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RE: Investigative Report

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**PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT
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This report sets forth our findings and conclusions based on our independent investigation into certain allegations made against the Executive Aide to the Mayor, Craig Kidd.

BACKGROUND

A. Events Precipitating the Investigation

Shortly before the November 2019 elections, a representative of the [Johns Creek Post](#) (“JCP”)¹ submitted an Open Records Act request to the City seeking records pertaining to the electronic communications and internet activities of Craig Kidd, the Executive Aide to Mayor Michael (“Mike”) E. Bodker. On December 1, 2019, following receipt and review of the requested records produced by the City, the JCP posted an [article](#) to its website, in which it purported to expose misconduct by Mr. Kidd in the following respects: (a) attempting to influence/manipulate the

¹ The JCP appears to be a locally maintained web-based platform for political opinion and community-related news, with an emphasis on politics and an admitted “hyper-focus” on issues relating to the City Council for the City of Johns Creek. In addition to the website, the JCP maintains a social medial presence on [Twitter](#), [Facebook](#), and [YouTube](#).

November 2019 election by recruiting candidates to run for seats on the City Council; (b) engaging in personal and political pursuits on City time and/or through the use of City-issued equipment and resources; (c) breaching security protocols in delivering City checks to the Mayor's home for signature; and (d) a matter allegedly constituting a lack of transparency.² Given the nature of the accusations against Mr. Kidd, it was determined that an independent investigation into possible Charter and/or policy violations was warranted.³ In January 2020, this firm was retained by the City through its City Attorney, Richard A. Carothers, to conduct the investigation.⁴

² The Open Records Act request sought the following records: (1) "text messages on [Mr. Kidd's] City phone including phone number/contact from January 1, 2019-September 30, 2019;" (2) "telephone log of all incoming and outgoing calls on [Mr. Kidd's assigned] City phone from January 1, 2019-September 30, 2019;" (3) "copies of all emails to and from @FultonGOP.org [on Mr. Kidd's assigned City phone and/or computer];" and (4) "website activity for City phone and City computer assigned to [Mr.] Kidd [for the period] April 1, 2019-September 30, 2019."

³ Because the City Charter vests sole and exclusive authority over the Executive Aide position in the Mayor, this investigation was conducted at the Mayor's request pursuant to his investigative authority. *See* Charter, Sec. 3.22(a) ("The Mayor may conduct inquiries and investigations into the conduct of the City's affairs"). While the Mayor expressed his strong preference for having no association with the investigation to avoid any perception that his involvement compromised its independence, we determined that interviewing him was essential. Accordingly, we wish to note that apart from one face-to-face interview and a subsequent follow-up interview conducted by telephone – both of which we requested – the Mayor has had no contact with the investigators. He has made no effort to direct, impede, or otherwise influence the investigation in any way.

⁴ As was discussed during the City Council's December 9, 2019 Work Session, there are at least two additional mechanisms by which investigations may be conducted. First, like the Mayor, the Council also possesses investigative authority under the City Charter. *See* Charter, Sec. 3.12. Second, an investigative process is available under the City's Code of Ethics. *See* City Code, Sec. 2-265(d).

B. The Investigation

In preparation for the investigation, we reviewed the aforementioned JCP articles dated December 1, 2019 and December 21, 2019, the related Open Records Act request, and the [video records](#) and [minutes](#) from the December 9, 2019 Work Session during which the allegations of the initial JCP article, the records produced in response to the Open Records Act request, and the need to initiate an investigation were first addressed by the Mayor and City Council as a body.

The investigation itself commenced with an examination of the voluminous records produced by the City in response to the Open Records Act request, as well as a review of potentially relevant provisions of the Official Code of Georgia, the City Charter, City Code, the City's Employee Handbook, and the job description for the Executive Aide position. Because of the potential applicability of a relatively recent amendment to the City Charter as it pertained to the Executive Aide position, research was also conducted into the relevant activities and published recommendations of the 2012 Charter Commission and the 2016 Charter Task Force, which included a review of the video records of the 2016 meetings of the [Task Force](#) and 2017 meetings of the [City Council](#) wherein the proposed Charter amendments were discussed and approved.

We conducted interviews (and in some cases, follow-up interviews) with Mr. Kidd, Mayor Bodker, Councilmember Chris Coughlin, former Assistant City Manager Justin Kirouac (who presided over the 2016 Charter Task Force), former Executive Aide Linda Johnson, State Representative Angelika Kausche, and Pallavi Purkayastha (a political strategist who works with, and previously managed the campaign of, Rep. Kausche). While he was not interviewed, Assistant City Attorney Ron Bennett was an invaluable resource for ensuring our access to requested records and witnesses.

Finally, research was conducted into various legal and constitutional issues implicated by the investigation, such as the First Amendment, federal and state campaign and election laws, and the traditional distinctions drawn between the personal staff of elected officials and other state and local government employees in various contexts (including in the context of political activity).

THRESHOLD ISSUES

A. The Executive Aide Position

Mayor Bodker has been the City's only Mayor since its incorporation in 2006 and, over that time, has had three Executive Aides. The first was Patricia ("Patty") Hansen, who primarily provided administrative and policy-related support to the Mayor. After Ms. Hansen's departure, Linda Johnson was appointed to the position. In contrast to her predecessor, as Executive Aide, Ms. Johnson focused more on research and communications matters, such as preparing press releases and speeches for the Mayor. Upon Mr. Kidd's appointment to the role, the position became more relationship and policy-focused, with the City's Communications Department taking over many of the functions previously handled by Ms. Johnson.

Mr. Kidd was appointed to the Executive Aide position in January 2018, after having been approached by the Mayor following his reelection to his current term in November 2017. Even prior to his appointment, Mr. Kidd worked in the political sphere, including managing local campaigns (at least one of which was for a candidate for City Council) and serving as First Vice Chairman to the Fulton County Republican Party – a position he currently holds.

The position of Executive Aide to the Mayor has existed since the City was first incorporated in 2006. The local legislation comprising the City's initial Charter provided as follows with respect to the position:

The Mayor shall in his or her sole discretion appoint an Executive Aide to the Mayor. The Executive Aide shall serve at the pleasure of the Mayor. The Executive Aide shall receive a salary comparable to that of city department heads, which salary shall be fixed by the Mayor. The Executive Aide shall report directly to the Mayor. The duties and responsibilities of the Executive Aide shall at all times be as set forth by the Mayor. The Executive Aide shall have the authority, upon the specific request of the Mayor, to act on behalf of the Mayor in the Mayor's ceremonial or administrative capacity. The Executive Aide shall have no authority to act on behalf of the Mayor in a legislative or executive capacity.

[2006 Ga. Laws 3503, 3522 \(Act No. 437\)](#). This language was codified in subparagraph (c) of Section 3.22 of the original City Charter, entitled “Powers and Duties of the Mayor.”

In 2017, the Mayor and Council, acting through the City’s home rule authority, amended Section 3.22(c) of the City Charter to address apparent concerns relating to the breadth of the Mayor’s authority to determine the Executive Aide’s duties and responsibilities.⁵ As amended, Section 3.22(c) now reads as follows:

The Mayor shall in his or her sole discretion appoint an Executive Aide to the Mayor. The Executive Aide shall serve at the pleasure of the Mayor. The Executive Aide shall receive a salary comparable to that of City department heads, which salary shall be fixed by the Mayor. The Executive Aide shall report directly to the Mayor. The duties and responsibilities of the Executive Aide shall at all times be as set forth by the Mayor *provided that the duties and responsibilities relate to City business and at no time shall the Executive Aide conduct personal business for the Mayor*. The Executive Aide shall have the authority, upon the specific request of the Mayor, to act on behalf of the Mayor in the Mayor’s ceremonial or administrative capacity. The Executive Aide shall have no authority to act on behalf of the Mayor in a legislative or executive capacity. (Emphasis added.)

([Ord. No. 2017-04-15, § 2, 4-24-2017](#).)

⁵ This amendment was one of several recommended by a [Charter Task Force](#) that met at least three times in September 2016. Notably, their efforts with regard to Section 3.22(c) represented the second attempt to modify the provision. On June 6, 2012, a formal Charter Commission, established in accordance with Section 7.18 of the City Charter, issued a [recommendation](#) – ultimately rejected – that, in lieu of an Executive Aide position, an “Office of the Mayor” be created and staffed. Interestingly, while that amendment was rejected, Mr. Kidd’s job description identifies his position as “Director of the Office of the Mayor,” as does the City’s website. For his part, Mr. Kidd occasionally refers to himself as “Chief of Staff” – an analogous title which he has found most people to be more familiar with. We will use the Charter term of “Executive Aide” throughout this report.

Accordingly, the Mayor's authority to determine and set the Executive Aide's duties and responsibilities was expressly made subject to two somewhat overlapping limitations; specifically, that the duties and responsibilities "relate to City business" and that they not pertain to "personal business for the Mayor."⁶

Even as amended, the Executive Aide position is and remains unique among other positions of employment in the City. It is one of a small number of Charter-created positions,⁷ and the only one for which the Mayor is the exclusive appointing authority – by which he acts entirely independently and without the need for consent, approval, or other input from the City Council or City Manager.⁸ In particular, the Mayor has the authority:

⁶ The record of the [Charter Task Force meeting](#) during which the amendment to Section 3.22(c) was discussed reflects that the Mayor considered the "personal business" restriction to be implicit in the original Charter language and had no objection to it being made explicit. (One hypothetical scenario offered as an example of impermissible "personal business" contemplated by this particular amendment was the executive aide being directed to pick up or drop off the mayor's dry-cleaning.) While there was some discussion regarding the addition of language prohibiting the Mayor from assigning tasks to the Executive Aide unrelated to internal City operations, that measure was rejected by a majority of the task force members and therefore was not included in the recommendations presented to the Mayor and Council. In its place, the "related to City business" requirement was added as a complement to the "personal business" restriction, with a majority of the task force members assigning a relatively broad meaning to the term "City business." By way of example, the majority viewed the assignment of tasks to the Executive Aide associated with the Mayor's service as President of the Georgia Municipal Association's (GMA) Board of Directors as being "related to City business." The Mayor expressed no objection to the amendment ultimately presented to and adopted by the [City Council](#), as the [minutes](#) also reflect.

⁷ The other positions being City Attorney, City Clerk, City Tax Collector, City Accountant, City Manager, and City Judge. *See* Charter, Sec. 3.22(b)(10); Charter, Sec. 3.23(a); Charter, Sec. 5.11(a).

⁸ *Compare* Charter, Sec. 3.22(b)(10) ("The Mayor shall ... [n]ominate the City Attorney, City Clerk, City Tax Collector, and City Accountant, subject to ratification by the City Council ..."); Charter, Sec. 3.23(a) ("The Mayor shall appoint a City Manager, subject to ratification by the City Council."); Charter, Sec. 4.12 (City

- To appoint the Executive Aide;
- To remove the Executive Aide at his pleasure;
- To set the Executive Aide's compensation (subject only to the restriction that it be comparable to that of department heads);
- To determine the duties and responsibilities of the Executive Aide; and
- To direct and manage the Executive Aide in the performance of those duties and responsibilities.

See Charter, Sec. 3.22(c); *see also* Charter, Sec. 4.10(a) (excluding Executive Aide from among those positions City Council “may establish, abolish, merge, or consolidate ..., prescribe functions and duties [for] ..., transfer or change the functions and duties of ..., [or] contract with private or governmental parties for the performance of the functions of ...”); Charter, Sec. 3.25 (excluding from the City Manager’s appointing and managerial authority those employees “who by this [Charter] are appointed ... by the Mayor or Council ...”).

In view of the foregoing, we have determined that the Executive Aide position was created by the original Charter to be, and remains under the current Charter, a traditional “personal staff” position. Depending on the context in which the issue arises, the distinction between regular employees and those holding personal staff positions can be very meaningful. For instance, while most legislation regulating the employment relationship is applicable to employees of state and local governments, in nearly each instance those employees who are appointed by elected officials to serve as members of their personal staffs are excluded from such coverage. *See* 29 U.S.C. § 203(e)(2)(C)(ii)(II) (Fair Labor Standards Act); 42 U.S.C. § 2000e(f) (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 630(f) (Age Discrimination in Employment Act); and 29 U.S.C. § 2611(3) (Family and Medical Leave Act). In determining whether an employee holds a personal staff position for purposes of one or more of these statutes, the following factors are considered: (a) whether the elected official has the power to hire or fire the employee; (b) whether the employee is personally accountable to only the elected official; (c) whether the employee represents the elected official in the eyes of the public; (d) whether the elected

Attorney); Charter, Sec. 4.13 (City Clerk); Charter, Sec. 4.14 (Tax Collector); Charter, Sec. 5.11(a) (Chief Municipal Judge). *See also* City Code, Sec. 2-180 (City Accountant); City Code, Sec. 2-181 (Tax Collector).

official has a considerable amount of control over the employee; (e) the location of the employee's position under that of the elected official in the chain of command; and (f) the closeness of the work between the elected official and the employee. *See Teneyuca v. Bexar County*, 767 F. 2d 148, 151 (5th Cir. 1985). *See also EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir.1985). Based on this standard, there is very little question whether Mr. Kidd, as the Mayor's Executive Aide, holds a "personal staff" position.

B. Applicability of the Employee Handbook

The primary focus of this investigation is whether Mr. Kidd committed the acts as alleged and, if so, whether those acts rise to the level of violations of the City Charter or any City policy. With regard to the latter, the relevant policies are contained within the City's Employee Handbook. A threshold issue is the extent to which those policies can be applied to Mr. Kidd in view of their origin and the unique nature of the Executive Aide position.

As previously observed, the Mayor has sole appointment and managerial authority over the Executive Aide. *See* Charter, Sec. 3.22(c) (Executive Aide shall report directly to Mayor and his/her duties and responsibilities shall at all times be as set forth by the Mayor). While the City Council also has broad (albeit indirect) authority under the City Charter with respect to City employees, the Executive Aide position is expressly exempted from that grant of authority. *See* Charter, Sec. 4.10(a) (excluding Executive Aide from among those positions City Council "may establish, abolish, merge, or consolidate ..., prescribe functions and duties ..., transfer or change the functions and duties of ..., [or] contract with private or governmental parties for the performance of the functions of ...").

As for personnel policies, the City Charter authorizes the City Council to "adopt rules and regulations *consistent with this Charter* concerning the method of employee selection ...; the administration of a position classification and pay plan, methods of promotion, ... and transfer of employees within the classification plan; [h]ours of work, vacation, sick leave, and other leaves of absence, overtime pay, and the order and manner in which layoffs shall be effected; such dismissal hearings as due process may require; and such other personnel notices as may be necessary to provide for adequate and systematic handling of personnel affairs." (Emphasis added.) Charter, Sec. 4.16. The limitation italicized above is consistent with State law. *See* O.C.G.A. § 36-35-3(a) ("The [city council] shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its ...

affairs ... which are not inconsistent with any charter provision applicable thereto.”). Given the explicit and exclusive grant of managerial authority to the Mayor over the Executive Aide position, it seems that it would be inconsistent with the Charter – specifically, Section 3.22(c) – for City Council to adopt personnel rules and regulations applicable – at least in certain respects – to the Executive Aide.

Further complicating the analysis is the fact that the City Council does not appear to have ever adopted the City’s Employee Handbook. Rather, from a review of the handbook itself and the minutes and other records relating to Council meetings and work sessions conducted during various periods of time when the handbook was amended, it appears that the handbook was adopted, implemented, and amended – not by the City Council – but by the City Manager acting pursuant to an ordinance-based delegation of authority from the Council. *See* [City Code, Sec. 2-62](#) (“The City Manager shall establish a personnel manual for all municipal employees.”).⁹ Of course, the Council cannot delegate authority it does not itself have – such as authority over the Executive Aide position – which the Charter also recognized in setting the parameters of the City Manager’s authority. *See* Charter, Sec. 3.25 (granting broad appointing and managerial authority to City Manager but excluding those employees “who by this [Charter] are appointed ... by the Mayor or Council”).¹⁰

⁹ While the Employee Handbook provides that it “conforms to [unspecified] guidelines established by the City Manager *and the City Council*,” it goes on to state more explicitly that “[t]he City Manager, working with the Human Resources & Support Services Director (HR Director), shall have the responsibility for the establishment and administration of the City Personnel Rules and Regulations.” (Emphasis added.) Employee Handbook, p. 1. *See also* Employee Handbook, pp. 1, 79 (“Any section or provision of these Personnel Rules and Regulations can be amended or changed by the City Manager with or without notice” and “[t]he City Manager has the authority to adopt any revision to any part of the Employee Handbook and may do so at any time with or without notice.”). Thus, notwithstanding the reference to the City Council’s guidelines, we believe that the City Manager (working with the HR Director) is the source of the Employee Handbook in accordance with Sec. 2-62 of the City Code.

¹⁰ The Employee Handbook is referred to alternatively as the “Employee Handbook,” the “Personnel Policies & Procedures Manual,” the “Policy and Procedures Manual,” and the “Personnel Rules and Regulations.” Employee Handbook, pp. 1, 79. The Charter and City Code, for their part, refer to “Rules and

In view of the foregoing, a substantial question exists regarding the extent to which the policies and procedures set forth in the Employee Handbook are applicable to Mr. Kidd. Certainly, any policies and procedures purporting to dictate the Executive Aide's work schedule, reporting relationships, appointment and separation standards, and anything else encroaching on the Mayor's Charter authority over the position would not be applicable. On the other hand, policies and procedures establishing certain benefits likely could be made applicable to Mr. Kidd without running afoul of the Mayor's Charter authority. Most of the remaining policies – which include those pertaining to standards of conduct and other matters potentially implicated by this investigation – fall into a gray area as to which an “as applied” or case-by-case analysis would be necessary. That said, at the December 9, 2019 Work Session, the Mayor made clear his position that he expects the Executive Aide to comply with the same City policies applicable to other City employees – at least those implicated by the alleged conduct in question. Accordingly, except as may be otherwise noted below, we have prepared this report based on the assumption that the relevant provisions of the Employee Handbook are applicable to Mr. Kidd.

INVESTIGATIVE FINDINGS

Based on our careful assessment all relevant information and documentation obtained during the course of the investigation and our consideration and analysis of all applicable legal and administrative authorities, we have made the following findings.

A. Whether Mr. Kidd Violated the City Charter and/or City Policy by Handling Nonwork-Related Matters on City Time and/or by Using City-Issued Equipment and Resources?

The question of whether Mr. Kidd violated the City Charter and/or any City policy by handling nonwork-related matters on City time and/or by using City-issued equipment necessarily must be broken down and addressed in two components.

Regulations” and to a “Personnel Manual,” respectively. *See* City Charter, Sec. 4.16; City Code, Sec. 2-62. For purposes of our investigation, except as may otherwise be expressly stated, we are using the term “Employee Handbook” to refer to the entire body of the City’s personnel policies, procedures, rules, and regulations (including, where applicable, those set forth in Articles III and IV of Chapter 2 of the City Code).

1. Handling Nonwork-Related Matters on City Time.

One consequence of the Executive Aide position's status as a personal staff position – exempt from the wage and hour provisions of the Fair Labor Standards Act – is that there exists a certain fluidity to Mr. Kidd's work schedule. Both he and the Mayor stated that Mr. Kidd's duties and responsibilities often require late-night hours – such as when he must attend an after-hours meeting or similar function with or on behalf of the Mayor. In recognition of this fact, the Mayor is deferential to Mr. Kidd's adjustments to his work hours. Similarly, while the Mayor has certain expectations – readily acknowledged and adhered to by Mr. Kidd – regarding the importance of “face-time” at City Hall, Mr. Kidd does not operate pursuant to a set work schedule.

While this is not a typical arrangement for exempt employees generally – given that most employers require more predictability and consistency in their subordinates' schedules (particularly since exempt employees usually have managerial or supervisory responsibility for subordinates of their own) – in this instance, the arrangement has proven satisfactory to the Mayor. Among other things, the Mayor believes that Mr. Kidd reliably communicates his schedule, that Mr. Kidd, when not working, will make himself available as needed, that Mr. Kidd is meeting his expectations regarding “face-time” at City Hall, and that the work is getting done to his satisfaction. Accordingly, the Mayor has not felt the need to require Mr. Kidd to adhere to a set work schedule.¹¹ These circumstances necessarily inform the analysis of any allegations against Mr. Kidd regarding his handling of nonwork-related matters “on City time.” Accordingly, this charge is NOT SUSTAINED.¹²

¹¹ The “Working Hours” chapter of the Employee Handbook specifies that an employee's work schedule is to be determined by his/her department head. *See* Employee Handbook, pp. 35-38. To the extent applicable to the Executive Aide position, the Mayor would be analogous to Mr. Kidd's department head.

¹² Irrespective of whether it can be viewed as occurring “on City time,” the propriety of an exempt, personal staff employee handling personal or other nonwork-related matters *in the workplace* is a management issue – to be addressed in this instance by the Mayor in the exercise of his exclusive discretion and authority over the Executive Aide. Relevant to this point, the Mayor, at the December 9, 2019 Work Session, expressed his view that the City should establish a “clear and bright line as it relates to what activity occurs when,” and suggested that this might best be accomplished by focusing on where the activity occurs (i.e., the employee's assigned

2. Handling Nonwork-Related Matters by Using City-Issued Equipment

The nonwork-related use of City-issued equipment and resources, as it pertains to the Executive Aide position, is addressed in the City Charter in relevant part as follows: “No ... appointed officer or employee of the City ... shall use property owned by [the City] for personal benefit [or] convenience, ... except in accordance with policies promulgated by the City Council” Charter, Sec. 2.15(c). The phrase “personal benefit or convenience” seems more narrow than the phrase “personal use,” but even equating the two, the quoted Charter provision does not purport to impose an absolute prohibition, as it expressly allows for use of City property “in accordance with policies promulgated by the City Council.” The Council does not appear to have promulgated any such policies itself; however, the Employee Handbook – implemented by the City Manager pursuant to a delegation of authority from the Council¹³ – does contain relevant provisions.

In particular, the “Information Technology” chapter of the Employee Handbook “governs the use of the City’s computer and electronic communications system, which in relevant part includes telephone, ... internet ... and other computer usage.” Employee Handbook, pp. 69-73. It further provides that “[t]he computer and electronic communications system is the property of the City ... and may only be used for approved purposes. Occasional, limited, appropriate personal use of the computer and electronic communications system is permitted.” Employee Handbook, p. 71. Unfortunately, rather than defining the term “appropriate personal use,” the chapter instead describes certain “inappropriate uses.” This is not instructive in the present case as none of the specific examples provided is implicated,¹⁴ leaving only the general – and somewhat circularly reasoned – catchall

workplace). While this is a reasonable approach to the issue, the fact remains that the City had no such standard in place at the time relevant to this investigation and therefore does not compel a contrary conclusion.

¹³ See City Code, Sec. 2-62 (“The City Manager shall establish a personnel manual for all municipal employees.”).

¹⁴ The specific examples provided include uses that are “fraudulent, harassing, racially offensive, sexually explicit, profane, obscene, intimidating, defamatory, or ... unlawful” Employee Handbook, p. 72. The handbook also provides several

applicable to any use “that ... in the City’s sole opinion is otherwise ... inappropriate.” Employee Handbook, p. 72.¹⁵

In view of the foregoing, the determination of whether Mr. Kidd violated the City Charter and the Employee Handbook by using his City-issued equipment and resources – namely, his laptop computer and mobile telephone – for nonwork-related purposes, requires application of the “occasional, limited, appropriate personal use” standard. Applying that standard to the evidence at hand, this charge is **SUSTAINED**.

The evidence reflects that, over the relevant time period, Mr. Kidd regularly used his City-issued laptop computer to watch and/or listen to sports radio broadcasts, to play music, and to review sports-related websites such as ESPN. He also used it to conduct comprehensive research relating to Councilmember Coughlin, including listening to archived podcast episodes, reviewing campaign finance reports, and watching video of his first Council meeting. The evidence also reflects that Mr. Kidd used his City-issued mobile telephone to read recaps of and watch scenes from various television shows, to review book summaries, and to research historical events; in fact, it appears that during the relevant time period, Mr. Kidd’s use of his mobile telephone’s internet function was primarily for nonwork-

similarly inapplicable examples of “other prohibited uses” of the computer and electronic communications system, such as any use that compromises the integrity of the system or violates any other City policy, guideline, or standard. *See* Employee Handbook, p. 71. Any use of the computer and electronic communications system that interferes with work performance is also deemed prohibited, but in the case of the Executive Aide, the Mayor is uniquely authorized to make this determination and, as previously observed, has expressed satisfaction with Mr. Kidd’s work performance.

¹⁵ The “Information Technology” chapter of the Employee Handbook defines “computer and electronic communications system” as including telephones, but also contains a separate policy specifically applicable to “mobile devices.” This latter term is undefined, but when viewed in context it clearly means (or at least includes) smartphones. This policy provides that the camera on a mobile device is “for City use only,” but imposes no restrictions on other uses of the device, such as telephone calls or texting. Nevertheless, in viewing the chapter as a whole, we conclude that City-issued mobile devices/smartphones are subject to the “occasional, limited, appropriate personal use” standard.

related matters. He also used it to exchange texts relating to Fulton County Republican Party matters.¹⁶

In sustaining this charge, we are mindful that the Employee Handbook permits some personal use of City equipment, that the applicable “occasional, limited, appropriate personal use” standard is largely subjective,¹⁷ and that we are not in a position to evaluate how Mr. Kidd’s personal use of City equipment compares to that of other employees with City-issued mobile telephones and/or laptop computers. Each of these considerations may be mitigating factors. Based on the totality of the facts and circumstances as revealed by our investigation, however, we are compelled to conclude that Mr. Kidd’s personal use of the equipment in question during the relevant time period was not occasional, does not appear to have been limited in any meaningful way, and, at least in those respects addressed *infra*, was not appropriate.

¹⁶ With regard to this last point, we note that the Employee Handbook provides several examples of “other prohibited uses,” one of which is “moonlighting.” While this term is undefined, its inclusion is consistent with the “Outside Employment” chapter of the City’s Employee Handbook, which similarly prohibits employees from using City equipment, supplies, etc. in connection with their outside employment (subject to exceptions not applicable here). *See* Employee Handbook, pp. 77-78. Because Mr. Kidd is not an employee of the Fulton County Republican Party, but holds an unpaid, volunteer position, we conclude that it does not constitute “moonlighting” or “outside employment” within the meaning of the Employee Handbook. At the very least, however, his texts relating to Fulton County Republican Party matters constituted personal use of City equipment and, as such, contributed to our conclusion sustaining this charge.

¹⁷ At the December 9, 2019 Work Session, the Mayor described the existing standard as unclear and as “intentionally a bit vague” – likely in an effort to preserve some degree of flexibility and discretion in its application – and expressed his desire for “a full review of the [City’s] policies related to personal use of [City equipment] to make sure ... that we give a little sharper clarity so that [City employees] know what’s inbounds and what’s out-of-bounds.” We regard these as valid points and can only reiterate that – in the present case – the volume of personal usage was sufficient to compel us to sustain the charge, notwithstanding any lack of clarity that may otherwise exist within the policy as presently structured.

B. Whether Mr. Kidd Violated the City Charter and/or City Policy by Delivering Unsigned City Checks to the Mayor’s Home for Signature?

Our investigation revealed that it was not uncommon for Mr. Kidd to bring documents and other City-related items to the Mayor's home and to retrieve such items from his home to take to City Hall. While there is an element of personal convenience associated with this practice, it is a far cry from the sort of “personal business” which the City Charter prohibits. To the contrary, it reflects the Mayor's status as a part-time official and Mr. Kidd’s willingness to adapt to the resulting practical and logistical challenges for the City’s benefit. While it may be fair to question the practice of leaving the checks in what may have been a less-than-fully-secure manner at the Mayor’s home, it was done with the knowledge and approval of the Mayor – his appointing authority and direct report – and thus implicates no misconduct on Mr. Kidd’s part. Accordingly, this charge is NOT SUSTAINED.

C. Whether Mr. Kidd Engaged in “Improper Political Activity” in Violation of the City Charter and/or City Policy?

Mr. Kidd is accused of having engaged in improper political activity in two respects: by attempting to recruit candidates to run against Councilmember Coughlin in the November 2019 election and by conducting opposition research on Councilmember Coughlin using his City-issued laptop.

1. Relevant Factual Background

Chris Coughlin was first elected to the City Council (Post 2) in November 2015 on a “stub” or interim basis through December 31, 2015, to complete the unexpired term of former Councilmember (now Secretary of State) Brad Raffensperger. Although he failed in his bid to hold the Post 2 seat for the full 2016-2019 term, he returned to the Council (Post 4) in April 2017 by successfully pursuing the seat vacated by Councilmember Bob Gray in a special election for the term expiring December 31, 2019. Councilmember Coughlin thereafter successfully sought reelection to his first (and current) full term in November 2019. Notably, as Councilmember Coughlin was seeking reelection to his Post 4 seat on the Council, there were also two vacant seats to fill due to decisions by his fellow Councilmembers Jay Lin (Post 2) and Steve Broadbent (Post 6) not to seek reelection.

The allegation that Mr. Kidd was attempting to recruit candidates to run against Councilmember Coughlin is based primarily on an exchange of text messages between Mr. Kidd and the Mayor. The exchange took place on the morning of Saturday, March 2, 2019, as the Mayor was in New York. The Mayor initiated the exchange to inform Mr. Kidd that he had signed some documents and placed them in the garage for him to retrieve. Approximately 30 minutes after the initial text, Mr. Kidd informed the Mayor that he had “spoke[n] with [Representative Angelika] Kausche’s aide [i.e., Pallavi Purkayastha],” that he thought he would be meeting with Ms. Purkayastha “this week to discuss November [i.e., the upcoming election], and that he imagined he would “blow her mind [i.e., because he planned to discuss her recruiting Democrats to run for City Council in the November election].”¹⁸

Ms. Purkayastha confirmed that she had a telephone conversation with Mr. Kidd regarding the November election as mentioned in his text exchange with the Mayor. While she and Mr. Kidd agree in their respective descriptions of the conversation that Councilmember Coughlin’s name never came up, Ms. Purkayastha indicated that Mr. Kidd did inform her that the reason for his call and the proposed meeting was to discuss the possibility of her recruiting Democrats to run for seats on the City Council. She recalled Mr. Kidd saying that a qualified, moderate candidate may attract sufficient support from Republican voters to be elected. Ms. Purkayastha stated that she was mildly amused by this, given that Mr. Kidd is well known locally as a Republican. She also indicated that she was aware that there would be vacant seats on the Council and was already entertaining the idea of Democrats filling those seats. Therefore, she thought the proposed meeting could prove productive and agreed to schedule one. Mr. Kidd, on the other hand, stated that he does not recall telling Ms. Purkayastha the reason for his call and for the proposed meeting other than that it involved the upcoming election.

Shortly after this conversation, but before she had gotten back to him about a meeting, Ms. Purkayastha had an unexpected encounter with Mr. Kidd at a local restaurant after work. In fact, she was sharing a table with Rep. Kausche and her husband, when Mr. Kidd sat down to join them. According to Ms. Purkayastha and Rep. Kausche, Mr. Kidd immediately began discussing the prospect of their

¹⁸ The bracketed information is not contained within the transcript of the Mr. Kidd’s text exchange with the Mayor; rather, it reflects findings made over the course of the investigation and is included for explanatory purposes.

recruiting qualified Democrats to run for Council; on this occasion, however, they both indicated that Mr. Kidd made clear that he was also talking about the Council seat held by Councilmember Coughlin.¹⁹

The Mayor denies that Mr. Kidd was speaking for or acting on his behalf to the extent he discussed recruiting an opponent for Councilmember Coughlin. For his part, Mr. Kidd denies both that he was speaking for anyone other than himself or that he expressed any specific interest in unseating Councilmember Coughlin. As to the latter point, however, a few weeks after the encounter at the restaurant, Ms. Purkayastha indicated that Mr. Kidd brought up the subject to her again. According to Ms. Purkayastha, the two had just appeared on a local podcast together when Mr. Kidd mentioned that Rep. Kausche had made Councilmember Coughlin aware of

¹⁹ Rep. Kausche recalls that Mr. Kidd said something to the effect of, “My boss and I are looking for someone to run against Chris Coughlin,” and that she assumed “boss” referred to the Mayor. Ms. Purkayastha indicated that she could not recall Mr. Kidd’s precise words, but that she also formed the impression that he was saying that the Mayor shared his interest in unseating Councilmember Coughlin. Ms. Purkayastha and Rep. Kausche both confirmed that they had no reason, apart from Mr. Kidd’s comment, to believe that the Mayor actually was interested in recruiting someone to run against Councilmember Coughlin. In fact, Rep. Kausche stated that she had spoken to the Mayor earlier about the prospect of recruiting candidates to run for seats on the Council, but that there was no mention of anyone challenging Councilmember Coughlin. (The Mayor confirmed this conversation as well, and it is also referenced in his March 2, 2019 text exchange with Mr. Kidd.) Both Ms. Purkayastha and Rep. Kausche indicated that recruiting someone to run against a sitting councilmember was an entirely different subject from what they had previously discussed with Mr. Kidd and the Mayor, respectively, that they would not be willing to work with Mr. Kidd on such a thing, and that they felt it was inappropriate for him to ask them to do so. Rep. Kausche was sufficiently off-put by the conversation, that she decided to make Councilmember Coughlin aware of it. Councilmember Coughlin’s description of Rep. Kausche’s account of the conversation is very consistent with the account she provided during her interview, although he incorrectly stated that the encounter occurred at lunch rather than after hours.

the conversation at the restaurant.²⁰ Mr. Kidd did not dispute the accuracy of the information that Rep. Kausche had conveyed to Councilmember Coughlin; rather, he asked Ms. Purkayastha why she was unwilling to consider recruiting someone to run against him. She recalls Mr. Kidd describing Councilmember Coughlin as fiscally conservative and asking how her political interests could align with his. Ms. Purkayastha did not perceive that Mr. Kidd was attempting to change her mind on the subject; rather, she believes he was expressing genuine curiosity.

Our investigation revealed no further evidence of any activity by Mr. Kidd relating to the recruitment of a candidate to run against Councilmember Coughlin. However, the records produced by the City in response to the Open Records Act request reveal that, in September and October 2019, Mr. Kidd ran several Internet searches related to Councilmember Coughlin.²¹ Mr. Kidd explained these searches as driven by his personal curiosity about Councilmember Coughlin, which is not inconsistent with how Ms. Purkayastha described his demeanor during their post-podcast conversation. On the other hand, that conversation took place in April 2019, and – while we have seen no evidence that Mr. Kidd shared his research with anyone, it bears noting that it was conducted after three individuals qualified to run against Councilmember Coughlin.

Based on our consideration of the totality of the facts and circumstances disclosed by the investigation, we find that the conversation between Mr. Kidd, Rep. Kausche and Ms. Purkayastha at the local restaurant transpired substantially as described by the latter two witnesses, that notwithstanding any reference he may have made to his “boss,” Mr. Kidd was not speaking for or at the request of the Mayor who lacked prior knowledge of Mr. Kidd’s intent to focus the conversation on Councilmember Coughlin, and that Mr. Kidd initiated the conversation on his own behalf, after hours, and off City property.²²

²⁰ Councilmember Coughlin indicated that he shared the information with the Mayor, who stated that he did the same with Mr. Kidd.

²¹ These searches include research into Councilmember Coughlin’s position on medical marijuana, his initial term on Council in 2015, and his campaign finance records.

²² While Mr. Kidd previously requested a meeting with Ms. Purkayastha in a more official capacity, the conversation at issue was unscheduled, unplanned, and

2. Whether Mr. Kidd’s Conduct Regarding Councilmember Coughlin Constitutes Improper Political Activity?

The “Disciplinary Action” chapter of the Employee Handbook identifies “improper political activity” as grounds for disciplinary action. *See* Employee Handbook, p. 57. Apart from this sole reference, however, the City Charter, the City Code, and the Employee Handbook are all silent on the issue of political activity by City employees. More importantly, we have found nothing that defines “improper political activity” or provides any standards or guidance for determining when an employee’s political activity becomes “improper political activity” within the meaning of the “Disciplinary Action” chapter of the Employee Handbook.

This observation is made in the context of the facts of this case; obviously, political activity by a City employee that violates state or federal law would constitute “improper political activity.” To this point, the City Charter requires compliance with the Georgia Election Code, O.C.G.A. § 21-2-1, *et seq.*, which includes, for example, O.C.G.A. § 21-5-30.2(b) prohibiting the use of public funds to support a political candidate.²³ Similarly, the federal Hatch Act, 5 U.S.C. § 1512 prohibits political activity by state and local government employees whose employment principally involves programs or activity financed by federal loans or grants.²⁴

As a general matter, public employers may adopt personnel policies defining “improper political activity” more broadly, to include conduct that would not necessarily violate state or federal law. Easily the most common examples are

occurred in an informal setting at a time when all participants were in an “off duty” capacity.

²³ Our research has revealed no legal authority extending the prohibition of this statute to services provided through the use of public equipment (such as Mr. Kidd’s laptop computer). In any event, as previously noted, we are unaware of any evidence that Mr. Kidd provided the results of his Internet research to any candidate to use in support of his/her campaign.

²⁴ Our investigation revealed no facts, nor are we aware of any allegations, that Mr. Kidd’s actions violated either the Georgia Election Code or the Hatch Act.

policies that prohibit “employees ... from engaging in ... political activities of any nature during work hours [or] while on work premises.” *See* Ga. Comp. R. & Regs. 478-1-.08 (State Personnel Board Rules). While the rights of public employees to engage in political activity are protected by the First Amendment, *see Buckley v. Valeo*, 424 U.S. 1, 48 (1976), the courts also recognize that the governmental employer has a legitimate interest in ensuring that its employees refrain from conduct that could undermine public confidence in the its lack of political bias. *See U.S. Civil Service Comm’n. v. National Assn. of Letter Carriers*, 413 U.S. 548, 565 (1973).

Personnel policies that strike a reasonable balance between these competing interests are constitutionally permissible, and the courts have consistently upheld such policies that, like the State Personnel Board Rule quoted above, prohibit political activity during work hours and/or in the workplace. *See James v. Collin Cty.*, 535 F.3d 365, 380 (5th Cir. 2008) (“neutral governmental employer policies limiting the political activity of employees, applicable only to such employees while on duty or on the governmental employer’s property, will almost always [be upheld as constitutional].”). On the other hand, where, as here, the governmental employer prohibits but fails to define or describe improper political activity, the prohibition is impermissibly vague and the courts will decline to engage in the balancing analysis. *See Hobbs v. Thompson*, 448 446, 473 (5th Cir. 1971) (invalidating policy prohibiting firefighters from “prominently identifying themselves with any candidate for office” as unconstitutionally vague because it failed to put firefighters on notice of what activities would violate the policy); *see also Ruff v. City of Leavenworth*, 858 F. Supp. 1546 (D. Kan. 1994) (municipal policy prohibiting employees from engaging in political activity during city elections was unconstitutionally vague because it failed to define “political activity.”). Accordingly, the charge that Mr. Kidd engaged in improper political activity as that term appears in the Employee Handbook is NOT SUSTAINED.

3. Whether Mr. Kidd’s Conduct Regarding Councilmember Coughlin Otherwise Violated the City Charter or Employee Handbook?

Although the conversation between Mr. Kidd, Rep. Kausche and Ms. Purkayastha at the restaurant was unscheduled and unplanned, occurred off City property and after hours, and was initiated by Mr. Kidd in his individual capacity, we have also determined, based on the weight of available evidence, that he gave Rep. Kausche and Ms. Purkayastha the impression that his proposal was being made

on behalf of, or at least with the knowledge and support of, the Mayor. In making this determination, we acknowledge – and do not lightly reject – Mr. Kidd’s assertion that it was not his intent to give such an impression. But while lack of intent is not irrelevant, as Executive Aide to the Mayor, one of Mr. Kidd’s primary job functions is literally to speak for the Mayor. As such, it is especially incumbent upon him to avoid circumstances where others could reasonably assume or perceive that he is acting or speaking in his representative capacity.

When he joined Rep. Kausche and Ms. Purkayastha at their table and brought up the subject of unseating Councilmember Coughlin, he knew that the Mayor had spoken to Rep. Kausche just a few days earlier about identifying qualified candidates to run for Council. As such, this was precisely the sort of situation where Mr. Kidd should have clarified that he was making his proposal in his individual capacity and not on behalf of or with the knowledge and support of the Mayor.

Likewise, when Mr. Kidd used his City-issued laptop computer to conduct Internet research on Councilmember Coughlin – shortly after candidates had qualified to run against him – he was fully aware of the controversy his conversation at the restaurant had caused and that Councilmember Coughlin and others believed or at least had concerns that the Mayor was involved in efforts to unseat him. It may fairly be assumed that Mr. Kidd did not anticipate an Open Records Act request for his browser history, but the “Information Technology” chapter of the Employee Handbook makes clear that users of City-issued computers “waive their right of privacy in ... the Internet sites they visit.” Employee Handbook, p. 72. Moreover, while “occasional, limited, appropriate personal use of [City] computers ... is permitted,” Employee Handbook, p. 71, they are primarily for official use and, therefore, Mr. Kidd should have recognized that his research on Councilmember Coughlin could be perceived as having been done at the Mayor’s request or with his knowledge and approval.²⁵

After careful consideration of all relevant facts and circumstances – including the substantial controversy surrounding this matter, the resulting distraction and unnecessary investment of time and resources, the potential undermining of public confidence, and the potential damage to internal relationships – it is our

²⁵ Accessing ESPN’s website or reading summaries of television shows are immediately recognizable as personal in nature. By contrast, the reasons for conducting research on a sitting Councilmember are not quite so apparent.

determination that Mr. Kidd's acts and omissions as described constitutes "inexcusable neglect of duty" (i.e., his duty to take reasonable steps to avoid blurred perceptions of his personal and official conduct) and "participation in activity that disrupts or disturbs the normal operations of ... any segment of the City government" within the meaning of the "Disciplinary Action" chapter of the Employee Handbook. Accordingly, to this extent, the charge against Mr. Kidd is SUSTAINED.

D. Whether Mr. Kidd Displayed a Lack of Transparency in Violation of the City Charter or Employee Handbook?

This charge is not supported by any allegation that Mr. Kidd destroyed, discarded or altered a record subject to Georgia's Records Act and the City's retention schedules, nor that he facilitated or participated in a meeting that was subject to, but conducted in violation of, the Open Meetings Act, or that he concealed or failed to produce a record that was requested and subject to disclosure under the Open Records Act, or that he otherwise violated an affirmative obligation placed upon him regarding disclosure of the relevant information by the City Charter, the Employee Handbook, or any directive from the Mayor. Accordingly, this charge is NOT SUSTAINED.

CONCLUSION

We trust that you will find the foregoing fully responsive to your needs and that you will not hesitate to contact us should you have any comments, questions, or concerns, or should you require any additional assistance from us with regard to this matter.