

Jorge Arana
to me

Jun 27, 2023, 4:25 PM (10 days ago) ☆ ↶ ⋮

FYI

From: William Clague <william.clague@mymanatee.org>
Sent: Friday, June 16, 2023 2:55 PM
To: Kevin VanOstenbridge <kevin.vanostenbridge@mymanatee.org>
Cc: Lee Washington <lee.washington@mymanatee.org>; Jorge Arana <jorge.arana@mymanatee.org>
Subject: P-Card Audit Report; Public Purpose

Chairman Van Ostenbridge:

You have asked for the legal advice of my Office regarding the statements included in the Clerk's May 30, 2023, Audit Report (Report) concerning the County's P-Card Program, with respect to the purchase of a database made on your behalf. I provide the following response.

Background:

In Fall, 2021, you inquired of me whether the purchase of an email database of registered voters in your district would constitute a legally permissible use of public funds. You confirmed that the database would be used to provide voters with a newsletter that would inform them of activities of Manatee County Government taking place in your district. Based on that information, I advised that such a purchase would constitute a legally permissible use of public funds. For the reasons explained below, I remain of that opinion.

In early 2023, you informed me that the Clerk had questioned the purchase (comprised of two separate purchases totaling approximately \$1,600). The Report states that the Clerk's concern was motivated by the inclusion of political data in the database. You have informed me that at the time of purchase you were not aware that this additional information would be included in the database. You have also informed me that when your aide inquired of the vendor, he was informed that the vendor did not have the ability to remove this data from the database.

Clerk's Report:

In the Report, the Clerk concludes that the purchase does not serve a public purpose within the meaning of Florida law. The Clerk relies upon an opinion of counsel from the law firm of Greenberg Traurig, P.A. (Greenberg). I have communicated directly with attorneys at Greenberg to express my concerns that: (a) the representation of the Clerk in this matter may constitute an impermissible conflict of interest, given Greenberg's longstanding role as the County's Bond Counsel; and (b) the opinion appears to reach legal conclusions based upon a misinterpretation of decisions of the Florida courts. Greenberg has informed me that it has since withdrawn from its representation of the Clerk. It has also provided written clarification (copy attached) of its legal analysis to address my concerns.

Public Purpose:

Article VII, Section 10 of the Florida Constitution provides: "Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person . . ." Art. VII, § 10, Fla. Const. The Florida courts have construed this language to require that public expenditures must serve a public purpose. *Dorvan v. Okaloosa County*, 82 So. 3d 801, 809 (Fla. 2012).

"If [a government entity] has used either its taxing power or pledge of credit to support issuance of bonds, the purpose of the obligation must serve a paramount public purpose and any benefits to a private party must be incidental. . . . If [a government entity] has not exercised its taxing power or pledged its credit to support the bond obligation, the obligation is valid if it serves a public purpose." *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 48 So.3d 811, 822 (Fla. 2010) (emphasis supplied).

In the absence of a pledge of credit or obligation of taxing power, "[e]xamples of valid "public purposes" that have been recognized by [the courts] rather broadly include an on-site road improvement project within a unit of a water control district, see *Northern Palm Beach County Water Control Dist.*, 604 So.2d at 443, the construction of an office building for a multistate insurance company, see *Linscott v. Orange County Indus. Dev. Auth.*, 443 So.2d 97 (Fla.1983), and the purchase of mortgages from private homeowners to alleviate shortages in public housing, see *State v. Housing Fin. Auth.*, 376 So.2d 1158 (Fla.1979)." *Id.* at 822-23. Because the purchase of the database does not involve a pledge of the County's credit or an obligation by the County to exercise its taxing power, it falls under this more relaxed construction of the public purpose requirement.

I have found no court decision directly addressing facts similar to these. Nevertheless, in light of the foregoing legal authority, I remain of the opinion that a reviewing court would probably conclude that the purchase of the database satisfies the public purpose requirement of the Florida Constitution, because the emails included in the database were used for the valid public purpose of providing public outreach regarding County business. While the extraneous data acquired from the vendor may not be usable for the intended purpose (and could potentially be used for an improper purpose, though there appears to be no evidence of such improper use), that does not, in my opinion, render the purchase invalid under the foregoing case law.

Finally, the courts have held to the longstanding doctrine that "[q]uestions of business policy and judgment are beyond the scope of judicial interference and are responsibility of the issuing governmental units." *Id.* at 818 (citing *State v. School Board of Sarasota County*, 561 So.2d 549, 553 (Fla.1990)). Accordingly, my opinion is limited to the legal question of whether the purchase of the database satisfies the public purpose requirement of the Florida Constitution as adjudicated by the courts.

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