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Decision Regarding Allegations of KOMA and Misuse of Public Funds violations.

Facts:

In early March 2014 I received a letter from Lisa Mendoza from the Kansas Attorney General's office. This letter stated that the AG's office had received a complaint made by Oswego City Councilman William B. Owens regarding a Kansas Open Meeting Act (KOMA) violation as well as a possible Misuse of public funds violation.

The alleged violations are as follows:

1. The KOMA violation, it was alleged, stemmed from an informational meeting held in the Oswego Community Center on January 21st, 2014 by the Oswego City Mayor and three members of the Oswego City Council. It was alleged that that this meeting was about the half cent sales tax increase that was on the February 18th Ballot. In his letter Mr. Owens said that because the Mayor and three Council members were there and the Labette Avenue was not notified of the meeting, it "appear[ed] that this meeting was a violation of the Kansas Open Meetings Act."
2. Misuse of Public Funds violation is alleged to have taken place when the City included a newsletter or flyer in the City water bills. The complaint states "as this flyer clearly promotes passage of the Sales Tax increase, it appears that this is a misuse of public funds to promote a political agenda."

I then made contact with Mr. Richard Tucker, the Oswego City Attorney, regarding the specific allegations made against the Oswego city council. During this communication it was determined that Mr. Tucker and I would meet with each member of the City Council, the Mayor and the City Clerk individually. During this meeting I would investigate the events surrounding the allegations made by Councilman Owens. These interviews were to take place and did take place at 5PM on April 1st at the Oswego City Hall. During these interviews I was provided, by Mr. Tucker, a copy of the minutes taken for the City Council meeting on January 13th 2014. These minutes made reference to an informational meeting to be held on January 21st 2014 that would be held at the Oswego Community Center. It was also determined through the interviews of the entire

City Council that there were never more than three City Council members present at the informational meeting held January 21, 2014. The names of the Council members present at the informational meeting held January 21, 2014 were Jane Rea, Dee Brown, and Susan Bringle.

During these interviews I inquired regarding the design and publishing of the newsletter that was sent out in the Oswego City water bill. I also inquired into the decision making process of using the water bill as a delivery device for this newsletter. I discovered that the person responsible for the content and design was Carol Eddington, the recently appointed Oswego City Clerk. Ms. Eddington informed me that Parsons had just passed a similar half cent sales tax increase within the last year. Ms. Eddington informed me that she called over to the Parsons City Hall; obtained a copy of the flyer that Parsons has used, and used that flyer as a template. Ms. Eddington did say that some changes regarding wording were requested by the Mayor.

The one specific change that Ms. Eddington could remember concerned the phrase on the Parsons flyer "It is a Fair Tax" which was changed to "It is the Most Fair Tax" on the Oswego flyer. During the interview with Mr. Fisher, he repeated that he tried to make sure that they, the City Council, did not tell people how to vote. When asked if he thought the phrase "It is the Most Fair Tax" could be seen as being in favor of the tax, Mr. Fisher stated that he did show a draft of the newsletter at the informational meeting on January 21st \ 2014. Mr. Fischer also emailed a copy of the flyer to some of the City Council member. It was his understanding that everyone seemed to think it was a non-political flyer designed to inform the voters of the tax.

The decision to send out the flyer with the water bills started as a suggestion by Councilwomen Susan Bringle in the City Council meeting held on January 13th, 2014 as evidenced in the minutes from that City Council meeting. There is no record of any objection to this, so the flyer was sent out in the water bill as Ms. Eddington said was often the case when the City wants to communicate directly to the citizens of Oswego.

Finally, I was able to meet with Labette Avenue employee Heather Brown. Ms. Brown was present at the informational meeting held on January 21st \ 2014. Ms. Brown did state that she was not present at the January 13th, 2014 City Council Meeting, nor was she called and informed of the meeting. Ms. Brown was phoned by a concerned citizen about an informational meeting which prompted her attendance. Ms. Brown was informed that one of the Councilwomen did try and text her details of the meeting, but was unsuccessful. Ms. Brown reported that Councilwomen Dee Brown stated that if another council member showed up one of the council members present would have to leave.

Findings:

Re: KOMA violation:

A "meeting" regulated by the Kansas Open Meetings Act is found in K.S.A. 75-4317a is defined; "As used in the open meetings act, "meeting" means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a *majority oft/re members/rip* of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency." (Emphasis added).

The City Council of Oswego, Kansas consists of six members. The Mayor is not a voting member of the City Council. In order for KOMA to govern the informational meeting, there needed to be a majority of the council at the informational meeting held on January 21⁵ 2014. Therefore, this is the end of my analysis. There was never any evidence presented that a meeting was held where four Oswego City Council members met together. I find that due to a lack of a majority the Kansas Open Meetings Act does not apply. Hence, there can be no KOMA violation.

Re: Misuse of Public Funds:

This is the second allegation made, and by far the most serious. A conviction of misuse of public funds, K.S.A. 21-6005, carries a maximum punishment of 136 months in Department of Corrections and a fine of not more than \$100,000.00 to as little as 12 months in County Jail. Any person convicted of Misuse of Public Funds must forfeit their official position. This is not a charge to be taken lightly.

The County Attorney's Office does not investigate criminal matters, and this is not, and was not a criminal investigation. This investigation consisted of determining if there was enough evidence to contact Law Enforcement and request an investigation into Misuse of Public Funds. I find that there was not enough evidence to support requesting an investigation into Misuse of Public Funds.

K.S.A. 21-6005 sets out the elements of Misuse of Public Funds as:

- "(a) Misuse of public funds is knowingly using, lending or permitting another to use public money in a manner not authorized by law, by a custodian or other person having control of public money by virtue of such person's official position.
- (b)(1) Misuse of public funds where the aggregate amount of money paid or claimed in violation of this section is:
- (A) \$100,000 or more is a severity level 5, nonperson felony;
 - (B) at least \$25,000 but less than \$100,000 is a severity level 7, nonperson felony;
 - (C) at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony; and
 - (D) less than \$1,000 is a class A nonperson misdemeanor.
- (2) Upon conviction of misuse of public funds, the convicted person shall forfeit the person's official position.
- (c) As used in this section, "public money" means any money or negotiable instrument which belongs to the state of Kansas or any political subdivision thereof." (Emphasis added).

As a public servant, there is a special access to the monies taken in by the Government. As such the penalties for any misuse must be severe. However, the statute requires that the State prove beyond a reasonable doubt person accused "knowingly" used the money in a manner not authorized by law. In this case I cannot see any actions that were taken by the Mayor, City Clerk, or the City Council that would fit the elements of Misuse of Public Funds.

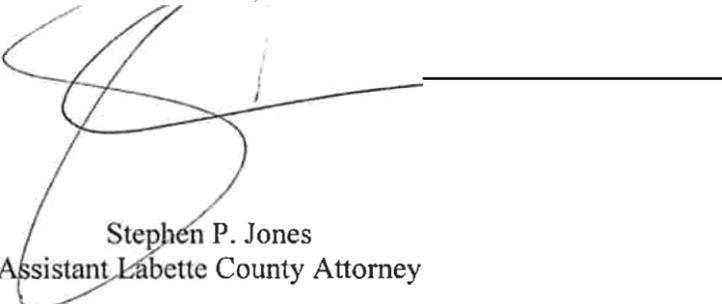
My finds are based on the following facts.

1. The City Clerk who designed the newsletter had just taken over as city clerk,
2. The City Clerk was told to alter certain portions of the newsletter.
3. The Mayor sent the newsletter around for guidance regarding the political nature of the newsletter.
4. Those who saw the newsletter did not find it particularly partisan regarding the sales tax increase.
5. The complaint by Councilman Owens overstates the political agenda of the flyer. It is not "clearly" anything.
6. Nothing on the newsletter tells the voters of Oswego how they should vote, only to vote on February 18¹¹, 2014.
7. The newsletter, although it can be seen to favor the increase by using such slogans as "It is the Most Fair Tax" and "What will the Y2 cent sales tax do for Oswego? Improve our Community" also explains how the monies will be collected, the financial impact in everyday transactions, and what other cities in the surrounding areas collect.
8. The Parsons Template was used.
9. The City of Oswego routinely uses inserts in the water bills to communicate with the citizens of Oswego about items of interest; such as bulk trash days, community garage sales, or the Fourth of July fireworks.
10. The League of Kansas Municipalities' Governing Body Handbook lists Municipal Newsletters sent out in the monthly water and sewage bills as the number one way for the City to communicate with its citizens.

Conclusion:

In conclusion, my findings regarding the initial complaint made to the Attorney General's office of a KOMA violation and Misuse of Public Funds are as follows. There was no KOMA violation because there was never a majority of the City Council so KOMA could not apply. There is insufficient evidence to show anyone knowingly misused public funds. Therefore, there is no reason to request an investigation into the allegations made by Councilman Owens. I find that there was a case of political tunnel vision regarding the news flyer. Although Mayor Fischer sent the flyer around for comments regarding the information contained in the flyer, he did so to those of the same political mind, those that had volunteered to help get the information out. There was no independent vetting of the information.

In the Future, it would be advisable for all parties involved to use the City Attorney for his knowledge and impartiality; to clear flyers and allegations of KOMA violations through him first. He is paid by the City for this very reason; two or three simple questions could have averted this incident.


Stephen P. Jones
 Assistant Labette County Attorney