IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY FLORIDA

GRAND JURY, FALL TERM 2017

IN RE: COMPLAINT OF PAUL HENRY CONCERNING THE UTILIZATION OF NGP VAN SOFTWARE BY CITY OF TALLAHASSEE MAYOR ANDREW GILLUM

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA

NO TRUE BILL PRESENTMENT

THIS MATTER came before the Grand Jury on August 7, 2017, to review the facts and circumstances of Mayor Andrew Gillum's use of "NGP VAN" software. Specifically, the inquiry stems from the complaint of Paul Henry alleging Mayor Andrew Gillum committed the crimes of Grand Theft and Official Misconduct by paying for this software with public funds when he believed they served no public purpose or benefit to the taxpayer. Mr. Henry specifically requested that the State Attorney refer the matter to the Grand Jury and we have now reviewed the facts as established by the Leon County Sheriff's Office and the applicable law concerning each of these crimes. We have heard the testimony of Detective Tyler Epstein and have reviewed the emails in question and find as follows.

FACTUAL FINDINGS PRESENTED

On March 6, 2017 the Office of the State Attorney received a written complaint dated March 2, 2017. It was authored by Mr. Paul Henry and requested an investigation into the actions of Mayor Gillum. The case was referred to the Leon County Sheriff's Office and was assigned to Detective Tyler Epstein. Detective Epstein is an experienced fraud detective who has conducted numerous investigations into various thefts and acts of criminal misconduct. Epstein met with Mr. Henry and discussed the written complaint. Mr. Henry's sole sources of information were media reports from WCTV and his review of public records available on the City of Tallahassee web site. Mr. Henry concluded that the software can serve no legitimate governmental purpose. He alleged that the software was used purely for political purposes and $3915.75 of City of Tallahassee monies were misappropriated by paying for this software. He denied any other knowledge concerning the complaint or alleged crimes.

Detective Epstein sought subpoenas duces tecum and search warrants for all emails and records concerning Mayor Gillum's use of NGP VAN software from both the City of Tallahassee and from NGP VAN Corporation. The returns revealed some 1628 emails that include the term "NGP VAN". Many were emails received from other sources that used this same software. Each result was reviewed by Detective Epstein to determine if the communications were "political advertisements" created by Mayor Gillum. In order to define the term "political advertisement," Detective Epstein relied on a definition from the Leon County Supervisor of Elections. This definition tracks Florida Statute § 106.011.

Detective Epstein conducted sworn interviews with Andre Libroth, Procurement Service Manager for the City of Tallahassee, Raoul Lavin, Assistant City Manager for Administration & Professional Services for the City of Tallahassee, Jonathon Kilpatrick, Chief Information Officer of the City of Tallahassee, Ricardo Fernandez, City Manager for the City of Tallahassee, Jim Cooke, Treasurer-Clerk for the City of Tallahassee, Alison Faris, Director of Communications for the City of Tallahassee, Bert Fletcher, City Auditor for the City of Tallahassee, Lewis Shelly, City Attorney for the City of Tallahassee, Akhenator Thomas, Administrative Staffer for the Tallahassee City Commission, Angela Whitaker, Internal Affairs Coordinator for Mayor Gillum, Jamie Van Pelt, Community Relations Coordinator for Mayor Gillum, Dustin Daniels, Chief of Staff for Mayor Gillum, and Mayor Andrew Gillum.

He discovered that NGP VAN is a privately held American company that specializes in electronic communications. They openly advertise that they are "the leading technology provider to Democratic and progressive campaigns and organizations, offering clients an integrated platform of the best fundraising compliance, field, organizing, digital, and social networking products." The software here was only utilized as a CRM or Client Relations Management System. Such a system is commonly used in government and industry to manage communications with clients or constituents. NGP Van software also holds the ability to track responses and assist in fundraising. There is no evidence that this fundraising option was utilized during the relevant period.

Mayor Gillum used this software during three relevant periods. First, he used it as a candidate for City Commissioner and later Mayor from April 2011 until November 21, 2014 when he was sworn in as Mayor. During this period he paid for the software out of his campaign monies and he and his staff became familiar with its operation. After his election as Mayor, he continued to pay for the software out of his excess campaign funds until they were exhausted in December of 2015. At that point, his Chief of Staff started directing the payment of this same software using City of Tallahassee funds. These ran from January 2016 until January 2017 and totaled $4965.75. The review showed that the software distributed 106 emails on behalf of the Mayor during the time period in question. He found that four of these qualify as "political advertisements." Each was campaign related to Democratic candidates and at least one is for a fundraiser. The other 102 were communications concerning a variety of local and regional community organizations and events.

The City of Tallahassee communications department employs numerous persons whose sole duty is to communicate the actions of the City for both elected and appointed officials. They run a television station, a web site, and use direct mail. Individual departments and elected officials supplement this communication stream using city staff. The Mayor specifically employs Mr. Van Pelt to communicate the Mayor's actions and appearances. Based on the evidence collected there is no evidence to indicate audits, regulations, or limits on how City elected officials use their personal city staff. Elected officials are not subject to review or audit by the City of Tallahassee.

Based on the evidence presented Mayor Gillum did not personally utilized the NGP Van software during the relevant period. Communications were delegated to staff. The only password on the system was for his Chief of Staff, Dustin Daniels. Daniels and Van Pelt are the only persons who ever created or directed the NGP Van software to send any communications using City of Tallahassee funds. No evidence was found to suggest that Gillum directed, or was personally involved, in the decision to send the four political emails or any other communications using the NGP Van system. Mayor Gillum ordered his staff to stop utilizing NGP Van software and reimbursed the City of Tallahassee $5082.45 on March 2, 2017. This amount included a processing fee.

The investigation never revealed any evidence of public records being destroyed, altered, or mutilated. Furthermore, there is no evidence of advantage or detriment to any person through manipulation of public records.

APPLICABLE FLORIDA LAW

Florida Statute Section 812.014

Florida Law requires the State to prove the following to support a charge of Theft:

To prove the crime of Theft, the State must prove the following two elements beyond a reasonable doubt:

1. Defendant knowingly and unlawfully obtained or used or endeavored to obtain or to use the property alleged of victim.

2. He or She did so with intent to, either temporarily or permanently,

a. deprive victim of his or her right to the property or any benefit from it.

b. appropriate the property of victim to his or her own use or to the use of any person not entitled to it.

"Obtains or uses" means any manner of

a. Taking or exercising control over property.

b. Making any unauthorized use, disposition, or transfer of property.

c. Obtaining property by fraud, willful misrepresentation of a future act, or false promise.

d. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, deception; or other conduct similar in nature.

Florida Statute Section 838.022

838.022 Official misconduct.—

(1) It is unlawful for a public servant or public contractor, to knowingly and intentionally obtain a benefit for any person or to cause unlawful harm to another, by:

(a) Falsifying, or causing another person to falsify, any official record or official document;

(b) Concealing, covering up, destroying, mutilating, or altering any official record or official document, except as authorized by law or contract, or causing another person to perform such an act; or

(c) Obstructing, delaying, or preventing the communication of information relating to the commission of a felony that directly involves or affects the government entity served by the public servant or public contractor.

Florida Election Law

Section 106.011, Florida Statutes, specifically defines several terms related to political speech.

(15) "Political advertisement" means a paid expression in a communications medium prescribed in subsection (4), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which expressly advocates the election or defeat of a candidate or the approval or rejection of an issue. However, political advertisement does not include:

(a) A statement by an organization, in existence before the time during which a candidate qualifies or an issue is placed on the ballot for that election, in support of or opposition to a candidate or issue, in that organization's newsletter, which newsletter is distributed only to the members of that organization.

(b) Editorial endorsements by a newspaper, a radio or television station, or any other recognized news medium.

CONCLUSION

We, the Grand Jury for Leon County, conclude that there is simply no evidence of Official Misconduct as defined by Florida Statutes. While it is understandable that common language may lead to the conclusion that any malfeasance by a public official would constitute the crime of Official Misconduct, Florida Statutes do not match that understanding. The Florida crime of Official Misconduct is only performed when a public document is manipulated or communication concerning a felony is obstructed by a public official. There is no evidence or allegation of such actions.

The question then turns to whether another crime was committed through the use of this software. First, the Grand Jury finds that the software in itself is not illegal. It is not illicit and the mere possession or use of it does not violate Florida law. Mayor Gillum and his staff face no criminal liability when using this legal software if it is purchased with private or campaign monies.

We next decide whether it can be legally used when paid by governmental monies. Mr. Henry concluded that this software could never serve a legitimate

governmental interest. We disagree. We conclude that governmental bodies at all levels spend vast monies communicating to their constituents and so the use of this software to announce city affairs does not constitute a crime. While the investigation shows that this software was capable of fundraising and other activities that might not serve a legitimate interest, the only way it was utilized was as a client relations management system distributing mass emails. The wisdom or waste of governmental officials in deciding which tools to use is a political issue and not one for criminal prosecution. It is disturbing to the Grand Jury that evidence presented suggests that all expenditures by the City of Tallahassee's elected officials are completely unchecked by internal audit or regulation. We would suggest that the City of Tallahassee empower some body to oversee and report the spending of its elected official's personal staffs who are not otherwise subject to internal audit and review.

Finally; we decide whether this governmentally leased software was used for personal or political purposes outside the scope of legitimate communication with constituents. We find it was. Leaders should not use governmental resources to fundraise. There is no question that the advertisement for Florida DEMS fundraising was outside the duties of the Mayor of Tallahassee and served no public interest.

We find the other three emails more questionable. While the investigator concluded they were political speech, we are not as sure. One of any mayor's duties is to be the city's representative when interacting with other political leaders. Whether speaking at the Democratic National Committee or introducing

the current Vice President of the United States, the voters of Tallahassee chose Mayor Gillum to be the person invited. The dissemination of his appearance at each may constitute an appropriate use of the software.

However, assuming all four emails are outside the bounds of legitimate governmental communication, we find no case against Mayor Andrew Gillum. Two persons, Jamie Van Pelt and Dustin Daniels, had the password for the system. There is no evidence to suggest that Mayor Gillum ever personally sent any emails using the system or specifically directed that any particular emails be sent. Mayor Gillum's act of taking public responsibility for his staff and paying back the money does not change the criminal requirement the he have committed a crime or been a principal to a crime. We find he was not.

Hence, only these staffers could hold criminal liability for inappropriately sending out the political emails. The system was lawfully utilized to communicate the public actions of Mayor Gillum. To be guilty of misappropriation, the State would have to prove that these staffers had a criminal intent to steal when they utilized this system to distribute each of these questionable emails. We don't find such evidence. These men sent 102 emails announcing the Mayor's participation and support of legitimate governmental activities such as the Longest Table and the Faith Leadership Network. Our issue is when they also announced the Mayor's participation and support of candidates and fundraising. We find that a less than 4% error rate in determining whether the Mayor was acting in furtherance of his position as Mayor, or as a private political fundraiser, cannot support a conclusion of criminal intent.

THEREFORE, with a quorum present and twelve or more in agreement, we find that the conduct of Mayor Andrew Gillum, was lawful pursuant to Florida Statutes. We further find that any violation of Florida Statutes concerning fundraising or electioneering through use of public property by his staff to be incidental and insufficient to support criminal prosecution.

RESPECTFULLY SUBMITTED this 7 day of August, 2017.

Michael Eastman
Foreperson

Attest:
Grand Jury Clerk