

MEMO

TO: TIM LEWIS, MAYOR
FROM: THOMAS M. HITCH, CITY ATTORNEY
RE: WITHHOLDING OF MATERIAL INFORMATION BY A COUNCIL MEMBER
DATE: DECEMBER 29, 2016

The purpose of this memorandum is to memorialize and set forth my opinion in writing regarding the duties and obligations of council members when they have material information that may affect the public health of the citizens of Charlotte. As we discussed, as city attorney, I specifically represent the council as, unlike other city officials, I am not an appointee of nor under the direct supervision of the city manager. It is in this capacity as attorney for the council itself that I set forth this opinion.

I have been advised, and it has been made clear by statements of Councilman Anthony Russo at the council meeting held on December 27, 2016, that he received information from a person he describes as an "informant" who had information regarding the use of illegal fittings at several locations within the City. It is my understanding that these fittings were determined to have lead content higher than what is now allowed for potable water. The City apparently has some of those fittings but they are now stored in a more inaccessible area of the City's storage facility.

Councilman Russo indicated that he obtained an affidavit from that individual and proceeded to the MDEQ with information alleging violations of law in the use of these prohibited fittings.

After an investigation by the MDEQ, the City provided sufficient evidence that at the one location identified by Councilman Russo, the City had, contrary to the affidavit, complied with the law. The information provided by Councilman Russo indicated, however, there were apparently other residential locations within the City of Charlotte where the illegal fittings were installed as part of their water service running between the city mains and the residential structures.

The city administration has pressed Councilman Russo to disclose the identity of the informant and the locations of the alleged illegal fittings. The administration has asserted that this information is

material as the disclosure of the informant will assist in determining the credibility of the underlying allegations, and the specific locations will give the city officials needed information to determine when water service repairs were done at those locations.

Councilman Russo has steadfastly refused to disclose the name of the person that is making those allegations and the locations where the alleged improper installation of the prohibited fittings were made.

As I stated at that council meeting, a council member owes a fiduciary duty to the city and its citizens for whom that council member serves. In Michigan, as elsewhere, a public office is a public trust. As public officers, they owe, at the very least, a duty of loyalty to the public no less than that of an agent to its principal. See *Burton Twp v Speck*, 378 Mich 213, 224 (1966). That decision was relied upon by the Illinois Appeals Court when it wrote as follows, in *County of Cook v Barret*, 36 Ill App 3rd 623; 344 NE2d 540, 545 (1975):

“In deciding this appeal, it is not necessary to locate the perimeters of the fiduciary obligations due the public from their elected officials. It is sufficient to recognize that, when such an official acts as agent for the public body in business transactions, he owes his principal duties of loyalty and good faith at least equal to those required of a private fiduciary in like circumstances. (Ill Rev Stat 1971, ch 102, par 3; *Burton Township v Speck* (1966), 378 Mich 213; 144 NW2d 347.) The obligations of a person who occupies the latter category are such that he must not place himself in a position which is adverse to that of his principal during the continuance of the agency.”

That this conflict does not involve monetary gain to Councilman Russo is of no moment. In the treatise *American Jurisprudence 2d*, in Volume 63A, Section 321, the authors write:

“Nevertheless, a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interest of the public. Public policy demands that an officeholder discharge his duties with undivided loyalty.”

As a public official who has the obligation of undivided loyalty to the public he serves, a council member is bound to impart material information that affects the public health and well being of the citizens of the City of Charlotte.

In reviewing these standards, it is my opinion that Councilman Russo, by refusing to disclose the name of the informant, produce a copy of the sworn affidavit, and divulge other information, such as the addresses where the allegedly illegal fittings are located, is continually breaching his duty of undivided loyalty to the City of Charlotte. He is letting his desire, for whatever reason, to maintain the anonymity of the informant supersede his duty to disclose material information that would aide and assist the City in its investigation. For example, it appears that this may be a former employee. Knowing that would be important, as, along with the addresses where the alleged improper fittings are located, it could limit the search to only those locations where service was performed during the

time frame when the employee worked for the City of Charlotte. This would clearly decrease the City's exposure and reduce its costs in making its investigation.

By refusing to disclose this information, Councilman Russo exposes the City to greater risks and greater expenses. In that regard, there are very real costs to the City that are being occasioned by Councilman Russo's continued violation of his fiduciary duties.

For all of these reasons, it was my conclusion as I stated at the meeting of December 27, 2016, and as I reiterate in this opinion, Councilman Russo's conduct amounts to misconduct in office and will only be rectified upon his compliance with the aforementioned reasonable requests being sought by the City's administration.

TMH:ddy