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ATTORNEY GENERAL

M E M O R A N D U M

Warrant Request Review Memorandum

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February 26, 2021

APPROVED: Fadwa Hammoud 3.16.2021
Solicitor General Date

TO: Fadwa Hammoud
Solicitor General

Check here when Division Chief has final approval authority for the request.

FROM: Mike Frezza (e-signed)
Assistant Attorney General
Criminal Trials and Appeals Division

Danielle Hagaman-Clark 3/1/2021
APPROVED: _____
Division Chief Date

Danielle Hagaman-Clark
Acting Division Chief
Criminal Trials and Appeals Division

RE: **Request for Authority to Deny Criminal Charges**
Due Date for Response: March 15, 2021
Make Your Date Investigation
AG No. 2019-0267831-A

Victim's position: Not Applicable

I. Recommendation

The Michigan Department of Attorney General was asked in July 2019 to investigate the City of Detroit and the Make Your Date Program (MYD). MYD is a prenatal program intended to reduce morality and pre-term births among vulnerable mothers, which became a mayoral priority shortly after Mayor Mike Duggan took office in January 2014. Allegations concerning the City of Detroit's Motor City Match program were referred to the federal agency that investigates crimes in such programs. The US Attorney for the Eastern District of Michigan denied charges.

After a thorough review of all physical and digital evidence collected and all statements taken, it is my recommendation not to request a criminal prosecution arising from the deletion of the MYD emails. The crimes below cannot be proven beyond a reasonable doubt.

- A violation of the Freedom of Information Act (FOIA) is a civil offense, MCL §15.240 Sec. 10 (Public Act 442 of 1976). There is no crime in this Act.
- There is insufficient evidence of Official Misconduct in Office, MCL §750.505, to prove a crime beyond a reasonable doubt. The investigation did not secure any admission of corrupt intent and no suspect's conduct gave rise to circumstantial evidence of a corrupt intent. Both Alexis Wiley and Ryan Friedrichs believed they were protecting staff-level personnel from, what was perceived, as Robert Carmack's mischief in his battles with Mayor Mike Duggan, and what numerous witnesses labeled, the related media drama. The City's training and policies on FOIA compliance and retention of public records were at best inadequate or completely non-existent. Numerous witnesses were never trained about either, including Ryan Friedrichs.
- There was no evidence of any violation of MCL §750.117, Bribery of a Public Official. No suspect gave, offered, or promised to give a valuable thing in exchange for an official act or omission.
- There was no evidence of any violation of MCL §750.175, Embezzlement by Public Official. There was no conversion of funds for personal use.
- There is insufficient evidence to support a violation of MCL §750.491, Destruction of Public Records. The analysis of this potential crime is in the discussion section below. One issue is the deleted emails were recovered and published by the City of Detroit Law Department to their website and accordingly, no records were destroyed.
- There is insufficient evidence to support a violation of MCL 750.483a(5), destruction of evidence to be offered in any future court or other proceeding where sworn testimony under an oath is taken. The analysis of this potential crime is in the discussion section below. In sum, the investigation did not show a pending FOIA request that covered any deleted email.

S/As Peter Ackerly and Diane Salter stated they do not believe there is probable cause that any crime has been committed. The prosecution would need to call the agents as witnesses, who if asked on cross examination, would state this.

In the 1,000,000-plus documents reviewed, none stated information revealing a personal relationship between Mike Duggan and Sonia Hassan. This undercuts a motive to hide or destroy these records based on this reason.

The Office of the Inspector General for the City of Detroit also investigated the deletion of Detroit emails concerning MYD. In October 2019, the OIG released a 312-page report. She opined that Mayor Duggan gave MYD preferential treatment in selecting it. The AG's criminal investigation did not find sufficient evidence of a crime concerning allocation or spending of public funds. The OIG has administrative recommendations as well. She found that two Detroit managers and an appointee should be sanctioned for ordering staff to delete emails contrary to City policy.

The AG's investigation was in depth. Many of the salient facts are discussed below and in the Investigator's Summary Report, which is attached. There are also numerous other reports and documents that are available on request.

II. Discussion

Former City employees Shannon Kennedy and Monique Phillips wrote complaining that the mayor's staff directed the deletion of emails about MYD. The media also reported Mayor Mike Duggan's Chief of Staff, Alexis Wiley, ordered two City of Detroit staff-level City employees in the Office of Development and Grants (ODG) to delete MYD emails. In May 2019, Ms. Kennedy was terminated for timecard violations. During her meeting with Human Resources she alleged, for the first time, deletion of MYD emails. She also raised improper spending by the City's Motor City Match program. Kennedy alleged federal money was steered by Duggan to friends. Motor City Match was investigated by US HUD-OIG and the US Attorney denied charges. Special Agents observed that the City mismanaged the program but there was no evidence of criminal intent. Kennedy's allegation about MYD was the first City officials knew about this alleged action. HR reported this to CFO David Massaron, who in turn notified the Mayor. Massaron stated Duggan was extremely angry.

Ms. Kennedy sued the City for her termination and claimed whistleblower protection. Ms. Kennedy states she cooperated with the Detroit Free Press after her termination. Monique Phillips after initially complaining about the deleted MYD emails was interviewed a second time. In Phillips' second interview she stated Kennedy wrote her complaint, which under pressure from her, she signed and sent to the AG.

The AG's Charitable Trusts Section investigated regulatory matters. It found there were two MYD programs, a non-profit that raised no money, and a second later-formed MYD operated by Wayne State University (WSU). It found since

MYD-WSU was a governmental entity it was statutorily exempt from the AG's oversight.

MYD is headed by Dr. Sonia Hassan. On November 14, 2019, a large mobile video billboard was driven around the Coleman A. Young Municipal Center. It displayed Duggan driving to a condominium complex in Novi without his security. Robert Carmack, a Detroit businessman and adversary of Mayor Duggan, arranged for it. Within days broadcast and print media outlets reported that Dr. Hassan resided there. Some months after this, Duggan's longtime marriage was dissolved by divorce. A putative Duggan/Hassan relationship was rumored within City Hall, though never openly admitted by Duggan or Hassan.

The investigation revealed that in December 2018 there was a conversation between Wiley and the Director of ODG, Ryan Friedrichs. They were the only two present. A verbal request was passed from Friedrichs to Sirene Abou Chakra for Phillips to delete her MYD emails and cease working with MYD. Friedrichs attributed the request to Wiley. Abou Chakra relayed this to Phillips with the same attribution. Despite an extensive search involving over 1,000,000 documents, no written evidence revealed whether Wiley initiated the directive, Friedrichs suggested it and Wiley agreed, or if Friedrichs misunderstood her and had the emails deleted, or some other occurrence.

Wiley refused to make a statement invoking her 5th Amendment rights. However, in discussions with her criminal defense attorney, it was conveyed that Wiley believed she was the victim of the "old boys club" in that Masseron and Friedrichs had colluded together to make it appear that she was to blame, rather than accepting blame for their own actions. Friedrichs would only make a statement with use-immunity protection. As Friedrichs occupied an inferior position, and initial indications were that Wiley gave the directive, the Office agreed to this. No case existed without hearing from a participant.

In his interview Friedrichs initially stated Wiley gave him the directive to delete staff-level ODG employee's MYD emails. Friedrichs conceded his recall was fuzzy on the details. He claims Wiley came to his office first asking about MYD fundraising activity. He asserts Wiley stated she attempted to delete her own emails, but they kept "popping back up." Friedrichs replied he or his management team would not delete their emails. On repeated and more in-depth questioning, Friedrichs states he cannot recall which of them first suggested his staff delete their emails. He says this part of the conversation was an afterthought. Friedrichs asserts that CFO David Massaron, his boss, told him Wiley had unsuccessfully attempted to delete her emails but could not and sought to have the deletion hold removed from her account. Massaron, in his interview, states prior to Kennedy's firing, Wiley asked him about removing her email deletion hold and what happens to her deleted emails. Wiley did not tell Massaron she had tried to delete her own emails, or they popped back up. Wiley could have been asking a general question to

learn what happened to Phillips and Huttenlocher's emails. Massaron, however, found her inquiry suspicious. He may have told Friedrichs. It appears Friedrichs may have filled-in his memory with his own perceptions. This calls into question his memory or implicates a blame shifting motive. This affects the value of him as a witness. Massaron is now the State of Michigan Budget Director.

Friedrichs states after he spoke to Wiley, he called Abou Chakra and passed on the directive to instruct her staff to delete their MYD emails. Both Abou Chakra and Monique Phillips, a staff level development officer, corroborated this request and that they were told it was at Wiley's request. Friedrichs indicated Wiley came to him on a workday. Abou Chakra is clear she received Friedrichs' call on a Sunday. She remembers just leaving brunch. Friedrichs explained Carmack was coming after them. MYD was a mayoral priority. It could appear something was improper. He desired to keep staff out of the drama. Abou Chakra and Phillips consistently stated this information was passed to Phillips. Abou Chakra is an honest appearing witness. In contrast, she opines that Kennedy is not.

In February 2019 there was a second request for another ODG staffer to delete her MYD emails. By this time Claire Huttenlocher had replaced Phillips as an ODG development officer. Friedrichs stated Wiley called him. She questioned about the ODG continued work with MYD. He was unsure. Wiley said, "I was told you were. Claire is still sending emails to Make Your Date, call Sirene." Friedrichs understood this to be a directive to delete emails, though the questioning was about working with MYD. There was no express statement to delete emails. Friedrichs then called Abou-Chakra. Friedrich again told Abou Chakra to tell Huttenlocher to delete her emails and stop interacting with MYD. He attributed this to Wiley. Friedrich, Abou Chakra, Huttenlocher all corroborate that this was Friedrichs' instructions, which he attributed to Wiley. Phillips was in Abou Chakra's car when Friedrichs called. She too corroborates this.

When Duggan learned about the deleted emails, he was angry. He tasked Massaron with the issue, who arranged to locate the deleted emails. This was done from WSU. The City had transitioned its email from Groupwise to Outlook. This physically prevented recovery from the City of the deleted emails. Significant to the AG's investigation, it eliminated the possibility of MSP forensics from obtaining evidence of deleted MYD emails by any person. The emails recovered from WSU were reviewed by Phillips and Huttenlocher. Both stated all their deleted emails were present. The recovered MYD previously deleted emails were publicly produced.

The investigation did not locate any email containing information about unlawful conduct or that concerning a personal relationship between Duggan and Hassan.

Analysis – Public Records

Destruction of Public Records, MCL 750.491, a two-year misdemeanor, the prosecution must prove that:

- Defendant willfully,
- carried away, mutilated, or destroyed,
- public records.

As preliminary matters, the emails of Monique Phillips and Claire Huttenlocher were not destroyed. They were recovered and published publicly. An argument could be made that the emails were destroyed on the Detroit servers but, in fact, they would have been backed up but for the switch to Outlook. As a practical matter the emails existed and were produced. The import is, at best, there was an attempt to destroy them or a one-year misdemeanor. MCL 750.92. Venue for this crime is therefore 36th District Court. In addition, there may be a legal challenge to construing the ODG staffer's emails as public documents. MCL 750.491(1) defines public documents as including *official* books, papers or records. These emails reflect the work that ODG staffers did for MYD in attempts to raise funds for the mayoral priority. It is uncertain if the low-level staffer's emails would rise to the level of "official public documents" under the law.

There are legal and factual issues with intent. Assuming Wiley directly or impliedly told Friedrich to have the ODG staff delete MYD emails, to prove the attempted destruction the prosecution must show a willful state of mind. Numerous witnesses stated they did not know the emails were public records. This includes Sirene Abou Charka, Monique Phillips and Claire Huttenlocher. The prosecution will call them as witnesses. There is a split of authority on willfulness. The Court of Appeals held willful includes actions done "voluntarily, consciously, and intentionally", ... even if done from a 'pure' or 'good faith' motive." *People v Waterstone*, 296 Mich App 121, 168; 818 NW2d 432 (2012). There are federal cases that require a bad motive. Willfulness in a criminal statute "means more than mere voluntariness. 'It implies a purposeful design to do a thing with evil or illegal design.'" *Morissette v United States*, 187 F2d 427, 434–35 (6th Cir. 1951).

A court may require the prosecution to prove that Wiley or Friedrichs knew the emails were public records, not merely ordering destruction of non-public records. Otherwise, it is a crime for not knowing what is a public record. A 36th District may view this as a harsh and unintended implementation of the statute.

In a resisting a police officer charge the Court of Appeals explained "willfully" means that the defendant must have done the proscribed act, *i.e.*, the resisting or obstructing, intending to do it. It is not a specific intent crime, but only an intent to

do a certain physical act. Defendant need not know he resisted a police officer. *People v Royal*, 62 Mich App 756; 233 NW2d 860 (1975) and *People v Gleisner*, 115 Mich App 196; 320 NW2d 340 (1982). The *Waterstone* court in the context of a willful neglect of duty charge took a step back from this. It intimated a defendant must know what was required of them. There must be a “showing that defendant failed to do what he was obligated to do.” *People v Waterstone*, 296 Mich App at 168. To interpret the statute otherwise is to make it a crime not to know what is, and is not, a public record. Unlike a police officer an email does not announce it is a public record.

There are factual impediments to the charge of attempted destruction of public records against Wiley or Friedrichs. Friedrichs expressly stated he did not understand the emails were public records. He will also be viewed as following orders, which mitigates his culpability. A jury will relate to a subordinate employee relying on what he believed was the judgment of a superior. He was trying to please her. They also know everyone makes mistakes at work. Particularly when you are just trying to help those you lead. He in contrast, volunteered to take the media heat and not delete his emails.

Friedrichs admits he does not recall whether Wiley or he suggested deleting the staff emails. Wiley will likely argue Friedrichs misunderstood what she wanted in the December 2018 meeting. In the February 2019 conversation between Wiley and Friedrichs, he does recall what she said. “Claire is still sending emails to Make Your Date, call Sirene.” Absent is the order to delete emails. This will be consistent with Wiley’s defense she did not ask for the deletion. Wiley instead expressly discussed OGD’s continued work with MYD. Ryan saw it as a deletion order.

Absent is any evidence that Ryan, after the first deletion, called Wiley and said I had the emails deleted. He did not do it after the second deletion either. The investigation did not establish proof beyond a reasonable doubt that Wiley ordered deletion.

Analysis – FOIA related crimes

As noted above the FOIA does not contain a criminal sanction. MCL §15.240, *et seq.*

There were two alleged deletion of MYD emails: by Monique Phillips in December 2018, and by Claire Huttenlocher in February 2019. Prior to these dates the City of Detroit received the following FOIA requests. There were other later FOIA requests after the emails had been deleted.

- November 14, 2018 – Fox2 News FOIA request for emails between Sonia Hassan and Mike Duggan. This is the same date the mobile video billboard drove in Detroit depicting Duggan in Novi.

- November 27, 2018 – The Detroit Free Press requests emails sent or received by Mike Duggan referencing Sonia Hassan, Make Your Date, Sister Friends, or Michigan Neonatal Biobank, Inc., and all text messages between Mike Duggan and Sonia Hassan.
- November 30, 2018 – The Detroit Free Press requests City contract and payments to the Southeastern Michigan Health Association; City communications with the Southeastern Michigan; and all contributions from the City to WSU for health programs; and all City contributions to Make Your Date and Sister Friends.
- January 10, 2019 – The Detroit Free Press requests emails sent by Ms. Wiley to Sonia Hassan and sent by Sonia Hassan to Alexis Wiley

The deleted emails were sent or received by Monique Phillips and Claire Huttenlocher. None of the FOIA requests prior to the deletions asked for the emails sent or received by Monique Phillips or Claire Huttenlocher. The first mention of Phillips or Huttenlocher is in a May 22, 2019 FOIA request from the Detroit Free Press. The deletions occurred in December 2018 and in February 2019.

To prove Concealing or Destruction of Evidence in a Future Civil proceeding contrary to MCL 750.482a(5), the prosecution must prove:

- defendant knowingly and intentionally,
- removed, altered, concealed, destroyed, or otherwise tampered,
- with evidence to be offered in a future official proceeding.

A future official proceeding may include a FIOA lawsuit. If records in response to a FOIA existed, they may be evidence in such a suit. In December 2018 and in February 2019 there was no FOIA request concerning Phillips or Huttenlocher. Accordingly, there cannot be a knowing intentional concealment or destruction of such evidence.

MYD and Lyft Contract

The Detroit OIG opined that Mayor Duggan gave MYD preferential treatment in its selection. The AG's criminal investigation did not find sufficient evidence of a crime concerning the awarding of a contract. Acting Office of Development and Grants Deputy Director Katerli Bounds explained all grants for which MYD received public funds complied with the requirements imposed by the State through the Southeast Michigan Health Association (SEMHA). The related documents reviewed by the Special Agents corroborated this.

According to City CFO David Massaron and Detroit's Health Department, Special Projects Director David Yeh, any City general funds paid for transportation. Lyft was used by mothers to secure rides for healthcare. The Lyft contract was awarded as provided by the City's bidding process. Lyft received about \$358,000.00. These general fund dollars did not go to MYD or Dr. Hassan.

Selection of MYD

Make Your Date was selected according to SEMHA's process and approved by it. City officials including Duggan had some discretion in recommending MYD for SEMHA's approval. There was insufficient evidence to support a crime in this selection process.

Dr Hassan

The investigation did not show that any City funds were paid to Dr. Sonia Hassan personally. She was compensated by Wayne State University.

III. Conclusion

While it may be possible to pursue a prosecution for attempted destruction of public documents (a 1-year misdemeanor), it is not recommended. A criminal prosecution of a city employee, for destruction of public records, by this Office would be a first of its kind. If the Office initiated charges it would charge a city employee with ordering other staff members to delete their emails while the higher-ranking person retained their own emails, as did other management staff. This is factually complicated by the fact that the emails attempted to be deleted were recovered and produced, and significantly, all the other MYD documents were not destroyed or attempted to be destroyed. The investigation showed the emails at issue were merely efforts to raise money for a City of Detroit priority, which by all indications was a very worthy priority. All charts, documents, reports, and contracts prepared associated with MYD were not destroyed or attempted to be destroyed. Weighing the factual and legal issues raised in this memorandum, we see a slim likelihood of a conviction. Accordingly, we do not recommend the Office pursue a prosecution.

There is no clear path to success, and while it may send a strong message to city office holders to ensure their employees are properly trained on FOIA laws and retention policies, there are more effective and less punitive ways to accomplish this goal. If there were charges, it would not be the office holder, Mike Duggan that would be responsible for a lack of training on behalf of his staff. Instead, Alexis Wiley would be responsible for such a total failure of training – a responsibility as matter of fairness and practicality she should not bear alone.

We recommend the Office consider creating a clear “best practice” training plan compliant with FOIA and records retention laws. The City of Detroit and others could use these best practices to properly train its employees. Citizens could then feel confident in the transparency afforded by Michigan FOIA and related laws.

Press release: Yes. Draft press release will be supplied on request.