

Confidential

**Council of the District of Columbia
Contracts and Grants**

**Report of Investigation
Pursuant to D.C. Council Resolution 18-217**

Submitted by

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I. INTRODUCTION

A. Genesis of Investigation

On Saturday, July 4, 2009, Marion Barry, a Member of the Council of the District of Columbia (the “D.C. Council” or “Council”), was arrested in connection with an apparent dispute involving a woman named Donna Watts-Brighthaupt, and was charged with criminal stalking.¹ Council Member Barry responded to the report of his arrest the following day through Natalie Williams, his office spokeswoman. Ms. Williams stated that the stalking charge was unfounded, noted that Mr. Barry felt “‘betrayed’ because of the emotional and financial support” he had given Ms. Watts-Brighthaupt, and suggested that she was unstable.² At a news conference on Monday, July 6, which Mr. Barry attended, his counsel, Frederick D. Cooke, Jr., Esq., repeated Mr. Barry’s claim of Ms. Watts-Brighthaupt’s “instability,” and asserted the belief that “the charge stems from a personal relationship that has gone horribly wrong in a lot of ways,” adding that he was confident that the charge against Mr. Barry would be dropped.³

Shortly thereafter, The Washington Post reported that Council Member Barry had hired Ms. Watts-Brighthaupt, “his then-girlfriend[,] as a city contractor two months after they began a relationship”; that she had been paid \$15,000 under that taxpayer-funded contract; and

¹ The Associated Press, *Former D.C. Mayor Barry Charged with Stalking*, ABC News, July 5, 2009, <http://abcnews.go.com/US/wireStory?id=8004715>.

² Tim Craig & Jenna Johnson, *The Charge Against Barry: Stalking His Ex-Girlfriend*, Wash. Post, July 6, 2009, at B1.

³ Brett Zongker, *Ex-DC Mayor’s Lawyer: New Charge Will Be Dropped*, ABC News, July 6, 2009, <http://abcnews.go.com/US/wireStory?id=8013245>; see also Tim Craig & Hamel R. Harris, *Canceled Trip Started Barry’s Bad Day*, Wash. Post, July 7, 2009, at A1.

that a purchase order authorizing an additional payment to her of \$5,000 was pending.⁴ During a news conference late that evening, Mr. Barry’s spokeswoman acknowledged the existence of the contract, and stated that Ms. Watts-Brighthaupt was awarded the contract because she met the “criteria” and “qualifications” for the job, and because she “was about to lose her house, [and] her car, due to her inability to find employment.”⁵

On Wednesday, July 8, 2009, the U.S. Attorney’s Office for the District of Columbia announced its decision not to pursue a criminal charge against Council Member Barry in connection with the July 4 incident.⁶ However, the disclosure of Ms. Watts-Brighthaupt’s contract raised a host of questions and concerns in the Washington community and spawned calls for the D.C. Council to take action.⁷ On Friday, July 10, 2009, Council Chairman Vincent C. Gray announced that the Council would conduct an independent investigation to determine whether the contract with Ms. Watts-Brighthaupt entered into at Mr. Barry’s behest complied with District laws and Council policies.⁸

⁴ Tim Craig, *Ex-Girlfriend Worked for Barry as a Contractor*, Wash. Post, July 8, 2009, at B1.

⁵ *Id.*

⁶ The Associated Press, *Stalking Charges Dropped Against Marion Barry*, ABC News, July 8, 2009, <http://abcnews.go.com/US/wireStory?id=8036432>.

⁷ Nikita Stewart et al., *For Barry, a Familiar Script Takes an Unfamiliar Twist*, Wash. Post, July 9, 2009, at A1; *The Latest Barry Scandal*, Wash. Post, July 9, 2009, at A6; Robert McCartney, *Police Thyself, D.C. Council*, Wash. Post, July 9, 2009, at B1; Editorial, *Unfit for Office: It’s Time for the D.C. Council to Take Action Against Marion Barry*, Wash. Post, July 9, 2009, at A18; *The Embarrassing Mr. Barry Strikes Again*, Wash. Post, July 10, 2009, at A22.

⁸ Michael Neibauer, *D.C. Council Investigating, Grumbling over Barry*, Wash. Exam’r, July 12, 2009, http://www.washingtonexaminer.com/local/D_C_-Council-investigating_-grumbling-over-Barry-7955372-50498932.html.

Later that evening new questions arose regarding Mr. Barry's conduct in a different area—earmark grant funding. Several news reports surfaced indicating that Council Member Barry had “steered nearly \$1M in earmarks to nonprofit groups that he created and that are under the control of Barry and his top aides.”⁹ On the following Monday, July 13, 2009, Council Member David A. Catania “called for an independent investigation into a slate of nonprofits that have received hundreds of thousands of taxpayer dollars but are alleged to have been created out of Marion Barry's office through forgery.”¹⁰ The following day, Mr. Catania formally requested that the D.C. Office of the Inspector General “conduct an audit and investigation” of the allegations.¹¹

B. The D.C. Council Acts: Resolution 18-217

On Tuesday, July 14, 2009, the D.C. Council formally acted to address concerns regarding both personal services contracts and earmark funding. The Council unanimously adopted the “Council Contracts and Grants Investigation Authorization Resolution of 2009” (“the Resolution”).¹²

⁹ Mike DeBonis, *Following Marion Barry's Money: Loose Lips Daily*, Wash. City Paper, July 13, 2009, <http://www.washingtoncitypaper.com/blogs/citydesk/2009/07/13/following-marion-barrys-money-loose-lips-daily/>.

¹⁰ Michael Neibauer, *Councilman: Probe Needed of Barry-linked Groups*, Wash. Exam'r, July 14, 2009, at 5. The six organizations at issue are: Clean and Green, Inc. (“Clean and Green”); Clean and Sober, Inc. (“Clean and Sober”); Ward 8 Educational Council, Inc. (“Ward 8 Educational Council”); Ward 8 Health Council, Inc. (“Ward 8 Health Council”); Ward 8 Workforce Development Council, Inc. (“Ward 8 Workforce Development Council”); and Ward 8 Youth Leadership Council, Inc. (“Ward 8 Youth Leadership Council”). They are collectively referred to throughout this Report as “the Ward Eight Councils.”

¹¹ Letter from David A. Catania, Member, Council of the District of Columbia, to Charles J. Willoughby, Inspector General, Office of the Inspector General (July 14, 2009) (on file with Special Counsel).

¹² Ex. 1, Council Contracts and Grants Investigation Authorization of 2009, D.C. Resolution 18-217, 55 D.C. Reg. 5892, *as amended* by Council Contracts and Grants Investigation Authorization Amendment Resolution of 2009, D.C. Resolution 18-286, 56 D.C. Reg. 8557 (collectively “the Resolution”).

The Resolution notes that Chairman Gray had arranged for Robert S. Bennett “to conduct an investigation into the awarding of these contracts [to Ms. Watts-Brighthaupt] and a thorough review of District laws and Council rules, policies, and procedures governing the issuance by the Council of personal services contracts and grants awarded to organizations by the Council during the budget process”; that Mr. Bennett had agreed to provide those services on a *pro bono* basis; and that Chairman Gray would delegate to Mr. Bennett the investigative duties and authorities required to conduct the inquiry, including the authority “to utilize subpoenas to obtain testimony and documents.”¹³ The D.C. Council subsequently designated Amy R. Sabrin to serve as Deputy Special Counsel.¹⁴

The Resolution directs Special Counsel to

- “Determine whether personal services contracts awarded by the Council to Donna Watts-Brighthaupt for services provided to Councilmember Marion Barry . . . were executed and administered in compliance with District law and Council rules, policies, and procedures;”
- “Conduct a thorough review of District laws and Council rules, policies, and procedures governing the issuance of contracts by the Council to independent contractors for the provision of services to individual Members of the Council (‘personal service contracts’) and grants awarded to organizations by the Council during the budget process (‘earmarks’) for the purpose of evaluating their adequacy and effectiveness,” with particular focus on “whether Council rules, policies, and procedures provide for effective screening of the contracts and grants for possible conflicts of interest or other circumstances that would prohibit their award and effective monitoring of the services provided under the terms of the contracts or grants;”

¹³ *Id.*

¹⁴ Ex. 2, D.C. Council Resolution 18-286, Council Contracts and Grants Investigation Authorization Amendment Resolution of 2009. At the time they were appointed, Mr. Bennett and Ms. Sabrin were partners in the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom LLP. Mr. Bennett has since become a partner in the Washington, D.C., office of Hogan & Hartson LLP. For purposes of this Report, Mr. Bennett, Ms. Sabrin, and their staff will be referred to collectively as “Special Counsel.”

- “Make recommendations for any necessary additions to or modifications of Council rules, policies, and procedures governing the issuance of personal service contracts or grants, especially additions or modifications that would provide for the identification of conflicts of interest or other circumstances that, once identified, would prohibit the Council from executing the contracts or grants;”
- “Make similar recommendations for any necessary changes to District laws;” and
- “Examine any other areas or matters that may be necessary to assist the Council as determined by the Chairman.”¹⁵

II. SCOPE OF INVESTIGATION

Special Counsel Bennett and Deputy Special Counsel Sabrin received assistance from a team of legal professionals from the Washington, D.C., offices of Skadden, Arps, Slate, Meagher & Flom LLP and Hogan & Hartson LLP who devoted thousands of *pro bono* hours to this Investigation.¹⁶ Our overall review was detailed and comprehensive, and was informed and supported in every phase by Brian Midkiff of Deloitte Financial Advisory Services LLP.¹⁷

A. Methodology

Special Counsel proceeded with the Investigation as directed in the Resolution, with particularized focus on each of the Council’s two central areas of concern: 1) personal services contracts and 2) earmark grants. In formulating our overall investigatory approach, we consulted with Members of the Council, the Office of the District of Columbia Auditor, and

¹⁵ Ex. 1, The Resolution, *supra* note 12.

¹⁶ Skadden, Arps, Slate, Meagher & Flom LLP personnel included: Edward D. Ross, Jr., Esq.; Leslie J. Abrams, Esq.; Robyn N. Carr, Esq.; Warren T. Allen II, Esq.; Anne-Marie K. Zell, Esq.; Leah F. Delany; Michael F. Dearington; and Katherine E. Popper.

Hogan & Hartson LLP personnel included: Phillip Metcalf, Esq.; Adam N. Bitter, Esq.; Sarah L. Olson, Esq.; Sarah E. Dean, Esq.; J. Aaron George, Esq.; M. Veronica Yopez, Esq.; Inna Jackson, Esq.; and Jeffrey Kagan.

¹⁷ The work of Deloitte Financial Advisory Services LLP did not constitute formal audit, compilation, review, or attestation services.

selected Council officials and employees. We generally employed the same basic methodology for the two main areas of review. First, we took steps to develop a general understanding of District law and D.C. Council rules, policies, and procedures potentially applicable to the issues set forth in the Resolution. Second, we obtained preliminary information from the Offices of the Secretary and the Budget Director of the Council about all personal services contracts and earmark grants awarded in the past five fiscal years. Based on that preliminary information, we narrowed the scope of review in each area to representative transactions that enabled us to identify and explore the full range of issues called for by the Resolution.¹⁸

Third, we initiated various investigative measures to gather additional relevant information, including requests and subpoenas for documents, requests for interviews and discussions, and subpoenas for testimony. Fourth, we solicited the views and recommendations of the Members of the Council with regard to potential reforms of procedures for awarding personal services contracts and earmark grants.

¹⁸ With regard to personal services contracts, we reviewed preliminary information concerning all such contracts entered by the Council on behalf of its Members from FY 2005 forward. That review focused our attention on certain contracts, which we concluded warranted a more in-depth analysis, consistent with the issues identified in the Resolution. These included all of the contracts entered by the Council at the behest of Council Member Barry since FY 2005.

Based on the recent history of earmark funding, we initially limited our focus to grants made in FY 2009 and FY 2010. We reviewed a compilation of all earmark grants for FY 2009 and FY 2010 provided by the D.C. Council's Office of the Budget Director. See Ex. 3, Office of the Budget Director, Fiscal Year 2009 Budget—One-Time Earmarked Grants Contact Information and Fiscal Year 2010 Budget—One-Time Designated Grants Information. We then identified FY 2009 earmarks for further review, based on a range of factors, including, *inter alia*, the nature, legal status, and professional history of the earmark recipient; the nature of the services provided under the grant; the amount of the grant; the relationships of the grantee, its principals, and contractors; the involvement of a fiscal agent; whether the Office of the District of Columbia Auditor was already auditing a particular grant; media reports or other available information raising questions about the grant; and any other information coming to our attention bearing on the utility of a more in-depth review. Special Counsel determined not to undertake further review of the FY 2010 grants because the D.C. Council voted to eliminate funding for all previously approved FY 2010 earmarks.

B. Depositions and Interviews

Pursuant to the Resolution and Council Rule 611,¹⁹ Special Counsel issued 10 testimonial subpoenas.²⁰ With the exception of one individual for whom we were unable to effect service, all individuals who were subpoenaed submitted to deposition. Thus, between July 2009 and December 2009, we deposed nine individuals, including Council Member Barry.²¹

In addition, Special Counsel conducted interviews with more than 40 witnesses, and met with Members of the Council and a number of representatives of organizations involved in the award, execution, and oversight of personal services contracts and earmark grants sponsored by the Council, including Council employees, personal services contract recipients, earmark grant recipients, fiscal agents, program officers from grant monitoring agencies, and D.C. government employees who are familiar with the Council personal services contracts and earmark grants processes.²²

C. Document Collection and Review

Special Counsel collected and reviewed thousands of documents obtained from numerous sources. Specifically, Special Counsel issued 46 document subpoenas.²³ The vast

¹⁹ Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 18, D.C. Resolution 18-1, 55 D.C. Reg. 784 (“Council Rules”). Council Rule 611 states the following: “The Council, any standing committee of the Council, and, if authorized by the Resolution establishing it, any special committee, may subpoena the attendance and testimony of witnesses and the production of documents and other tangible items at meetings, hearings, and depositions in connection with an investigation”

²⁰ *See* App. A.

²¹ *Id.*

²² *Id.*

²³ *Id.*

majority requested a broad range of documents from January 1, 2005 to present pertaining to specific Council personal services contracts or earmark grants. Special Counsel also sent document requests to D.C. governmental agencies that were tasked with monitoring the Council earmark grants awarded to certain organizations.²⁴ Members of the Council also voluntarily provided relevant information.

Additionally, the administrative offices of the D.C. Council cooperated fully with Special Counsel's requests for documents and information. Through the Office of the Secretary, the Council produced documents to us, granted full access to its email system, and produced a great volume of data and email correspondence related to a number of individuals and organizations we identified. The Office of the Secretary also provided copies of the Council's responses to approximately 26 Freedom of Information Act ("FOIA") requests that were linked substantively to the Investigation. The Office of the Budget Director and the Office of Finance and Resource Management also provided documents and data at our request related to personal services contracts and earmark grants. Special Counsel is especially appreciative of the cooperation and assistance these Offices provided.

III. SUMMARY OF KEY FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

A. Personal Services Contract to Donna Watts-Brighthaupt

Special Counsel found that approval of the personal services contract to Donna Watts-Brighthaupt was not obtained in accordance with D.C. law or Council rules, policies, and procedures because the authorities responsible for approving such contracts were misled about its purpose and because Mr. Barry did not disclose his financial, personal, and sexual relationships

²⁴ *Id.*

with Ms. Watts-Brighthaupt. Special Counsel further found that Council Member Barry received part of the contract proceeds from Ms. Watts-Brighthaupt in payment for loans he claimed to have made to her.

1. Factual Findings

The complex facts regarding Ms. Watts-Brighthaupt's personal services contract are discussed in detail in Part V below. Based on the evidence, Special Counsel determined as follows:

- Mr. Barry arranged for a personal services contract to be awarded to Ms. Watts-Brighthaupt, with whom he had a sexual and close personal relationship. Ms. Watts-Brighthaupt was paid a total of \$15,000 pursuant to the contract.
- Mr. Barry sought to hire Ms. Watts-Brighthaupt to draft a proposal for a program entitled "Emerging Leaders of Ward Eight." The initial scope of work for this project was not accepted by the Office of the Secretary, which must approve personal services contracts. The Office of the Secretary advised Mr. Barry that the project description was insufficiently detailed and that the project was not appropriate for funding because it appeared to be political in nature and did not relate to Mr. Barry's Council functions. Subsequently, Mr. Barry submitted a new scope of work stating that Ms. Watts-Brighthaupt would assist in the planning and execution of a series of public hearings on poverty reduction, which was accepted by the Secretary. Thereafter, however, Ms. Watts-Brighthaupt executed the original Emerging Leaders project proposal.
- Significant portions of the initial Emerging Leaders deliverable prepared by Ms. Watts-Brighthaupt for Council Member Barry were copied without attribution from publicly available materials located on the Internet.
- Testimony and other evidence shows that Council Member Barry sought approval for the contract after paying for certain expenses for Ms. Watts-Brighthaupt, and that he received a portion of the moneys paid to Ms. Watts-Brighthaupt under the contract as repayment for funds he claimed to have loaned her. Specifically, knowing she was in financial distress, Mr. Barry on occasion paid Ms. Watts-Brighthaupt's mortgage, utility and car repair bills, and bought other items for her that she had believed to be gifts, including jewelry and a coat. Ms. Watts-Brighthaupt testified that on several occasions, Mr. Barry personally delivered a contract payment check to her, insisted that they go directly to a bank, waited in the car while she cashed the check, and when she returned to the car, required her to pay a portion of the funds over to him, claiming that the payments he made on

her behalf were loans, not gifts. She did not recall how much she gave him out of the check proceeds, but it may have been between several hundred or several thousand dollars. Mr. Barry acknowledged that he insisted that Ms. Watts-Brightaupt repay the money he believed she owed him, but could not recall the amounts involved. He further testified that he might have gone with her to the bank on one or two occasions when she owed him money, but did not specifically recall doing so. He denied, however, that he insisted that she cash the checks and repay him from the proceeds.

2. *Conclusions*

As discussed in detail below, Special Counsel concludes that the foregoing conduct circumvented the Council's policies and procedures for the awarding of personal services contracts and resulted in a misuse of government funds. In the view of Special Counsel, it also constitutes a conflict of interest under the laws and regulations of the District of Columbia, violates the standards of conduct applicable to Council Members, and warrants a referral to appropriate authorities for investigation of possible violations of law.

3. *Recommendations Regarding Personal Services Contracts*

Special Counsel concludes that controls recently implemented by the Council through the Office of the Secretary have substantially improved the accountability for personal services contracts. The Council, however, should require that a Council Member seeking approval for a personal services contract certify that he or she has no financial, business, family, or personal relationship with the proposed contractor or contractor personnel. The contractor likewise should be required to agree to abide by District of Columbia conflict of interest laws and regulations. Additionally, there should be greater transparency with regard to the award of personal services contracts. In particular, the name of the Council Member seeking approval for the contract, the amount of the contract, the identity of the contractor, and the stated purpose of the contract should be reported publicly at the time of award. Special Counsel's

recommendations as to personal services contracts are addressed in greater detail in Part VIII below.

B. Council Earmark Grants

Special Counsel finds that—notwithstanding the Council’s recent efforts to impose controls on earmark grants, and notwithstanding that many of these grants benefit well-run, legitimate organizations—Council earmark grants create substantial opportunities for waste and abuse. Further, as a practical matter, the present procedures for awarding and monitoring Council earmarks substantially undermine grantee accountability.

Special Counsel’s review of earmarks focused on certain grants sponsored by Council Member Barry, which illustrate the pitfalls of earmark grant making. A detailed discussion of the facts and Special Counsel’s conclusions regarding these earmark grants appears in Part VI below. These are summarized as follows:

1. Factual Findings

Council Member Barry sponsored 41 earmark grants in FY 2009—the highest number by far of earmarks by any Member of the Council. The 41 grants totaled \$8,475,000.²⁵ In particular, Special Counsel finds as follows:

- At the behest of Mr. Barry, six councils in Ward Eight (“the Ward Eight Councils”) were awarded a total of \$450,000 in earmark grants for FY 2009. These entities principally performed citizen-services activities in the Ward represented by Mr. Barry.
- The Ward Eight Councils were conceived by Council Member Barry and implemented at his direction by Brenda Richardson, a long-time supporter who managed his Constituent Services Office (“CSO”). Although Ms. Richardson

²⁵ The District’s FY 2009 budget contained a total of nearly \$48 million in Council and Mayoral earmark grants. Although Mr. Barry was associated with the highest number of Council earmark grants, he did not have the highest total dollar amount. *See* Table 3, *infra* (noting grants and amounts by all Council Members).

asserts that the councils acted independently of Mr. Barry, there is substantial evidence that the Council Member oversaw the management of the councils through her.

- As part of reforms enacted for FY 2009 by the D.C. Council to improve accountability for earmark grantees, recipients were required to be incorporated to receive grant funds. A number of signatures on the Articles of Incorporation of the Ward Eight Councils were falsified.
- At Mr. Barry's direction, Rev. Anthony Motley drew on funds from the account of an entity known as the Marion Barry Scholarship Fund to pay the incorporation fees for the Ward Eight Councils. The money in that fund had been raised for the purpose of providing scholarships to students.
- A handful of individuals close to Mr. Barry, and their friends and relatives, made tens of thousands of dollars from the Ward Eight Councils and other Barry-sponsored earmark grantees. In particular, Ms. Richardson was under contract to serve as the Project Director for three of the Ward Eight Councils and was paid a total of \$101,363 by them. Another Barry supporter, Rev. Anthony Motley, was under contract for approximately \$34,000 from two Barry-sponsored grantees, and he also received \$14,550 in fiscal agent fees paid by another grant recipient. Likewise, Mr. Barry's Narcotics Anonymous sponsor received a total of \$16,465 from two grantees.

2. Conclusions

Special Counsel concludes that many of the grantee organizations to which Mr. Barry steered public funds were rife with waste and abuse, and provided substantial financial benefits to some of his close friends and supporters. These grants also effectively permitted Mr. Barry to circumvent laws and regulations that restrict the nature and amount of funds that can be expended for citizen-service programs.

We note that deficits of professionalism and accountability were not unique to grants sponsored by Council Member Barry. Special Counsel reviewed documentation for certain other grantees, and the Office of the District of Columbia Auditor audited a number of grants sponsored by Members of the Council and found grant performance and accountability

lacking there as well.²⁶ The Auditor’s Report concluded “that sufficient internal controls were not developed to effectively ensure that District funds were properly managed, and accounted for, and used only for their intended purposes.”²⁷ Special Counsel concurs with this finding.

3. Recommendations

Special Counsel recommends that the earmark grants sponsored by Council Member Barry be the subject of a referral to the appropriate authorities, including the District of Columbia Office of Campaign Finance, for further investigation into possible violations of law and ethical standards.

Special Counsel also recommends that the D.C. Council eliminate its current practices with regard to the award of Council earmark grants. If earmark grants are retained, they should be awarded with greater transparency and only to well-established charitable organizations with proven track-records for fundraising and accountability. Specific potential reforms are discussed in more detail in Part VIII below.

C. Mr. Barry’s Efforts to Impede Special Counsel’s Investigation

Special Counsel found that Council Member Barry attempted to impede the Investigation by refusing to answer material questions related to his conduct and by advising a material witness to withhold documents and information requested or subpoenaed by Special Counsel. Detailed evidence regarding this conduct is set forth in Part VII below. This conduct should be the subject of Council disapprobation and should be referred to authorities for investigation of possible violations of D.C. laws concerning obstruction of Council proceedings.

²⁶ Office of the District of Columbia Auditor, Report: District’s Earmark Process Needs Improvement (2009) (hereinafter Auditor’s Report).

²⁷ *Id.* at i.

IV. LAWS AND RULES OF CONDUCT AFFECTING D.C. COUNCIL MEMBERS

There are a number of laws and regulations that are generally applicable to the conduct of Members of the Council, which are relevant to Special Counsel's Investigation.

A. Conflict of Interest Laws and Standards of Conduct

The Official Code of the District of Columbia (the "D.C. Code"), the District of Columbia Municipal Regulations ("D.C. Municipal Regulations"), the District of Columbia Personnel Regulations, and the Council Rules all address conflicts of interest and other standards of conduct applicable to Members of the Council. As set forth in more detail below, these provisions recognize generally that a public office is a public trust,²⁸ and that Council Members and other District employees should avoid actions which would adversely affect the confidence of the public in the integrity of the District government.²⁹

This section addresses the District of Columbia statutes and regulations that supply the standards of conduct applicable to Members of the D.C. Council. We note, however, that beyond the local laws and rules discussed herein, officials of the District of Columbia also are subject to a number of federal criminal statutes which prohibit bribery, gratuities, and conflicts of interest.³⁰

1. D.C. Statutes and Regulations

We turn first to the standards of conduct applicable to Council Members. Section 1-618.01(a) of the D.C. Code broadly requires that each employee of the District government,

²⁸ D.C. Code § 1-1106.01(a).

²⁹ *See, e.g.*, 18 DPM § 1803.1.

³⁰ *See, e.g.*, 18 U.S.C. §§ 201, 203, 205.

including Members of the Council,³¹ “must at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.” Additionally, chapter 18 of the D.C. Personnel Manual, which is also applicable to the Mayor, Members of the Council, and all District employees,³² enjoins such officials to “at all times maintain a high level of ethical conduct in connection with the performance of official duties,” and to “refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.”³³ To that end, District officials are prohibited from engaging in any activity that “might result in or create the appearance” that misconduct occurred, regardless of whether the activity was specifically prohibited by the regulations, including such things as: “[u]sing public office for private gain;” “[g]iving preferential treatment to any person;” or engaging in conduct “[a]ffecting adversely the confidence of the public in the integrity of government.”³⁴ Further, officials are prohibited from directing subordinates to perform tasks beyond their official duties during work hours,³⁵ and from engaging in outside employment and using government property for non-official uses.³⁶

³¹ D.C. Code § 1-602.02.

³² 18 DPM § 1802.1.

³³ *Id.*

³⁴ 18 DPM § 1803.1 (“An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, or create the appearance of the following: [u]sing public office for private gain [or] [a]ffecting adversely the confidence of the public in the integrity of government.”).

³⁵ 18 DPM § 1804.1(b), (c) (“An employee may not engage in any outside employment or activity which is not compatible with the full and proper discharge of his or her duties and responsibilities as a government employee. Activities or actions which are not compatible with government employment include, but are not limited to, the
(cont’d)

The District’s conflicts of interest statute, D.C. Code section 1-1106.01, also applies to Members of the Council. It states, in pertinent part:

(a) The Congress declares that elective public office is a public trust, and any effort to realize personal gain through official conduct is a violation of that trust.

(b) No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any business with which he or she or a member of his or her household is associated, other than that compensation provided by law for said public official.

....

(g) Any public official who, in the discharge of his or her official duties [on the Council], would be required to take an action or make a decision that would affect directly or indirectly his or her financial interests or those of a member of his or her household, or a business with which he or she is associated, or must take an official action on a matter as to which he or she has a conflict situation created by a personal, family, or client interest, shall: [p]repare a written statement describing the matter requiring action or decision, and the nature of his or her potential conflict of interest with respect to such action or decision

Members of the Council are to report such conflicts to the Chairman, who may publish the disclosure and excuse the Member from voting, deliberating, or otherwise acting on the matter giving rise to the conflict.³⁷

For purposes of the conflicts of interest statute, the term “household” is defined as “the public official and his or her immediate family.”³⁸ “Immediate family” is defined as “the

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following: (b) Using government time and services for other than official business; [or] (c) Ordering, directing, or requesting subordinate officers or employees to perform during regular working hours any personal services not related to official D.C. government functions and activities[.]”).

³⁶ See 18 DPM §1800.3 (“No employee of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.”); and 18 DPM § 1806.1 (“A District employee shall not use or permit the use of government property, equipment, or material of any kind . . . for other than officially approved purposes.”).

³⁷ D.C. Code § 1-1106.01(a), (b), (g).

public official's spouse or domestic partner and any parent, brother, sister, or child of the public official, and the spouse or domestic partner of any such parent, brother, sister, or child.”³⁹ Further, the statute does not define “personal . . . interest.”⁴⁰ It has therefore been suggested that the statute precludes only financial conflicts of interest affecting an official's personal, family, or business finances, and does not extend to conflicts of interest created by personal relationships outside the official's immediate family, as defined therein.⁴¹ Special Counsel is of the view, however, that obtaining a contract with public funds for an individual with whom an official has an intimate relationship could be a conflict arising from a “personal interest” within the meaning of section 1-1106.01(g) and certainly would be a breach of the public trust declared in section 1-1106.01(a).⁴²

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³⁸ *Id.* § 1-1106.01(i)(4).

³⁹ *Id.* § 1-1106.01(i)(5).

⁴⁰ *Id.* § 1106.01(g).

⁴¹ Those who assert that the conflict of interest statute encompasses only financial conflicts, or only those that are personal to the Member or his or her family, point to subsections (a) and (g). Subsection (a) speaks to violations based on “effort[s] to realize a *personal gain* through official conduct . . .” suggesting the aim of the statute to is avoid personal enrichment by officials. D.C. Code § 1-1106(a) (emphasis added). Subsection (g) also references an official's “*financial interests* or those of a member of his or her household, or a business with which he or she is associated.” *Id.* § 1-1106.01(g) (emphasis added). However, in addition to listing the kind of “financial interests” that may give rise to a conflict, that same subsection goes on to separately require disclosure of “a conflict situation created by a *personal, family, or client interest,*” without reference to financial interest, and without defining “personal . . . interest.” *Id.* (emphasis added). Arguably then, the statute encompasses “personal interests” in addition to financial or family interests.

⁴² The Model Ethics Code created by CityEthics.org, the organization consulting with the Council to review its ethical regulations, argues that romantic relationships should be included in the definition of “personal interests.” The Comment to Model Code 100.1 states, “The general rule is: If it looks to others as if you might be giving someone special treatment, or if it would look that way to others if they knew about the relationship, you should not act with respect to that person or entity, and instead should recuse yourself.” Model Ethics Code, CityEthics.org, <http://www.cityethics.org/print/153>.

With regard to Council Members, violations of sections 1-618.01 and 1-1106.01 are investigated by the D.C. Office of Campaign Finance (the “OCF”), which reports its findings to the Board of Elections and Ethics (“the Board”).⁴³ Violations are punishable by civil penalties,⁴⁴ or upon referral to the U.S. Attorney for the District of Columbia, through criminal prosecution.⁴⁵

The D.C. Municipal Regulations also bar public officials⁴⁶ from acting on any matter “upon which there is a conflict or potential conflict, created by their financial, personal, family, business, or client interest.” D.C. Mun. Regs. tit. 3 section 3300.1.⁴⁷ Like Section 1-1106.01 of the D.C. Code, the wording of this regulation suggests that a “personal” conflict of interest is distinct from a “financial” or “family” conflict. Thus it is reasonable to conclude that the regulations bar acting in matters which create an actual or potential *personal* conflict, such as one created by an intimate relationship, apart from any financial or familial conflict. The term “personal . . . interest,” however, is not defined. The regulations require public officials who

⁴³ D.C. Code §§ 1-618.03, 1-1103.01.

⁴⁴ *Id.* § 1-1103.02(b).

⁴⁵ *Id.* § 1-1103.01(c). Criminal violations may result in fines of up to \$5,000 and six months in jail, or, if the violation involves the submission of a knowingly false filing, report, or statement to the Board, may result in a fine of up to \$10,000 and a sentence of up to five years. *Id.* § 1-1107(a), (b).

⁴⁶ Council Members and District employees paid at a rate of DS-13 or above, are deemed to be public officials pursuant to title 3, section 3300.1, of the D.C. Municipal Regulations (2009). The Board issued a Notice of Proposed Rulemaking on January 15, 2010, whereby the cited section of the D.C. Municipal Regulations will be title 3, section 3302.12. *See* 57 D.C. Reg. 624 (Jan. 15, 2010).

⁴⁷ *See id.*

have an actual or potential conflict of interest to recuse themselves from any affected actions or decisions and to disclose the conflict or potential conflict.⁴⁸

2. Council Rules

The Council has its own Rule, Council Rule 202, that addresses conflicts of interest, which was in effect at the time of most of the events under review. Rule 202⁴⁹ requires a Council Member who “must take an official action on a matter as to which he or she has a conflict situation created by a personal, family, or client interest,” to disclose that information in writing to the Chairman or submit a statement for the Council record. Rule 202 also indicates a “personal” interest is distinct from a “family” interest, but does not provide any definitions for the terms used therein. The Rule goes on to describe the circumstances under which a Member may voluntarily excuse himself from deliberations or those circumstances under which recusal is mandatory.

On September 22, 2009, the Council enacted two resolutions amending the Council’s Rules regarding ethics: The “Council Code of Official Conduct Rules Amendment Resolution of 2009”⁵⁰ added a new Council Rule, Rule 201a, and set forth a Code of Conduct for Council Members and staff. The new Rule broadly requires “Councilmembers and Council staff [to] maintain a high level of ethical conduct in connection with the performance of their official duties” and to refrain from being party to any official actions “that would adversely affect the

⁴⁸ See D.C. Mun. Regs. 3 tit. §§ 3303, 3305.

⁴⁹ Ex. 4, Selected Council Rules, Period 18.

⁵⁰ Ex. 5, Council Code of Official Conduct Rules Amendment Resolution of 2009, D.C. Resolution 18-248, 56 D.C. Reg. 7804, Sept. 22, 2009 (“Resolution 18-248”).

confidence of the public in the integrity of the District government.”⁵¹ Furthermore, Council members are to

act solely in the public interest and not for any personal gain or take an official action on a matter as to which he or she has a potential conflict of interest created by a personal, family, client, or business interest, avoiding both actual and perceived conflicts of interest and preferential treatment.⁵²

The new Council Code of Official Conduct includes language specifically prohibiting the use of public office for private gain and ordering subordinates to perform non-official duties during work hours. It also admonishes Council Members to avoid conflicts of interests in relation to contracts for service.⁵³ The resolution further states that Council Members and their staff are responsible for understanding and complying with other Council and District ethics laws. The second resolution, the “Council Ethics Counselor Appointment Resolution of 2009,” appointed the General Counsel as the Ethics Counselor for the Council.⁵⁴

B. Statutes and Regulations Governing Citizen-Service Programs

District law and regulations preclude the expenditure of public moneys on citizen-service programs, also known as constituent services activities. A citizen-service program is defined as “encompass[ing] any activity or program which provides services to the residents of

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Ex. 6, Council Ethics Counselor Appointment Resolution of 2009, D.C. Council Resolution 18-247, 56 D.C. Reg. 7803, Sept. 22, 2009.

the District of Columbia; and promotes their general welfare, including, but not limited to, charitable, scientific, educational, medical or recreational purposes.”⁵⁵

District law and regulation generally provide that constituent services activities of the Mayor and Council Members may only be financed by a transfer of unused campaign funds or private contributions, not out of appropriated funds.⁵⁶ Moreover, the amount of contributions to and expenditures from constituent services funds are limited, and the Mayor and the Members of the Council are required to report all contributions and expenditures from such funds.⁵⁷ At the time of the events under review, D.C. Code section 1-1104.03(a) limited total contributions and expenditures for any citizen-service program to \$40,000 each year.⁵⁸

V. PERSONAL SERVICES CONTRACTS

A. Overview of Council Personal Services Contracts

Personal services contracts are intended to allow the Council to contract with individuals and organizations when professional, specialized, or technical expertise is needed. The Chairman of the Council, Vincent C. Gray, delegated the Council’s contracting authority to the Office of the Secretary,⁵⁹ thereby allowing the Secretary to authorize contracts on behalf of

⁵⁵ D.C. Mun. Regs. tit. 3 § 3014.1.

⁵⁶ D.C. Code § 1-1104.03; D.C. Mun. Regs. tit. 3 § 3014.5.

⁵⁷ D.C. Code § 1-1104.03.

⁵⁸ The contribution and expenditure limits set forth in D.C. Code section 1-1104(a) were increased to \$80,000, effective September 23, 2009 by D.C. Law 18-52, the “Citizen-Service Programs Amendment Act of 2009.”

⁵⁹ The Secretary, in turn, sub-delegated a portion of her authority to the Council’s Deputy Secretary or Contracting Officer. Interview with Cynthia Brock-Smith, Secretary, Council of the District of Columbia, & Ronald Collins, Assistant Secretary, Council of the District of Columbia, in Wash., D.C. (Jan. 20, 2010).

the Council.⁶⁰ Importantly, while the Secretary has been delegated contracting authority, individual Council Members do not have that same authority.⁶¹ Practically speaking, however, the Secretary authorizes personal services contracts at the request of an individual Council Member.

Each Council Member has a “Personal Services Account” (the “PSA”) which consists of: 1) a committee budget and 2) a personal office budget.⁶² The latter budget, intended to cover each Member’s personal office staffing needs, was roughly \$307,000 for each Council Member. Additionally, Council Members who chair committees have committee budgets that range between \$385,000 and \$465,100, depending on the size of the committee. In addition, each Council Member is given a “Non-Personal Services Account” (the “Non-PSA”), which is the account from which Council Members pay for supplies, travel, and equipment. Each Council Member’s Non-PSA budget is roughly \$20,000. Council Members are permitted to transfer funds among their budget accounts by requesting a “reprogramming.”⁶³ Council Members must have sufficient funds in their budgets to support a request for a personal services contract.⁶⁴

⁶⁰ Interview with Cynthia Brock-Smith, Secretary, Council of the District of Columbia, Ronald Collins, Assistant Secretary, Council of the District of Columbia, & Brian Flowers, General Counsel, Council of the District of Columbia, in Wash., D.C. (July 16, 2009).

⁶¹ *See generally* D.C. Code §§ 2-301.01 *et seq.* No Council staff or officer, other than the Secretary, has the authority to obligate the Council in procurement actions.

⁶² Interview with Cynthia Brock-Smith, Ronald Collins, & Brian Flowers, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.*

B. District Laws and Council Rules, Policies, and Procedures Relevant to Personal Services Contracts

At the time of the events under investigation, there were no D.C. statutes or regulations specifically applicable to Council personal services contracts.⁶⁵ Because the Council’s contractors are not employees of the District of Columbia, there are no clear standards to which contractors must adhere.⁶⁶ Likewise, the Procurement Practices Act (the “PPA”), D.C. Code section 2-301.01, which outlines uniform procurement procedures and guidance for the District of Columbia government, exempts the Council from its application.⁶⁷

Therefore, in 2007, the Chairman instructed the Secretary to implement procedures to govern the award and use of personal services contracts. In response, the Office of the Secretary has developed certain internal processes with respect to the review and approval of such contracts, and is able to require that certain standards are met because contract invoices cannot be paid until the Secretary authorizes a purchase order.

Before the Secretary will issue a purchase order, the Secretary insists on receiving from a Council Member who requests a personal services contract at least the following: 1) a

⁶⁵ As discussed in Part IV, *supra*, there are a number of generally applicable statutes, regulations, and Council rules that impose upon Council Members a duty to disclose conflicts of interest, prohibit actions that would adversely affect the confidence of the public in the integrity of government, or which restrict the use of appropriated funds for constituent services.

⁶⁶ Interview with Cynthia Brock-Smith, Ronald Collins, & Brian Flowers, *supra* note 60; Interview with Cynthia Brock-Smith & Ronald Collins, *supra* note 59; Interview with Mary Montgomery, Human Resources Director, Council of the District of Columbia, in Wash., D.C. (Jan. 14, 2010).

⁶⁷ “[T]his chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions, but excluding the *Council of the District of Columbia*, District of Columbia courts, the District of Columbia Financial Responsibility and Management Assistance Authority, and . . . the Office of the Chief Financial Officer of the District of Columbia, and the District of Columbia Advisory Neighborhood Commissions.” D.C. Code § 2-301.04(a) (emphasis added).

statement of work; 2) a list of actual deliverables; and 3) a timetable for provision of same. The Secretary also mandates that each Council Member provide sufficient information to show that the subject of the contract is appropriately related to Council functions. In keeping with the Chairman's desire to place additional controls on the use of personal services contracts, the Secretary is in the process of creating a new procurement manual and system for the Council.⁶⁸

C. Factual Findings and Conclusions Regarding Council Member Barry's Use of Personal Services Contracts

As reflected in Table 1, between FY 2005 and FY 2009, Council Member Barry was responsible for more spending on personal services contractors than all of the other Council Members combined.

⁶⁸ Interview with Cynthia Brock-Smith & Ronald Collins, *supra* note 59. Additionally, the Council's Director of Human Resources, who was hired in October 2008, has made it a practice to advise Council Members that it is not appropriate to use personal services contracts to engage independent contractors to perform duties that normally are performed by Council employees, or to supervise Council personnel. Interview with Mary Montgomery, *supra* note 66.

Table 1
Summary of Personal Services Contracts by Council Member
FY 2005 through FY 2009

Council Member	FY	Number of Purchase Orders	% of Total Number of Purchase Orders	Value of Purchase Order(s)	% of Total Value of Purchase Orders	Amount Paid	% of Total Amount Paid
Barry, Marion	2005	1		\$1,000		\$1,000	
	2006	0		\$0		\$0	
	2007	6		\$101,826		\$60,848	
	2008	7		\$191,800		\$132,182	
	2009	8		\$97,400		\$64,600	
	Sub total	22	39.29%	\$392,026	64.79%	\$258,630	65.25%
Bowser, Muriel	2005	*					
	2006	*					
	2007	0		\$0		\$0	
	2008	1		\$3,000		\$3,000	
	2009	0		\$0		\$0	
	Sub total	1	1.79%	\$3,000	0.50%	\$3,000	0.76%
Brown, Kwame	2005	0		\$0		\$0	
	2006	1		\$5,000		\$5,000	
	2007	2		\$57,800		\$8,620	
	2008	3		\$9,349		\$9,349	
	2009	4		\$30,160		\$27,080	
	Sub total	10	17.86%	\$102,309	16.91%	\$50,049	12.63%
Brown, Michael	2005	*					
	2006	*					
	2007	*					
	2008	*					
	2009	2		\$5,500		\$0	
	Sub total	2	3.57%	\$5,500	0.91%	\$0	0.00%
Cheh, Mary	2005	*					
	2006	*					
	2007	2		\$4,225		\$4,225	
	2008	2		\$4,200		\$4,200	
	2009	3		\$9,986		\$1,200	
	Sub total	7	12.50%	\$18,411	3.04%	\$9,625	2.43%
Fenty, Adrian	2005	1		\$12,000		\$12,000	
	2006	3		\$26,690		\$22,486	
	2007	*					
	2008	*					
	2009	*					
	Sub total	4	7.14%	\$38,690	6.39%	\$34,486	8.70%
Graham, Jim	2005	0		\$0		\$0	
	2006	0		\$0		\$0	
	2007	0		\$0		\$0	
	2008	0		\$0		\$0	
	2009	1		\$2,680		\$2,680	
	Sub total	1	1.79%	\$2,680	0.44%	\$2,680	0.68%
Gray, Vincent	2005	0		\$0		\$0	
	2006	0		\$0		\$0	
	2007	1		\$16,043		\$16,043	
	2008	1		\$1,500		\$1,500	
	2009	0		\$0		\$0	
	Sub total	2	3.57%	\$17,543	2.90%	\$17,543	4.43%
Mendelson, Phil	2005	0		\$0		\$0	
	2006	0		\$0		\$0	
	2007	1		\$5,500		\$5,500	
	2008	0		\$0		\$0	
	2009	0		\$0		\$0	
	Sub total	1	1.79%	\$5,500	0.91%	\$5,500	1.39%
Thomas, Jr., Harry	2005	*					
	2006	*					
	2007	3		\$5,537		\$5,165	
	2008	0		\$0		\$0	
	2009	0		\$0		\$0	
	Sub total	3	5.36%	\$5,537	0.91%	\$5,165	1.30%
Wells, Tommy	2005	*					
	2006	*					
	2007	1		\$5,490		\$5,490	
	2008	1		\$4,188		\$4,188	
	2009	1		\$4,244		\$0	
	Sub total	3	5.36%	\$13,922	2.30%	\$9,678	2.44%
Grand Total		56		\$605,118		\$396,356	

Source: Data provided by the Office of the Secretary and purchase order documentation.

*FY in which the individual was not a Council Member.

During the period at issue, Mr. Barry entered into 22 personal services contracts under which contractors were to receive approximately \$392,000.⁶⁹ These contracts accounted for 65.25% of all funds the D.C. Council actually spent on personal services contractors.⁷⁰ No other Council Member entered into more than 10 personal services contracts or awarded more than \$102,309 during the same period.⁷¹

Special Counsel conducted a review of all personal services contracts awarded at the request of Council Member Barry during this period, with particular focus on three contractors. As detailed below, Special Counsel finds that: 1) Council Member Barry's award of a personal services contract to Donna Watts-Brighthaupt was not in accordance with District laws or Council rules, policies, and procedures; 2) certain personal services contracts awarded by Mr. Barry to Brenda Richardson were for various citizen-service programs and, therefore, were an inappropriate use of Council funds; and 3) evidence does not support a finding that personal services contracts to The Bowen Group, LLC were not awarded in accordance with District laws or Council rules, policies, and procedures.

1. Donna Watts-Brighthaupt's Personal Services Contract

Special Counsel finds that Council Member Barry's award of a personal services contract to Donna Watts-Brighthaupt was not in accordance with District laws or Council rules, policies, or procedures because: 1) Council Member Barry did not provide accurate information about the contract's purpose to those responsible for approving such contracts; 2) Council

⁶⁹ See Table 1. Of the total amount Council Member Barry awarded, \$258,630 was actually paid.

⁷⁰ *Id.*

⁷¹ *Id.*

Member Barry did not disclose his sexual, personal, or financial relationship with Ms. Watts-Brighthaupt; and 3) Council Member Barry demanded and received several hundred to several thousand dollars from the funds paid to Ms. Watts-Brighthaupt under the contract, as repayment for moneys he claimed to have lent her.

(a) Factual Findings

Ms. Watts-Brighthaupt and Council Member Barry first met in 2004 at a campaign “meet and greet.”⁷² They next met in June 2008, at which time Ms. Watts-Brighthaupt began driving Council Member Barry to various locations in connection with his reelection campaign.⁷³ Ms. Watts-Brighthaupt testified that at this time, she and Council Member Barry developed a personal relationship.⁷⁴

Around June or July 2008, Ms. Watts-Brighthaupt began experiencing financial difficulties and undertook to find full-time employment.⁷⁵ Ms. Watts-Brighthaupt sent Council Member Barry several emails containing information about positions she was pursuing.⁷⁶ Mr.

⁷² Barry Dep. 9:16–10:10, Dec. 22, 2009; Watts-Brighthaupt Dep. 28:20–22, Nov. 5, 2009.

⁷³ Barry Dep. 10:10–14, 13:1–18; *see* Watts-Brighthaupt Dep. 29:11–21.

⁷⁴ Watts-Brighthaupt Dep. 29:16–30:1.

⁷⁵ *Id.* at 36:2–20.

⁷⁶ *E.g.*, Email from Donna Watts-Brighthaupt to Marion Barry, Member, Council of the District of Columbia (July 15, 2008, 7:02 PM) (on file with Special Counsel); Email from Donna Watts-Brighthaupt to Marion Barry, Member, Council of the District of Columbia (July 25, 2008, 11:09 AM) (on file with Special Counsel); Email from Donna Watts-Brighthaupt to Marion Barry, Member, Council of the District of Columbia (July 30, 2008, 12:43 PM) (on file with Special Counsel).

Barry tried to get her a job at one of the organizations about which Ms. Watts-Brighthaupt had emailed, Sasha Bruce Youthwork.⁷⁷ The two also discussed other possible positions.⁷⁸

Some time after August 2008, Ms. Watts-Brighthaupt and Council Member Barry began a sexual relationship.⁷⁹ According to Ms. Watts-Brighthaupt, her sexual relationship with Council Member Barry ended in October 2008, but Council Member Barry continued to ask her for sexual favors.⁸⁰ As demonstrated by numerous emails, voicemails, and their own testimony, their relationship remained close and personal, if not sexual, at least through the time of this Investigation.⁸¹

Council Member Barry refused to testify about whether he was involved in a sexual relationship with Ms. Watts-Brighthaupt, but he conceded that their relationship was “personal” and “romantic.”⁸² Mr. Barry contended that his sexual relationship with Ms. Watts-Brighthaupt did not come within the scope of the Resolution 18-217, which authorized the Special Counsel Investigation, notwithstanding the Council’s express finding therein that “the

⁷⁷ Barry Dep. 38:14–16; Email from Donna Watts-Brighthaupt to Marion Barry, Member, Council of the District of Columbia (July 30, 2008, 12:43 PM) (on file with Special Counsel).

⁷⁸ Watts-Brighthaupt Dep. 38:17–42:3.

⁷⁹ Watts-Brighthaupt Dep. 34:2–14.

⁸⁰ *Id.* at 35:17–21, 38:11–14, 131:15–22.

⁸¹ *See, e.g.,* Barry Dep. 29:5–8, 46:7–47:3; Watts-Brighthaupt Dep. 29:16–30:1, 33:16–34:14, 226:19–227:4, 269:11–273:11; Ex. 7, Email from Donna Watts-Brighthaupt to Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry (June 29, 2009, 8:50 PM); Ex. 8, Email from Donna Watts-Brighthaupt to Donna Rouse, Manager, Office of Council Member Marion Barry (June 30, 2009, 11:14 PM); *Transcripts of Marion Barry’s Voicemails to Donna Watts-Brighthaupt Bonus Track: One Recorded Fight Between Them*, Wash. City Paper, July 8, 2009, <http://www.washingtoncitypaper.com/display.php?id=37515>. Mr. Barry confirmed that he left the voicemails discussed in the Washington City Paper article. Barry Dep. 122:4–124:1.

⁸² Barry Dep. 29:5–32:7.

circumstances surrounding the awarding of the personal services contracts to Donna Watts-Brighthaupt warrant the conduct of an investigation.”⁸³ Council Member Barry’s personal attorney, Frederick D. Cooke, Jr., Esq., also directed him not to answer when asked whether awarding public money to someone with whom Council Member Barry had a personal, romantic relationship would be appropriate because, as Mr. Cooke said, “it’s borderline into criminal conduct.”⁸⁴ Mr. Cooke went on to say “I don’t think we’re here to probe a criminal act,” despite the fact that Resolution 18-217 calls for Special Counsel to “[d]etermine whether . . . contracts awarded . . . to Donna Watts-Brighthaupt . . . were executed and administered in compliance with District law.”⁸⁵ Council Member Barry followed Mr. Cooke’s advice and refused to answer Special Counsel’s questions about his sexual relationship with Ms. Watts-Brighthaupt; but Mr. Cooke explicitly said that Council Member Barry was not basing his refusal to answer on an assertion of privilege under the Fifth Amendment to the U.S. Constitution.⁸⁶

In September 2008, Ms. Watts-Brighthaupt traveled to Jamaica with Council Member Barry, and he paid for the trip.⁸⁷ He also paid Ms. Watts-Brighthaupt’s mortgage that month.⁸⁸

⁸³ *Id.* at 29:5–32:7, 47:20–50:17.

⁸⁴ *Id.* at 48:3–6.

⁸⁵ *Id.* at 48:9–10.

⁸⁶ *Id.* at 48:11–12.

⁸⁷ Barry Dep. 107:2–19; *see* Watts-Brighthaupt Dep. 51:4–18. The two traveled together on other occasions, including trips to Denver, Las Vegas, and Memphis. *Id.* 105:14–111:4.

⁸⁸ Watts-Brighthaupt Dep. 112:12–113:4.

In October of 2008, Council Member Barry sought to hire Ms. Watts-Brighthaupt to create a “Young Emerging Leaders Development Program.”⁸⁹ The Office of the Secretary withheld approval of the proposed contract because the scope of work for the Emerging Leaders project did not relate to Council Member Barry’s Council functions.⁹⁰ The Secretary said that the initial contract request included little to no detail about what Ms. Watts-Brighthaupt was expected to do.⁹¹ She raised the issue with Council Member Barry and his Chief of Staff.⁹² Specifically, she explained to them the requirements for personal services contracts, and that the purpose for the contract could not be for political activities.⁹³

Subsequently, Council Member Barry submitted a new scope of work stating that Ms. Watts-Brighthaupt would assist in the planning and execution of a series of public hearings on poverty reduction.⁹⁴ The Secretary said she and her Office were not aware at the time that Council Member Barry had a sexual or personal relationship with Ms. Watts-Brighthaupt.⁹⁵ The Office of the Secretary approved the revised proposal because such a program would come

⁸⁹ Ex. 9, Donna Watts-Brighthaupt, Proposal: “Young Emerging Leaders Development Program” (Oct. 9, 2008); see Barry Dep. 13:19–16:12.

⁹⁰ Interview with Cynthia Brock-Smith, Ronald Collins, & Brian Flowers, *supra* note 60; see Ex. 9, Donna Watts-Brighthaupt, *supra* note 89.

⁹¹ Interview with Cynthia Brock-Smith, Ronald Collins, & Brian Flowers, *supra* note 60; see Ex. 9, Donna Watts-Brighthaupt, *supra* note 89.

⁹² Interview with Cynthia Brock-Smith, Ronald Collins, & Brian Flowers, *supra* note 60.

⁹³ *Id.*

⁹⁴ Ex. 10, Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (Oct. 22, 2008).

⁹⁵ Interview with Cynthia Brock-Smith, Ronald Collins, & Brian Flowers, *supra* note 60.

within the scope of official Council functions.⁹⁶ Thereafter, however, Ms. Watts-Brighthaupt, with the Council Member's knowledge and approval, carried out the Emerging Leaders project, as originally envisioned.⁹⁷

Documentary evidence shows that Council Member Barry cancelled and reinstated Ms. Watts-Brighthaupt's contract. He appears to have first ended the contract by letter dated November 10, 2008, in which he advised Ms. Watts-Brighthaupt of his "decision" to terminate her contract effective November 21, 2008.⁹⁸ In a follow-up memorandum dated December 5, 2008, Council Member Barry requested that Secretary Cynthia Brock-Smith terminate Ms. Watts-Brighthaupt's contract, effective November 21, 2008.⁹⁹ By letter dated December 27, 2008, Council Member Barry advised Ms. Watts-Brighthaupt that it was "regrettable that [she] chose not to go forward with the emerging leaders program" after she "had agreed to a two month extension [*sic*] of the present contract."¹⁰⁰ Then, only three days later, by memorandum dated December 30, 2008, Council Member Barry advised the Secretary to

⁹⁶ Compare Donna Watts-Brighthaupt *supra* note 89 with Ex. 10, Memorandum from Marion Barry, *supra* note 94.

⁹⁷ See Ex. 11, Donna Watts-Brighthaupt, Emerging Leaders of Ward 8, an Empowerment Proposal (Spring 2009).

⁹⁸ Ex. 12, Letter from Marion Barry, Member, Council of the District of Columbia, to Donna Watts-Brighthaupt (Nov. 10, 2008), Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (Dec. 5, 2008), Letter from Marion Barry, Member, Council of the District of Columbia, to Donna Watts-Brighthaupt (Dec. 27, 2008), Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (Dec. 30, 2008).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

immediately reinstate, extend, and enlarge Ms. Watts-Brighthaupt's contract.¹⁰¹ The reasons for these machinations are unclear.¹⁰²

Ultimately Ms. Watts-Brighthaupt was paid a total of \$15,000 for her work on the Emerging Leaders project. According to both her testimony and that of Mr. Barry, the Council Member received a portion of those moneys.¹⁰³ Ms. Watts-Brighthaupt was in substantial financial distress, and she testified that Council Member Barry on occasion paid her mortgage, utility and car repair bills, and bought other items for her that she had believed were gifts, including jewelry and a coat.¹⁰⁴ Specifically, Ms. Watts-Brighthaupt testified that Council Member Barry paid her mortgage in September 2008—before she received a personal services contract—and he paid some of her utility bills between October 2008 and February 2009.¹⁰⁵ She believed these were gifts.¹⁰⁶

¹⁰¹ *Id.*

¹⁰² Ms. Watts-Brighthaupt said she did not know at the time that the contract had been cancelled. She testified that Council Member Barry frequently made sexual advances towards her—before, during, and after October 2008 when she began working for him as a contractor—and, when she rebuffed his advances, he would react negatively towards her. Watts-Brighthaupt Dep. 131:15–132:15, 231:5–10; Watts-Brighthaupt Dep. 29:5–30:1 Nov. 12, 2009 (hereinafter Watts-Brighthaupt Dep. II). Ms. Watts-Brighthaupt speculated that Council Member Barry cancelled her contract when he became angry because she refused to comply with his requests for sexual favors. Watts-Brighthaupt Dep. 131:15–132:15. Council Member Barry testified that he terminated Ms. Watts-Brighthaupt's contract “a couple of times” because she would go through cycles of depression and would stop answering her telephone for “two or three days.” Barry Dep. 37:3–21. The Council Secretary said that Council Member Barry sometimes cancelled contracts because he ran out of money in his budget. Interview with Cynthia Brock-Smith & Ronald Collins, *supra* note 59.

¹⁰³ Barry Dep. 20:13–28:13; Watts-Brighthaupt Dep. 122:7–10.

¹⁰⁴ *See* Watts-Brighthaupt Dep. 103:18–133:16.

¹⁰⁵ *Id.* at 112:12–113:5.

¹⁰⁶ *Id.* at 202:14–19.

However, Ms. Watts-Brighthaupt testified that, on more than one occasion, Council Member Barry personally delivered contract payment checks to her, accompanied her to a bank, waited in the car while she cashed the check, and required her to pay a portion of the funds over to him when she returned to the car, claiming that the payments he made on her behalf were loans, not gifts.¹⁰⁷ She recalled this occurring in particular when she received her largest payment under the contract, testifying that on that occasion, while Mr. Barry waited for her in the car, he made a list of all the items for which she owed him money.¹⁰⁸ Ms. Watts-Brighthaupt did not recall the total amount she gave him from check proceeds over the course of the contract, but estimated that it could have been several hundred to as much as \$4,000.¹⁰⁹

Mr. Barry acknowledged receiving money from Ms. Watts-Brighthaupt as repayment for funds he claimed to have loaned her.¹¹⁰ Specifically, he testified that he made payments on her behalf and that he insisted that Ms. Watts-Brighthaupt repay him.¹¹¹ He estimated that he loaned her \$3,000 to \$4,000.¹¹² He stated that one mortgage payment alone was \$1,600, that he paid her mortgage several times, and that he paid a car repair bill of

¹⁰⁷ *Id.* at 103:18–133:16. Documents in Special Counsel’s possession corroborate Ms. Watts-Brighthaupt’s testimony by showing that members of Council Member Barry’s Staff signed to retrieve at least three of the four checks issued to Ms. Watts-Brighthaupt. Typically, contractors would receive their checks by mail or retrieve them in person. When another party picks up a check, that party is required to sign for it.

¹⁰⁸ *Id.* at 126:8–128:1. Ms. Watts-Brighthaupt stated that she no longer had a copy of the list, having turned it over to other government investigators.

¹⁰⁹ *Id.* at 201:12–17.

¹¹⁰ *Id.*

¹¹¹ Barry Dep. 23:2–22.

¹¹² *Id.* at 23:19–22.

approximately \$800.¹¹³ Council Member Barry did not specifically recall going to the bank with Ms. Watts-Brighthaupt, but testified that he might have done so on one or two occasions when she had not repaid the money he believed she owed him.¹¹⁴ He denied, however, that he insisted that she cash the checks and repay him from the proceeds.¹¹⁵

Ms. Watts-Brighthaupt's performance under the contract does not appear to have provided value commensurate with the sums she received because significant portions of the deliverable she prepared for Council Member Barry were copied nearly verbatim from a 1997 U.S. Department of Education survey.¹¹⁶ During her deposition, Ms. Watts-Brighthaupt identified the initial draft she delivered to Council Member Barry. She conceded that much of the language from the 1997 Department of Education survey is substantially the same as language that appears in the deliverable.¹¹⁷ In response to questioning, Ms. Watts-Brighthaupt testified that she copied much of the material from a school assignment she had completed years

¹¹³ *Id.* at 23:20–22, 25:15–20. Council Member Barry gave varying answers to the question of when he first paid her mortgage. At first he said he could not recall; subsequently he indicated that it may have been in December 2008. *Compare id.* at 20:20–21:7 *with id.* at 27:1–16. As noted above, Ms. Watts-Brighthaupt said he made the first payment on her behalf in September 2008. Watts-Brighthaupt Dep. 113:12–13.

¹¹⁴ Barry Dep. 22:2–10.

¹¹⁵ *Id.*

¹¹⁶ *Compare* U.S. Department of Education, National Center for Education Statistics, NCES 97-906, 1996 National Household Education Survey: Adult Civic Involvement in the United States (1997), <http://nces.ed.gov/pubs97/web/97906.asp> *with* Ex. 11, Donna Watts-Brighthaupt, *supra* note 97; *see also* Watts-Brighthaupt Dep. 97:10–11 (“I probably plagiarized my own self after plagiarizing five years ago.”).

¹¹⁷ Watts-Brighthaupt Dep. 81:2–17. Ms. Watts-Brighthaupt also copied the contents of a sample “Public Speaking and Oral Advocacy Interactive Evaluation Sheet” included with the deliverable. *Compare* Ex. 13, Prepping your Informative Speech, *with* Ex. 11, Donna Watts-Brighthaupt, *supra* note 97, at 27. Ms. Watts-Brighthaupt said that she copied the content from materials she received in a public speaking course. Watts-Brighthaupt Dep. 85:1–86:13.

earlier.¹¹⁸ Moreover, Ms. Watts-Brighthaupt could not produce any evidence substantiating her claims that she conducted the survey and performed the statistical analysis noted in her deliverable. Nonetheless, in justifying the personal services contract, Council Member Barry testified that Ms. Watts-Brighthaupt “produced a quality product” that was worth “two or three times what we paid for.”¹¹⁹

Even cursory due diligence would have revealed that sections of the deliverable had been copied—the original source is on the Internet, and Special Counsel located it within a matter of minutes. Moreover, Council Member Barry did not recognize the deliverable when shown a copy during his deposition (he testified that he had received a bound volume with a blue cover from Ms. Watts-Brighthaupt, whereas the exhibit he received during testimony was not bound).¹²⁰

Additionally, several of the invoices submitted on behalf of Ms. Watts-Brighthaupt for payment under the personal services contract were challenged by Council personnel. Council Member Barry’s Chief of Staff, Bernadette Tolson, refused to sign certain

¹¹⁸ *Id.* at 81:2–17, 97:10–11. A subsequent draft of the deliverable does not contain much of the material lifted from the 1997 Department of Education survey, but Ms. Watts-Brighthaupt testified that she was “sure she did not revise” the sections at issue and speculated that Brenda Richardson might have revised the document because Ms. Richardson had access to it on a shared thumb drive. *Id.* at 215:10–218:19.

¹¹⁹ Barry Dep. 127:14–16.

¹²⁰ Barry Dep. 127:17–128:2. Council Member Barry might possibly have received a heretofore unidentified document which he believes to be Ms. Watts-Brighthaupt’s deliverable. If that were true, however, the document would have been subject to the subpoena he received and should have been produced to Special Counsel. Ms. Watts-Brighthaupt testified, moreover, that Exhibit 11, the document we presented to Council Member Barry during his deposition, was a copy of the deliverable she submitted to him. Watts-Brighthaupt Dep. 76:20–78:16, 215:10–218:19.

invoices Ms. Watts-Brighthaupt submitted to receive the contract funds.¹²¹ On one occasion, she thought the deliverable descriptions Ms. Watts-Brighthaupt provided were insufficient;¹²² and on another occasion she did not see any work product related to the tasks Ms. Watts-Brighthaupt purported to have completed within the corresponding two-week timeframe.¹²³

Brenda Richardson, while working as a volunteer in Council Member Barry's Constituent Services Office, approved one of Ms. Watts-Brighthaupt's invoices, at Council Member Barry's direction.¹²⁴ The invoice was for \$7,500, but there was only \$6,250 available under the corresponding purchase authorization.¹²⁵ Ms. Watts-Brighthaupt testified that Council Member Barry directed her to request \$7,500 because he had increased the amount of money to be paid under her contract.¹²⁶ The Office of the Secretary rejected the invoice because it was not signed by a Council employee and because it was for more funds than remained under the

¹²¹ Interview with Bernadette Tolson, Chief of Staff, Office of Council Member Marion Barry, in Wash., D.C. (Oct. 30, 2009).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Richardson Dep. 196:18–197:17, Nov. 10, 2009; Ex. 14, Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (May 22, 2009).

¹²⁵ Ex. 15, Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (May 15, 2009).

¹²⁶ *See* Watts-Brighthaupt Dep. 196:4–208:14; *see also* Ex. 15, Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (May 15, 2009).

contract.¹²⁷ Ms. Watts-Brighthaupt stated that Ms. Richardson had also drafted content for one of Ms. Watts-Brighthaupt's invoices at Council Member Barry's direction.¹²⁸

Council Member Barry testified that his personal relationship with Ms. Watts-Brighthaupt had no bearing on his decision to hire her, and that the decision to do so "was [based] strictly on her ability, not because of anything else."¹²⁹ He further asserted that she had not told him about her finances and her inability to pay her mortgage and other bills "until later on."¹³⁰ There is substantial evidence, however, that Mr. Barry knew of Ms. Watts-Brighthaupt's financial difficulties prior to the award of the contract when he was assisting her in her efforts to find work.¹³¹ Indeed, at a news conference on his behalf, Mr. Barry's spokeswoman, Natalie Williams, stated that he gave Ms. Watts-Brighthaupt the contract because she "was about to lose her house [and] her car."¹³² Moreover, even if he began paying her mortgage as late as December, as he asserted at one point in his testimony, he caused her contract to be reinstated late that same month.¹³³

¹²⁷ Interview with Cynthia Brock-Smith & Ronald Collins, *supra* note 59.

¹²⁸ Interview with Donna Watts-Brighthaupt, in Wash., D.C. (Nov. 12, 2009); Email from Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry to Donna Watts-Brighthaupt (May 15, 2009, 7:30 PM) (on file with Special Counsel).

¹²⁹ Barry Dep. 47:9–13.

¹³⁰ *Id.* at 47:14–17. This claim is inconsistent with Ms. Watts-Brighthaupt's testimony. According to Ms. Watts-Brighthaupt, Mr. Barry made a mortgage payment on her behalf in September 2008, before the contract was awarded. Watts-Brighthaupt Dep. 112:13–16.

¹³¹ Watts-Brighthaupt Dep. 38:18–41:11; Barry Dep. 38:10–16.

¹³² Craig, *supra* note 4. Ms. Williams testified that she obtained this information from Mr. Barry. Williams Dep. 78:5–79:10, Dec. 22, 2009.

¹³³ Barry Dep. 23:20–22, 25:15–20.

A subsequent email communication from Council Member Barry to Ms. Watts-Brighthaupt, dated June 29, 2009, further supports the conclusion that Council Member Barry was not adverse to using public funds, either in the form of contracts or grants, to assist Ms. Watts-Brighthaupt when she was in financial need.¹³⁴ The June 2009 email concerns Council Member Barry's desire to help Ms. Watts-Brighthaupt when she was dealing with a serious medical condition:

The first order of business is to find a way to remove all stress out of your life. You said the biggest stress was finances. Therefore the finance support team should be the highest priority. I told you today that I thought I could work out a way for you to work with Brenda Richardson whom you like and trust, to work 20 to 25 hours a week for the next three months for \$5,000 a month. And I also promise you that I will work out a way for the next 12 months for at least \$40,000. Thus we will have \$55,000 in the pot.¹³⁵

When asked in his deposition whether he intended to secure these funds by putting Ms. Watts-Brighthaupt on payroll or getting her another personal services contract, Council Member Barry testified, "I wasn't sure what I was going to do. I just knew I wanted to do it."¹³⁶ But Council Member Barry stated in the document itself, "*If I couldn't get the contract, I would put my personal money in it.*"¹³⁷ Council Member Barry's personal motivation to assist

¹³⁴ Ex. 7, Email from Donna Watts-Brighthaupt to Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry (Jun. 29, 2009 8:50 PM). The email to which Ms. Watts-Brighthaupt replies is from Council Member Barry and appears earlier in the chain. The email appears to come from Brenda Richardson, but Council Member Barry acknowledged that he dictated the message, and the message concludes "Love you, Your Friend, Marion." *Id.*; Barry Dep. 36:3-7.

¹³⁵ Ex. 7, Email from Donna Watts-Brighthaupt to Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry (Jun. 29, 2009 8:50 PM).

¹³⁶ Barry Dep. 40:8-15.

¹³⁷ Ex. 7, Email from Donna Watts-Brighthaupt to Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry (Jun. 29, 2009 8:50 PM) (emphasis added).

Ms. Watts-Brighthaupt in June 2009 is strong evidence that the same personal interest drove him to award her the October 2008 personal services contract.

(b) Conclusions

Special Counsel concludes that Council Member Barry's actions in connection with the award and administration of a personal services contract to Donna Watts-Brighthaupt were not in accordance with District laws or Council rules, policies, and procedures.

First, it is Special Counsel's view that Council Member Barry's conduct constituted a conflict of interest, violated the public trust, and cast substantial doubt on the integrity of the District government in violation of numerous District laws and regulations, and Council Rule 202.¹³⁸ In seeking approval for the contract, Council Member Barry failed to disclose a conflict of interest. Council Member Barry acknowledged in sworn testimony that he had loaned Ms. Watts-Brighthaupt money. Thus, he had an undisclosed financial interest in her ability to repay him. He furthered that financial interest by taking official action to award her a public contract which enabled her to repay him as she was otherwise unemployed and had insufficient sources of income to pay her mortgage and other bills. Council Member Barry also had an undisclosed sexual and personal relationship with Ms. Watts-Brighthaupt when he arranged for her to receive a personal services contract.

¹³⁸ See D.C. Code § 1-1106.01 (b), (g); D.C. Mun. Regs. tit. 3 § 3301.12 (barring public officials from acting on any matter "in which there is conflict or a potential conflict, created by their financial, personal, family, business, or client interest."); 18 DPM § 1800.1 (requiring certain officials to "maintain a high level of ethical conduct in connection with the performance of official duties," and to "refrain from taking, ordering or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government"); 18 DPM § 1803.1 ("An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, or create the appearance of the following: using public office for private gain [or] affecting adversely the confidence of the public in the integrity of government").

Second, because the Office of the Secretary was not given accurate information about the nature of the work to be performed or Mr. Barry's undisclosed conflicts of interest, he did not properly obtain approval from the Office of the Secretary and circumvented controls on personal services contracts implemented by that Office. After the Secretary's Office declined to process the initial Emerging Leader's proposal, Council Member Barry knowingly signed and submitted documentation to the Office of the Secretary that did not accurately describe the contract's purpose in order to ostensibly bring Ms. Watts-Brighthaupt's work within the scope of legitimate Council functions. The Secretary approved the revised proposal. Afterward—with Mr. Barry's knowledge and approval—Ms. Watts-Brighthaupt performed the tasks associated with the initial proposal. By allowing her to do so, Council Member Barry violated contracting policies that require personal services contractors to perform work related to the functions of the Council.

Third, Council Member Barry obtained a publicly funded contract for a person who owed him money. This conduct warrants a referral to federal and District authorities to investigate possible violations of criminal law.

2. *Brenda Richardson's Personal Services Contracts*

In 2007 and 2008, Brenda Richardson entered into two personal services contracts to perform work for Council Member Barry's CSO and the Council Committee on Housing and Urban Affairs. Financial records reviewed by Special Counsel confirmed that, pursuant to these two contracts, Ms. Richardson was paid a total of \$30,000. Under the contracts, Ms. Richardson "serve[d] as a temporary consultant for Councilmember Marion Barry's Ward 8 Constituent

Services Office,”¹³⁹ and set up several programs run out of Council Member Barry’s CSO, including the Anacostia Business Improvement District Committee, the Ward 8 ANC Council, and the Ward 8 Drug Prevention Council.¹⁴⁰

On October 16, 2009, Council Member Barry sought a third personal services contract for Ms. Richardson. Under the proposed contract, Ms. Richardson was to continue the work she had previously been doing with the existing Ward Eight Councils and establish at least six more councils.¹⁴¹ The Office of the Secretary declined to approve the contract, explaining that the proposed scope of work for the contract consisted of work that “should more aptly come under the umbrella of citizen-service programs.”¹⁴² In response to the Secretary’s determination, as of December 21, 2009, Ms. Richardson joined Council Member Barry’s Council staff as Deputy Chief of Staff for Community Engagement in his CSO.¹⁴³

Special Counsel concludes that the work performed by Ms. Richardson pursuant to personal services contracts entered into in 2007 and 2008 was for various citizen-service programs, which are defined as programs that “provide[] services to the residents of the District of Columbia; and promote[] their general welfare, including, but not limited to, charitable,

¹³⁹ Ex. 16, Richardson Contractual Agreement (Jan. 4, 2007).

¹⁴⁰ Richardson Dep. 30:15–31:10; Ex. 17, D.C. Council Purchase Order PO242824 (Nov. 20, 2007).

¹⁴¹ Ex. 18, Memorandum from Marion Barry, Member, Council of the District of Columbia to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (Oct. 16, 2009).

¹⁴² Ex. 19, Memorandum from Ronald Collins, Assistant Secretary, Council of the District of Columbia to Marion Barry, Member, Council of the District of Columbia (Oct. 29, 2009).

¹⁴³ Interview with Cynthia Brock-Smith & Ronald Collins, *supra* note 59.

scientific, educational, medical or recreational purposes.”¹⁴⁴ D.C. Code section 1-1104.03 and title 3, section 3014.1 of the D.C. Municipal Regulations provide that citizen-service programs may only be funded through 1) a transfer of unused campaign funds and 2) a designated account for such services provided by private donations.¹⁴⁵ Accordingly, Special Counsel concludes that Ms. Richardson’s personal services contracts may have circumvented legal restrictions on the type and amount of funding that may be used for citizen-service programs.

Special Counsel did not find any evidence that Council Member Barry received any portion of the compensation Ms. Richardson earned pursuant to her personal services contracts. Nor did Special Counsel find any evidence that Ms. Richardson had a romantic or sexual relationship with Council Member Barry.¹⁴⁶

3. *The Bowen Group, LLC’s Personal Services Contract*

From May 2007 through May 2008, Council Member Barry’s Council Committee or office entered into three personal services contracts with Sharon Bowen, through her organization The Bowen Group, LLC, pursuant to which she was paid \$50,000.¹⁴⁷ Press reports raised questions as to whether Ms. Bowen was awarded personal services contracts because she had a romantic or sexual relationship with Council Member Barry; however, Special Counsel

¹⁴⁴ D.C. Mun. Regs. tit. 3 § 3014.1.

¹⁴⁵ *See id.*; D.C. Code § 1-1104.03.

¹⁴⁶ During her deposition, we asked Ms. Richardson to describe the nature of her relationship with Council Member Barry. She stated that it was one of Council Member and volunteer and that they did not socialize. Richardson Dep. 32:17–34:15. Council Member Barry also denied having a romantic or personal relationship with Ms. Richardson. Barry Dep. 75:15–19.

¹⁴⁷ Ex. 20, Bowen Contractual Agreement (May 29, 2007), Bowen Contractual Agreement (Sept. 6, 2007), Bowen Contractual Agreement (May 21, 2008).

found insufficient evidence to conclude that such a relationship existed.¹⁴⁸ Ms. Bowen denied having a romantic or sexual relationship with Council Member Barry.¹⁴⁹ In at least one press report, Council Member Barry denied having a romantic or sexual relationship with Ms. Bowen.¹⁵⁰ At the outset of his deposition, Council Member Barry denied having a romantic relationship with Ms. Bowen.¹⁵¹ When Special Counsel asked later whether he had a romantic or sexual relationship with Ms. Bowen, Council Member Barry refused to answer, asserting that the question was outside the scope of the inquiry.¹⁵² No other witnesses conveyed direct knowledge of any romantic or sexual relationship between Council Member Barry and Ms. Bowen, nor did Special Counsel find any evidence that Council Member Barry received any portion of Ms. Bowen's compensation from her personal services contracts.¹⁵³ In sum, Special Counsel found

¹⁴⁸ Jason Cherkis & Mike DeBonis, *Marion Barry's Other Woman*, Wash. City Paper, Aug. 13–19, 2009, <http://www.washingtoncitypaper.com/display.php?id=37640>.

¹⁴⁹ In her interview, Ms. Bowen said she did not socialize with Council Member Barry and that all of their contacts were work-related. She conceded that, occasionally, she and Council Member Barry would have meals together and attend the same social functions, but stated that all of these events were work-related. When we asked Ms. Bowen whether she had a romantic or sexual relationship with Council Member Barry, Ms. Bowen denied the allegations and said that when the allegations surfaced she was “outraged.” Telephone Interview with Sharon Bowen, Principal, The Bowen Group, LLC (Nov. 13, 2009).

¹⁵⁰ In an interview with the Washington City Paper, Council Member Barry denied ever having a sexual or romantic relationship with Ms. Bowen. In response to the allegations, Council Member Barry said, “I resent these implications that if I got [*sic*] out with a lady that there's something personal going on,' 'She and I got no personal relationship,' 'I got a lot of enemies out here. They make up stuff, and they spread rumors, they insinuate things I urge you to take things with a grain of salt.’” Jason Cherkis & Mike DeBonis, *Marion Barry's Other Woman*, Wash. City Paper, Aug. 13–19, 2009, <http://www.washingtoncitypaper.com/display.php?id=37640>.

¹⁵¹ Barry Dep. 32:8–16.

¹⁵² Barry Dep. 99:17–100:8.

¹⁵³ During her interview, we asked Ms. Bowen whether she had ever given any portion of the compensation she received from her personal services contracts to Council Member Barry, and she responded, “No, absolutely not. That would be unethical.” Ms. Bowen also said she never purchased gifts for Council Member Barry or donated to Council Member Barry's campaign. Telephone Interview with Sharon Bowen, Principal, The Bowen Group, LLC (Nov. 13, 2009); Barry Dep. 32:8–13.

no evidence to conclude that Ms. Bowen's personal services contracts were not awarded in accordance with District laws or Council rules, policies, and procedures.

D. Other Personal Services Contracts

Special Counsel was not requested or obligated to examine all personal services contracts awarded by the Council, but made an effort to review them to better inform any recommendations to the Council. Therefore, in addition to the personal services contracts awarded at the request of Council Member Barry, Special Counsel conducted a review of the 34 contracts awarded at the request of other Council Members from FY 2005 forward, under which contractors were to receive approximately \$213,000.¹⁵⁴ Our initial examination involved reviewing contract documentation in the possession of the Office of the Secretary and publicly available information about the contractors. In many cases, this information was sufficient to allow us to quickly conclude that a particular contractor was a *bona fide* entity providing services of the nature contracted for, and that the services were the appropriate subject of a personal services contract.

For a few contracts, the documentation provided by the Secretary or publicly available information was insufficient to make these assessments. In these cases, additional documents were obtained from Council Members and the contractors. All of the Council Members and each of the contractors cooperated with the Investigation by submitting documents and, where follow up was warranted, certain contractors voluntarily participated in interviews. This review did not disclose any conflicts of interest in the awarding of these personal services

¹⁵⁴ Of the total amount awarded under the other Council Members' personal services contracts, approximately \$138,000 was paid. *See* Table 1, *supra*.

contracts and did not support a finding that a contractor failed to provide services as contracted. Nor did it suggest that the contracted for services were inappropriate for Council funding.

Our review did suggest, however, that Council procedures need to be updated to ensure effective screening for possible conflicts of interest; and to ensure that adequate documentation is required to provide for effective monitoring of the services provided under the terms of the contracts.¹⁵⁵ Recommendations in that regard are set out in Part VIII below.

VI. COUNCIL EARMARK GRANTS

Many Council earmark grants benefit worthy, well-run organizations. Nonetheless, Special Counsel finds that certain earmark grants created substantial opportunities for waste and abuse, notwithstanding the Council’s recent efforts to impose certain controls and oversight on grantees. In particular, Special Counsel found that several grants sponsored by Council Member Barry went to organizations that were incorporated through falsified documents, and that a few individuals close to Mr. Barry, together with members of their families and friends, personally received tens of thousands of dollars from earmark grants in which Mr. Barry played a role. It appears that these grants also permitted Mr. Barry to circumvent District laws limiting the amount and nature of funds that can be expended for constituent services.

A. Overview of Council Earmark Grants

For purposes of this Report, the term “earmark” or “earmark grant” is defined as “an approved measure by the Council, which results in the appropriation of funds for a specific purpose . . . direct[ly to] organizations, institutions, and private sector entities.”¹⁵⁶ Each

¹⁵⁵ See Part VIII, *infra*.

¹⁵⁶ Council of the District of Columbia, Office of Policy Analysis, Report 17-02: Special Allocations of the Council of the District of Columbia, 1–2 (2008).

Member of the Council, as well as the Executive Office of the Mayor, may designate earmark grants.¹⁵⁷ As shown in the table below, the appetite for earmark grants increased dramatically between FY 2005 and FY 2009, going from 2 earmarks in 2005 to 154 in 2009. Funding for earmark grants increased from \$1.25 million in FY 2005 to \$47.9 million in FY 2009.¹⁵⁸

Table 2
Summary of District of Columbia Earmark Grants
FY 2005 through FY 2009

FY	Number of Earmark Grants	Dollar Value of Earmark Grants
2005	2	\$1,250,000
2006	25	\$17,510,900
2007	44	\$29,308,282
2008	99	\$49,766,576
2009*	154	\$47,922,000
Grand Total	324	\$145,757,758

Source: Council of the District of Columbia Office of Policy Analysis Report 17-02, *Special Allocations of the Council of the District of Columbia*, March 12, 2008, page 2.

*FY 2009 BSA Section 8002.

B. Council Earmark Funding for FY 2009

The Fiscal Year 2009 Budget Support Act of 2008 (the “FY 2009 BSA”) was passed on June 26, 2008.¹⁵⁹ For the first time, the FY 2009 BSA included a list of documentation that grantees were required to submit before funding could be released. However, some of the newly established requirements were perceived to be onerous for start-up organizations, prompting concern that those requirements might preclude the funding of

¹⁵⁷ *Id.* at 25.

¹⁵⁸ In FY 2010, before canceling earmarks all together, the Council approved grants totaling \$20.8 million, of which \$6.9 million originated from the Mayor and \$13.9 million originated from the Council. *See* Fiscal Year 2010 Budget Support Act of 2009, D.C. Act 18-255, 57 D.C. Reg. 181, Dec. 18, 2009.

¹⁵⁹ Fiscal Year 2009 Budget Support Act of 2008 § 8002, D.C. Law 17-219, 55 D.C. Reg. 7602, June 26, 2008.

otherwise worthy organizations. As a result, legislation was introduced on July 17, 2008, to ease the requirements for organizations that could not meet certain requirements.¹⁶⁰ This amendment allowed an organization to submit a certified financial statement in lieu of a recent financial audit, and provided for a “fiscal agent” to be appointed for organizations that could not meet certain of the documentation requirements.¹⁶¹ However, the Council retained incorporation as a mandatory requirement for all aspiring earmark recipients, a necessary and important control that it refused to waive or otherwise relax. The amendment was silent on the functions and duties of a fiscal agent. Nor did it address the amount of fees, if any, a fiscal agent could receive for its work.

In final form, section 8003(a) of this amendment required grantees or fiscal agents to submit the following information before they could receive funds:

- Articles of Incorporation for the grantee;
- IRS certification of 501(c) tax-exempt status;
- A recent financial audit or current financial statement showing good financial standing and delineating existing assets and liabilities, pending lawsuits, and pending and final judgments;
- IRS Form 990 for the most recent fiscal year;
- A notarized statement certifying that 1) the organization is current on District and federal taxes, 2) the Council may verify tax status, 3) the organization serves District residents, and 4) that the District shall have access to the organization’s records; and
- A scope of work and budget narrative.¹⁶²

Pursuant to section 8003(b), grantees also were required to submit to a random audit by the District of Columbia Auditor.

¹⁶⁰ Designated Appropriation Allocations Temporary Amendment Act of 2008, D.C. Law 17-275, 55 D.C. Reg. 11041, Sept. 30, 2008 (hereinafter “fiscal agent legislation”).

¹⁶¹ *Id.*

¹⁶² *Id.* § 8003.

Special Counsel focused on earmark grants made in FY 2009, following implementation of the controls outlined above. For that fiscal year, the Council approved grants involving more than \$47.9 million in funding. The vast majority of those earmarks, involving approximately \$41.4 million, were sponsored by Members of the Council either by requesting that the Mayor specify the earmark grant in the budget he submitted to the Council, or by inserting the earmark grant into the budget during the Council mark-up process.¹⁶³ For purposes of this Report, “sponsor” is defined to include a Council Member’s efforts to support an earmark grant by either means.

¹⁶³ The FY 2009 BSA contained \$23.5 million in earmark grants in the budget submitted by the Mayor; and the remaining \$24.4 million in earmark grants were inserted during the Council’s budget mark-up.

Table 3
Summary of Earmark Grants by Sponsor
FY 2009

Sponsor(s) [Note 1]	Earmark Grants		Earmark Grants Involving Fiscal Agents	
	Number	Value	Number	Value
Alexander; Mayor	12	\$1,260,000	3	\$190,000
Alexander; K. Brown; Graham	1	\$232,000		
Barry	37	\$8,075,000	10	\$1,400,000
Barry; K. Brown	2	\$200,000		
Barry; Evans	1	\$100,000		
Barry; Mayor	1	\$100,000		
K. Brown	9	\$1,202,000		
K. Brown; Mayor	1	\$100,000	1	\$100,000
K. Brown; Wells	1	\$150,000		
Catania	10	\$3,775,000		
Catania; Mayor	1	\$200,000		
Catania; Evans; Mayor	1	\$250,000		
Catania; Thomas, Jr.	2	\$400,000		
Cheh	2	\$350,000		
Cheh; Mayor	3	\$850,000		
Evans	5	\$1,450,000		
Evans; Mayor	12	\$14,800,000		
Graham	21	\$4,758,000	1	\$332,000
Gray	8	\$1,800,000	1	\$250,000
Mayor [Note 2]	11	\$5,870,000		
Mendelson	4	\$1,050,000		
Wells	2	\$100,000		
Wells; Mayor	1	\$200,000		
Unidentified [Note 3]	6	\$650,000		
Grand Total	154	\$47,922,000	16	\$2,272,000 [Note 4]

Source: Compilation provided by the Office of the Budget Director.

Note 1: The "Mayor" is designated a sponsor for earmark grants included in his budget.

Note 2: The 11 earmark grants for which the Mayor was the only sponsor include one \$600,000 earmark grant in which \$100,000 was funded by the Council.

Note 3: "Unidentified" sponsor indicates earmark grants inserted into the budget by the Council during the mark-up process where no Council Member has been identified as a sponsor.

Note 4: The compilation from which the data was derived included 17 earmark grants involving fiscal agents. It was determined, however, that one grantee included in that number did not use a fiscal agent.

According to information provided by the Office of the Budget Director, Council Member Jack Evans sponsored or co-sponsored the highest total amount of earmark funding, at \$16.5 million. Council Member Barry sponsored the highest number of grants. He was the sole sponsor of 37 earmark grants involving \$8,075,000, and he co-sponsored an additional four earmarks totaling \$400,000. All told, Mr. Barry sponsored 41 earmark grants—more than one-

fourth of the earmarks proposed by the Council. Those 41 grants involved \$8,475,000, the second highest total amount.

Of the Council sponsored earmarks for FY 2009, 16, or 11.6%, were designated to earmark grantees that required fiscal agents in order to qualify for earmark funding. Of these, 10 were sponsored by Mr. Barry.¹⁶⁴

C. Earmark Grants Sponsored by Council Member Barry

In light of the press reports that were the impetus for this Investigation, and in view of the fact that Council Member Barry sponsored a number of grants for organizations that could not meet the FY 2009 BSA requirements without reliance on a fiscal agent, several earmarks sponsored by Mr. Barry were identified by Special Counsel’s criteria for in-depth review.

In particular, the Investigation focused on grants to seven organizations, which were awarded a total of \$550,000 in grant funds:

**Table 4
Councils in Ward Eight**

Organization	Value of Grant
Clean and Green, Inc.	\$75,000
Clean and Sober, Inc.	\$75,000
Ward 8 Business Council Incorporated	\$100,000
Ward 8 Educational Council, Inc.	\$75,000
Ward 8 Health Council, Inc.	\$75,000
Ward 8 Workforce Development Council, Inc.	\$75,000
Ward 8 Youth Leadership Council, Inc.	\$75,000
Grand Total	\$550,000

Of these councils, all but the Ward 8 Business Council Incorporated (“Ward 8 Business Council”) were incorporated after enactment of the FY 2009 BSA. The same six,

¹⁶⁴ See Ex. 3, Office of the Budget Director, *supra* note 18.

collectively referred to as “the Ward Eight Councils,” were required to affiliate with a fiscal agent in order to qualify for funding because they had not yet applied or qualified for 501(c)(3) status and because of other deficiencies. The evidence regarding these councils, set forth below, is detailed and complex.

1. Factual Findings

(a) The Ward Eight Councils Were Conceived by Council Member Barry

Council Member Barry directed the creation of the Ward Eight Councils.¹⁶⁵

These six grantees were successors to prior Ward Eight groups that Mr. Barry founded and supported through his Ward Eight Constituent Services Office (“CSO”).¹⁶⁶

Council Member Barry testified that the councils were his “vision [for] empower[ing] the people of Ward Eight.”¹⁶⁷ He decided to create a number of councils in 2006, proceeded to “put the structure together,” and discussed their missions with Brenda Richardson.¹⁶⁸ Each of the Ward Eight Councils focused on a topic that Council Member Barry

¹⁶⁵ Barry Dep. 54:20–55:11, 70:22–73:6, 79:4–81:17, 83:3–84:4, 104:5–20; Richardson Dep. 44:7–102:11; Interview with Drew Hubbard, Esq., Committee Clerk, Office of Council Member Marion Barry, in Wash., D.C. (Oct. 7, 2009); Interview with Essita Holmes Duncan, Esq., Former Legislative Counsel, Office of Council Member Marion Barry, in Wash., D.C. (Aug. 24, 2009); Interview with Anthony Motley, Treasurer, Marion Barry Scholarship Fund, in Wash., D.C. (Sept. 15, 2009).

¹⁶⁶ Barry Dep. 54:20–55:11, 70:22–73:6, 79:4–81:17, 83:3–84:4, 104:5–20; Richardson Dep. 34:16–35:8, 42:16–43:4, 136:4–15.

¹⁶⁷ Barry Dep. 54:20–55:11, 70:22–71:1. When asked during a deposition how the elimination of earmark grants might affect his ability to serve as a Council Member in Ward Eight, Council Member Barry testified, “It would interfere with my ability to empower the people of Ward Eight, to uplift the people of Ward Eight, and to bring as many resources as I know how to get to the people of Ward Eight, because we’ve been deprived for so long, we’ve been discriminated against so long and kicked in the behind so long, yes, it would interfere with it.” *Id.* at 58:12–18.

¹⁶⁸ *Id.* at 55:8–9, 71:4–5, 77:10–14. Rev. Anthony Motley said that he and Council Member Barry developed councils for Ward Eight in 2006 after returning from a trip to China. Interview with Anthony Motley, *supra* note 165.

wanted to address; for example, Clean and Sober was to address community addiction challenges, and the Ward 8 Workforce Development Council was to expand employment opportunities in the Ward.¹⁶⁹ Rev. Anthony Motley, a community activist and one of Mr. Barry’s confidantes, explained that Council Member Barry could not be everywhere, so the groups were his “eyes and ears and legs on the ground” that could “address ideas and bring them back to Barry as a Councilman.”¹⁷⁰ Rev. Motley said the Ward Eight Councils were really “an extension of the Council Member.”¹⁷¹

As stated above, some of the Ward Eight Councils or their predecessors were active before they were incorporated in order to receive FY 2009 earmark grants.¹⁷² Ms. Richardson managed the groups’ activities while working in Council Member Barry’s CSO.

¹⁶⁹ Barry Dep. 79:12–80:18.

When asked to describe the Ward Eight Councils, Council Member Barry testified:

Well, it’s a new concept for me as to how I can empower and involve citizens in the community. For instance, we have a senior citizens’ council, and part of that mission is advocacy, advocacy. Testify before the City Council, if necessary, advocacy in the community for rights and services for seniors. There’s a business council. Their job is to try to enhance the business climate in Ward Eight, to attract businesses, to help monitor these contracts for CBE participation and et cetera. There’s one way—give you an example. We have a council on single parents, and they have had several meetings, about 25, 30 people. And out of that meeting came a commitment that they wouldn’t curse or wouldn’t scream at their kids for 24 hours, as a first step in getting them to begin parenting differently.

So it’s a wide array of things. I can’t explain all of them myself because I don’t know all what’s going on with that. But I know the general direction is advocacy, it’s involvement, it’s empowerment, it’s learning, information. They have educational seminars. Clean and Sober had a whole half day of discussion on sobriety, drug use, et cetera.

Id.

¹⁷⁰ Interview with Anthony Motley, *supra* note 165.

¹⁷¹ *Id.*

¹⁷² Richardson Dep. 77:10–78:18.

Council Member Barry awarded personal services contracts to Ms. Richardson in 2007 and 2008 to oversee the councils,¹⁷³ and sought as well to engage a supporter named Sharon Wise for the same purpose in 2007.¹⁷⁴ Most of the councils operated out of Council Member Barry’s CSO before and after incorporation, and often held meetings in the conference room at that location.¹⁷⁵

(b) Corporate Documents for the Ward Eight Councils Were Falsified, and Funds from an Unrelated Scholarship Account Were Used to Pay Their Corporate Filing Fees

Council Member Barry conceived of the idea that some of the councils could obtain earmark grants for FY 2009.¹⁷⁶ They did not, however, satisfy the new documentation requirements imposed by the BSA. He therefore directed Ms. Richardson to “get [the above-noted Ward Eight Councils] incorporated, if they weren’t incorporated, to get them a set of bylaws, et cetera, and to recommend people—not recommend, but to recruit people for the board.”¹⁷⁷ Council Member Barry told Ms. Richardson to work with his Committee Clerk, Drew Hubbard, Esq., and his then-Legislative Counsel, Essita Holmes Duncan, Esq., to ensure that the

¹⁷³ See Part V, *supra*.

¹⁷⁴ By memorandum dated September 21, 2007, Council Member Barry proposed that the D.C. Council approve a sole-source personal services contract with Ms. Wise to assist him in, *inter alia*, “conceptualizing, designing, planning, and moderating numerous community policy councils to engage the community on policy issues currently before the Council of the District of Columbia.” Ex. 21, Memorandum from Marion Barry, Member, Council of the District of Columbia, to Cynthia Brock-Smith, Secretary, Council of the District of Columbia (Sept. 21, 2007). Ms. Wise testified at deposition that she did not enter into such a contract, she had never seen the memorandum, she never signed such a contract, and she never provided the services described in the memorandum. Wise Dep. 178:14–181:8, Oct. 21, 2009. Ms. Wise stated that she received an unsolicited check in the amount of \$5,000 from the D.C. Council in 2007. According to Ms. Wise, Council Member Barry told her that he had finally gotten some money and was able to pay her for some of the work she had done for him on a voluntary basis. *Id.*

¹⁷⁵ Bunn Dep. 67:12–68:12, Dec. 4, 2009; Richardson Dep. 42:20–43:1.

¹⁷⁶ See Barry Dep. 72:12–22; Interview with Jackie Ward, in Wash., D.C. (Aug. 26, 2009).

¹⁷⁷ Barry Dep. 83:14–84:4.

Ward Eight Councils were eligible to receive earmark grants.¹⁷⁸ Mr. Hubbard and Ms. Holmes Duncan created boilerplate Articles of Incorporation for the Ward Eight Councils that were not yet incorporated.¹⁷⁹

On July 23, 2008, at the direction of and with the assistance of Ms. Richardson,¹⁸⁰ Articles of Incorporation for the Ward Eight Councils were purportedly signed and executed by the respective incorporators, three for each organization.¹⁸¹ Many of the individuals identified as incorporators, board members, or agents of these Ward Eight Councils were community activists who had been involved in the groups Mr. Barry had founded, or were volunteers at the CSO.¹⁸² Ms. Richardson testified that she 1) asked the individuals listed therein as incorporators to serve in that capacity, and each signatory agreed to do so; 2) asked the individuals listed therein as board members to serve in that capacity, and each agreed to do so; 3) asked the individuals listed therein as registered agents to serve in that capacity, and each agreed to do so; and 4) asked James Bunn, Sr., the Chair of the Ward 8 Business Council, to notarize the documents, and he agreed to do so.¹⁸³ Mr. Bunn swore under oath that he did in fact notarize the signatures on these

¹⁷⁸ *Id.*; Interview with Drew Hubbard, Esq., *supra* note 165; Interview with Essita Holmes Duncan, *supra* note 165; Richardson Dep. 52:15–53:3, 76:2–5.

¹⁷⁹ Interview with Drew Hubbard, Esq., *supra* note 165; Interview with Essita Holmes Duncan, *supra* note 165. As noted above, the Ward 8 Business Council, another earmark grant recipient, was incorporated earlier.

¹⁸⁰ Richardson Dep. 76:2–80:22; Barry Dep. 83:14–19; Bunn Dep. 238:12–239:13.

¹⁸¹ Exs. 22–27, Articles of Incorporation for the Ward Eight Councils.

¹⁸² Richardson Dep. 77:10–78:1.

¹⁸³ *Id.*; *see* Richardson Dep. 81:3–102:11.

documents.¹⁸⁴ Ms. Richardson testified that she was not present when any of these individuals signed the Articles of Incorporation.¹⁸⁵

Special Counsel found, however, that all the Articles of Incorporation submitted to the Department of Consumer and Regulatory Affairs (the “DCRA”) for these organizations contained signatures that were falsified, and that the documents were not properly notarized. Specifically, the investigation revealed substantial, credible evidence that:

- The purported signatures of four individuals, accounting for 12 of the 18 incorporators’ signatures appearing on the Articles of Incorporation of the Ward Eight Councils, were not executed by those individuals,¹⁸⁶ and that two purported

¹⁸⁴ Bunn Dep. 221:1–233:9.

¹⁸⁵ Richardson Dep. 80:7–11; The Articles of Incorporation all appear to have been signed on July 23, 2008. Exs. 22–27, Articles of Incorporation for the Ward Eight Councils.

¹⁸⁶ Three individuals denied under oath signing the Articles of Incorporation or otherwise actively participating in the incorporation process:

1) Sharon Wise, whose name and signature appeared as an incorporator of three councils: Ward 8 Health Council, Ward 8 Educational Council, and Ward 8 Workforce Development; registered agent for Ward 8 Educational Council and Ward 8 Health Council; and a director of Ward 8 Workforce Development Council. Wise Dep. 120:18–121:22, 140:4–141:14, 152:9–153:14, 161:9–163:6;

2) Theodore Wesby, whose name and signature appeared as “Ms. Mercedes Wise” on the Articles of Incorporation of the Ward 8 Youth Leadership Council, as an incorporator and director of that council. Wesby Dep. 45:22–46:21, Oct. 21, 2009; and

3) Pamela Thomas, whose name and signature appeared as an incorporator of three councils: Clean and Green, Clean and Sober, and Ward 8 Youth Leadership Council; and a director of Ward 8 Youth Leadership Council. Thomas Dep. 79:22–83:13, Nov. 16, 2009.

A fourth individual, Carmen McCall, whose name and signature appeared as an incorporator on five of the Ward Eight Councils: Clean and Green, Clean and Sober, Ward 8 Educational Council, Ward 8 Health Council and Ward 8 Youth Leadership Council, and the registered agent of Ward 8 Youth Leadership Council, voluntarily appeared for an interview. Ms. McCall denied signing Articles of Incorporation or participating in the incorporation process for any of the five councils on which her name appeared as an incorporator or registered agent. Interview with Carmen McCall, Former Volunteer, Office of Council Member Marion Barry, in Wash., D.C. (Sept. 21, 2009).

signatures of a fifth individual on those documents also may not have been executed by that individual;¹⁸⁷

- Several individuals identified as registered agents, directors, or officers in the Articles of Incorporation or in reports submitted to the DCRA, were not aware of their appointments to those positions and were not actually serving in those capacities at the time the Articles of Incorporation and reports were filed;¹⁸⁸ and
- The notary process regarding the execution of the Articles of Incorporation of the Ward Eight Councils was defective in the following additional material respects:
 - Mr. Bunn failed to require appropriate identification of various signatories;¹⁸⁹
 - Mr. Bunn failed to require that all incorporators sign the Articles in his presence;¹⁹⁰

¹⁸⁷ Jackie Ward, whose name and signature appeared as an incorporator of three councils: Clean and Green, Ward 8 Educational Council, and Ward 8 Health Council; as registered agent for Clean and Green; and as a Project Director of Ward 8 Health Council, voluntarily appeared for an interview. Ms. Ward specifically recalled signing the Articles of Incorporation for one council, the Ward 8 Educational Council. However, she had no memory of signing the Articles of Incorporation for the other two councils at all, or doing so on the same day that she signed the Ward 8 Educational Council's Articles of Incorporation, notwithstanding that she was the founder and driving force behind Clean and Green and had drafted some of the language appearing in Clean and Green's Articles of Incorporation. Ms. Ward was especially perplexed that she had no memory of signing the Articles of Incorporation of Clean and Green, a milestone event in her view, given her role in that organization and the importance of that council to her. Interview with Jackie Ward, in Wash., D.C. (Aug. 26, 2009).

¹⁸⁸ Three individuals indicated that they were not aware that they had been appointed registered agents: Ms. Wise; Ms. McCall; and Ms. Ward. Wise Dep. 141:8–10, 158:19–159:5; Interview with Carmen McCall, Former Volunteer, Office of Council Member Marion Barry, in Wash., D.C. (Sept. 21, 2009); Interview with Jackie Ward, in Wash., D.C. (Aug. 26, 2009). Four individuals indicated that they were not aware that they had been appointed directors: Ms. Wise; Mr. Wesby; Ms. Thomas; and Ms. Ward. Wise Dep. 17:2–9, 153:15–163:6; Wesby Dep. 44:2–45:5; Thomas Dep. 62:3–10; Interview with Jackie Ward, in Wash., D.C. (Aug. 26, 2009). Ms. Ward also stated that she was unaware that she had been appointed Treasurer of the Workforce Development Council. She also noted that the address listed for her on a report regarding the Workforce Development Council—2700 Douglas Road, SE, Washington, D.C. 20020—was incorrect. Ex. 28, Two Year Report for Non-Profit Foreign and Domestic Corporation for Ward 8 Workforce Development Council (Jan. 13, 2009); Interview with Jackie Ward, in Wash, D.C. (Aug. 26, 2009).

¹⁸⁹ Mr. Bunn testified that he obtained identification in connection with notarizing various incorporation documents, but he did not maintain a notary log or any documentation that would substantiate his claim. Bunn Dep. 236:4–17. His claim to have obtained identification from signatories is contradicted by the fact that “Ms. Mercedes Wise” does not exist and by the testimony and statements of individuals who denied signing or swearing to various incorporation documents.

¹⁹⁰ Darryl Colbert, whose name appeared as an incorporator, registered agent and director of Clean and Sober, recalled signing the Articles of Incorporation for that organization, but stated that he did not do so in the presence of Mr. Bunn. Mr. Colbert stated that he had been asked to go to the CSO on short notice and he signed
(cont'd)

- Mr. Bunn failed to require an oath or affirmation by various signatories;¹⁹¹
- Mr. Bunn falsely certified to the required elements of the notary process;¹⁹² and
- Mr. Bunn failed to make an appropriate record of the purported notarizations.¹⁹³

Ms. Richardson and Mr. Bunn disputed under oath any knowledge of impropriety regarding the preparation, execution, or notarization of the Articles of Incorporation.¹⁹⁴ Mr. Bunn acknowledged his failure to properly record the notary events as required under District law.¹⁹⁵ However, he denied that he failed to abide by the other notary requirements. Mr. Bunn testified that his memory of the circumstances of the notarizations of the Ward Eight Councils had faded, but he maintained that each of the individuals whose names and signatures appeared as incorporators on the Articles of Incorporation for the Ward Eight Councils personally appeared before him, produced appropriate identification, signed the respective

(cont'd from previous page)

the Articles while seated in his car in the rear of Mr. Barry's CSO. A document was brought to his car for signature by a young man who worked in that office. No one else was present. Mr. Colbert looked at the document, but stated he did not fully read it. Mr. Colbert stated that he did not swear or affirm the contents of the document, and that the document he signed was not notarized in his presence. Interview with Darryl Colbert, in Wash., D.C. (Aug. 24, 2009).

¹⁹¹ Only two of the eight listed incorporators on the Articles of Incorporation of the Ward Eight Councils recalled signing Articles of Incorporation in Mr. Bunn's presence: Rev. Motley and David Smith. Interview with Anthony Motley, *supra* note 165; Interview with David Smith, Chief Executive Officer, Pearl Coalition, in Wash., D.C. (Sept. 15, 2009).

¹⁹² *See generally* D.C. Office of Notary Commissions & Authentications, Notary Public Handbook (2008); *see also* notes 186–191, *supra*, and corresponding text.

¹⁹³ Bunn Dep. 221:19–235:4, 236:4–17.

¹⁹⁴ *See* Richardson Dep. 77:1–105:8; Bunn Dep. 221:19–235:4.

¹⁹⁵ Bunn Dep. 221:19–235:4, 236:4–17.

Articles, and certified the signature and the accuracy of the contents of those Articles by oath or affirmation.¹⁹⁶

On September 18, 2008—at the direction of Council Member Barry¹⁹⁷—Rev. Anthony Motley executed checks payable to the D.C. Treasurer from the account of the Marion Barry Scholarship Fund (“the Fund”) to cover the cost of the incorporation filing fees for the Ward Eight Councils.¹⁹⁸ Council Member Barry’s Office Manager, Donna Rouse, who was an officer of the Fund, advised that the money in the Fund had been raised at an event sponsored by D.C. developer, Herbert Miller, for the purpose of providing scholarships to District students.¹⁹⁹

Rev. Motley said that he decided that paying the incorporation fees from the Fund was permissible because the Ward Eight Councils were “related to education” and “benefited people from the Ward.”²⁰⁰ According to Rev. Motley, he made the decision to use Fund money;

¹⁹⁶ Bunn Dep. 221:19–235:4.

¹⁹⁷ Interview with Drew Hubbard, Esq., *supra* note 165 (stating that Council Member Barry told him to ask Rev. Motley to pay the filing fees for the organizations out of the Marion Barry Scholarship Fund); Interview with Donna Rouse, Manager, Office of Council Member Marion Barry, in Wash., D.C. (Aug., 20, 2009) (same). *See also* Ex. 29, Email from Drew Hubbard, Esq., Committee Clerk, Office of Council Member Marion Barry, to Anthony Motley, Treasurer, Marion Barry Scholarship Fund (Sept. 4, 2008, 7:54 PM) (noting, “Rev. Motley as we talked about before CM Barry asks that you help the following organization with funds to file their articles of incorporations.”).

¹⁹⁸ Ex. 30, Checks Drawn on the Account of the Marion Barry Scholarship Fund; Interview with Anthony Motley, *supra* note 165. Rev. Motley said he wrote checks to the D.C. Treasurer for each Ward Eight Council and delivered them to Mr. Hubbard. Interview with Anthony Motley, *supra* note 165. Donna Rouse and Rev. Motley signed all the checks. *Id.* Ms. Rouse said that she recalled signing blank checks, but she did not know to whom Rev. Motley would ultimately issue them. Interview with Donna Rouse, Manager, Office of Council Member Marion Barry, in Wash., D.C. (Aug. 25, 2009).

¹⁹⁹ Interview with Donna Rouse, Manager, Office of Council Member Marion Barry, in Wash., D.C. (Aug. 25, 2009); *see also* David Nakamura, *D.C. Developer Sways the City With Big Bucks and Big Ideas*, Wash. Post, July 25, 2006, at A01 (“Miller’s impressive socializing has another motive: to get close to the people he needs for his business deals. On March 5, Miller and his wife, Patrice, hosted a 70th birthday party for Ward 8 council member and former mayor Marion Barry (D), a \$1,000-per-head event that raised money for a scholarship fund.”).

²⁰⁰ Interview with Anthony Motley, *supra* note 165.

Mr. Hubbard and Council Member Barry did not specifically ask him to use Fund money to pay the Ward Eight Councils' incorporation fees.²⁰¹ Mr. Hubbard, however, specifically recalled that Council Member Barry told him to instruct Rev. Motley to use money from the Fund.²⁰²

On October 29, 2008, the DCRA issued Certificates of Incorporation for each of the Ward Eight Councils.²⁰³

(c) Council Member Barry Directed Certain Actions of the Councils

Council Member Barry testified that from time to time he was involved in directing the activities of the Ward Eight Councils, through Ms. Richardson, whom he described as his “accountability officer” for the groups.²⁰⁴ Ms. Richardson likewise told others that “Council Member Barry has asked me to serve as the coordinator for all the Councils.”²⁰⁵ Many

²⁰¹ *Id.*

²⁰² Interview with Drew Hubbard, Esq., *supra* note 165.

²⁰³ Exs. 22–27, Articles of Incorporation for the Ward Eight Councils.

²⁰⁴ Barry Dep. 77:4–14:

Q I want to -- did she make decisions about the Ward 8 councils independent of you, or did you work together? Did you give her direction?

A What kind of direction?

Q About what they should do, how they should go about operating, what they should focus on.

A Well, we talked about the mission of these councils, what they ought to be working on.

Q Okay. So you gave her directions from time to time?

A Yes.

See also id. at 72:8–22 (noting Council Member Barry’s reference to Ms. Richardson as his accountability officer).

²⁰⁵ *See* Ex. 31, Email from Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry, to Michael Snoddy, Public Health Analyst, Addiction Prevention and Recovery Administration of the Department of Health (Jan. 13, 2009 7:52 AM).

documents corroborate that Mr. Barry was active in the affairs of the Ward Eight Councils, usually communicating his preferences through Ms. Richardson and others.²⁰⁶ For example, Special Counsel received evidence that Council Member Barry directed personnel and salary changes at one council, and Ms. Richardson often told others that she was acting on behalf of Mr. Barry.²⁰⁷ Yet, Council Member Barry also testified that it would be inappropriate for him to do so:

Q Is it appropriate when you give an entity like one of these councils an earmark for you, the councilman, to direct their activities? Is that okay or is it not okay? I don't know, I'm asking you.

A It's not okay.

Q And why is that?

A Because each of those councils is supposed to have a board of directors, a chair of the board, officers of the board, and they are supposed to make the decisions about who they hire, who they don't hire, and they're supposed to be the sort of overall guider——guider to the Project Director to carryout the mission of the council. That's what they're supposed to do.

Q So they're supposed to operate independently of you?

A Yes. You know, not 100 percent. I know what they're doing over there. That's why I brought——

Q Did you have any role in who became board members of them?

A No, no.

²⁰⁶ See, e.g., Ex. 32, Email from Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry, to Sharon Wise (Jan. 27, 2009, 4:26 PM) (directing how Sharon Wise was to spend Clean and Sober funds “pursuant to our recent conversation with CM Barry and Patrice Sheppard”); Telephone Interview with Sharon Bowen, Principal, the Bowen Group (Nov. 13, 2009) (Ms. Bowen stated that she reported to Council Member Barry and carried out his wishes with regard to the Ward 8 Business Council while working pursuant to personal services contracts in 2007 and 2008.).

²⁰⁷ See Part VI, *infra*.

Q Did you make recommendations?

A Maybe one or two times. I don't think——not much, though. I gave that assignment to Brenda Richardson.²⁰⁸

(d) A Handful of Barry Supporters Benefited Financially from the Councils and Other Grantees

Special Counsel received evidence that several of the councils provided useful, meaningful, and valuable services to the Ward Eight community. The reports submitted by various Ward Eight Councils typically reflect activities and services consistent with their stated missions that were worthwhile to segments of the community. In some instances, the agencies monitoring council performance determined that certain of the councils successfully achieved their missions. In addition, a number of individuals active in council activities are highly capable, resourceful, and committed to making contributions to their communities, though in some cases the extent of their specialized knowledge and experience is not clear. That the councils' efforts and their various community activities were intended to be beneficial to the residents of Ward Eight is not open to question.

However, it was not always clear whether the councils were the most effective vehicles for providing these benefits or whether the benefits provided were outweighed by deficiencies in the organizations' management and operations. Further, the D.C. Auditor's Report stated that "[t]he FY 2009 BSA failed to establish appropriate standards regarding the amount of earmark funds recipients could allocate to administrative salaries, fringe benefits, and indirect costs (general operating costs)."²⁰⁹ In keeping with this observation, Special Counsel

²⁰⁸ Barry Dep. 82:5–83:9.

²⁰⁹ Auditor's Report, *supra* note 26.

noted that the earmark grants sponsored by Council Member Barry allocated a significant percentage of their FY 2009 earmark funds to general administrative salaries and indirect costs, and little to programming. The Ward Eight Councils were no exception.

Table 5
Summary of Ward Eight Council Expenditures
FY 2009

Classification of Expense	Clean and Green, Inc.	Clean and Sober, Inc.	Ward 8 Educational Council, Inc.	Ward 8 Health Council, Inc.	Ward 8 Workforce Development Council, Inc.	Ward 8 Youth Leadership Council, Inc.	Total	% of Total Expenses
General/Administrative Salary Expenses	\$46,049	\$40,450	\$47,600	\$44,000	\$45,000	\$41,260	\$264,359	60.98%
Indirect Expenses								
Fiscal Agent	\$6,000	\$7,500	\$6,000	\$6,000	\$6,000	\$6,000	\$37,500	8.65%
Attorney - 501(c)(3)	\$1,450	\$1,450	\$1,450	\$1,450	\$1,450	\$1,930	\$9,180	2.12%
Computer & Equipment	\$3,855	\$3,030	\$1,196	\$155	\$2,278	\$4,683	\$15,197	3.51%
Office Supplies and Telephone(s)	\$4,937	\$5,252	\$4,324	\$3,373	\$5,518	\$481	\$23,885	5.51%
Postage	\$745	\$672	\$950	\$462	-	\$262	\$3,091	0.71%
Filing Fees	\$150	-	\$135	\$135	\$75	-	\$495	0.11%
Subtotal	\$17,137	\$17,904	\$14,055	\$11,575	\$15,321	\$13,356	\$89,348	20.61%
Program Expenses								
Marketing, Promotion, and/or Graphic Design	\$5,969	\$11,697	\$3,793	\$7,637	\$3,793	\$2,487	\$35,376	8.16%
Incentives/Giveaways [Note 1]	\$2,543	\$1,024	\$3,061	\$2,918	-	\$300	\$9,846	2.27%
Catering/Food	\$2,090	\$653	\$4,606	\$2,100	\$1,835	\$2,305	\$13,589	3.13%
Miscellaneous	\$267	\$1,041	\$506	\$250	\$300	\$250	\$2,614	0.60%
Subtotal	\$10,869	\$14,415	\$11,966	\$12,905	\$5,928	\$5,342	\$61,425	14.17%
Unknown Expenses [Note 2]	\$764	\$32	\$302	-	\$6,260	\$11,060*	\$18,418	4.25%
Grand Total Expenses	\$74,819	\$72,801	\$73,923	\$68,480	\$72,509	\$71,018	\$433,550	

Source: Financial data provided by Ward Eight Councils and/or oversight agencies. Classification determined from review of receipts, check orders, check copies, and/or copies of check registers.

Note 1: "Incentives/Giveaways" classification refers to gifts provided to citizens in connection with Ward Eight Council events.

Note 2: "Unknown Expenses" classification indicates available information insufficient to classify expenditure.

In particular, the Investigation revealed that three individuals closely connected to Mr. Barry, with their friends and family members, garnered substantial financial benefit from the earmark grants that Mr. Barry sponsored.

(i) Brenda Richardson

Brenda Richardson was paid more than \$100,000 by three grantees. As noted above, Ms. Richardson was a long-time community activist and supporter of Council Member

Barry. Among other things, as a volunteer, she typed correspondence and emails dictated by Mr. Barry and communicated his wishes to his staff.²¹⁰ Ms. Richardson also played a central role in the development, incorporation, and functioning of the Ward Eight Councils. Ms. Richardson was in charge of quality control for the councils, selected various vendors utilized by the councils, and regularly reported to Council Member Barry regarding the councils.²¹¹

When Ms. Richardson told Council Member Barry that she could no longer coordinate the Ward Eight Councils without pay, Council Member Barry proposed that the organizations should hire Ms. Richardson and suggested that she seek their boards' approval.²¹² As a result, Ms. Richardson earned approximately \$101,363 from the FY 2009 earmark funds for the Ward Eight Councils,²¹³ through contracts she received to act as Project Director for: the Ward 8 Educational Council, the Ward 8 Health Council, and Clean and Green.²¹⁴

Ms. Richardson was contracted to work .5 FTE (“full time equivalent”) for each of the three councils, resulting in her being paid for 1.5 FTE, *i.e.*, one and one-half full-time

²¹⁰ *See, e.g.*, Richardson Dep. 41:17–21; 184:1–15, 193:6–7; 199:4–9.

²¹¹ Richardson Dep. 58:6–61:17, 173:8–174:11; Ex. 31, Email from Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry, to Michael Snoddy, Public Health Analyst, Addiction Prevention and Recovery Administration of the Department of Health (Jan. 13, 2009 7:52 AM).

²¹² Barry Dep. 72:12–73:9.

²¹³ This figure is derived from Special Counsel’s review of invoices Ms. Richardson submitted.

²¹⁴ Ex. 33, Richardson Contractual Agreement (Oct. 1, 2008), Richardson Contractual Agreement (Oct. 1, 2008), and Richardson Contractual Agreement (Oct. 1, 2008); *see also* Richardson Dep. 54:11–13.

jobs.²¹⁵ Ms. Richardson's son Adam was also employed for a period by the Ward 8 Business Council.²¹⁶

Furthermore, Ms. Richardson submitted invoices for payment to the councils reflecting that she worked fewer hours than she was committed to work, but she was nonetheless paid the full amounts under the contract for the pertinent pay period. To fulfill her obligations as a .5 FTE for these organizations, her contracts required her to work 20 hours per week for each council. The invoices she submitted stated that she worked 40 hours per month, which would have been only 10 hours per week, for each organization.²¹⁷ These invoices were not questioned by the fiscal agents or the agencies monitoring each grant.

(ii) Sharon Wise and Darryl Colbert

Sharon Wise was a supporter of Council Member Barry and a personal friend of Ms. Richardson.²¹⁸ She was hired as the Project Director for two earmark recipients, Clean and Sober and the Ward 8 Youth Leadership Council. Ms. Wise's son, Theodore Mercedez Wesby, also worked as an intern on both grants. Financial records reflect that Ms. Wise was paid a total of \$27,640 pursuant to both grants, and her son received total payments of \$9,533. Eventually, the boards of both grantees terminated Ms. Wise and Mr. Wesby's employment.²¹⁹

²¹⁵ *Id.*

²¹⁶ Interview with Adam Richardson, in Wash., D.C. (Jan. 17, 2010).

²¹⁷ Richardson Dep. 150:14–151:17.

²¹⁸ Richardson Dep. 161:19–162:1.

²¹⁹ Letter from Rodney Bunn to Sharon Wise (Apr. 26, 2009) (on file with Special Counsel); Letter from Derrick Colbert to Sharon Wise (Apr. 3, 2009) (on file with Special Counsel); Letter from Tendani Mpulubusi to Theodore Wesby (Apr. 26, 2009) (on file with Special Counsel).

Ms. Wise has alleged that she was terminated because she complained when Council Member Barry and Ms. Richardson wanted to use part of her salary for other purposes, and that Council Member Barry threatened her for calling attention to their inappropriate uses of the earmark funds.²²⁰ Specifically, Ms. Wise testified that Mr. Barry's friend and Narcotics Anonymous sponsor, Darryl Colbert, was in danger of losing his home to foreclosure and needed financial assistance from Council Member Barry. According to Ms. Wise, Council Member Barry told her that her salary was decreased so that Mr. Colbert could be hired and receive funds from the grant proceeds.²²¹ Ms. Wise's salary was in fact reduced by \$15,000 when Mr. Colbert received a consulting contract from Clean and Sober for \$12,000.²²² A review of financial records reflects that Mr. Colbert ultimately was paid \$13,500 by Clean and Sober and \$2,966 by Ward 8 Youth Leadership Council.

Council Member Barry and Ms. Richardson have denied that Ms. Wise's salary was reduced to benefit Mr. Colbert.²²³ Other evidence, however, corroborates these allegations. Mr. Colbert told Special Counsel that he was upset when he heard that Ms. Wise was going to be paid to run Clean and Sober because, prior to the earmarks being granted, he had been running the Ward 8 Drug Prevention Council and voluntarily doing the same work that Ms. Wise was

²²⁰ Wise Dep. 69:17–70:9; 254:16–256:19.

²²¹ Wise Dep. 70:10–71:61; *see also* Ex. 31, Email from Brenda Richardson, Deputy Chief of Staff, Office of Council Member Marion Barry, to Michael Snoddy, Public Health Analyst, Addiction Prevention and Recovery Administration of the Department of Health (Jan. 13, 2009 7:52 AM) (noting that Brenda Richardson submitted a request to modify the budget of Clean and Sober to decrease the amount Sharon Wise was to receive as Project Director from \$40,000 to \$25,000 and to begin paying Darryl Colbert \$12,000 as the Coordinator for the Ward 8 Drug Prevention Council).

²²² *See id.*; *see also* Ex. 34, Clean and Sober Consulting Services Agreement with Darryl Colbert (Jan. 1, 2009).

²²³ Barry Dep. 88:21–90:11; Richardson Dep. 70:8–70:20.

going to be paid to do. Mr. Colbert stated that he complained to Ms. Richardson who later told him that Council Member Barry said that he could be paid as a consultant under the Clean and Sober grant.²²⁴ Moreover, in March 2009, Eric Goulet and Justin Constantino of the Office of the Budget Director met with Ms. Wise, Ms. Richardson, Ms. Powell, Ms. Sheppard, and Drew Hubbard of Council Member Barry’s Office. At this meeting, Ms. Richardson stated that Council Member Barry made the decision to hire Mr. Colbert and decrease Ms. Wise’s salary.²²⁵

There is evidence as well that Mr. Colbert was frequently in need of money to pay his mortgage and that in 2007 and 2008, Mr. Colbert received \$3,600 from the Ward 8 Constituent Services Fund for mortgage and other financial assistance.²²⁶ Furthermore, in August 2009, after he became a paid consultant to Clean and Sober and when Clean and Sober’s funds were being held up by the grant monitor, Mr. Colbert emailed the new Project Director demanding payment and stating, “I NEED to PAY my MORTGAGE [*sic*] NOW.”²²⁷

According to Ms. Richardson, Patrice Sheppard (whose organization, Lydia’s House, was the fiscal agent for Clean and Sober), and Michael Snoddy, Public Health Analyst from the Addiction Prevention and Recovery Administration (“APRA”) of the Department of

²²⁴ Interview with Darryl Colbert, in Wash., D.C. (Sept. 2, 2009).

²²⁵ In reference to the salary reduction, Ms. Richardson said, “The Council Member did that. The Council Member did that.” Mr. Goulet replied that Council Member Barry “should not be directly making decisions about these grant agreements.” Recording of Meeting with Eric Goulet, Budget Director, Council of the District of Columbia, in Wash., D.C. (Mar. 2009); *see also* Wise Dep. 248:7–250:21. Ms. Wise asserted she inadvertently recorded the meeting on her cell phone. Wise Dep. 248:7–249:5.

²²⁶ Report of Receipts and Expenditures for a Citizen-Service Program (OFC Form 10) for the Ward 8 Constituent Services Fund Forms for 2007 and 2008.

²²⁷ Ex. 35, Email from Darryl Colbert to Tanya Blue (Aug. 1, 2009 2:23 PM) (“I have a lot riding on this check!”), Email from Darryl Colbert to Tanya Blue (Aug. 3, 2009 12:15 PM) (“Ha[ve] u heard about our money?”), Email from Darryl Colbert to Tanya Blue (Aug. 10, 2009 2:26 PM) (“I need someone to tell me about the money I NEED to PAY my MORTGAGE [*sic*] NOW.”) (capitalization in original).

Health, Ms. Wise was fired for failing to adhere to the scope of work for Clean and Sober. For example, Ms. Wise failed to plan two events which were required under the work plan.²²⁸ With regard to the Ward 8 Youth Leadership Council, Ms. Richardson and the fiscal agent for the Ward 8 Youth Leadership Council, Maria Powell, stated that Ms. Wise was not servicing the residents of Ward Eight as was required in the scope of work for the grant.²²⁹ Ms. Richardson and Ms. Sheppard also contend that Ms. Wise spent grant funds inappropriately.²³⁰

Ms. Wise also alleged that Council Member Barry threatened to “blackball” her when she complained about how the grants were being managed. Ms. Wise testified that, after she complained to Council Chairman Gray and the Office of the Budget Director regarding the problems she was having with the grants, Mr. Barry told her that if she complained to them again, “[Y]ou’re not going to be able to work in this town. People know me. They don’t know you.”²³¹ Council Member Barry testified generally that there was no basis to Ms. Wise’s allegations concerning these grants.²³²

²²⁸ Richardson Dep. 70:10–20; Interview with S. Patrice Sheppard, Founder, Lydia’s House, in Wash., D.C. (Sept. 3, 2009).

²²⁹ Richardson Dep. 163:2–16.

²³⁰ Richardson Dep. 156:19–157:3; Interview with S. Patrice Sheppard, Founder, Lydia’s House, in Wash., D.C. (Sept. 3, 2009). An issue also arose after Ms. Wise’s termination regarding her failure to return a computer purchased with grant funds. Ms. Wise testified that she had not returned the computer because Clean and Sober still owed her money under her contract.

²³¹ Wise Dep. 254:16–256:19. Ms. Wise filed a complaint with the Office of the Inspector General regarding Mr. Barry’s purported threats.

²³² Barry Dep. 92:12–94:6.

Finally, according to Ms. Wise, during the period she was a recipient of grant funds, Council Member Barry frequently requested sexual favors, but she did not comply.²³³ Council Member Barry refused to answer questions regarding the nature of his relationship with Ms. Wise.²³⁴

(iii) Rev. Anthony Motley

Rev. Anthony Motley is one of Council Member Barry's confidantes and supporters who benefited financially from earmark grants.²³⁵ Rev. Motley personally received at least \$54,000 from earmark grant recipients for FY 2009:²³⁶ approximately \$39,500 through contracts with two grantees to which Council Member Barry directed earmark funds—Inner Thoughts and Jobs Coalition;²³⁷ and at least \$14,550 in fiscal agent fees from a grant to the National Association of Former Foster Care Children of America, Inc. (“NAFFCCA”) that

²³³ During her deposition, we asked Ms. Wise if Council Member Barry had ever requested a sexual favor. Ms. Wise responded, “He probably suggested it about 562 times.” She went on to state that Council Member Barry had, on numerous occasions, said things like, “Sit on my lap. You’re cute. Come over here and give me a hug. That’s my baby.” Ms. Wise testified that her response to Council Member Barry was, “Have you lost your mind?” *Id.* 176:17–177:9.

²³⁴ Special Counsel asked Council Member Barry if he “ever [had] a personal or romantic relationship with [Ms. Wise].” Council Member Barry declined to answer stating, “I think that’s outside the scope of the inquiry.” Barry Dep. 86:6–9.

²³⁵ Interview with Anthony Motley, *supra* note 165. In 2008, Rev. Motley served as a Special Assistant to Council Member Barry’s Campaign Manager and he has been Council Member Barry’s “medical attorney in fact” since February 2009. *Id.*

²³⁶ Interview with Anthony Motley, Executive Director, Inner Thoughts, Inc., in Wash., D.C. (Feb. 1, 2010).

²³⁷ *Id.*; Ex. 36, Contract between Inner Thoughts, Inc. and Anthony Motley (Oct. 2008) (Executive Director Contract), Contract between Jobs Coalition and Anthony Motley (Oct. 2008) (Executive Director Contract), and Contract between Jobs Coalition and Anthony Motley (Oct. 1, 2008) (Project Director Contract).

Council Member Barry testified he sponsored at the request of Council Member Muriel Bowser.²³⁸

Specifically, Rev. Motley had a contract to serve as Executive Director for grantee Inner Thoughts, pursuant to which he received \$12,000 for FY 2009.²³⁹ After the FY 2009 Inner Thoughts contract period ended, Rev. Motley paid himself another \$5,500 over and above the contract amount, using FY 2009 NAFFCCA funds he deposited into Inner Thoughts' account.²⁴⁰ He also had two contracts with grantee Jobs Coalition: as Executive Director he received \$12,000 for FY 2009; and as Project Director for Jobs Coalition, he received \$9,996 for FY 2009.²⁴¹

Additionally, Inner Thoughts received a portion of NAFFCCA's \$300,000 grant as a fee for serving as a fiscal agent.²⁴² Although Inner Thoughts as an organization was the

²³⁸ Ex. 37, Fiscal Agent Agreement between Inner Thoughts, Inc., and NAFFCCA (Oct. 1, 2008). Council Member Barry testified that he sponsored the earmark grant to NAFFCCA at Council Member Muriel Bowser's request because she had not "identified" enough available funds to sponsor the grant herself. Barry Dep. 101:2–14. NAFFCCA's President, Louis Henderson, stated that he communicated with Council Member Bowser and Barry's offices in his effort to secure earmark grant funds for NAFFCCA. Interview with Louis Henderson, President, NAFFCCA, in Wash., D.C. (Oct. 19, 2009). The Office of the Budget Director identified Mr. Barry as the sponsor. Council Member Bowser denied "requesting, advocating for, or administrating the NAFFCCA earmark grant" in a letter to Council Chairman Vincent Gray dated July 17, 2009. Letter from Muriel Bowser, Member, Council of the District of Columbia, to Vincent Gray, Chairman, Council of the District of Columbia (July 17, 2009) (on file with Special Counsel).

²³⁹ Ex. 36, Contract between Inner Thoughts, Inc. and Anthony Motley (Oct. 2008) (Executive Director Contract), Contract between Jobs Coalition and Anthony Motley (Oct. 2008) (Executive Director Contract), and Contract between Jobs Coalition and Anthony Motley (Oct. 1, 2008) (Project Director Contract).

²⁴⁰ Interview with Anthony Motley, *supra* note 236.

²⁴¹ *Id.* The grant monitor, CYITC, evidently did not question this arrangement.

²⁴² Ex. 37, Fiscal Agent Agreement between Inner Thoughts, Inc., and NAFFCCA (Oct. 1, 2008); Auditor's Report, *supra* note 26, at 18.

fiscal agent, Rev. Motley caused the \$14,550 in fees to be paid over to himself personally.²⁴³ At the time, NAFFCCA was in bankruptcy. NAFFCCA had filed for bankruptcy protection in July of 2008, yet it continued to receive grant funds.²⁴⁴ NAFFCCA had unsatisfied federal and District tax liabilities totaling approximately \$227,032 and had not filed a federal tax return since 2007.²⁴⁵

Special Counsel identified numerous irregularities with regard to the earmark grantees with which Rev. Motley was associated. First, Special Counsel received substantial evidence that Rev. Motley treated earmark funds from all three grantees, including those of the bankrupt NAFFCCA, as one pool of money.²⁴⁶ For example, he acknowledged that he deposited NAFFCCA's last two earmark checks, totaling \$101,850, into an Inner Thoughts bank account.²⁴⁷ Rev. Motley then used at least \$48,000 of the money to pay expenses incurred after the close of the grant period, including expenses NAFFCCA ostensibly owed to his organizations, Inner Thoughts and Jobs Coalition.²⁴⁸ He accomplished this in part by causing NAFFCCA—without the approval of NAFFCCA's board or others—to enter into agreements to pay Jobs Coalition \$5,000 for rent, and \$15,000 for consulting services, after the close of the grant

²⁴³ Rev. Motley said that he believed that the fiscal agent fees received from NAFFCCA were compensation for services he personally provided; therefore, he deposited the funds into his personal account. Rev. Motley said the fee went towards his administrative efforts, and he estimated he spent between four and six hours each month on matters related to NAFFCCA. Interview with Anthony Motley, *supra* note 165; Interview with Anthony Motley, *supra* note 236.

²⁴⁴ Auditor's Report, *supra* note 26, at 18.

²⁴⁵ *Id.*

²⁴⁶ Interview with Anthony Motley, *supra* note 165.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

period.²⁴⁹ When questioned about this apparent breach of fiduciary duty and self-dealing, Rev. Motley said he believed that, as fiscal agent, Inner Thoughts was entitled to retain grant funds awarded to NAFFCCA so long as Inner Thoughts performed work that was related to the purpose of the NAFFCCA grant.²⁵⁰ Rev. Motley also said that expenses for operations were sometimes pooled across the three grantee organizations and he did not always track their expenses separately.²⁵¹

Furthermore, Rev. Motley admitted that he manufactured supporting documentation for certain grantee expenses—in some instances, after receiving Special Counsel’s document subpoena.²⁵² Specifically, Rev. Motley produced backdated employee time cards to Special Counsel.²⁵³ He then admitted that he created the time cards following receipt of

²⁴⁹ Ex. 38, Sublease Agreement between Jobs Coalition, Inc., and ITI/NAFFCCA (Nov. 20, 2009) and Independent Contractor Agreement between Jobs Coalition, Inc., and Inner-Thoughts-NAFFCCA. Specifically, to support \$15,000 and \$5,000 transfers of NAFFCCA funds to Jobs Coalition, Rev. Motley produced to Special Counsel a \$15,000 contract which he executed on behalf of “Inner Thoughts-NAFFCCA” and a \$5,000 sublease agreement, executed during November 2009, between “Inner-Thoughts-NAFFCCA” and Jobs Coalition. *Id.* Rev. Motley signed the sublease agreement on behalf of Jobs Coalition and he had an “Inner Thoughts-NAFFCCA” employee sign on behalf of NAFFCCA. Although the sublease was executed in November 2009—well after the close of the grant period—the lease ostensibly covered October 1, 2008 to September 30, 2009 and was paid in one single \$5,000 payment during November 2009. *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Rev. Motley stated that he did not discuss with Council Member Barry how to respond to Special Counsel’s subpoena or the creation of documents in response to the subpoena. Interview with Anthony Motley, *supra* note 236. Special Counsel demanded, pursuant to a D.C. Council subpoena dated August 28, 2009, that Inner Thoughts produce, *inter alia*, all its financial records related to D.C. Council grants. Despite receiving follow-up requests on September 25, 2009; October 7, 2009; October 19, 2009; November 3, 2009; January 8, 2010; and January 21, 2010, Rev. Motley still only made a partial production, and he never produced all subpoenaed financial records and communications. Special Counsel obtained other relevant financial records from the grant monitor responsible for overseeing these grants.

²⁵³ Ex. 39, Timesheets of Radiance Wowlin (Oct. 16, 2009) and Jessica Smith Havair (Oct. 19, 2009).

Special Counsel’s subpoena, in order to support prior grant fund expenditures.²⁵⁴ Special Counsel also received substantial evidence that Rev. Motley failed to accurately document expenses and segregate earmark grant funds. For example, to document Jobs Coalition’s rent expenses, Rev. Motley submitted to its grant monitor a copy of a lease that Jobs Coalition purportedly entered into with Bellevue Homeownership Resource Center; however, Rev. Motley told Special Counsel that the Bellevue Homeownership Resource Center is not a real organization.²⁵⁵ In reality, according to Rev. Motley, Jobs Coalition pays rent to an individual.²⁵⁶ He also pre-paid himself and his assistant at Inner Thoughts, Veronica Clark, for several months with FY 2009 Inner Thoughts earmark funds.²⁵⁷

(iv) Tanya Blue

Tanya Blue was a personal friend of Brenda Richardson.²⁵⁸ She received payments totaling nearly \$21,000 from four Ward Eight Councils—Clean and Green, Clean and Sober, Ward 8 Educational Council, and Ward 8 Health Council—according to our analysis of

²⁵⁴ Interview with Anthony Motley, *supra* note 236.

Rev. Motley said that he did not discuss his document production or the Special Counsel Investigation with Council Member Barry with two exceptions: he advised Council Member Barry that he told Special Counsel that Council Member Barry was stubborn, and he advised Council Member Barry that he had spent “considerable” time with Special Counsel staff in connection with the investigation.

²⁵⁵ Ex. 40, Sublease Agreement between Bellevue Homeownership Resource Center and Jobs Coalition (Oct. 1, 2008).

²⁵⁶ Interview with Anthony Motley, *supra* note 236.

²⁵⁷ *Id.*

²⁵⁸ Richardson Dep. 69:1–7.

the financial records of those organizations.²⁵⁹ Ms. Richardson played an integral role in securing contracts for Ms. Blue for various projects of Ward Eight Councils²⁶⁰ and in later directing Ms. Blue's performance of those same contracts.²⁶¹ Ms. Richardson also arranged for Clean and Sober to interview Ms. Blue for the vacancy Sharon Wise's termination as Project Director created, notwithstanding the fact that Ms. Blue had no particular experience in addiction prevention or counseling.²⁶² Ms. Blue was given the job and Clean and Sober subsequently paid Ms. Blue \$7,123.²⁶³ In this capacity, Ms. Blue coordinated with Mr. Colbert. Ms. Blue said Mr. Colbert did very little work²⁶⁴ and submitted such brief reports that she did not include them in the monthly reports submitted to the fiscal agent.²⁶⁵

At Ms. Richardson's direction, Ms. Blue was also paid to perform work for other Ward Eight Councils.²⁶⁶ For example, while under contract with the Ward 8 Educational Council, Ms. Blue developed brochures for Clean and Green, Ward 8 Youth Leadership Council,

²⁵⁹ One payment of \$1,424.62 under Ms. Blue's Clean and Sober contract remained outstanding as of the date of her interview. Interview with Tanya Blue, Wash., D.C. (Dec. 8, 2009).

²⁶⁰ Interview with Tanya Blue, Wash., D.C. (Dec. 8, 2009).

²⁶¹ *Id.* For example, Ms. Blue worked on brochures for Ward Eight Councils at Ms. Richardson's request and consulted Ms. Richardson regarding development and design of the brochures. *Id.*

²⁶² *Id.*; see also Part VI, *supra* (discussing the circumstances surrounding Ms. Wise's termination).

²⁶³ Interview with Tanya Blue, Wash., D.C. (Dec. 8, 2009). One payment of \$1,424.62 under Ms. Blue's Clean and Sober contract remained outstanding as of the date of her interview. *Id.*

²⁶⁴ According to Ms. Blue, one of Darryl Colbert's job duties was to arrange for speakers at the monthly Ward 8 Drug Prevention Council meetings, but often he failed to do so and the task was left to Ms. Blue to accomplish. Interview with Tanya Blue Wash., D.C. (Dec. 8, 2009).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

and Ward 8 Workforce Development Council, but did not receive separate payment for these services.

Special Counsel also found evidence that some of the work Ms. Blue performed did not justify the amount of payment provided.²⁶⁷ Three Ward Eight Councils paid Ms. Blue \$6,300 in total for the development of “annual reports,” which, in fact, were one page tri-folds.²⁶⁸ Additionally, the Ward 8 Health Council paid Ms. Blue \$2,000 for the preparation of a health guide, despite the fact that Ms. Blue never completed the health guide.

D. Conclusions

Based on the foregoing, Special Counsel concludes that the documentation that permitted the Ward Eight Councils to obtain grant funding was falsified. They were conceived by Mr. Barry, moreover, to conduct constituent service activities in Ward Eight, and he continued to be significantly involved in their affairs after he secured earmark funding for them. This effectively permitted Mr. Barry and the councils to avoid legal limits on the amount and kinds of funds that may be expended on constituent service activities. Finally, these and other grantees to whom Mr. Barry steered funds primarily benefited a few confidantes and supporters of the Council Member.

²⁶⁷ *Id.*

²⁶⁸ Interview with Tanya Blue, Wash., D.C. (Dec. 8, 2009).

²⁶⁹ Interview with Maria Powell, Executive Director, Behavioral Environmental and Academic Program (“BEAP”), in Wash., D.C. (Aug. 25, 2009); Interview with Louis Henderson, President, NAFFCCA, in Wash., D.C. (Oct. 19, 2009).

E. Oversight of Earmark Grants

Earmarks are not awarded through a competitive process, and there is no uniform or formal procedure for parties to apply for a grant. It appears that most Council earmarks are the result of informal contacts or lobbying of Council Members.²⁶⁹ In other cases, a Council Member himself may initiate the concept of a grant and facilitate the creation of a grantee.²⁷⁰ The level of due diligence performed on proposed grantees also varies by the practice of each Council Member.²⁷¹

Special Counsel also observed that an inherent feature of the earmark process is the mutual support between the Mayor and the Council, and among the Council Members themselves, for each other's earmarks. Because of this mutuality of interest, there is little incentive for a Council Member to closely scrutinize or oppose another's earmarks.²⁷² Accordingly, while every earmark grant must be included in the budget and the budget is approved by the full Council as part of the BSA, that approval process does not assure rigorous review of the proposed grants.

²⁷⁰ See Part VI, *supra*.

²⁷¹ Council Member David A. Catania, for example, who chairs the Committee on Health, appears to apply an exceptional level of pre-grant review, requiring potential grantees to appear at a public budget hearing and describe the proposed use for the funds and deliverables and submit a budget. The Committee reviews the submissions and selects grantees for inclusion in the BSA based on a number of factors, including need and feasibility. The BSA, details final terms and conditions, set by the Department of Health, to which these grantees will be subject. Other reviews are less rigorous. According to one of Council Member Barry's staffers, after a presentation from an organization that Council Member Barry decided to sponsor, his staff would prepare a write-up of the organization to be presented to the Council or relevant committee, without further due diligence. Interview with Drew Hubbard, Esq., *supra* note 165.

²⁷² For example, according to Council Member Barry, the majority of the Council initially was opposed to the \$10 million earmark granted to Ford's Theater in FY 2008. However, in return for Council Member Evan's agreement to "help [him] find \$10 million," Council Member Barry agreed to support the Ford's Theater earmark. Barry Dep. 63:7–64:15.

After award, all grants are subject to monitoring by various agencies of the District of Columbia, the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”), or the D.C. Children & Youth Investment Trust Corporation (“CYITC”) (collectively, the “agencies”). As part of its audit of FY 2009 earmark grants, the Office of the District of Columbia Auditor (the “Auditor”), headed by Deborah K. Nichols, considered the effectiveness of these agencies’ oversight efforts with respect to earmarks generally. The Auditor’s Report, entitled, “District’s Earmark Process Needs Improvement,” found, among other things, that: 1) the policies and procedures governing the issuance, monitoring, payment, and funding of FY 2009 earmarks were insufficient—specifically noting that the lack of a competitive process allowed for misuse of the earmarks;²⁷³ 2) the absence of a credible review process allowed for the submission of incomplete and incorrect documentation resulting in waste and fraud;²⁷⁴ 3) the absence of clear roles and responsibilities for fiscal agents led to inconsistency in the work performed and fees charged and a lack of accountability;²⁷⁵ and 4) the roles and responsibilities of the oversight agencies were not defined, allowing for inconsistency in the quality and level of monitoring.²⁷⁶

Special Counsel met with representatives of these agencies, and found the personnel responsible for grant oversight generally to be well-intentioned and, for the most,

²⁷³ Auditor’s Report, *supra* note 26.

²⁷⁴ *Id.* at 7.

²⁷⁵ *Id.* at 8.

²⁷⁶ *Id.*

diligent and professional.²⁷⁷ The agencies, however, are significantly under-resourced, and as discussed below, there are certain features of Council earmark grant-making which inhibit robust oversight. Thus, while deficiencies in grant oversight may be explicable, Special Counsel concurs with the D.C. Auditor’s findings that they were substantial. We therefore adopt the Auditor’s findings, and make certain additional observations concerning issues peculiar to earmark grants, which we gleaned from meetings with the above cited agencies.

Table 6
Summary of Earmark Grants Managed by Oversight Organization
FY 2009

Oversight Organization	Number of Earmark Grants Managed	Value of Earmark Grant(s) Managed	% of Total Value of All Earmark Grants Managed
Office of the Deputy Mayor for Planning and Economic Development	46	\$22,739,000	47.45%
DC Children & Youth Investment Trust Corporation	47	\$8,860,000	18.49%
Commission on the Arts and Humanities	22	\$5,750,000	12.00%
Department of Health	19	\$5,025,000	10.49%
Department of Employment Services	1	\$2,000,000	4.17%
Justice Grants Administration	3	\$850,000	1.77%
Department of Human Services	7	\$750,000	1.56%
Department of Housing and Community Development	1	\$700,000	1.46%
Department of Parks and Recreation	2	\$600,000	1.25%
Metropolitan Police Department	1	\$200,000	0.42%
Department of Mental Health	1	\$200,000	0.42%
Department of Small and Local Business Development	2	\$130,000	0.27%
Alcoholic Beverage Regulation Administration	1	\$100,000	0.21%
District Department of Transportation	1	\$18,000	0.04%
Grand Total	154	\$47,922,000	

Source: Compilation provided by the Office of the Budget Director.

1. Lack of Consultation Prior to Grant Award

Each agency with which we met expressed a concern that it was not consulted by the Council before a grant was included in the BSA and assigned to a monitoring agency. The

²⁷⁷ Special Counsel met with representatives of the following agencies: the District of Columbia Department of Health on December 9, 2009; CYITC on December 10, 2009; the Addiction Prevention and Recovery Administration of the District of Columbia Department of Health on December 18, 2009; and DMPED on January 15, 2010.

agencies have substantial experience with grantees and a broad understanding of the programs available and the effectiveness of service providers in their fields. However, Council Members rarely consulted the agencies as to the need, amount, or scope of the earmark grants, a practice which sometimes resulted in ineffective or duplicative earmark grants. Similarly, earmark grants sometimes went to fledgling organizations serving few clients when more experienced organizations were already effectively serving the same population and were in need of funds.

Likewise, Council Members did not solicit the agencies' views as to the appropriateness of the monitoring assignments. In some cases, the Council tasked agencies with monitoring earmark grants that did not fall within the agencies' fields of work and involved areas in which the agencies had no experience.

2. *Robust Oversight Was Inhibited by the Fact of Council Member Sponsorship*

Because earmark grants are awarded at the behest of an elected official and enacted into law as part of the BSA, the agencies believed they did not have *de facto* authority over the earmark grantees. Some agencies refrained from imposing substantive changes to the scope of an earmark grant under the assumption they were not free to vary what the Council had approved. As one official put it, the agency is handed an earmark grant and told to "make it work." In other cases, the purpose and scope of the earmark was so broad and vague that the agency had difficulty identifying milestones which a grantee had to meet.

Several agencies also indicated that on occasions when they had been vigorous in their oversight, the grantee would complain to the sponsoring Council Member, who would pressure the agency to take a more lenient approach. As one agency employee put it, she did not "push back" on earmark grants because of the potential for political ramifications. It is difficult

for Special Counsel to discern whether political retribution was more feared than actually applied, but on at least one occasion, an agency reported that a Council Member pressured the agency to pay out funds to an earmark grantee despite the grantee's failure to account for earmark funds received the prior fiscal year. In any event, it was evident that the mere prospect of arousing a Council Member's ire shaped the monitors' approach to earmark grants.

3. *The Agencies Often Did Not Have a View Across Multiple Grants*

There is no mechanism to share information on a comprehensive, earmark-wide basis with the agencies. Thus, the individuals monitoring a grant did not have access to information on multiple earmark grantees that would have revealed interconnected personnel and questionable payments. For example, an agency could not know what other sources of funding the earmark grantee staff members were receiving (unless the additional funding came from another earmark grant the agency was administering). Therefore, the fact that the same individuals were receiving funds from multiple Ward Eight Council grantees was not known to any of their grant officers.

4. *The Agencies Did Not Apply Uniform Standards to Grantees*

Also of concern was the lack of a systematic approach to monitoring the earmark grantees. As noted in the Auditor's Report, the Council did not issue a set of uniform standards against which the agencies could hold the earmark grantees accountable,²⁷⁸ so the method of monitoring and level of oversight of the earmark grantees varied. Some agencies conducted at least one site visit and disbursed funds incrementally dependant upon the earmark grantees' submission of financial and programmatic reports. Another attended all public meetings of the

²⁷⁸ Auditor's Report, *supra* note 26, at ii.

grantee. Yet another conducted no site visit and disbursed the entire amount of funds at the beginning of the earmark grant.

Many of the agencies were tasked to monitor a large number of earmark and other grants with no additional resources. The DMPED, for example, had a single employee assigned to oversee 48 Council earmarks as well as 25 other grants.²⁷⁹

CYITC is an independent non-profit agency. Therefore, unlike the government agencies involved in grant oversight, CYITC received a fee equivalent to 3% of the grant amount for each earmark it administered. During FY 2009, CYITC administered 170 grants, including 47 earmark grants that totaled \$8,860,000²⁸⁰ (which equates to 31% of the number and 18% of the dollar value of total earmark grants the Council awarded). CYITC's financial monitoring consisted of an annual risk-based "desk audit" of 30% of the 170 earmark and other grants it oversaw. A single person was responsible for all the desk audits. Moreover, this financial monitoring only occurred once a year, involved a small population of expenditures, and did not include every grantee.

5. Office of Partnerships and Grant Services Sourcebook

On December 30, 2009, the Mayor's Office announced the publication of a *City-Wide Grants Manual and Sourcebook* (the "*Sourcebook*") by the Office of Partnerships and Grant Services of the Executive Office of the Mayor.²⁸¹ In the news release announcing the publication of the *Sourcebook*, Attorney General Peter Nickles stated that, "[t]oday's

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 4; *see also* Table 6 and note 277, *supra*.

²⁸¹ Office of Partnerships and Grant Services of the Executive Office of the Mayor, *City-Wide Grants Manual and Sourcebook* (2009).

announcement is especially timely in view of the recent D.C. Auditor’s Report on the need for improvements to the District’s earmark grantmaking process,” and anticipated that the procedures set forth in the *Sourcebook* would “capture these much needed reforms not only for earmarks, but for grant making activities throughout the government.”²⁸² While providing much needed uniformity in the District’s general grant making and monitoring process, the *Sourcebook* explicitly exempts earmarks from the requirement that all grants be made on a competitive basis.²⁸³ Pursuant to the *Sourcebook*, Council earmarks will be subject to uniform programmatic reporting and monitoring requirements as all other grants. These include requiring at least two monitoring activities per year to check on fiscal and programmatic compliance, the use of an assessment tool to evaluate various factors including program effectiveness and internal controls, required reporting by the monitor, and a close-out audit.²⁸⁴ These standards beneficially address the Auditor’s major concerns regarding grant monitoring. It remains a concern of Special Counsel, however, that they do not and cannot remediate the flaws in the Council earmark grant system that stem from the non-competitive and political character of those grants.

VII. COUNCIL MEMBER BARRY FAILED TO COOPERATE FULLY WITH THE COUNCIL’S INVESTIGATION AND ATTEMPTED TO IMPEDE THAT INQUIRY

Council Member Barry voted for Resolution 18-217 authorizing the investigation of his conduct regarding personal services contracts and earmark funding, and following its

²⁸² News Release, D.C. Mayor’s Office, *Fenty Announces New Uniform Grantmaking Procedures for Executive Agencies* (Dec. 30, 2009), <http://www.dc.gov/mayor/news/release.asp?id=1796&mon=200912>.

²⁸³ Office of Partnerships and Grant Services of the Executive Office of the Mayor, *City-Wide Grants Manual and Sourcebook* 10 (2009).

²⁸⁴ *Id.* at 25–27.

adoption, pledged to cooperate with the Investigation.²⁸⁵ Special Counsel finds, however, that Council Member Barry failed to cooperate fully with the Council's Investigation, notwithstanding his pledge to do so, and attempted to interfere with the inquiry.

A. Factual Findings

1. Council Member Barry Declined to Answer Questions Seeking Information Relevant and Material to the Subject Matter of the Council's Inquiry

During his deposition, Mr. Barry declined to answer questions that went to the heart of the Council's inquiry, on the ground that the questions were outside the scope of the Investigation authorized by Resolution 18-217.²⁸⁶ He specifically declined to answer questions about the nature of his relationship with Ms. Watts-Brighthaupt on that basis,²⁸⁷ even though the Council found that "the circumstances surrounding the awarding of the personal services contract to Donna Watts-Brighthaupt warrant the conduct of an investigation,"²⁸⁸ and even though the Resolution explicitly stated that a "primary purposes" of the Council's inquiry was to determine whether the award and administration of the contract with Ms. Watts-Brighthaupt was "in compliance with District law and Council rules, policies and procedures," including laws, rules, and policies regarding "conflicts of interest."²⁸⁹ Mr. Barry acknowledged that his relationship

²⁸⁵ Michael Neibauer, *Barry Will Cooperate with Investigation*, Wash. Exam'r, July 15, 2009, <http://www.washingtonexaminer.com/local/Barry-will-cooperate-with-investigation-7971395-50794777.html>.

²⁸⁶ See Barry Dep. 29:9–32:7. Council Member Barry also declined to produce financial records in response to a subpoena on the grounds that they were "beyond the scope of the resolution." Letter from Frederick D. Cooke, Jr., Esq., Counsel for Council Member Marion Barry, to Amy Sabrin, Deputy Special Counsel, Council of the District of Columbia (Dec. 9, 2009) (on file with Special Counsel).

²⁸⁷ Barry Dep. 30:12–20.

²⁸⁸ The Resolution, *supra* note 12.

²⁸⁹ *Id.*

with Ms. Watts-Brighthaupt was “personal” and “romantic,” but refused to say whether it was a sexual relationship.²⁹⁰ As discussed more fully in Part IV of this Report, under District law the sexual nature of a relationship may bear on whether a particular personal relationship is cognizable under controlling conflict of interest principles and standards of conduct.²⁹¹ When Special Counsel pressed the issue, however, Mr. Barry was dismissive:

I know the City Council doesn’t want to know that answer. I’m a part of the City Council. I voted for the Resolution. I was in the Chairman’s office when it was discussed. And at no time was there ever any interest in getting into the personal affairs of any Member of the Council. None, none. I want to make that very clear . . . that that was not part of the Resolution.²⁹²

Mr. Barry likewise declined to answer questions about the nature of his relationships with other women with whom the Council had entered personal services contracts at his behest.²⁹³

²⁹⁰ Barry Dep. 29:5–30:9. Mr. Barry initially asserted that the question of whether his relationship with Ms. Watts-Brighthaupt was a sexual relationship was “beyond the scope” of the Council’s inquiry on his own. *Id.*; *see also id.* at 46:5–6. As set forth in Part V above, when Special Counsel asked Mr. Barry a short time later whether “you think it is appropriate to be responsible for giving . . . public funds [to someone] with whom you have a personal romantic relationship,” Mr. Cooke, Mr. Barry’s counsel, directed Mr. Barry not to answer. Mr. Cooke contended that even that question “[was] beyond the scope of the inquiry” because it called for an answer “that arguably could be a criminal offense,” and “[t]his investigation clearly does not envision in any way a criminal investigation.” *Id.* at 47:20–48:19, 50:3–5. In any event, Mr. Barry eventually responded to the question and said that “[u]nless there is a ban against it or unless it violates D.C. law, I don’t know why a city councilman would not be able to do that.” *Id.* at 52:2–9.

²⁹¹ *See* Part IV, *supra*.

²⁹² Barry Dep. 30:22–31:8.

²⁹³ *Id.* at 85:9–86:14, 94:7–13, 99:17–100:8. Mr. Barry was less than fully cooperative throughout the course of the Investigation. He did not respond to requests that he produce documents voluntarily or that he voluntarily submit to a deposition, nor did he respond in a timely fashion to subpoenas demanding the production of documents or his appearance at a deposition.

2. Council Member Barry Attempted to Dissuade a Material Witness from Providing Relevant and Material Information to Special Counsel

The evidence available to Special Counsel supports the conclusion that Council Member Barry attempted to dissuade Ms. Watts-Brighthaupt from providing relevant, material information to Special Counsel and complying fully with a subpoena *duces tecum* demanding documents relevant to the Council's Investigation. The evidence further indicates that Mr. Barry may actually have succeeded in doing so and thereby deprived Special Counsel of material evidence and investigative leads.

Mr. Barry denied that he tried to discourage Ms. Watts-Brighthaupt, or anyone else, from cooperating in the Council's inquiry.²⁹⁴ Viewed in context, however, the evidence shows that Mr. Barry mounted a concerted effort during a critical 24-hour period to limit Special Counsel's access to material evidence by attempting to persuade Ms. Watts-Brighthaupt to withhold complete and accurate information, and to refrain from turning over documents that she was legally obligated to produce.²⁹⁵ In four separate conversations during that 24-hour period, Mr. Barry pressed Ms. Watts-Brighthaupt about her plans to meet with Special Counsel and sought to convince her not to do so.²⁹⁶ He denigrated the gravity and importance of the Council's inquiry, implicitly suggesting that Ms. Watts-Brighthaupt need not treat the matter seriously.²⁹⁷ He claimed that other individuals who apparently had been subpoenaed in the

²⁹⁴ *Id.* at 115:13–119:12, 128:16–129:8.

²⁹⁵ Watts-Brighthaupt Dep. II 5:18–12:9.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 5:21–6:5.

Council’s inquiry were not producing bank statements or computers,²⁹⁸ and said that she would be a “fool” to do so.²⁹⁹ He advised her to withhold bank statements, her computer, and her résumé from Special Counsel, cautioning her not to do something “stupid”³⁰⁰ that she would later regret.³⁰¹ He told her that “her personal business”—by which she understood he meant “anything pertaining to me and him outside the proposal” for her contract—was not within the scope of the Council’s Investigation.³⁰²

The evidence about Mr. Barry’s efforts to interfere with the Council’s inquiry is detailed below. It consists primarily of Ms. Watts-Brighthaupt’s testimony under oath about events and conversations that took place in the 24 hours preceding her second deposition.

Ms. Watts-Brighthaupt was initially deposed in this matter on November 5, 2009, and appeared without counsel. Prior to that date, she had been unable, for technical reasons, to produce certain documents in response to a subpoena *duces tecum*.³⁰³ At the conclusion of her deposition, Ms. Watts-Brighthaupt agreed to meet with Special Counsel to effect production of

²⁹⁸ *Id.* The basis of Mr. Barry’s knowledge for his assertion to Ms. Watts-Brighthaupt that other individuals were not producing those materials is unclear. When questioned on that subject during his deposition, Mr. Barry denied under oath that he discouraged anyone, including Ms. Watts-Brighthaupt, from producing documents to Special Counsel, including financial documents. Barry Dep. 115:13–119:12, 125:10–126:3, 128:16–129:8

²⁹⁹ Watts-Brighthaupt Dep. II 9:1–2.

³⁰⁰ *Id.* at 6:2–3.

³⁰¹ *Id.* at 9:21–22, 11:7–12.

³⁰² *Id.* at 9:7–22.

³⁰³ Watts-Brighthaupt Dep. 10:6–18, 11:14–12:3; Watts-Brighthaupt Dep. II 10:16–11:4. Ms. Watts-Brighthaupt also indicated that she had provided the originals of certain responsive documents to another investigative agency. Watts-Brighthaupt Dep. 11:1–6.

documents in compliance with the subpoena.³⁰⁴ To facilitate the production, Ms. Watts-Brighthaupt agreed to meet in the offices of Special Counsel on Wednesday, November 12, and to bring her laptop computer to the meeting. Special Counsel also requested that investigators be permitted to image Ms. Watts-Brighthaupt's computer hard drive in order to enable her to identify and produce all responsive documents.³⁰⁵

Mr. Barry visited Ms. Watts-Brighthaupt's home on Tuesday, November 11. He had just returned from Memphis and "[went] straight to [Ms. Watts-Brighthaupt's] house for dinner."³⁰⁶ At some point early that evening, Mr. Barry invited Ms. Watts-Brighthaupt to accompany him on a trip to Atlanta the following day.³⁰⁷ When Ms. Watts-Brighthaupt's daughter, who was present during the conversation, reminded her that she could not travel to Atlanta because she had to meet with Special Counsel the following day, Mr. Barry pressed Ms. Watts-Brighthaupt on the reason for the meeting:³⁰⁸

And he said, Why do you have to go back? What do you have to go back for? What are they asking for? And I said, I had not given any papers yet. And I promised papers and I have to give them, and you know how old my printer is

. . . .

And he said, You don't have to bring your computer. And I said, Their printers would be more efficient and I want to get it over with. And I said, I don't have anything to hide. And he said, You might think you don't

³⁰⁴ Watts-Brighthaupt Dep. 279:5–20.

³⁰⁵ Interview with Donna Watts-Brighthaupt, in Wash., D.C. (Nov. 12, 2009).

³⁰⁶ Watts-Brighthaupt Dep. II 11:19–12:1.

³⁰⁷ *Id.* at 10:7–10.

³⁰⁸ *Id.* at 10:10–20.

have anything to hide, but you don't know what they will find that will hurt you. I am not worried about it; I am not going to get hurt. It is going to be you. And I can't help you.³⁰⁹

In the ensuing discussion, and in additional conversations later that evening and the following morning, Mr. Barry sought to dissuade Ms. Watts-Brighthaupt from attending the meeting with Special Counsel or complying with the Council's document subpoena. Mr. Barry told her that she did not have to go to the scheduled meeting, urged her not to attend without a lawyer, and offered to arrange to get a lawyer for her.³¹⁰ He advised her not to turn over her hard drive to Special Counsel. He said she would be "stupid" to do so;³¹¹ "they are not the grand jury."³¹² He also advised Ms. Watts-Brighthaupt not to turn over bank statements, claiming that "no one has given their bank statements nor their private computers" to Special Counsel.³¹³

Mr. Barry left Ms. Watts-Brighthaupt's home at some point after dinner, but returned late that evening—" [H]e just showed up again around midnight."³¹⁴ At that time he "only mentioned . . . casually maybe twice" her bringing her computer to Special Counsel.³¹⁵

³⁰⁹ *Id.* at 10:16–20, 11:5–12.

³¹⁰ *Id.* at 5:18–6:5; 7:20–22.

³¹¹ *Id.* at 6:2–3.

³¹² *Id.* at 6:3.

³¹³ *Id.* at 6:3–4. Ms. Watts-Brighthaupt's and Mr. Barry's bank account records were relevant to the evidence that Special Counsel had received regarding the payments Ms. Watts-Brighthaupt made to Mr. Barry. *See* Part V, *supra*. Ms. Watts-Brighthaupt had indicated that both may be stored on her computer.

³¹⁴ Watts-Brighthaupt Dep. II 12:3–4.

³¹⁵ *Id.* at 12:5–9.

Mr. Barry stayed at Ms. Watts-Brighthaupt's home that night.³¹⁶ Before leaving the following morning, he raised the issue again, telling Ms. Watts-Brighthaupt, "I would advise you to think about it, to await Scott Bolden's phone call, and he will give you a name of a lawyer."³¹⁷ (Mr. Bolden was representing Brenda Richardson in this matter.) Later that morning, Mr. Barry attempted to reach Ms. Watts-Brighthaupt several times by phone—"[a]bout two times on my cell and about three times on my home."³¹⁸ He succeeded on one occasion.³¹⁹ During that conversation, according to Ms. Watts-Brighthaupt, Mr. Barry told her the following: "[H]e says it is in my best interest not to take my computer; I would be a fool; I am making things worse for myself; he cannot help me if I do it; no one has given their bank statements."³²⁰ Mr. Barry also told her "that Reverend Motley came down here without a lawyer, and he was against that. He told him not to come. But he believes Reverend Motley did okay."³²¹

Mr. Barry further told Ms. Watts-Brighthaupt that "I am not to—my personal business is not within the scope."³²² Asked what Mr. Barry meant by her personal business, Ms. Watts-Brighthaupt replied:

³¹⁶ *Id.* at 17:15–18:7.

³¹⁷ *Id.* at 7:20–22.

³¹⁸ *Id.* at 8:13–18.

³¹⁹ *Id.* at 8:19–20.

³²⁰ *Id.* at 8:22–9:4.

³²¹ *Id.* at 9:4–7. Apparently, Mr. Barry attempted to monitor the Council's inquiry by talking to witnesses who had been interviewed or deposed. Ms. Watts-Brighthaupt testified that in her presence Mr. Barry called Ms. Richardson on his cell phone, inquired "How did you do?" listened as Ms. Richardson "spoke for a while," and, after hanging up, told her that Ms. Richardson said, "I think I did okay." *Id.* at 19:12–20:5.

³²² *Id.* at 9:7–8.

*I think it was broad. I perceive it to be broad. Anything pertaining to me and him outside the proposal. He was worried about letters that he wrote to me. And he asked if I scanned it on the laptop. And I said, I think so. I don't know if he was worried. He asked about the letters. And he said that is out the scope and is not going to hurt him any. It is going to hurt me (emphasis added).*³²³

Ms. Watts-Brighthaupt met with Special Counsel about noon that day. She brought her computer to the meeting and produced various responsive documents to Special Counsel electronically.³²⁴ However, she declined to make her computer hard drive available for imaging.³²⁵ She also declined to produce other email correspondence with Mr. Barry that she deemed personal in nature, notwithstanding that the subpoena demanded all of her correspondence with Mr. Barry.³²⁶ Later that afternoon, following her production of documents, Ms. Watts-Brighthaupt was deposed about Mr. Barry's conversations with her during the preceding 24 hours—the prior evening and that morning—concerning her meeting with Special Counsel and her response to the document subpoena.³²⁷ At one point during the deposition, Ms. Watts-Brighthaupt's cell phone rang. She paused, viewed the phone's monitor and stated, “[t]his is Marion.”³²⁸ Ms. Watts-Brighthaupt chose to ignore the call, and turned off her phone.³²⁹

³²³ *Id.* at 9:13–22.

³²⁴ Interview with Donna Watts-Brighthaupt, in Wash., D.C. (Nov. 12, 2009).

³²⁵ *Id.*

³²⁶ *Id.* The subpoena *duces tecum* directed to Ms. Watts-Brighthaupt demanded the production of all correspondence with Mr. Barry and his office. Subpoena to Donna Watts-Brighthaupt issued by Robert S. Bennett, Special Counsel, and Cynthia Brock-Smith, Secretary, Council of the District of Columbia (Oct. 6, 2009) (on file with Special Counsel).

³²⁷ Watts-Brighthaupt Dep. II 7:15–12:9.

³²⁸ *Id.* at 16:8-9.

³²⁹ *Id.* at 16:8–14.

On January 25, 2010, about two and one-half months after her meeting with Special Counsel, in a telephone conversation about her first deposition in this matter, Ms. Watts-Brighthaupt told Special Counsel that at some point Mr. Barry told her that she should respond “I don’t recall” if she could not “remember verbatim” or if she was unsure about an answer to a question posed to her.³³⁰ At that time, Ms. Watts-Brighthaupt said that she was uncertain whether Mr. Barry gave her that advice before her first deposition on November 5, 2009, or before her second deposition on November 12, 2009, one week later.³³¹

In his deposition testimony, Council Member Barry disputed Ms. Watts-Brighthaupt’s account of his conversations with her concerning her meeting with Special Counsel and her response to the document subpoena directed to her.³³² He stated “any allegations that I tried to discourage anyone from cooperating with this investigation is absolutely false, false, false,” adding that “[a]nybody who said it is a liar, simple as that.”³³³ When people asked him about the Investigation, Mr. Barry stated, he told them to “get . . . a lawyer” and “just tell the truth.”³³⁴

³³⁰ Telephone Interview with Donna Watts-Brighthaupt, in Wash., D.C. (Jan. 25, 2010). At her first deposition on November 5, 2009, when asked if Mr. Barry discussed with her “what you should say during this deposition,” Ms. Watts-Brighthaupt answered, “No.” Watts-Brighthaupt Dep. 15:22–16:2. However, on December 16, 2009, Ms. Watts-Brighthaupt reviewed the transcript of her November 5 deposition and prepared an errata sheet, noting a correction, in which she indicated that the correct answer to that question was “Yes.” On January 25, 2010, Special Counsel contacted Ms. Watts-Brighthaupt to ascertain her reason for proposing to change her answer to that question from “No” to “Yes.” Mr. Watts-Brighthaupt replied she remembered that Mr. Barry had discussed with her what she should say during her deposition. She went on to say that Mr. Barry “told [her] to answer ‘I don’t recall’ in response to questions if [she] could ‘not remember verbatim’ or if [she] was unsure about an answer.” Telephone Interview with Donna Watts-Brighthaupt, in Wash., D.C. (Jan. 25, 2010).

³³¹ Telephone Interview with Donna Watts-Brighthaupt, in Wash., D.C. (Jan. 25, 2010).

³³² Barry Dep. 116:1–121:11.

³³³ *Id.* at 117:12–16.

³³⁴ *Id.* at 117:18–20.

Mr. Barry denied recommending a lawyer to Ms. Watts-Brighthaupt.³³⁵ However, he acknowledged telling her that “there are several lawyers in town who I understand have indicated that they would assist people who were part of the investigation,”³³⁶ and that, in that context, “I might have mentioned Scott Bolden.”³³⁷

Mr. Barry flatly denied that he told Ms. Watts-Brighthaupt not to produce documents to Special Counsel or to speak with Special Counsel.³³⁸ Asked whether he ever said to her that she would be a fool to cooperate with Special Counsel, Mr. Barry replied, “[a]bsolutely not.”³³⁹ However, he was less certain about other aspects of their conversation: When asked whether he told her that letters he wrote to her were outside the scope of the Investigation, he testified that he did not recall.³⁴⁰ Likewise, when asked whether he told Ms. Watts-Brighthaupt that she would be a “fool” to provide Special Counsel access to her computer hard drive, Mr. Barry replied, “I don’t recall such as that.”³⁴¹

Mr. Barry denied that he told any potential witnesses what they should say or what information they should provide to Special Counsel.³⁴² He also denied that he talked to

³³⁵ *Id.* at 117:21–118:11.

³³⁶ *Id.* at 118:6–9.

³³⁷ *Id.* at 118:11.

³³⁸ *Id.* at 118:17–119:2.

³³⁹ *Id.* at 119:6–8.

³⁴⁰ *Id.* at 119:9–12.

³⁴¹ *Id.* at 121:2–5.

³⁴² *Id.* at 124:5–125:5.

anyone about what documents they should or should not provide to Special Counsel.³⁴³ However, when asked whether he told anyone that he or she did not have to produce financial records that had been requested, Mr. Barry replied that he “might have said something to [one individual] about his bank accounts.”³⁴⁴ Mr. Barry explained: “He was in the office and he was upset about the fact that they asked for his bank account, et cetera. And I said, well, talk to your lawyer about that, but I don’t understand what the relevance of that to this investigation is.”³⁴⁵ Mr. Barry then added: “It was a commentary, it wasn’t any kind of, you know, suggestion or anything like that.”³⁴⁶

As the deposition was concluding, Special Counsel announced that he had “nothing else.”³⁴⁷ When Mr. Barry’s counsel indicated at that point that the proceeding was over, Mr. Barry signaled that he had more to say.³⁴⁸ Following a brief conversation off the record, Mr. Barry went back on the record to make a short statement. He then addressed once again the question about whether he may have interfered in the Council’s Investigation:

You had a question about advising not to cooperate, et cetera. I want to make it crystal clear I’ve not done that. There’s no reason to. I think that I’ve followed whatever procedures there were – that were there or lack thereafter [*sic*], in some instances, so I just wanted to again reiterate that, if people make allegations about any and everything, but I have nothing

³⁴³ *Id.* at 125:6–9.

³⁴⁴ *Id.* at 125:10–14.

³⁴⁵ *Id.* at 125:19–126:1.

³⁴⁶ *Id.* at 126:1–3.

³⁴⁷ *Id.* at 128:3.

³⁴⁸ *Id.* at 128:4–14.

but respect for this process, I voted for the Resolution. Anybody asked me about why I voted for it, because I believe it's the right thing to do.

So therefore, having done that, I would not go behind, trying to hide anything or cover anything. There's nothing to cover up from my perspective.³⁴⁹

B. Conclusions

As the findings make clear, Special Counsel does not credit Council Member Barry's testimony in significant respects. To the contrary, Special Counsel finds there is substantial evidence that Mr. Barry engaged in conduct to impede the Council's Investigation. This conduct may implicate criminal laws respecting obstruction and false testimony, and should be referred to appropriate authorities for investigation.

VIII. SPECIAL COUNSEL'S RECOMMENDATIONS

A. Recommendations Regarding the Conduct of Council Member Barry

Special Counsel recognizes that other authorities ultimately are charged with determining whether a public official's conduct violates the District's and the Council's conflict of interest laws and official standards of conduct. It is the view of Special Counsel, however, that Council Member Barry's actions with regard to 1) providing a personal services contract to Ms. Watts-Brighthaupt with whom he had undisclosed financial and sexual relationships,³⁵⁰ and 2) his role in the formation, incorporation, and funding of the various Ward Eight Councils³⁵¹ violated D.C. Code section 1-618.1 and 18 DPM sections 1803.1 and 1800.1 because Mr. Barry

³⁴⁹ *Id.* at 128:16–129:8.

³⁵⁰ *See* Part V, *supra*.

³⁵¹ *See* Part VI, *supra*.

failed to maintain a high level of ethical conduct in the performance of his official duties,³⁵² used his office for his gain and the gain of his friends and supporters,³⁵³ and participated in official actions which adversely affected public confidence in the integrity of the District government.³⁵⁴ Mr. Barry’s conduct was a breach of public trust and at a minimum created a substantial appearance of impropriety.³⁵⁵

Special Counsel is also of the view that these actions violated laws, regulations, and Council Rules regarding conflicts of interest, as follows:

- Council Member Barry breached the public trust and acted with a conflict of interest in violation of D.C. Code section 1-1106.01, D.C. Municipal Register Title 3 sections 3300.1 and 3303, and Council Rule 202 by failing to disclose a personal financial interest—i.e., that Ms. Watts-Brighthaupt owed him money and was financially unable to repay him—before causing the Council to enter into a personal services contract with Ms. Watts-Brighthaupt.³⁵⁶
- Council Member Barry further breached the public trust and otherwise violated these same provisions by failing to disclose that he had a personal conflict of interest—i.e., an undisclosed close personal and sexual

³⁵² 18 DPM § 1800.1 (requiring certain officials to “maintain a high level of ethical conduct in connection with the performance of official duties,” and to “refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.”).

³⁵³ 18 DPM § 1803.1 (“An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, or create the appearance of the following: [u]sing public office for private gain [or] [a]ffecting adversely the confidence of the public in the integrity of government.”).

³⁵⁴ 18 DPM § 1800.1.

³⁵⁵ 18 DPM § 1803.1.

³⁵⁶ See D.C. Code § 1-1106.01(a), (b), (g); Council Rule 202 (requiring members to disclose “conflict situations” created by “a personal, family, or client interest” and to refrain from acting thereon); D.C. Mun. Regs. tit. 3 § 3300.1 (barring public officials from acting on any matter “upon which there is a conflict of interest or potential conflict, created by their financial, personal, family, business, or client interest.”); D.C. Mun. Regs. tit. 3 § 3303 (requiring disclosure of a conflict of interest to the Board and Council Chairman).

relationship with Ms. Watts-Brighthaupt—when he arranged for her to receive a personal services contract.

Additionally, Special Counsel is of the view that Council Member Barry effectively circumvented District laws limiting the amount and type of funding for citizen-service activities,³⁵⁷ by obtaining appropriated funds for the Ward Eight Councils which he created and continued to oversee, and which performed constituent services in his Ward. Council Member Barry also violated D.C. Code section 1-618 and 18 DPM sections 1804.1(c) and 1806 by allegedly ordering employees on his Council Committee and office staff to draft and file the incorporation documents for the Ward Eight Councils.³⁵⁸

Finally, Special Counsel is of the view that Council Member Barry’s actions to impede this Investigation violated Council Rule 201a, and the Council Code of Official Conduct by, among other things, again adversely affecting public confidence in the integrity of the District government.

In view of the foregoing, Special Counsel recommends that the Council:

- Enact a resolution expressing the Council’s collective condemnation of Mr. Barry’s conduct;

³⁵⁷ D.C. Code § 1-1104.03; D.C. Mun. Regs. tit § 3014.5. (Providing that constituent services activities of the Mayor and Council Members may only be financed by a transfer of unused campaign funds or private contributions; limiting the amount of contributions to and expenditures from constituent services funds; and requiring that all contributions and expenditures from such funds be reported to the OCF.).

³⁵⁸ Interpretive Opinion 03-03, Office of Campaign Finance of the District of Columbia, April 24, 2003. (Addressing the propriety of “a member of council assigning a member of his staff (who is an attorney) to assist . . . in drafting by-laws and Articles of Incorporation for the creation of an organization which will later seek to do business with the District . . .” and finding that the activity described “would be in violation of” D.C. Code § 1-618.01(a), 18 DPM § 1804.1 (b), (c), (e), and 1806.1.” These staff members may have violated 18 DPM § 1804.1 (b) by “[u]sing government time and services for other than official business” when they created and filed the incorporation documents.).

- Consider whether it would be appropriate to remove Mr. Barry from his Council Committee Chairmanships or take other administrative action with regard to his Committee appointments; and
- Refer the matters referenced herein to the authorities charged with investigating potential violations of criminal and civil laws, including the United States Attorney’s Office for the District of Columbia, the District of Columbia Office of Campaign Finance, and other authorities as the Council deems appropriate.

B. Reforms to Procedures Governing Personal Services Contracts

D.C. Council Resolution 18-217 directed Special Counsel “to evaluate the adequacy and effectiveness of Council rules, policies and procedures governing the issuance and administration of personal service contracts.” Special Counsel concludes that recent controls implemented by the Council through the Office of the Secretary have substantially improved the accountability for personal services contracts. These controls, outlined above,³⁵⁹ are in the process of being incorporated into a written manual by the Secretary. They include, among other things, that a Council Member seeking approval for a proposed contract provide the Secretary’s office with a clearly defined statement of work, a defined set of deliverables, a timetable for performance, and a written justification of the need for the contract. The Secretary’s controls should also be sure to include the following:

- When a Council Member seeks approval for a personal services contract, he or she should be required to certify that the Member has no financial, business, family, or personal relationship with the proposed contractor or contractor personnel, including that he or she has no conflict of interest within the meaning of Council Rules 201a, 202, or D.C. Code section 1-1106.01 and related regulations. If he or she cannot provide such certification, the relationships or conflicts of interest should be disclosed to the Secretary and the Chairman.
- Any request for a personal services contract should include a description of the qualifications and experience of the contractor as it relates to the services being provided.

³⁵⁹ See Part V, *supra*.

- The Secretary should publish a notice of the award of all personal services contracts, including the name of the Council Member who sought approval for the contract, the amount of the contract, the identity of the contractor, and the stated purpose of the contract.
- Personal services contractors should be required to abide by District of Columbia conflict of interest laws and regulations in connection with the performance of the contract. Without such a requirement, contractors could be used to perform work that normally would be performed by Council employees, while avoiding the conflict of interest rules.
- Any contractor with whom a Council Member wishes to do business should certify that he or she is in compliance with D.C. laws and regulations requiring that contractor to be registered with DCRA or the D.C. Office of Tax and Revenue, as appropriate.
- The Council should require, upon completion of contract performance and prior to final payment, a certificate of completion indicating that all work called for under the contract has been satisfactorily completed, signed by both the contractor and the Council Member.

C. Recommendations Regarding Council Earmark Grants

D.C. Council Resolution 18-217 directed Special Counsel to conduct a thorough review for the purpose of evaluating the adequacy and effectiveness of the rules, policies, and procedures governing the award and monitoring of Council grants to organizations, and asks that we make recommendations with regard to modifications of such rules, policies, and procedures. We have conducted the in-depth examination of earmarks that the Council requested, including soliciting views on these issues from Council Members, grant-monitoring authorities, and grantees.

As a result of this review, Special Counsel recommends that earmark grant-making, as currently practiced by the D.C. Council, be discontinued. The Council has in recent years made strides to improve accountability for earmark grantees.³⁶⁰ Moreover, it supplemented the reforms applicable to FY 2009 grants with provisions that in the future would limit the

³⁶⁰ Ex. 4, Selected Council Rules, Period 18, Council Rules 730-733.

amount of individual grants and preclude grantees from receiving earmarks in successive years.³⁶¹ The rules, policies, and procedures currently in place, however, have not and will not prevent conflicts of interest, waste, fraud, or abuse. Further, the Council's rules do not ensure that earmark grants are thoughtfully awarded or subject to effective oversight by professional grant managers.

In the view of Special Counsel, the current form of Council earmarking is not a sound method for appropriating public funds. It effectively permits each Member to designate individual programs for funding on an ad hoc basis without prudently establishing spending priorities. Council Members, moreover, are understandably not equipped to fully and carefully vet individual grantees, and the legislative "logrolling" inherent in the earmark appropriations process inhibits thorough scrutiny of proposed grant recipients. The informal method by which grantees are selected clearly does not ensure that public funds go to the best or most effective organizations to deliver the intended services or accomplish the stated goals of the grant.

Competitive grant-making would make it substantially more likely that tax dollars will go to programs that are sufficiently well-managed and competent to satisfy the requirements of a competition, and that grant recipients are vetted by experienced grant managers prior to receiving a grant. The additional time and effort involved in awarding a grant through competition is worth the investment because it is more likely to result in the award of public funds to capable and effective organizations. It would also minimize the duplication and misapplication of funds inherent in the earmark process.

³⁶¹ *Id.*

If the Council determines to continue earmarking grants without competition, Council Rules 730-733 should be supplemented to include, at a minimum, the following elements:

- The use of fiscal agents should be eliminated. Fiscal agents did not ensure the proper management of grantees, and in several instances were themselves the source of waste or abuse of public funds. Grants should go only to those organizations that are already incorporated and already qualified as non-profits pursuant to section 501(c)(3) of the I.R.S. Code. While this may mean that worthwhile start-up organizations will not receive earmark grants, public funds are too valuable to risk on unproven organizations. Only organizations that are already sufficiently well-managed to garner support in their community, to incorporate, and to apply for tax-exempt status from the I.R.S. should be considered for public funding.
- For the same reasons, the Council should consider requiring grantees to have been incorporated for at least three years, and should consider awarding earmark grants only to those organizations that can raise matching funds in the private sector.
- Organizations seeking grants should be required to submit a formal request to the Committee with oversight over the subject of the grant, including a detailed description of the organization, its officers, the proposed grant activities, a budget, and a financial statement. Would-be grantees should also testify at a hearing of the relevant Council Committee. While some Council Members already require this of proposed grantees, these procedures should be adopted for every proposed earmark. This would lead to a more thoughtful process of setting funding priorities, enhance the pre-award vetting of grantees, and provide transparency prior to the award of any grant.
- In addition to the current limits of \$250,000 for non-capital grants and \$1 million for capital funding,³⁶² there should be a limit on the overall percentage of or dollars in the District budget that can be allocated to Council earmark grants. Without such a check on overall earmark spending, the appetite for earmarks could continue to increase exponentially.
- To preclude grantees from becoming dependent on earmark funding, the Council's current ban on consecutive annual funding allocations should be expanded to preclude any grantee from receiving earmark grants more than three times.
- Council Members and staff, as well as the officers and directors of a proposed grantee, should be required to disclose the existence of any personal, familial, or financial

³⁶² Ex. 4, Selected Council Rules, Period 18, Council Rule 732.

relationships between the Council Member or staff and officer and directors of the grantee.

- The Council should make absolutely clear to grantees that earmark grants are subject to oversight by the District's grant monitoring agencies, which may impose additional requirements on grantees. The Council's current rules state only that grantees may be required to submit additional information to the grantor agencies or organizations.³⁶³ The Council should inform grantees that they are subject to the guidelines set forth in the new Office of Programs and Grant Services *Sourcebook* with regard to monitoring grants. And Council Members should avoid inserting themselves or their staff in the grant administration process, and allow professional grant managers to enforce those guidelines without interference.
- The Council should provide more resources to the public agencies charged with monitoring earmark grants. It is the impression of Special Counsel that, because of the earmark grantees' relative inexperience and disorganization, effective oversight of earmark grants is more demanding than oversight of grants awarded through competition. At the same time, the agencies have been tasked with overseeing a dramatically increasing number of earmark grants.³⁶⁴ Yet there has been little by way of additional resources provided to support grant oversight activities.

D. Enhancements to the Council's Ethics Regime

At the request of Council Chairman Vincent C. Gray, Special Counsel surveyed the ethics rules of a number of jurisdictions.³⁶⁵ All have ethics systems with three primary components, the first of which is a comprehensive code of conduct. Like many of the jurisdictions surveyed, the Council's newly adopted Code of Official Conduct³⁶⁶ is very comprehensive and addresses most ethical issues that are likely to arise.

³⁶³ Ex. 4, Selected Council Rules, Period 18, Council Rule 730(b) ("Nothing in this title shall be construed as waiving the requirements to submit information required of all grantees by the grantor agencies or organizations.").

³⁶⁴ As noted above, the number of earmarks grew from 2 in 2005 to 154 in FY 2009.

³⁶⁵ The jurisdictions reviewed include Chicago, Miami-Dade County, Los Angeles, New York, Seattle, and San Francisco, as well as the United States Senate and House of Representatives.

³⁶⁶ See Part IV, *supra*.

The second component of the majority of the codes of ethics is the existence of an adjudicatory body to investigate violations and enforce the jurisdictions' ethics laws. In the District, the Board of Elections and Ethics ("the Board") acts as the primary ethics enforcement agent, and the Office of Campaign Finance ("the OCF") has the power to investigate and enforce the District's ethics laws against high level officials, including Council Members. The OCF and the Board have a process for reviewing allegations of unethical conduct against a Council Member which includes a complaint, internal inquiry, investigation, hearing, and possible sanctions.³⁶⁷ However, as the Office of Policy Analysis of the Council of the District of Columbia noted in its report, "A Comparative Analysis of Ethics Accountability," the Council itself lacks any internal mechanism to adjudicate ethics violations by its members.³⁶⁸

A third component of the ethics systems reviewed is a set of sanctions for violations of the ethics rules. While the Board and OCF may levy monetary civil penalties and the U.S. Attorney may bring criminal charges for violations,³⁶⁹ there is no formal sanction that the Council itself may impose on its own Members for violations. At present, the Council does not have the authority to sanction any of its members, save a resolution expressing the sense of

³⁶⁷ See Terrance Norflis, Council of the District of Columbia Office of Policy Analysis, Report 18-08:A Comparative Analysis of Ethics Accountability Systems, 2-4 (2009).

³⁶⁸ *Id.* at 4. ("The Council of the District of Columbia is noticeably absent from the District's ethics structure and plays a very limited role in the ethics oversight process. There is no provision of ethics law that compels the Council to participate in any ethics procedure").

³⁶⁹ *Id.* at 3.

the Council or a decision by the Chairman, with approval of the Council, to revoke a committee appointment or chairmanship pursuant to the general power of appointment.³⁷⁰

The jurisdictions we surveyed have a variety of mechanisms for investigating alleged ethics violations. These include external and internal mechanisms, or both.³⁷¹ Given the political make-up and relatively small size of the Council of the District of Columbia, however, setting up a permanent, full-scale committee or investigatory office as an administrative function of the Council would require a significant amount of resources and expertise, and it would be difficult to guarantee the independence and non-partisanship of such an office. Such an operation, moreover, would duplicate, in substantial part, the work of other existing District offices including the Office of Campaign Finance, the Office of the Inspector General, and the Auditor. In the absence of a permanent internal investigatory arm, the Council may, when

³⁷⁰ Pursuant to Council Rule 221, “[a]t or near the beginning of a new Council Period, the Chairman shall nominate the chairperson and members of each committee of the Council. The Council shall by resolution act on the Chairman’s nominations.” Arguably, implicit in the power to nominate and confirm is the power to remove.

³⁷¹ The majority of the jurisdictions reviewed have some form of ethics commission. *See* Los Angeles Charter Vol 1 §§ 702 and 706 (2009) *and* Rules of Los Angeles City Council, Rule 88. (Los Angeles has an Ethics Commission made up of five members, appointed by the Mayor, City Attorney, Controller, President of the Council, and President Pro Tem of the Council, charged with investigating violations of conflict and ethics laws by any person, including City Council members. A Council Member accused of an ethics violation must be provided notice and the opportunity to be present and represented by counsel during a public hearing to determine if a violation has occurred. In addition to the Ethics Commission process, the City Council has the authority to appoint an ad hoc committee to consider censure. During a censure hearing, the accused may make an opening an closing statement, question his or her accusers, and be represented by a person of his or her choice.); Seattle Municipal Code § 4.16.090 (2006). (In Seattle, if a complaint is made against a Council Member, the Executive Director of the Seattle’s Board of Ethics Commission conducts a preliminary investigation and may determine that an enforcement proceeding is in order. The enforcement proceeding is a public hearing. At the conclusion of the hearing and upon a finding of misconduct, the commission may recommend a sanction to the City Council which makes the final determination as to sanctions.); City of San Francisco Charter § 15.100, Appendix C § C3.699-13 (2009). (San Francisco’s Ethics Commission has the sole responsibility for determining whether violations of ethics rules have occurred and for imposing sanctions. If the Commission deems that there is cause to conduct an investigation into a violation of the ethics laws, it must provided the accused notice and the opportunity to be present and represented by counsel during a public hearing. Upon a finding that a violation has occurred, the Commission may impose sanctions.); *see also* New York City Charter § 2603 (2004); New York City Rules of the Council §§ 7.00 and 10.80; Chicago Municipal Code §§ 2-156-310, 2-156-395.

information comes to its attention that suggests a violation of Council Rules or ethics laws or regulations has occurred, refer the matter to the appropriate office or offices, or engage, as it did in this instance, a special counsel. The Council may then choose to act on the results of those investigations.

Even in the absence of an internal investigatory mechanism, Special Counsel recommends that the Council adopt a system of sanctions that it may impose for violations of law and regulation, as well as of Council Rules 201a, 202, and the Code of Official Conduct. Comparable jurisdictions typically employ four general forms of sanction: 1) monetary fines; 2) reprimand; 3) censure; and 4) removal. Of the eight codes reviewed, six provide for a monetary penalty when an ethical rule has been violated to the economic benefit of the official.³⁷² Generally, the fines range between \$250 and \$5,000 for each violation or a multiple of the economic value of anything sought or received in violation of the applicable rule. Restitution is also sought in some cases.³⁷³ Each of the codes provides for an official reprimand, which typically is viewed as a sanction for moderately serious offenses.³⁷⁴ Censure, a formal resolution officially chastising an elected official, is generally reserved for extremely serious offenses.³⁷⁵

³⁷² See Seattle Municipal Code § 4.16.100(A); City of San Francisco Charter, App. C § C3.699-13(c) (2009); Miami-Dade, Fl., Code of Ordinances, ch. 2, art. 1, § 2-11.1(bb)(1) (2009); Rules of the Council of the New York City Council § 10.80(b)(4) (2009); Municipal Code of Chicago § 2-156-395(c); Rules of the Committee on Standards of Official Conduct of the U.S. House of Representatives, 111th Cong., Rule 24(e)(4) (2009) (“House Ethics Rules”).

³⁷³ See Senate Ethics Manual, 108th Cong., Rule 4(g)(2) (2003) (“Senate Ethics Manual”); Seattle Municipal Code § 4.16.100.

³⁷⁴ See Senate Ethics Manual, Rule 4(g)(2); House Ethics Rule 24(g); Miami-Dade, Fl., Code of Ordinances, ch. 2, art. 1, § 2-11.1(bb)(1) (2009); Rules of the Council of the New York City Council § 10.80(b)(2); and Rules of the Los Angeles City Council, Rule 87.

³⁷⁵ See House Ethics Rule 24(g); Dirksen Congressional Center, Senate Censure/Condemnation Cases, http://www.congresslink.org/print_basics_senatecensure.htm.

Removal, suspension, or expulsion of an official from office or from an affected committee are the most serious sanctions provided for in any of the codes, with the exception of specific provisions for criminal prosecution of select rules.³⁷⁶

We recommend that the Council adopt sanctions that, at a minimum, include authority to reprimand or to censure a Member, and expressly to remove a Member from Committee positions.³⁷⁷ The Council could act upon the findings of one of the offices listed above or of a special counsel, after affording notice to the affected Member and an opportunity to respond in writing or to go before the full Council in a public hearing to argue why he or she should not be sanctioned.

³⁷⁶ See Seattle Municipal Code § 4.16.090(I) (“a violation shall be cause for suspension, discharge, or removal from office[.]”); City of San Francisco Charter, App. C § C3.699-13(c) (“when the commission determines on the basis of substantial evidence presented at the hearing that a violation has occurred . . . the commission may recommend . . . that the officer be removed from office”); Municipal Code of Chicago § 2-156-410(a) (“Any official who . . . violates any provision of this chapter, shall be subject to removal from office.”).

³⁷⁷ Removal from office as a Council Member would not appear to be within the statutory authority of the Council. See D.C. Code §§ 1-204.111–1-204.114. (The D.C. Code only provides for a recall of elected officials by the voters. There is no provision that allows for a removal from office instigated by the Council or a body charged with reviewing violations of ethics rules.)