

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

M E M O R A N D U M

December 28, 2020

***Investigation into the Matter of the Procurement of Every Action VAN for
COVID-19 Contact Tracing Services***

Purpose

The Michigan Department of Attorney General was requested by Senator Jim Runestad to conduct a *criminal* investigation into the procurement of a state contract with Every Action VAN regarding COVID-19 contact tracing services. A team consisting of three Investigators (including the Chief of Investigations) and four Assistant Attorneys General (including Acting Criminal Division Chief), investigated and evaluated any potential criminal activity regarding the procurement actions surrounding the Great Lakes Community Engagement/Every Action VAN contract. This investigation and evaluation solely focused upon determining whether any criminal liability existed, therefore any evaluation regarding state procurement policies was limited to determining whether criminal conduct occurred. This investigation did not extend to an evaluation of state procurement best practices.

Recommendation

Upon a thorough review of all physical evidence collected and all statements taken, it is our recommendation that any request for criminal charges arising from the procurement of the contract to perform contact tracing for COVID-19 positive cases, between MPHI and Great Lakes Community Engagement (or any of its parent companies or subsidiaries), be denied for all the reasons contained herein and stated below:

- Pursuant to the American Bar Association's Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor, a prosecutor evaluating a criminal matter shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." This rule is mirrored in

the Michigan Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor.¹

- It cannot be proven the procurement rules were knowingly violated.
- There are no criminal consequences stated within any procurement rule or statute for any perceived violation of any procurement rule.
- There was no evidence of any violation of M.C.L. §750.478 – Willful Neglect of Duty.
- There was no evidence of any violation of M.C.L. §750.505 – Misconduct in Office.
- There was no evidence of any violation of M.C.L. §750.505- Common Law Fraud.

Items Reviewed

The following items were reviewed during this review:

- Initial Report by Special Agent Ted Goff
- Witness Interview Summaries of the following witnesses:
 - From the Michigan Department of Health and Human Services (“MDHHS”)
 - Matthew Buck
 - Joseph Coyle
 - Kathryn (“Katie”) Macomber
 - Christine Sanches
 - From the Michigan Public Health Institute (“MPHI”)

¹ The Michigan Rules of Professional Conduct also state, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” MI R. Professional Conduct, Rule 3.8.

- Ta-Tanisha Manson
 - Ammie Young
 - From Kolehouse Strategies
 - Donald Michael (“Mike”) Kolehouse
 - From the Governor’s Office
 - Corina Andorfer
 - Zach Pohl
 - From the State Emergency Operations Center (“SEOC”)ul style="list-style-type: none;"> - Major Emmitt McGowan – SEOC
- From the Michigan Department of Labor and Economic Opportunity (“LEO”)ul style="list-style-type: none;">- Michael Edward (“Ed”) Duggan, Jr.
- From the Department of Technology, Management and Budget (“DTMB”)ul style="list-style-type: none;">- Jeff Ballard
- Sunil Chowdary
- James Colangelo – DTMB (Chief Procurement Officer)
- Ashley Guttman
- Kimberly Koppsch-Woods
- Kevin Walker
- Witness Interviews of the following individuals:
 - Matthew Buck – “MDHHS”
 - Joseph Coyle – “MDHHS”
 - Ta-Tanisha Manson – “MPHI”
 - Ammie Young – “MPHI”

- Zach Pohl – Governor’s Office
- Ed Duggan – “LEO”
- Major Emmitt McGowan – “SEOC”
- Emails from various recipients and senders regarding the Kolehouse/GLCE Contract, including:
 - Sarah Lyon-Callo – “MDHHS”
 - Katie Macomber – “MDHHS”
 - Christine Sanches – “MDHHS”
 - Lynn Sutfin – “MDHHS”
 - Andrea Taverna – “MDHHS”
 - Ta-Tanisha Manson – “MPHI”
- Proposed volunteer scripts (initial, daily, final)
- Written responses from Mike Kolehouse
- Emergency Purchase Orders from March 2020
- Contract between MPHI and MDHHS (also known as the “Funding Source Agreement”)
- Subcontract between MPHI and GLCE, Every Action VAN, with Exhibits A, B, C and D
- MPHI Articles of Incorporation
- MPHI Re-stated Articles of Incorporation
- Chapters 5 and 10 of the Michigan Procurement Policy Manual
- State Administrative Board Resolution 2019-1
- DTMB COVID-19 Emergency Guidance for Purchases

Items Not Reviewed with Explanation

The Department of Attorney General was unable to interview three critical individuals from the Michigan Department of Health and Human Services, (hereafter “MDHHS”), Andrea Taverna, Sarah Lyon-Callo and Lynn Sutfin. All three individuals were contacted by Special Agents with the Department of Attorney General, but all three individuals refused to provide any statements or further information to the Agents.

Laws Reviewed

The following laws were reviewed in response to the investigation performed:

- Executive Order 2020-04 – Declaring a State of Emergency 3/10/20
- Executive Order 2020-33 – Declaring a State of Emergency 4/1/20
- Emergency Management Act, Act 390 of 1976 (M.C.L. §30.402 et seq.)
- Uniform Guidance §200.320(f)(2)
- Management and Budget Act, Act 431 of 1984 (M.C.L. §18.1261)
- Constitution of the State of Michigan of 1963, Art. IV §10
- Public Health Code, Act 368 of 1978 (M.C.L. §333.2611)
- M.C.L. §333.21787 0 Michigan public health institute
- *Groves v. Department of Corrections*, 295 Mich. App. 1 (2011)
- *MCNA Insurance Company v. Department of Technology*, 326 Mich. App. 740 (2019)
- Conflict of Interest, Act 318 of 1968 (M.C.L. §15.301 et seq.)
- Contract of Public Servants with Public Entities, Act 317 of 1968 (M.C.L. §15.321 et seq.)
- State Ethics Act, Act 196 of 1973 (M.C.L. §15.341 et seq.)
- Criminal Codes
 - M.C.L. §750.478 – Willful Neglect of Duty
 - M.C.L. §750.505 – Misconduct in Office
 - M.C.L. §750.505 – Common Law – Fraud

- *People v. Carlin*, 239 Mich. App. 49 (1999)
- *People v. Coutu*, 459 Mich. 348 (1999)
- *People v. Milton*, 257 Mich. App. 467 (2003)
- *People v. Waterstone*, 296 Mich. App. 121 (2012)

Background Information

This criminal investigation was requested by Michigan State Senator Jim Runestad. There were no documents or other evidence provided by Senator Runestad. The general allegations were Governor Whitmer's office unlawfully utilized a business owned and operated by Mr. Mike Kolehouse, with whom the Governor allegedly had personal and political connections. Further, there were allegations that the vendor, Kolehouse Strategies, LLC (or Great Lakes Community Engagement), was going to take the information obtained through their services with this contract and provide that information to the Democratic Party for political uses. The Michigan Department of Attorney General agreed to complete the investigation and did so utilizing Special Agents within the Department of Attorney General. These agents conducted numerous interviews and obtained thousands of emails and other documents for review.

Key Individuals for Criminal Liability Analysis

Based upon a thorough review of the available evidence, the key individuals related to this investigation were Andrea Taverna, with the Department of Health and Human Services, Kathryn Macomber, with the Department of Health and Human Services, Ed Duggan, with the Department of Labor and Economic Opportunity, and Mike Kolehouse, with K2K Consulting.

Facts

On March 10th of 2020 Governor Whitmer executed Executive Order 2020-04, declaring a State of Emergency due to the COVID-19 pandemic.² As part of the response to the pandemic, the concept of contact tracing was discussed and determined necessary. Taking the lead in the contact tracing program was the Michigan Department of Health and Human Services, which is the procuring agency for the contact tracing contract. It is not entirely clear how the concept of contact tracing and the need for procuring a vendor to assist with the task arose, as Ms. Taverna did not provide any information to the investigation. It is also unclear as to

² Governor Whitmer declared a subsequent State of Emergency on April 1, 2020 in Executive Order 2020-33 for the continued COVID-19 pandemic.

how Ms. Taverna became the lead on the project. However, it is clear from the investigation that Ms. Taverna became in charge of developing a contact tracing program related to the COVID-19 pandemic.

Michael Edward Duggan, Jr. (hereafter “Mr. Ed Duggan”) stated he was contacted by Ms. Taverna late in March regarding her work with the COVID-19 response.³ **See Exhibit 1.** Ms. Taverna sought his help locating a firm who could help organize volunteers for contact tracing. Mr. Ed Duggan provided Ms. Taverna with Donald Michael Kolehouse II (hereafter “Mr. Mike Kolehouse” or “Mr. Kolehouse”) and made the introduction.⁴ **See Exhibit 2.** Mr. Mike Kolehouse was the only name provided to Ms. Taverna by Mr. Ed Duggan. Ultimately the contract was awarded to Mr. Mike Kolehouse through his company Kolehouse Strategies and his vendor, NGP VAN.

Later the subcontractor was changed from Kolehouse Strategies to Great Lakes Community Engagement (hereafter “GLCE”), which is a subsidiary business of Mr. Kolehouse⁵ and NGP VAN was changed to Every Action VAN. Mr. Kolehouse indicated Kolehouse Strategies is mainly used for contracts of a political nature, whereas GLCE is used for contracts with nonprofit and corporate entities. Both entities conduct canvassing, volunteer organizing and petitioning. Mr. Kolehouse further stated NGP VAN and Every Action VAN are communications platforms for organizing volunteers, sending emails, making calls, and recording data. While both platforms are similar, Every Action VAN is meant for fundraising and community engagement. NGP VAN and Every Action VAN are vendors utilized by Mr. Kolehouse and are not owned or connected in any other way to Mr. Kolehouse. The reason for the change was the political nature of Kolehouse Strategies and NGP VAN. Zack Pohl, Communications Director for the Governor’s Office, indicated to Ms. Taverna that using politically involved entities may be a distraction and thus Ms. Taverna changed the entity information. **See Exhibits 3 and 4.**

After Ms. Taverna obtained the vendor information, she included Ms. Kathryn Macomber, Director of the Division of HIV and STD Programs within MDHHS, in the

³ Mr. Ed Duggan was familiar with Ms. Taverna from when they both worked in Governor Whitmer’s Executive Office. Mr. Ed Duggan was part of Governor Whitmer’s executive staff before moving to the position of Senior Advisor of the Michigan Department of Labor and Economic Development. While he was in the Governor’s Office, Ms. Taverna was the Deputy Director of Cabinet Affairs before she moved to MDHHS.

⁴ Mr. Ed Duggan met Mr. Kolehouse when Mr. Ed Duggan worked for the Democratic Party. Mr. Kolehouse’s company, Kolehouse Strategies, worked for the Michigan Democratic Party and One Campaign.

⁵ Mr. Kolehouse owns K2K Consulting, of which GLCE and Kolehouse Strategies are assumed names.

project development. Ms. Macomber continued the negotiations with Mr. Kolehouse, and she suggested the contract proceed through MPHI, to which Ms. Taverna agreed. **See Exhibit 5.** Ms. Macomber eventually connected with Ms. Ta-Tanisha Manson, General Counsel for MPHI, and Ms. Ammie Young with MPHI.

The Department of Health and Human Services has a master agreement (hereafter the “Funding Source Agreement” or “Master Agreement”) with the Michigan Public Health Institute (hereafter “MPHI”).⁶ The purpose of the Funding Source Agreement is to provide funding for community health and human services and within the Master Agreement it is stated that the “Department may request that Grantee perform data analytic activities or serve as an honest broker at the Department’s direction for projects...”. MPHI then enters into subcontracts with other entities to perform the work or services needed or contemplated by MDHHS. All subcontracts executed by MPHI on behalf of MDHHS ensure that that all the terms and conditions of the Funding Source Agreement are met, including non-disclosure of confidential information provisions.

MPHI entered into a subcontract with GLCE, executing the contract on April 20, 2020. GLCE was required to sign a Data Use and Non-Disclosure Agreement (hereafter “DUA”) regarding any information they would obtain during the contract, which they executed on April 14, 2020. **See Exhibit 6.** On April 21, 2020 Governor Whitmer decided the contract did not go through the proper process and had the contract cancelled. A Stop Work Order was issued on April 21, 2020 and was forwarded to all parties. **See Exhibit 7.** Per Matthew Buck, with MDHHS, a new contract has been executed for the same services. The new awardee was Rock/Deloitte and will cost considerably more than the GLCE/Every Action VAN contract.

Relevant Procurement Rules

The Michigan Procurement Policy Manual, Chapter 5 – Pre-Solicitation, Section 5.1 states, “M.C.L. 18.1261 requires the use of competitive solicitation from the private sector when practicable...Any deviation from the requirements identified in this Chapter must be approved by the Chief Procurement Officer.” In this case, the Chief Procurement Office was and is Mr. James Colangelo, who indicated during his interview that he was not contacted regarding the GLCE contract.

Section 5.3.4 of the Michigan Procurement Policy (hereafter “Policy”) provides the competitive solicitation method requirements are based upon the dollar value of the purchase/contract. Under this section it is stated that any contract/purchase over the amount of \$50,000.00 would require direct solicitation, an RFP (request for proposal)

⁶ MPHI was created under the Public Health Code, Act 368 of 1978, M.C.L. §333.2611(3).

or an RFQ (request for quote). This may require either a formal competitive bidding process or an informal competitive bidding process. Mr. Colangelo also provided this information to the Special Agents during his interview. Mr. Colangelo stated that for purchases under \$50,000.00, the individual department may handle the procurement independently and without a Request for Proposal (hereafter “RFP”). For purchases over \$50,000.00, a RFP, or some other form of formal solicitation, is required. For any contract with a value over \$500,000.00, DTMB must handle the procurement process. However, MDHHS does have delegated authority to handle purchases between \$50,000.00 and \$500,000.00 but must follow the same process as DTMB. Finally, all IT purchases must go through DTMB, regardless of the price.

However, there are exceptions to the above rules. Section 5.7 of the Policy provides for several exceptions. In particular, Section 5.7.1 provides an exception when the emergency purchase is related to the protection of public health or safety and when the Chief Procurement Officer determines that the purchase is necessary for the imminent protection of public health or safety, or is to mitigate an imminent threat to the public health or safety. The State Administrative Board would also not be required to approve the purchase or contract; however, they would still need to be notified within 30 days of purchase/execution.

Additionally, under Section 5.7.3, the competitive solicitation is not required if the purchase is in response to a declared state of disaster or emergency. Again, Administrative Board approval is not required, but notice within 30 days of purchase/execution is still required. Mr. Colangelo also provided these rules during his interview. However, Mr. Colangelo also provided the additional information that the SEOC would still need to provide approval and that all IT purchases must still go through DTMB.

Chapter 10 of the Policy governs the State’s ability to enter contracts. Under Section 10.2, only the Chief Procurement Officer can enter contracts on behalf of the State. However, the Chief Procurement Officer can delegate that authority. Mr. Colangelo informed the Department of Attorney General that MDHHS does have delegated authority to enter contracts up to the amount of \$500,000.00.

The State Administrative Board, pursuant to Resolution 2019-1, stated in Section 6 that “[p]rior approval by the Board is not required for contracts for emergency purchases entered into in cases involving threats to public health or safety...or in response to a declared state of emergency or state of disaster under the Emergency Management Act...All emergency contracts must be reported. To the Board within 30 days after execution.” **See Exhibit 8.**

The Management and Budget Act, Act 431 of 1984 provides for the solicitation of “competitive bids from the private sector whenever practicable”. M.C.L. §18.1261(1). However, the Act also provides exceptions to the competitive bid rule. The exceptions

include when the “procurement of goods or services is in response to a declared state of emergency or state of disaster under the emergency management act...”; when “the procurement of goods or services is in response to a declared state of emergency under 1945 PA 302, MCL 10.31 to 10.33”; and when “the procurement of goods or services is in response to a declared state of emergency under 1982 PA 191, MCL 10.81 to 10.89.” M.C.L. §18.1261(3)(c), M.C.L. §18.1261(3)(d), and M.C.L. §18.1261(3)(e).

MPHI

MPHI is a nonprofit corporation incorporated on July 19, 1990 and was designed to assist MDHHS in preventing disease, prolonging life, and promoting public health, with a major emphasis on the prevention and control of infectious and chronic disease. Additionally, under M.C.L. §333.21787 MDHHS “may consult and work with [MPHI] ... The department may also contract with the [MPHI] for the performance of specific functions required or authorized...” *Id.* MPHI executes roughly 500-600 contracts per a year, with approximately 75-80% of those being for MDHHS. MPHI is often utilized because they are able to execute contracts at a quicker pace than going through the Michigan Department of Management and Budget (hereafter “DTMB”).

Review of the Evidence

Below is a summary of what the investigatory team reviewed in order to perform their analysis.

Contract with MPHI

As previously stated, MDHHS may execute contracts with MPHI pursuant to M.C.L. §333.21787. At the time of the Contact Tracing Contract in question, MDHHS had an active contract with MPHI, the Funding Source Agreement, which allowed for MDHHS to utilize the services of MPHI to enter into a subcontract for services required by MDHHS. The total amount of the Funding Source Agreement, which was signed on October 1, 2019, was for \$107,152,653.00.

Included within the terms of the Funding Source Agreement is the requirement that MPHI is to ensure that all subcontracts are executed, and the subcontractor complies with all the applicable terms and conditions of the Funding Source Agreement, which would include the non-disclosure of confidential information.

Contract with GLCE/Every Action VAN

The GLCE contract was really a contract between MPHI and GLCE, pursuant to the Funding Source Agreement between MPHI and MDHHS. The contract was set to begin on April 1, 2020 (though not executed until after the start date) and was to terminate on June 1, 2020. The contract also required thirty-days' notice to terminate.

Pursuant to the contract, GLCE would perform the following services:

- Manage volunteers who perform informational calls with individuals who had confirmed COVID exposure
- Manage volunteers, and have paid staff, who perform daily calls to individuals who were moved to the daily tracking program. They would receive calls for fourteen days.
- Have project managers who would upload and download data, manage call platforms, add, and control survey questions and data collection, integration with MDHHS systems, and perform quality control and oversight.
- Have volunteer managers who would handle scheduling, troubleshooting technical errors, provide script oversight, debrief volunteers, perform quality control calls, perform trainings, answer questions, monitor data for accuracy, and transcribe notes.

MDHHS would have access to and training on how to access the data collected. Additionally, GLCE would send progress reports to MPHI and would be required to comply with all applicable terms under the Funding Source Agreement. GLCE would also be required to keep records of all costs, etc. for MPHI to be able to audit and/or verify. Additionally, GLCE would have to ensure compliance with all HIPAA requirements.

The contract also contained a conflict of interest section and a code of conduct standards section. In particular, GLCE would have been prohibited from having any interest that would conflict with the contract, from doing anything that would create the appearance of impropriety, and would be prohibited from paying off any MPHI or state employee.

Apart from the above sections, the contract also contained an extensive confidentiality and privacy section. GLCE could not "disclose, publish or use at any time, any confidential information, which include[d] data collected, stored, or managed on behalf of MPHI, any personal or private information which was furnished in connection with services provided under the agreement." Additionally, Exhibit D of the contract was dedicated to privacy requirements.

Pertinent areas within Exhibit D discussed the conditions in which GLCE must control access to data, with levels of authorization, and must have secured storage of any data.

Exhibit B contained the budget for the contract, which stated that Ms. Macomber would be the approver of all invoices. GLCE would receive \$82,000.00 for the first four weeks of service and \$112,250.00 for the last four weeks of service. There was a not to exceed clause in the amount of \$194,250.00. The contract was signed on April 20, 2020 by Janice Kidd for MPHI and by D. Mike Kolehouse for GLCE.

Non-Disclosure Agreement

In addition to the provision included within the body of the GLCE contract and any and all attachments thereto, Mr. Kolehouse also had to execute a Data Use and Non-Disclosure Agreement (“DUA”). **See Exhibit 6.** Pursuant to this DUA, GLCE would collect the data and upload it to their server (here Every Action VAN). MDHHS would then receive back that data and would also be allowed direct access to the data systems.

The DUA provided that Every Action VAN would protect the data via security access and various forms of controls and technical safeguards. Additionally, all data must be destroyed upon completion of the contract. All access to the data would also be limited and GLCE would be required to return or destroy any and all original and copies of any information obtained. **See also, Exhibit 9.**

Apart from GLCE executing a DUA, all volunteers would also be required to sign a confidentiality agreement. **See Exhibit 10.** Provided within the body of this agreement, it was stated, among other things, that the volunteer would not “access, review, discuss, copy, disclose, or use confidential information outside of [their] services as a volunteer.”

Additionally, the types of information that may be collected were also monitored and established by MDHHS. MDHHS provided “volunteer scripts” that would be used to collect the information. **See Exhibit 11.** This limited the amount of information that would be obtained by GLCE, Every Action VAN and all volunteers.

Emails

The investigation performed by the Department of Attorney General also included a review of over a thousand pages of emails received from MDHHS, Mr. Kolehouse, Ms. Manson, and Mr. Pohl, among others. Several of these

emails are attached to this report as exhibits. A review of the emails provides several key points:

- Ms. Taverna reached out to Mr. Ed Duggan to obtain a contact for contact tracing. She was seeking a company who could effectively manage a large group of volunteers.
- Mr. Ed Duggan provided Ms. Taverna with Mr. Kolehouse's contact information and made the connection for the two parties.
- Ms. Taverna awarded the contract to Mr. Kolehouse without seeking any form of competitive bid or large-scale vetting process.
- Ms. Taverna sought the help of Ms. Macomber and Mr. Coyle in negotiating and executing the contract.
- Ms. Macomber suggested the contract go through MPHI, of which Ms. Taverna agreed, after indicating she was not that familiar with procurement procedures.
- Ms. Macomber informed Ms. Sanches that MDHHS would be utilizing the services of MPHI for the contract.
- The original contract was to be between Kolehouse Strategies and MPHI, with some confusion as to whether Kolehouse was going to utilize NGP VAN as a vendor.
- Ms. Taverna reached out to Mr. Pohl to inform of the contract and Mr. Pohl alerted Ms. Taverna to some potential hazards to using NGP VAN.
- Ms. Taverna had the contract changed from Kolehouse Strategies to GLCE and Every Action VAN would replace NGP VAN. Mr. Pohl gave his personal approval to the change.
- It appears Ms. Taverna took Mr. Pohl's approval to be that of the Governor's Office.
- This contract did not go through DTMB or the SEOC for any approvals.
- This contract moved very fast, from selection to execution.
- The contract was quickly cancelled.
- There was not a consensus regarding what the proper procurement process was for this particular contract.

- There was not a consensus for whether this was an “IT” contract or a “services” contract.
- There were no emails where anything nefarious was discussed or contemplated.
- There were no emails where any favors were discussed or contemplated.
- There were no emails where Governor Whitmer was included during the selection or execution of this contract.
- There were no emails that would indicate any person had any intent to not follow proper procurement procedures.
- There were no emails that would indicate any person had any intent to conduct any criminal conduct.
- There were no emails that would indicate any person had any intent to willfully neglect any duty proscribed to them via the nature and description of their employment.
- There were no emails demonstrating any deception on the part of any individual.

Interviews with Witnesses

During the Department of Attorney General’s investigation, several individuals were interviewed. These witnesses provided very important background information as well as important information as to this specific contract procurement and procurement of contracts in general. Notable from these interviews were the differing opinions as to whether the GLCE contract was one for services or one for IT, and whether proper procurement of the contract occurred, given the emergency declaration and situation. In fact, after a review of all these interviews, there was no consensus on either subject.

Below is a summary of the statements made by, or taken from, the witnesses interviewed in this matter.

Mr. Mike Kolehouse

Mr. Kolehouse provided special agents with various emails and documents related to the contact tracing contract. As previously noted, Mr. Kolehouse owns K2K Consulting, which consists of both Kolehouse Strategies and GLCE. Mr. Kolehouse does not have any relationship with Every Action VAN or NGP VAN, other than they are vendors he utilizes for data management. Mr.

Kolehouse had no other contracts with MPHI and stated that his only other work for the state was regarding a pedestrian awareness campaign for MOSHP⁷ and Mr. Kolehouse had never been under contract with the State of Michigan previously.

Mr. Kolehouse was contacted about contact tracing around March 24, 2020 by Mr. Ed Duggan, who called him on the phone. Mr. Ed Duggan stated MDHHS was looking for a company that could do large scale volunteer management and phone calls for a back-tracing program that was being developed. He wanted to know if Mr. Kolehouse would be willing to speak with someone at MDHHS. Mr. Kolehouse was put into contact with Ms. Taverna. **See Exhibit 12.**

Initially Ms. Taverna believed Mr. Kolehouse would be donating his services, however as the discussions progressed Mr. Kolehouse indicated to her that the scope of work would be too large to work pro bono. Mr. Kolehouse was then asked by Ms. Macomber to provide a statement of work, which he provided on April 7, 2020. **See Exhibit 13.** The statement of work was approved on April 14, 2020 and turned into a formal contract on April 16, 2020. The rate charged by Mr. Kolehouse was for the salaries (for the period being utilized) of his fourteen managers, Director of Operations, and himself, plus taxes.

Originally the contract was going to be between Kolehouse Strategies but was later changed to GLCE. He indicated that GLCE is the entity he uses to do nonprofit and corporate work, so MDHHS decided to proceed in that manner. Regarding NGP VAN, Mr. Kolehouse stated the use of NGP VAN was just a mistake, as he was always negotiating with Every Action VAN. All the paperwork he had submitted inadvertently had NGP VAN information on it, as that is the vendor he typically used.

Mr. Kolehouse explained he had to sign a strict data usage and non-disclosure agreement, prior to the execution of the contract. **See Exhibit 6.** He further explained that the data stored in Every Action VAN would not be accessible to anyone else or for any other purpose than that stated within the contract. They had secure FTP protocols established for the transfer of the data to MDHHS. Once the program completed, all the data would be returned to MDHHS and any and all copies would be deleted and destroyed.

GLCE began preparations for the work beginning April 1, 2020 and formally signed a contract with MPHI on April 20, 2020. However, on April 21, 2020

⁷ However, they were not directly hired by the State. They were hired by a marketing firm who had been hired by the State.

they were informed to stop work immediately and the contract was cancelled. **See Exhibit 7.**

Mr. Kolehouse had a professional relationship with Mr. Ed Duggan, as they worked in parallel supporting the same campaign. They, however, had no personal encounters and Mr. Kolehouse has never performed any work or services for Mr. Ed Duggan. Mr. Kolehouse has never worked with or for Ms. Taverna and had no previous knowledge of her. Mr. Kolehouse also did not have any personal relationship with Governor Whitmer. He had previously worked for One Campaign and the Michigan Democratic Party (or “MDP”) but never had any direct contact with Governor Whitmer’s campaign. He did donate to her campaign and did attend a few events where the Governor was in attendance. Additionally, Mr. Kolehouse had very limited contact with the Governor’s Office regarding this contract. He stated he had a phone call with Ms. Amanda Stitt on either April 18, 2020 or April 19, 2020 regarding the use of Every Action VAN as opposed NGP VAN.⁸ He also sent Ms. Stitt a text message on April 21, 2020 inquiring into their media responses. Mr. Kolehouse also had a brief phone conversation with Mr. Zack Pohl regarding a media request his company had received. Other than those correspondences he had no additional contacts with the Governor’s Office.

Mr. Ed Duggan

Mr. Ed Duggan stated he became involved in the project when Ms. Taverna contacted him seeking recommendations for someone who could help organize volunteers for contact tracing. He provided Ms. Taverna with Mr. Kolehouse’s information and put the two parties in contact with one another. Mr. Ed Duggan did not discuss this project with Governor Whitmer and had no further involvement in the project. Ms. Taverna told him MDHHS was going to move forward with Mr. Kolehouse, but then a few days later she told him MDHHS was getting pressure from state government about using a Democratic firm and inquired as to whether he knew of any Republican firms she could reach out to. Mr. Ed Duggan did not have any further contacts to provide.

Mr. Ed Duggan was not familiar with Every Action VAN but was familiar with NGP VAN. He indicated that he later learned Every Action VAN was the non-profit arm of NGP VAN. He also stated he had never been employed by Mr. Kolehouse. Mr. Ed Duggan had no knowledge of any payments, kickbacks, or “under the table” activity regarding this contract and did not believe there was a valid argument regarding the concern with the data collection. Mr. Ed

⁸ The Governor’s office indicates Ms. Stitt does not – and has not – worked at their office.

Duggan could also not provide comment regarding the procurement process, as he was not familiar with the process.

Ms. Kathryn Macomber

Ms. Kathryn Macomber is an epidemiologist with MDHHS and became involved with the contract in question when Ms. Taverna asked her to assist with the program. Ms. Macomber was the responsible party for finalizing the approval of the contract and having MPHI execute the subcontract. She acknowledged that the State Emergency Operations Center (hereafter “SEOC”) was not utilized. Originally, Ms. Macomber believed the contract was going to be paid by an unidentified philanthropic organization and that Kolehouse Strategies was simply providing a call center. **See Exhibit 14.** However, after it was realized that was not the case, Ms. Macomber helped to establish the budget for the project. **See Exhibit 15.** The overall budget for this contract was \$203,768.00 and was to go from April 1, 2020 through September 30, 2020.

Ms. Macomber had no previous relationship or even knowledge of Mr. Kolehouse, K2K Consulting or any of its assumed names, Every Action VAN or NPG VAN. The contract awardee information was provided to her from Ms. Taverna. **See Exhibit 16.** While preparing, organizing, and implementing this contract she had numerous conversations with Mr. Kolehouse and did not perceive any issues. Ms. Macomber did not have any concerns regarding the data that would be gathered, and she did not have any beliefs that the data would be used for political purposes. Additionally, Ms. Macomber indicated several employees with DTMB and MDHHS were involved in implementing this project and no concerns were raised about the security of any information nor the appropriateness of using Kolehouse Strategies or GLCE.

Mr. Joseph Coyle

Mr. Joseph Coyle has worked for MDHHS since 2013 and prior to joining MDHHS he was employed with MPHI. Mr. Coyle does grant writing and contract development for MDHHS but with COVID it was “all hands on deck” at MDHHS so he was brought in to the contact tracing program by Ms. Taverna.⁹ With the contact tracing program, Mr. Coyle was tasked with figuring out how the information and data would flow within the tracing program.

Mr. Coyle was not familiar with either GLCE or NPG VAN prior to working on this project. He first learned of Mr. Kolehouse after an email introduction from

⁹ Mr. Coyle had previously worked on contact tracing for TB.

Mr. Ed Duggan and Ms. Taverna and believed that it was Mr. Ed Duggan who introduced Ms. Taverna to Mr. Kolehouse. Mr. Coyle was unaware if anyone from the Governor's Office being involved with the selection of Mr. Kolehouse for the contract. Mr. Coyle was aware there was a vendor name change at one point during the process but was unaware as to why the name was changed.

While Mr. Coyle has very limited experience with the State's procurement process, he was aware there is a master agreement between MDHHS and MPHI which allows MDHHS to allocate funding to create subcontracts through MPHI. Mr. Coyle stated that MPHI ultimately helps create the subcontracts and scope of work as they relate to specific projects. The purpose of using MPHI as opposed to other methods, is that MPHI can move quickly in executing the contracts. Mr. Coyle was unsure who made the decision to utilize MPHI, but believed it was Ms. Macomber who made the suggestion.

Mr. Coyle believed that Mr. Kolehouse was providing his services on a pro-bono basis in the beginning and was just going to help with the management of volunteers. However, the scope of work began to evolve, and, in the end, Mr. Kolehouse was also going to be involved in the data collection and transfer of data back to MDHHS for analysis. Therefore, Mr. Coyle believes that while originally this contract was not viewed as an IT contract, it did evolve into one as a result of the added data collection services. Per Mr. Coyle, all IT purchases, regardless of whether there is an emergency declaration, require DTMB approval. Although, this contract did not go through DTMB, there were employees from DTMB involved in the implementation of the project.

MDHHS did consider multiple vendors that could provide similar services but there was never a bid process. There were informal discussions about other companies that may be available and a discussion as to their ability to perform the work required. While, Mr. Coyle did not believe the 'right processes' were followed in terms of getting the work out for bid, and while the optics of using GLCE were not great, Mr. Coyle did believe GLCE offered a good solution at a fair price. In fact, Mr. Coyle stated the new and current contact tracing contract will cost the State considerably more money and the delay resulting from stopping the GLCE contract did have consequences. Further, Mr. Coyle did not believe any illegal act occurred during the negotiations and execution of the GLCE contract.

Mr. Coyle also did not see how any of the data collected during the contact tracing could be used for political purposes. The call banks would have utilized a script, and the contract required GLCE to sign a Data Use Agreement, which required all the data to be kept separate from any other data or database. Further, GLCE and any vendor would have to destroy and delete all collected data at the termination of the contract.

Ms. Ta-Tanisha Manson and Ms. Ammie Young

Ms. Ta-Tanisha Manson is the General Counsel for MPHI and was interviewed along with Ms. Ammie Young of MPHI. Ms. Manson provided background information regarding MPHI and their relationship with MDHHS. Ms. Manson stated when an agency wished to utilize MPHI, that agency would either contact her or Ms. Young and then MPHI would serve as the fiduciary, and ensure that all contracts complied with state and federal rules regarding salaries, costs, verifying subcontractors are acceptable, etc. However, it was the responsibility of the requesting agency to ensure that the agency was compliant with procurement rules.

As it related to the GLCE contract, Ms. Manson indicated she was contacted on April 15, 2020 by Ms. Laura Geist (with MDHHS) via email. Ms. Geist indicated they needed to utilize MPHI because the contract needed to be executed quickly. Ms. Manson stated MPHI could assist quickly given the exigent circumstances and they moved as allowed under the emergency/exigency exception of the Uniform Guidance, Section 200.320(f)(2), which provides that procurement may be made by non-competitive proposals if “the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.” U.G. §200.320(f)(2). Ms. Manson was informed the subcontractor would be Kolehouse Strategies. Ms. Manson then provided Ms. Geist with Ms. Young’s contact information. Ms. Manson and Ms. Young were not aware of any prior contract or work relationship between MPHI and Kolehouse Strategies.

On April 17, 2020 Ms. Macomber emailed Ms. Manson and requested the subcontractor name be changed from Kolehouse Strategies to GLCE, which Ms. Manson believed was simply another entity owned by Mr. Kolehouse. MPHI negotiated the contract with Mr. Kolehouse and the contract was executed on April 20, 2020. There was nothing unusual or concerning about the contract, initial discussions, negotiations nor the execution per Ms. Manson and Ms. Young. On April 21, 2020 Ms. Manson received an email from Ms. Christine Sanches requesting the contract be terminated effective immediately. Ms. Manson did not ask for, nor received, any explanation for the sudden termination, however, she did read about it later in the news. The new contact tracing contract did not go through MPHI.

Ms. Christine Sanches

Ms. Christine Sanches is the Director of the Bureau of Grants and Purchasing within MDHHS. Ms. Sanches indicated she had no personal involvement with the GLCE contract, and that the contract went through MPHI at the request of Ms. Macomber. **See Exhibit 17.**

Mr. Matthew Buck

Mr. Matthew Buck works for MDHHS and became involved in the contact tracing project after Kolehouse Strategies had already been chosen as the subcontractor. He had no knowledge or involvement in the selection of Kolehouse Strategies, nor was he aware of who selected them. Mr. Buck was to design how the contact tracing was to be conducted, meaning he had to determine how to get the correct information to the proper people after the data had been collected.

Mr. Buck was not aware the GLCE contract went through MPHI and had no involvement with the contract itself nor its procurement, but he did have an advisory role in the procurement and contract between MDHHS and the new Rock/Deloitte contact tracing contract. The Rock/Deloitte contract did gain both DTMB and SEOC approval. Mr. Buck acknowledged there was a considerable monetary difference between the two contracts.

Mr. Buck has some knowledge and previous experience with procurement within the State of Michigan. He has used MPHI before and believes they are an effective way of setting up services quickly. However, IT contracts are not supposed to go through MPHI, and are required to obtain DTMB approval. Although Mr. Buck did not consider the GLCE contract to be an “IT” contract, but instead believed it to be a “services” contract. Mr. Buck had no knowledge or experience with procurement during a state of emergency, nor any knowledge or experience with the SEOC.

Additionally, Mr. Buck had no knowledge of Kolehouse Strategies, GLCE or Every Action VAN prior to this contract. He also did not know Mr. Ed Duggan. He had worked with Ms. Taverna previously with past opioid projects. Finally, Mr. Buck also had no knowledge of any role played by the Governor’s Office nor of any wrongdoing by any party.

Ms. Ashley Guttman

Ms. Ashley Guttman is a project manager with DTMB and became involved with the GLCE contract on March 30, 2020 when it was determined a project manager was needed to help with IT and customer relationship management services as they related to the contract. Ms. Guttman indicated the team on the contract met regularly in mid-April. By the time Ms. Guttman became involved in the project, GLCE/Kolehouse Strategies had already been selected and she had no knowledge as to the selection process nor was she aware the contract went through MPHI. Further, Ms. Guttman had no prior knowledge of Mr. Kolehouse or his companies, had no prior knowledge of NGP VAN or Every Action VAN and was also not familiar with any data safeguards that

had been put into place. Ms. Guttman was aware that Ms. Macomber was working on a DUA, but she was not familiar with the terms of the DUA.

Mr. Kevin Walker

Mr. Kevin Walker is also a project manager with DTMB and was assigned to the contact tracing project about three to four weeks after Ms. Guttman, once the project's scope began to get larger. Mr. Walker had no knowledge of the original contract going through MPHI, had no knowledge of Mr. Kolehouse or his companies prior to this project and had no prior knowledge of NGP VAN or Every Action VAN. Mr. Walker was also not familiar with whatever data safeguards had been put into place. Mr. Walker is aware that all IT contracts are to go through DTMB but is not sure if an emergency declaration changes any procurement rules or procedures.

Mr. Zack Pohl

Mr. Zack Pohl is the Communications Director for the Governor's Office. During Mr. Pohl's interview he indicated he was not involved in the development of the GLCE contract, nor was he involved in choosing Mr. Kolehouse. Mr. Pohl is also not familiar with State procurement guidelines.

Mr. Pohl learned of the contact tracing contract on April 14, 2020 from Ms. Taverna and believed it would be a good topic for Governor Whitmer to discuss in a press conference. **See Exhibit 18.** Ms. Taverna stated the work would be similar to political organizing and that they were going to utilize NGP VAN for the software aspect of the project. Mr. Pohl advised Ms. Taverna that using NGP VAN could be a distraction, given its ties to the Democratic Party. A couple of days later Ms. Taverna informed him the contract was switched from Kolehouse Strategies to GLCE and from NGP VAN to Every Action VAN. Mr. Pohl was not familiar with either of those entities, but Ms. Taverna informed him they were used by nonprofit organizations, although they were owned by the same individuals as the previous contract. Mr. Pohl advised her that sounded better.¹⁰ **See Exhibit 19.**

Mr. Pohl did not notify anyone else within the Governor's Office of this contract nor does he believe anyone from the Governor's Office was involved in any aspect of the contract or selection of vendor. Mr. Pohl is not aware of who approved the contract, nor is he aware of who cancelled the contract. Though

¹⁰ Mr. Pohl noted during the interview that he does not have the authority to approve any contracts.

he believes the contract was cancelled after Republican members of the Legislature voiced objections.

Mr. Jeff Ballard

Mr. Jeff Ballard is a Solutions Architect with DTMB and is assigned to supporting MDHHS. In late March 2020 he was included in the contact tracing project to do the solutions assessment. His involvement was solely for the technical aspects and he was not involved in the contract. Mr. Ballard had no knowledge of the selection of Mr. Kolehouse, nor was he familiar with Mr. Kolehouse or his business entities.

Mr. Ballard stated he had some familiarity with the State's procurement process, but he was not involved in the procurement aspect of this contract. Further, he has no understanding of MPHI or with the SEOC process. He indicated this was a fast-moving contract. Mr. Ballard also stated he had no concern about the safety of the data collected and saw no possibility of any data collected being used later for any political purpose.

As soon as the GLCE contract was terminated his team then moved on to the next contract with Rock/Deloitte.

Mr. Sunil Chowdary

Mr. Sunil Chowdary is a Manager of the IT Architects within DTMB. Mr. Chowdary had no knowledge of the selection and awarding of the GLCE contract, was not aware it had even been awarded to Mr. Kolehouse, nor was he familiar with Mr. Kolehouse or his business entities. Mr. Chowdary also has no familiarity with MPHI or the SEOC process.

Mr. Chowdary indicated that DTMB procurement becomes involved in the approval process for IT contracts and that requirement does not change during a declared state of emergency. However, Mr. Chowdary did not have any concerns over the storage of the data under the GLCE contract.

Ms. Kimberly Koppsch-Woods

Ms. Kimberly Koppsch-Woods works with DTMB. Ms. Koppsch-Woods had very limited knowledge of the GLCE contract and believed the contract to be primarily a "services" contract, where GLCE was going to perform their own IT. She had no knowledge as to the selection and awarding of the contract.

Ms. Koppsch-Woods stated that MDHHS utilizes MPHI often if the contract does not involve technology and involves mainly services. Some contracts with IT components have gone through MPHI previous, however, MPHI usually

reaches out to DTMB if the contract appears to be an IT contract. Ms. Koppsch-Woods did not believe the way in which MDHHS acted and operated would have been out of the ordinary in this circumstance.

Mr. James Colangelo

Mr. James Colangelo is the Chief Procurement Officer with DTMB. He found out about the GLCE contract after it had already been finalized. He believes the contract was really comprised of two components, one being an IT component and the other a services component. In his opinion, this contract should have gone through DTMB. He was aware of MDHHS' relationship with MPHI and believed they often used MPHI to avoid oversight. He further stated, DTMB became involved with the new Rock/Deloitte contract, using Deloitte for the IT aspect as they were already under contract with them and they were already performing similar work.

Mr. Colangelo described the normal procedures for procurement. For purchases under \$50,000.00, the individual department may handle the procurement independently and without a Request for Proposal (hereafter "RFP"). For purchases over \$50,000.00, a RFP, or some other form of formal solicitation, is required. For any contract with a value over \$500,000.00, DTMB must handle the procurement process. MDHHS does have delegated authority to handle purchases between \$50,000.00 and \$500,000.00 but must follow the same process as DTMB. However, all IT purchases must go through DTMB, regardless of the price.

The process may vary when the State is under a declaration of emergency or disaster. During this time, individual departments can make purchases up to \$500,000.00 and no RFP or competitive bidding process is required. **See Exhibit 20.** However, the Michigan Emergency Operations Center (also known as the SEOC) must give final approval of all contracts. Contracts may also go through the competitive bid process through a quick RFP, which reduces the bid time to a few days, and can be sent to just a small group of potential vendors. It would then be sent to the SEOC for approval.

During a declared emergency, all IT purchases must still go through DTMB. In determining whether a contract is an "IT" contract, it is not the cost that is evaluated, but whether the product or service is hosted on state systems. Regardless of whether the purchase is an IT purchase or not, all procurements under an emergency must still be submitted to the Administrative Board within 30 days of its execution or purchase. **See Exhibit 8.**

Major Emmitt McGowan

Major Emmitt McGowan is a Michigan State Police Officer and is the Commanding Officer of the SEOC. Major McGowan is not familiar with MPHI, Mr. Kolehouse, or any of Mr. Kolehouse's business entities. Major McGowan stated that once the SEOC is activated, all major purchases require the checks and balances of the SEOC.

The GLCE contract was not submitted for approval to the SEOC, and no one at the SEOC had heard of it. If the contract was going to be utilizing any "COVID funding", it should have been submitted to the SEOC for approval. The proper procurement process within the SEOC is to channel the purchase through a resource request and enter the request into the Michigan Critical Incident Management System (hereafter "MICIMS"). Once in the MICIMS the need is then evaluated and the SEOC determines if the expense is an "allowable expense". If allowable, the purchase is then pushed to procurement, which is then handled by DTMB. DTMB would review the request and then make the purchase. The new Rock/Deloitte contract was submitted and approved by the SEOC and DTMB following an open bid process.

Ms. Corina Andorfer

Ms. Corina Andorfer is the Chief Compliance Officer within the Executive Office of Governor Whitmer. Ms. Andorfer began reviewing the GLCE contract to determine whether the appropriate process was followed, however she stopped reviewing upon learning that the Department of Attorney General was investigating. Ms. Andorfer believed the contract fell under the emergency portion of the procurement process. Ms. Andorfer declined to make any further comments as to whether she believed there were any issues with the contract.

Legal Analysis

Procurement Rules Analysis

After conducting numerous interviews, reviewing hundreds of emails, and reviewing the relevant State procurement rules and guidelines, the extent to which there was a procurement violation with the execution of the GLCE/Every Action VAN contract is unclear at best, and the extent to which there was a knowing and intentional violation of the procurement rules is without any evidence. While there does appear to be a violation of the emergency procurement process by way of the contract not gaining the approval of the SEOC first, even that aspect is not quite clear in that there is no evidence of any notice being distributed that notification to the SEOC was required. **See Exhibit 21.** Additionally, there is no clear consensus whether the contract was an "IT" contract or a "services" contract, which makes the procurement analysis even more uncertain.

Under the Michigan Procurement Policy Manual, there are exceptions to the general procurement rules requiring competitive solicitation. Those exceptions include, (1) when the purchase would be necessary for the imminent protection of public health or safety or (2) when there is a declared state of emergency or state of disaster. Michigan Procurement Policy, Chapter 5. In this situation, condition one and two have both been met, at least in part. Governor Whitmer declared a State of Emergency and a State of Disaster under Executive Orders 2020-04 and 2020-33 and there is a valid argument that contact tracing was and is necessary for the imminent protection of public health and safety. However, pursuant to exception one, MDHHS would have been required to seek the approval of Mr. Colangelo, which they did not. Under exception two, on the other hand, MDHHS would have been able to sidestep the competitive bid process. Further, DTMB did send out notice on March 27, 2020 that they were “exercising emergency procurement authority.” **See Exhibit 21.** Therefore, under these provisions and notices, MDHHS would have been able to solicit this contract without the use of a competitive bidding process.

The most unclear procurement determination related to this contract is whether it is an “IT” contract or whether it is a “services” contract. Various witnesses provided different opinions regarding this determination and after an analysis of the contract it is unclear as to whether, even by Mr. Colangelo’s definition of an “IT” contract, this contract would fall under the DTMB approval requirement. Based upon witnesses’ interviews and the various emails, the contract was contemplated as a “services” contract. That initial determination appeared clear. The question then becomes whether it transformed into an “IT” contract. While some “IT” aspects did develop, arguably this contract remained one for services. Under Mr. Colangelo’s definition of an “IT” contract, the GLCE contract falls short. The data obtained pursuant to the GLCE contract was going to be temporarily housed with Every Action VAN, however, that data was then going to be moved back to MDHHS for analysis. Arguably, the IT aspect of the contract was not going to be performed by GLCE, and thus the contract was not for “IT”, but rather for services.

MDHHS also did not appear to violate the State Administrative Board’s Resolution 2019-1, requiring that all emergency contracts be reported to the Board within thirty days of execution. This contract was not executed until April 20, 2020. Thus, the contract would not need to be reported until May 20, 2020, however, it was cancelled before it was reported. Therefore, no violation of this rule could have occurred.

The only procurement rule that seemed to be violated, was the requirement that the SEOC approve the contract prior to its execution. Major McGowan

provided that if the contract was going to be utilizing any “COVID funding”, it should have been submitted to the SEOC for approval. The proper procurement process within the SEOC is to channel the purchase through a resource request and enter the request into the MICIMS. Once in the MICIMS the need would have then been evaluated. If allowable, the purchase would have then been pushed to procurement. This did not happen with the GLCE contract. However, **there was no evidence available to demonstrate that Ms. Taverna or Ms. Macomber (the two individuals involved with and responsible for the execution of the contract), would have had any knowledge of that requirement.** The notice that was distributed to State employees regarding emergency purchases (found in **Exhibit 21**), did not discuss that process, nor mention it.

Further, it should also be noted that none of the procurement rules or statutes contain criminal penalties for any failure to comply with the rule or statute.

State Ethics Analysis

An in-depth analysis of the State Ethic’s laws was not performed. However, a quick review of the State Ethic Act, Act 196 of 1973, specifically, M.C.L. §15.341 and M.C.L. §15.342, did not reveal any violations on the part of any individual listed above as a “key individual”. While the individuals meet the definition of employee or public officer under M.C.L. §15.341, **there was no evidence of any violation of M.C.L. §15.342.**

Additionally, a review of Act 317 of 1968, Contract of Public Servants with Public Entities, yielded no findings of any wrongdoing on the part of any key individual. M.C.L. §15.322 provides that a “public servant shall not directly or indirectly solicit any contract between the public entity of which he or she is an officer or employee and... him or herself...any firm...where they are a partner, member or employee...any private corporation where they are a stockholder owning more than 1%...[or] any trust where they are a beneficiary.” *Id.* **A review of the emails, witness interviews, and other documents provided no evidence of any violation of Act 317 of 1968.**

The same is true for Conflict of Interest, Act 318 of 1968 (which codifies Article 4, §10 of the Michigan Constitution of 1963). The Act states that “[n]o member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest...” M.C.L. §15.302. The Act provides that in order to “be prohibited by this act his or her personal interest must be of such substance as to induce action on his or her part to promote the contract for his or her own personal benefit.” M.C.L. §15.304. **There was no evidence**

that this Act had been violated during the selection, negotiation, or execution of the GLCE contract.

Criminal Law Analysis

The only criminal violations that appeared applicable were violations of M.C.L. §750.478 – Willful Neglect of Duty, M.C.L. §750.505- Common Law Offenses – Misconduct in Office, or M.C.L. §750.505 – Common Law Offenses – Fraud. **There was no evidence of any criminal intent or criminal conduct and thus there were no findings to substantiate any criminal charges.**

Misconduct in Office is defined as “corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.” *People v. Waterstone*, 296 Mich. App. 121,133 (2012) *citing People v. Coutu*, 459 Mich. 348, 354 (1999). The criminal charge of Misconduct in Office is found in either M.C.L. 750.478 or M.C.L. 750.505, depending on the type of misconduct. With misconduct charges, there are three potential theories of liability: (1) malfeasance (committing an act which itself is wrongful), (2) misfeasance (committing a lawful act in a wrongful manner), or (3) nonfeasance (failing to perform any act that the duties of the office require). *People v. Waterstone*, 296 Mich. App. 121 (2012) *citing Perkins & Boyce*, Criminal Law (3d ed) p. 540. To charge under the malfeasance or misfeasance theories, prosecution must utilize M.C.L. 750.505, which provides the statutory authority to criminally charge any indictable common law offense when there is no specific statute under which to charge. M.C.L. 750.505 provides that any misconduct in office charge under the malfeasance or misfeasance theories would be a felony punishable by up to 5 years in prison and/or a fine or a fine of not more than \$10,000. M.C.L. 750.505. The elements of common-law Misconduct in Office are “(1) the person must be a public officer, (2) the conduct must be in the exercise of the duties of the office or done under the color of the office, (3) the acts were malfeasance or misfeasance, and (4) the acts must be corrupt behavior.” *People v. Carlin*, 239 Mich. App. 49, 64 (1999). However, if the theory of liability is one of nonfeasance, prosecution must charge under M.C.L. 750.478, which provides for the criminal charge of a misdemeanor, punishable by up to one year in jail and/or a fine of not more than \$1,000. *See People v. Waterstone*, 296 Mich. App. 121 (2012).

In order to sustain a charge of Misconduct in Office, there must be a finding that the actor was a “public officer”, as contemplated in the charge of Misconduct in Office and “there must be established a ‘breach of a positive statutory duty’ or ‘the performance of a discretionary act with an improper or corrupt motive.’” *Carlin*, 239 Mich. App. at 66 *citing* 63C Am Jur 2d, Public Officers and Employees, §373, p. 814. The Michigan Supreme Court provided

guidance on determining whether an actor is a ‘public officer’ or an employee in *People v. Coutu*, 459 Mich. 348 (1999). In *Coutu* the Court cited *People v. Freeland*, 308 Mich. 449 (1944), stating “[a] public officer was distinguished from an employee ‘in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond.’” *Coutu*, 459 Mich. at 354 *citing People v. Freeland*, 308 Mich. 449, 458 (1944). The Court provided the following factors in considering whether the individual was considered a “public officer” or an employee:

- (1) Was the position created by the Constitution, legislature, municipality, or other body through authority conferred by the legislature?
- (2) The position must “possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public”. *Id.* at 354.
- (3) Are powers of the position and the duties to be discharged conferred, either directly or indirectly by the legislature or through legislative authority?
- (4) Are the duties performed by the individual independent and without control of a superior power (other than the law)? The exception being if the duties are those of an inferior or subordinate office created or authorized by the legislature.
- (5) Does the position have some permanency and continuity, and not be only temporary or occasional?
- (6) Was there an oath or bond requirement with the position?

Coutu, 459 Mich. at 354-355.

With the present case, there is no evidence to support proof beyond a reasonable doubt, or even the lower burden of probable cause, that there was any misfeasance, malfeasance or nonfeasance on behalf of any of the individuals involved in the selection, negotiation or execution of the GLCE contract. Additionally, there is the possibility that some of the actors would not even meet the definition of a public officer, although not enough information is known to make a full analysis of that element. **There is also no evidence of any corrupt behavior on the part of any of the individuals involved with the GLCE contract.** Thus, there can be no criminal charges arising from Willful Neglect of Duty or Misconduct in Office.

There is also no evidence to demonstrate any type of fraud in relation to the GLCE contract. Black’s Law Dictionary defines fraud as “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” Black’s Law Dictionary goes on to state that intentional fraud may be a crime. However, there is no

evidence that anyone misrepresented anything regarding the parties to the contract, the work to be performed under the contract, or the reason behind the contract. Therefore, there can be no sustainable criminal charges for Fraud.

As there is no evidence of any intentional wrongdoing, and no evidence required for any of the elements necessary to sustain criminal charges for Misconduct in Office (which includes Willful Neglect of Duty), no criminal charges could be filed against any of the individuals associated with the selection, negotiation or execution of the GLCE contract.

Conclusion

To conclude, after a thorough review of the available evidence, this investigation has found the following:

- It cannot be proven the procurement rules were knowingly violated.
- There are no criminal consequences stated within any procurement rule or statute for any perceived violation of any procurement rule.
- There was no evidence of any violation of M.C.L. §750.478 – Willful Neglect of Duty.
- There was no evidence of any violation of M.C.L. §750.505 – Misconduct in Office.
- There was no evidence of any violation of M.C.L. §750.505- Common Law – Fraud.

Pursuant to the American Bar Association’s Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor, a prosecutor evaluating a criminal matter shall “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” This rule is mirrored in the Michigan Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor. Therefore, based upon the findings of the investigation, no criminal charges should be filed regarding the procurement of the GLCE/Every Action VAN contract and this matter should be closed.