts to secure a raise post-election and by attempting to delay or frustrate then candidate Meyer's open records request in late October for financial data on the payroll tax. Though this Report will not delve into the details of the Meyer Request, it is clear that Klein sought to obstruct this request by misstating the City policy that requests had to be in writing (Meyer's was in writing) or for information as opposed to specific documents (which is inconsistent with how he claims the Local 38 Forum requests was treated). In both instances, Warnock refused to accommodate Klein's position – even leading Klein to complain as to the raise that he was being "singled out". And, had it not been for Warnock, then the Meyer request would have been dealt with much differently to the detriment of Meyer.

Local 38.” The Press Release also stated that the emails had been turned over to the Commonwealth’s Attorney.

The General Election was six days away on November 8.

Beginning on November 2 and continuing until November 4, Klein spoke with or emailed five reporters. He sent numerous emails – well over twenty – crafting a response. He involved a staff attorney in reviewing the email produced. He sent several emails defending his conduct to non-media persons.

Finally, at 10:22 pm on November 4, he sent an email to all members of the Commission, *except Commissioner Steve Frank who had endorsed Meyer*, which copied all of the Department Directors and members of the Legal Department. The email stated:

Fyi the attached Local 38’s most recent press release, and an attached email we also provided them in same batch, wherein I let you all know the info I gave you was available to all political candidates.

Their press release did not reference this other email of course.

Please feel free to share this with the world if you like.

I work for you all.

When you ask me for info I give it to you.

If I don’t have it, I go get it.

I think you all know that.

Please let me know if you have any questions.

Thanks!

Larry

This, of course, is not accurate. Candidate Downing had asked Klein for this information on three separate occasions and it had not been provided. Klein represented to Warnock on September 7 and to Warnock and Mathew on September 1 that the Local 38 Topic List document would be provided to all of the candidates. It was not.

It is my opinion based on the facts of the investigation and the reasonable inferences that can be drawn from them, that the manner in which Klein chose to deal with the crisis of a bad story on the eve of the election was no more than an attempt to continue covering up his improper conduct. Klein had clearly injected himself into the campaign on the side of Carran, and was at the point of the Local 38 Press Release placed into a position of having to maintain the subterfuge he created.

The Open Record Request to Inspect/Produce by IAFF Local 38

On September 16, 2016, Local 38 sent a written request to inspect or receive copies of seven classes of emails amongst various City employees, Commissioners and the Mayor. Notably, all of the requests specifically requested that Commissioner Frank not have been a recipient in six of the seven classes. The exactness chosen by Local 38 for the various classes of emails was due to the information provided to it by Chief Mathew (referenced earlier). Mathew had felt that Klein “used” him to create a document to support Klein’s chosen candidate, Carran. This was Mathew’s method for getting this out into the public eye. To achieve the transparency that the City touted on its website.

The request was logged in by the Legal Department, the three-day response deadline was calendared, and the request was assigned to Assistant City Solicitor Cassandra Zoda.

Zoda responded by email, and sought to work with Local 38 in narrowing the scope of Request 7. Ultimately, on September 23, Local 38 withdrew that Request and reiterated its need for a response to the other six Requests.

On October 6, Zoda formally responded to the other Requests. In that response, Zoda asserted various exemptions and, using the formula prescribed by the Office of Attorney General in a prior appellate opinion, estimated that the response would be on or around February 10, 2017. This led to another series of emails between Zoda and Wheatley. On October 10, Local 38 sent an Amended Request in an effort to narrow the scope. Zoda responded that the Amended Request was more expansive than the original, and that the time to produce would be December 30. On October 11, Local 38 again amended its Request to a “rolling” production: respond to Request 1 first, then Request 2, and so on.

On October 17, the City produced the first batch of responsive documents to Local 38 in CD-R format. The next batch was produced on CD-R on October 27. The next batch was produced in PDF format by email dated October 31. With the consent of Local 38, following the Requests 1 and 2 production, on November 3, the City formally responded and set out the number of documents it was not producing based on exemptions under the Act, the particular exemptions relied upon, and produced a list of all the “re lines” of the withheld emails for identification in case of appeal to the Attorney General under the Act.

During this rolling production, Local 38 appealed to the Attorney General as prescribed by the Act that the time taken by the City to respond to the September 16 Request, as amended on October 10 and 11, was unreasonable and thus in violation of the Act. The City responded to the appeal on November 3.

On January 13, the Attorney General in 17-ORD-004, denied the appeal, and held that the City had not violated the Act in its response to Local 38.

During this process, Local 38 issued a Press Release on October 25, announcing its appeal and claimed that the City was delaying its obligation to turn over the requested documents. The Release said that the “excuses [for not producing the documents] are pitiful and barely pass the smell test. This is simply a delay tactic by the City and it raises the obvious question: what is the City hiding?”

In response to this Press Release, Klein requested Warnock and Zoda to begin preparing a Press Release detailing the efforts of the Legal Department to comply. It was also expected that a representative of Local 38 would attend and speak on the issue during the public comment portion of the Commission meeting scheduled on October 25.

It is understandable and appropriate that the City would choose to respond to the Press Release. This is particularly true because the Release did not set forth the actions of the City to respond to the Request. The document ultimately prepared by Warnock and Zoda does accurately set out the actions undertaken in response to the Local 38 Request, and does so straightforwardly without any spin.

There is one item worth noting given that the Local 38 Request would require the production of the emails relating to the preparation of the Local 38 Topic List document, including the document itself. Within thirty minutes of receiving the Press Release from a reporter for comment, Klein forwarded the reporter’s email and Local 38 Press Release to Desmarais stating that “I have Frank and Cassandra working on a press release about this.” It is not forwarded to Mathew or anyone else. The task of responding to the Local 38 Request had never involved the Department of Operations. Thus, the question does arise as to why Klein provided this information to Desmarais.

In summary, it is my opinion that the Legal Department, and specifically Zoda and Warnock, acted appropriately in both responding to the Request from Local 38 and in taking the lead in preparing a factual narrative of that effort for the use of the City in responding to the October 25 Press Release of Local 38.

Investigation by Registry of Election Finance and Attorney General

On October 25, Commonwealth’s Attorney Rob Sanders was provided copies of the emails received by Local 38 pursuant to its request under the Open Records Act. Local 38 expressed concern that possible illegal conduct had occurred in the production of the Local 38 Topic List document by Klein and other City employees.

Sanders concluded that since the election had not yet taken place and that he had made public statements in support of Meyer that he was in a conflict of interest. On November 4, Sanders referred the matter to both the Kentucky

Registry of Election Finance (“Registry”) and the Office of the Kentucky Attorney General (“OAG”).

On November 28, the Registry wrote Sanders stating that “[u]pon careful review of your letter and the documentation enclosed therewith, please be advised that no violation of KRS 121.045 appears to have occurred.”

On December 29, the OAG wrote Sanders stating that “[separate from the KRS Chapter 121 issue [Campaign Finance statutes], was the question of whether local city employees were used to conduct illegal campaign activities. You believed that asking city employees to prepare documents for a candidates’ forum was improper. Again, our Department of Criminal Investigations concluded that as the request was written there was no criminal activity. Of significance in reaching this finding is an email from Covington City Manager Larry Klein, in which he informs several employees that they are free to share the information gathered for the forum with “any candidate who may also want to review it”. (emphasis added) (email of Wednesday, September 7, 2016, provided with your original complaint.)”

Both the Attorney General and Registry have co-equal power to investigate violations of KRS Chapter 121. It appears from the OAG letter that at Sanders request it forwarded the materials it received to the Registry to be included in its consideration of the complaint. Based on its letter, the OAG did not conduct its own investigation nor make a separate determination of whether the conduct presented to it violated the Campaign Finance laws.

Typically, when the OAG, or the Registry determines to not move forward from an investigation to a prosecution there is little reason to doubt or second-guess the decision. However, that is not the case here. In my judgment, sufficient evidence does exist to believe that there may have been violations of both KRS Chapter 121.045 and KRS 522.020 and 522.030, official misconduct. Moreover, it is my judgment that the OAG essentially undertook no investigation of the allegations, but simply took the Klein email of September 7 at face value.

The Klein email of September 7 makes no sense and does not exonerate Klein from possible criminal jeopardy. As analyzed already, that email was addressed to Carran, Huizenga and Wells. There is nothing to suggest that the copied City employees were “free to share the information . . . with any candidate.” In other words, a campaign document was prepared by City employees for incumbent officials that were candidates for City office to be used expressly for a campaign event. The document was provided at the end of the business on the day before the campaign event for which it was prepared. Yet, Klein rather than personally providing the document to the other candidates relied upon the three incumbent candidates to share the document if asked.

This is absurd on its face, and even more ridiculous for the OAG, the Chief Law Enforcement Officer of the Commonwealth, to use this to exonerate a City Manager that had clearly injected himself into the election in favor of the incumbent candidates.

This appears to be the extent of the investigation conducted by the OAG. On October 24, 2017, I wrote the OAG requesting a copy of its entire investigation file as well as copies of correspondence between it and the Registry, it and employees of the City, and OAG internal meeting notes in which this was discussed. The purpose was to understand what it had done investigation-wise that would support its decision. On October 31, 2017, the OAG wrote back stating that under the Open Records Act it was not going to permit access. Two follow up calls were made by me to attempt to obtain the requested materials. A single voicemail was left which I returned, but have not received a call back. Thus, beyond the letter to Sanders on December 31, 2016, I have not been able to review what further actions the OAG took in investigating this matter.

Despite this, I have been able to determine the following:

- The OAG did not interview any of the witnesses who I interviewed – every person who had any involvement in the Local 38 Forum;
- The OAG did not interview any of the other candidates to determine if the document was shared or if similar information had been requested from the City;
- The OAG did not review any of the email accounts with potentially relevant information on Local 38 and other relevant evidence (i.e. the “door to door” canvassing email of Carran referencing the Fire response times): Carran, Desmarais, Klein, Warnock, or Mathew;
- The OAG did not review any of the internal documents of the City that related to the Local 38 matter; and,
- Based on emails reviewed in the pertinent accounts, the OAG did not interview Klein, Carran or Desmarais.

There can really be no debate that what the OAG says is an “investigation” by its Department of Criminal Investigations was no investigation at all. The OAG simply read the emails provided to it by Sanders, then thought about those emails, and then decided the law had not been violated. In doing so, the OAG sent a clear message that activity of the type found here – the clear use of public resources to support a candidate for city office – will be tolerated.

Given the history of public corruption in Kentucky, the number of prosecutions for similar activity undertaken by the United States and prior Attorneys General, and Covington’s own recent history of corruption with the conviction of a prior Finance Director, Bob Due, such a cavalier and shallow approach to what took place in City Hall during the 2016 General Election borders on irresponsibility and dereliction.

My confidence in this view of the OAG investigation and conclusion is bolstered further by other examples of Klein's engagement found in e-mail accounts. It is evident that the Local 38 matter was not a "one off". These will be delineated in the next section. However, had the OAG reviewed these same email accounts, then it certainly would have seen these other examples. And, like in any public corruption investigation, the quality of a conclusion is enhanced by other examples of similar conduct.

For this reason, it is my opinion that the conclusions of the OAG and the Registry (which also undertook no independent investigation despite its statutory powers to do so) are of no value and cannot be relied upon.

Other Evidence of the Involvement of Klein in the Election

The review of all of the email accounts led to the discovery of additional evidence of the involvement of Klein in the Carran campaign, as well evidence of motive for him to engage in the campaign. It needs to be pointed out that the emails reviewed were only partial since it was determined that the Klein and Carran accounts had been tampered with or otherwise scrubbed. These will be detailed serially by date.

1. On May 8, Klein emailed Desmarais advising that Carran wanted to be briefed on Hebron's debt service payments and the City's Comprehensive Annual Financial Report from 2010. The purpose of the briefing was that Carran believed "this question will come up tomorrow night at Madison Christian church forum." The forum referenced was a campaign event that was reported on by the media. ("Four candidates duke it out in Covington mayoral debate", WKRC Cincinnati, May 9, 2016). The briefing occurred at City Hall the next day, May 9, 2016. This is a clear example of using public resources, time and employees to provide direct aid to a candidate.

2. On August 31, Klein emailed himself with this statement, "Archives section of Louisville Courier Journal. February 6, 1993. Follow up story on February 25, 1993.". A review of those archives at newspapers.com shows that both articles related to a DWI charge Meyer received in Fayette County in February, 1993. This is a clear example of "opposition research" on a candidate using public computers perhaps on public time.

3. On September 6, Klein emails Desmarais to obtain her views on a "data driven roadshow over next couple of months?". He referenced neighborhood associations and civic organizations at which presentations could be made showing data application to budget. Though this may well not be related to a campaign, the investigation disclosed at least one similar project used by prior Finance Director Bob Due in which Klein assisted that long time City Hall employees thought was done to help incumbent members during an election.

4. On September 9, in an email exchange with Roger Auge II, Klein responded to Auge's inquiry about whether Klein intended to retire post-election regardless of the outcome. Klein advised that he had no retirement plans. He went on to say, "Joe wants to fire me, and has made that clear to everyone, so the election is something of an [sic] referendum on me too, I suppose." This is a remarkable statement for a City Manager to make. Under the city manager form of government the statutes envision a professionalized local government administration which tends to the everyday business of the municipality without being subjected to political pressures or becoming engaged in electoral politics. See, *KRS 83A.150*.

5. On September 10, Klein emailed Carran suggesting she "make it to Monte Casino this weekend", a neighborhood in Covington. While no specific event is referenced, the tone of the email indicates it is election related given the statement "[h]earing some positive feedback might be good right now to let you know that a lot of people see the good that is happening and the great job you are doing."

6. On October 22, Carran emailed Klein to his City email account a YouTube clip titled "Re-Elect Sherry Carran Mayor Covington". Klein then forwarded the email from his Covington account to Bill Goetz and Gene Weaver requesting assistance in opening and playing the clip. There are numerous other emails between Klein and Goetz. Goetz is a former mayor and city manager of Ft. Mitchell. This is, at a minimum, an example of using city resources in a political campaign. An inference can be made, which would need to be examined further in a criminal investigation, or grand jury proceeding, that Klein was providing advice on the video messaging of the Carran campaign.

7. On October 25, Carran emailed Klein on his Covington account reporting that her interview on Channel 19 went well. She thanked "you all" for their help. Klein responded by saying "You bet!" with copies to Desmarais and Mathew. This is the only reference to this campaign event found in the email accounts, so it is unclear the nature of the help, if it was campaign related, and whether Desmarais or Mathew were involved. An inference can be drawn that Klein at least provided substantive assistance and acknowledged the thank-you. This is an example of a matter for further follow up had the OAG investigated the claims submitted to it by Sanders.

8. On October 26-27, Klein engaged in an email exchange on his official Covington account with Scott Wartman, a reporter for the Cincinnati Enquirer. Wartman asked Klein if Meyer were elected would Klein resign. Klein responded by stating he loved his job, and then asked Wartman if Meyer had said that he intended to fire Klein if elected. Wartman said that Meyer declined to take a position stating "we'll cross that bridge when we come to it." Though this is not *per se* campaign related, it does indicate that Klein is sharing with a member of

the news media who is writing on the campaign his personal concern if one of the candidates win. It certainly evidences a preference for Carran to win.

9. November 4, Klein forwarded to Carran an email he obtained, originally from Marilyn Baker to Huizenga. In the email, Baker complains about Huizenga not endorsing Carran. I repeat it here to note that it evidences that Klein passed on campaign related information he obtained to Carran.

10. November 8, Klein received an email from a colleague responding to Klein's email expressing condolences on the death of an officer. Klein responds to the recipient's response "hope all is well on your end," by saying "Mayor and Commission election here today. Other person running for Mayor (endorsed by FOP and Local 38) wants to fire me, so what's news about that huh?" This is evidence of Klein's concern for his job should Meyer win, and that he is sharing that concern with others.

The degree of culpability differs amongst these emails. They range from evidence of clear involvement in the election on the side of Carran while using City resources, employees and time, to commiserating about his possible fate should Meyer win. Regardless of the differences, these all paint a picture of the most senior City employee not only convincing himself of his certain firing but then taking actions on behalf of the opposing candidate, Carran, to save his job.

This is not acceptable behavior for a public official. Though the conduct described in this section is perhaps punishable under the criminal statutes that does not cure the other consequence of public corruption. This conduct causes substantial damage to all Covington employees and officials. This conduct erodes the public trust in its government. This is particularly problematic in Covington given its own recent history of a large theft of public monies by a former Finance Director.

In the reporting of the Madison Christian Church candidate forum, Local 12 reported, "For most of the hour-long debate, things were pretty cordial. But at the very end, current Mayor Sherry Carran took a shot at her likely opponent in the fall, former state legislator and former state education secretary Joe Meyer. Carran said Covington has made great progress in her term as mayor, but things would go backwards into what she termed the old politics if someone else was elected. 'Old politics was that way, if you knew somebody you got favors and I don't know how else to say it. Is Joe Meyer old politics? He's been in politics a long time. He has old politics working for him, yes,' said Carran."

The irony of this statement is that earlier that day, Carran used the resources, employees and time that belonged to the taxpayers of Covington for her own gain: to win an election. It also appears that at least Klein was willing to accommodate this misuse of the public's resources to protect his own job. And,

as the evidence gathered also showed, both Carran and Klein were willing to use others without their full understanding to win the election.

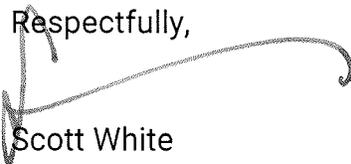
Appendices

The following appendices are attached to the Report.

1. Registry reports of Carran Campaign for Mayor, 2016.
2. Email related to the IAFF Local 38 Candidate Forum.
3. Email related to the October 25, 2016, IAFF Local 38 Press Release.
4. Email and correspondence related to the IAFF Local 38 Open Records Act request to inspect to the City.
5. Correspondence related to the Kentucky Attorney General and Kentucky Registry of Election Finance investigations.
6. Email related to other electioneering by Larry Klein.

This concludes my investigation for the City of Covington. Thank you again for the trust placed in me to carry this out independently, thoroughly, and without regard to possible consequences.

Respectfully,


Scott White