



**FOR IMMEDIATE RELEASE**

**Dec. 29, 2017**

## **Commission releases firm's preliminary report regarding state auditor request**

SPRINGFIELD, MO — Greene County commissioners unanimously voted on Dec. 29 to waive attorney-client privilege in order to release a report issued by legal firm Graves Garret LLC on Dec. 22. That report is attached.

The County Commission hired Graves Garrett on Dec. 7 to review and investigate allegations brought forward by the Missouri State Auditor's Office and the Missouri Ethics Commission.

The report will serve as a guide to the County Commission as they discuss the options available to them — including inviting State Auditor Nicole Galloway to investigate. Commissioners have requested Graves Garrett reach out to the state auditor's office for more details on the whistleblower allegations, as well as discover the scope of investigation she proposes and associated costs.

The County Commission has also authorized Graves Garrett to cooperate with and supply documentation to the Missouri Ethics Commission on its behalf.

"Greene County prides itself on transparency, so we wanted to bring this report forward as soon as we were able to vote to do so," said Associate Commissioner Harold Bengsch. "The report and subsequent information request we have out to the auditor's office will give each commissioner an opportunity to assess the scope of a possible investigation and truly feel informed about the decisions we face."

The Commission will reconvene to make those decisions once the necessary details have been ascertained.

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**For more information, contact Trysta Herzog, Greene County Director of Communications, at 417.868.4140 or [therzog@greencountymo.gov](mailto:therzog@greencountymo.gov).**



Graves Garrett LLC

Edward D. Greim  
Direct Dial: (816) 256-4144  
Fax: (816) 817-0780  
[edgreim@gravesgarrett.com](mailto:edgreim@gravesgarrett.com)

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**CONFIDENTIAL & SUBJECT TO ATTORNEY-CLIENT PRIVILEGE**

**VIA E-MAIL**

Bob Cirtin, Greene County Presiding Commissioner  
Harold Bengsch, 1<sup>st</sup> District Commissioner  
Lincoln Hough, 2<sup>nd</sup> District Commissioner  
John Housley, County Counselor  
[BCirtin@greenecountymmo.gov](mailto:BCirtin@greenecountymmo.gov)  
[hbensch@greenecountymmo.gov](mailto:hbensch@greenecountymmo.gov)  
[LHough@greenecountymmo.gov](mailto:LHough@greenecountymmo.gov)  
[jhousley@lowtherjohnson.com](mailto:jhousley@lowtherjohnson.com)

**Re: Review of investigation regarding November 2017 sales tax measure**

Dear Commissioners and Counselor Housley:

On December 8, 2017, this Firm entered into an engagement with the Greene County Commission to: (1) review and respond to recent correspondence from the Missouri Ethics Commission and Missouri State Auditor; and (2) review the allegations in that correspondence and provide advice regarding an investigation into the allegations. This letter is the written component of our report to you, but we are also willing to report to you in person and answer any questions you may have.

The remainder of this letter covers both points, but for clarity of presentation we will first address point (2), our review of recent allegations and our recommendation regarding a possible investigation.



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**Recommendation regarding a possible investigation  
(Engagement Point 2)**

The Firm recommends that the Commissioners undertake an investigation into the following issues:

- (1) Whether specific written communications paid for by Greene County constituted advocacy, rather than education, within the meaning of § 115.646 and the interpretation of that statute by the Missouri Ethics Commission.
- (2) Whether Greene County otherwise violated Missouri campaign finance law by failing to (a) include a properly worded disclaimer on specific written communications, or (b) report certain expenditures as non-committee expenditures.
- (3) Whether Greene County resources were used to advocate for, rather than simply educate regarding, the sales tax. This includes the following sub-topics:
  - a. Whether and to what extent staff advocated for the sales tax on County time;
  - b. Whether and to what extent County resources were used to advocate for the tax;
  - c. Whether and to what extent any County employee was directed, as a condition of employment, to spend personal time or financial resources supporting the sales tax.

The remainder of this portion of the letter: (A) explains the work we have completed to date; (B) provides our estimate regarding the tasks and time that an effective investigation would entail; and (C) provides options for conducting the investigation.



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#### **A. The Firm's Initial Review**

The Firm's first tasks were to identify relevant documents and witnesses; ensure that relevant documents were preserved; and to obtain a sampling of the most relevant documents and records.

1. On Monday, **December 11, 2017**, the first business day after the Firm was retained, counsel sent document preservation letters to the two applicable custodians of records, Greene County Clerk Shane Schoeller and Greene County Sheriff Jim Arnott. Those letters asked the custodians to preserve and segregate documents with dates between June 1, 2016, and the present that related to:
  - Sales tax ballot measure
  - Invest in Greene County PAC
  - Campaign committee
  - Push card
  - Put card
  - Postcard
  - GIFs
  - Memes
  - Voter education
  - Public outreach
  - Public education
  - Messaging
  - Campaign strategy
  - Fundraising
  - Shockey Consulting Services, LLC
  - Jail tours
  - "Paid for by Greene County"
  - Missouri Ethics Commission
  - Missouri State Auditor, Nicole Galloway



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2. On **December 13, 2017**, attorneys Matthew Mueller and Edward Greim conferred with Mr. Schoeller to more precisely define the list of materials to be preserved. Schoeller identified Jess Kerr as the appropriate IT professional to assist in preserving digital materials.

Later that day, Ben Hurst conferred by phone with Jess Kerr to obtain information about the County's digital record retention posture and to give additional instructions.

- Kerr confirmed that he has created a segregated drive that is accessible by administrators only and that is exempt from the automated or routine deletion process. He further stated that he had taken steps to ensure that the drive had adequate storage.
- Kerr stated that the County uses Microsoft's remote email server and that materials there are automatically deleted after 30 days if not opened or saved. He stated that he had already run searches for and extracted emails responsive to the list of terms we provided initially and that these emails are now stored on the segregated drive.
- Hurst asked that Kerr preserve all emails existing in the Microsoft server for the certain accounts on a list we would provide.
- Kerr stated that officials retain additional PST files on the County's internal server system. He stated that the server is incrementally backed up every other day and that the County keeps a monthly backup indefinitely. Hurst asked Kerr to retain a copy of the most recent incremental backup; Kerr stated that the County had already begun to do so.
- Hurst asked Kerr to take steps to retain files (including emails) on a limited list of individual officials' computers which the Firm promised to provide. Kerr stated that the County does not perform backups of individual machines, so that steps to retain such files would require action on each individual's machine.
- Kerr stated that the County does not provide cell phones for officials or employees. He stated that he has no way to preserve phone related records.



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- Hurst asked Kerr to preserve logs of employees accessing the system, both locally and through VPNs.

Also on December 13, Hurst spoke with Mailyn Jeffries, the Human Resources Director. She stated that she would send the timecard information that she had, but that most of the employees on the 28-person list provided by the Firm were either elected officials or exempt employees and do not submit timecards.

On **December 14**, Hurst followed up with Kerr by email to confirm the previous day's conversation and provide the list of individual officers and email accounts the Firm had promised the day before. The list consisted of 28 officials and employees, which include Commissioners Bengsch, Cirtin, and Hough; other elected officials; and senior employees known to have received communications regarding the sales tax. Hurst also asked Kerr to preserve the four most recent monthly backups in the segregated drive. By phone, Kerr confirmed that he had secured the requested email accounts and had saved the most recent incremental backup of the servers in a segregated drive.

Between **December 14 and December 20**, the Firm requested, and in most cases has already received and made an initial review of,<sup>1</sup> responsive emails and documents from the Commissioners as well as the following:

- Trysta Herzog, Director of Communications and Public Engagement (emails and draft work product)
- Chris Coulter, County Administrator (emails)

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<sup>1</sup> The purpose of these specific requests was not to replace a more detailed review of preserved electronic and hard copy records, which can and should be undertaken using the records the Firm has separately asked the County to preserve; it was simply to obtain what may be the most responsive and useful documents for purposes of understanding the scope and nature of the matters to be investigated.



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- Cindy Stein, County Auditor (Sunshine Law responses and certain financial records, including checks and invoices)
- Mailyn Jeffries, Human Resources Director (timesheets and other Human Resources records)
- Justin Hill, County Treasurer (a report of county expenditures over four months)
- Shane Schoeller, County Clerk (meeting minutes from August 1, 2017 to the present)
- Sheriff Jim Arnott, through counsel (a list of employees who gave jail tours in 2016 and 2017; an outline of remarks for the tours; a list of those who attended the tours; and a personnel manual applicable to employees of the sheriff's office).

With respect to IT-related items, by Thursday, December 21, 2017, Mr. Kerr had reported as follows:

- The preservation of user-editable files on officials' local machines had been completed;
- IT was working on preserving records of any logs of employees' or officials' access to their accounts via VPN remote access.

Finally, as of Friday, December 22, 2017, the Firm is awaiting confirmation regarding the existence of records regarding the County's landline VOIP phone service. Also, the Firm sent Shockey Consulting a document preservation request on December 22, 2017, and conferred with a representative of that firm via telephone regarding its preservation obligations. Shockey confirmed in writing that it would gather, segregate, and preserve responsive documents, but the Firm has not yet collected records from Shockey.



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## **B. Estimate regarding the scope and nature of an investigation**

Based on its work over the last ten business days and its initial review of materials directly provided by County, the Firm can draw some tentative conclusions about the factual issues that should be investigated and the steps necessary to make a thorough and competent inquiry.

### **1. Factual issues**

Several emails, some of which have been made public, were circulated among commissioners Hough, Cirtin, and Bengsch, as well as other officials and employees, regarding the sales tax election. The topics of those emails range from fundraising to campaign organization to messaging and public communications. With respect to these emails and other related verbal communications, the following questions are relevant:

- (a) What is the relevant set of written and oral communications?
- (b) Of this set, how many occurred on County time or were sent with the aid of County resources, even if the "resources" involve only a County email account accessed using a non-County server, or County computer hardware used during non-County time?
- (c) How many communications were preparations for later public communications that constituted advocacy, rather than education, to the extent this distinction is meaningful under § 115.646, RSMo., and Missouri Ethics Commission interpretive authority?
- (d) How many communications, even if they are preparations for later public communications that constituted advocacy, related to campaign activity conducted by officeholders in their individual capacities, or in their capacities as persons who controlled a Missouri campaign committee?

Second, records exist of specific public communications that were either disseminated or were prepared in draft form. Again, a two-part inquiry is necessary. To





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what extent were the communications actually disseminated or prepared using County resources, and to what extent were the communications or putative communications actually “advocacy” rather than “education”?

Third, some communications between Commissioners or supervisory officials, on the one hand, and staff, on the other, may have led staff to believe that their decisions regarding off-duty political support for the sales tax could affect the conditions of their employment. The questions here are what communications about off-duty political support actually occurred; whether the involved employees in fact harbored a subjective belief that their off-duty political support would affect their workplace conditions of employment; whether the communications are objectively susceptible to the meaning the employees impart to them; and whether any employees’ conditions of employment were actually affected.

## **2. Investigative steps**

We estimate that it will be necessary to conduct a minimum of 12, and as many as 25, witness interviews of varying length. This would include at a minimum Commissioners Hough, Cirtin, and Bengsch; senior officials Herzog; Coulter; Stein; Jeffries; Hill; and Schoeller; Sheriff Arnott; a representative of the Shockey firm; and senior staff who worked with these individuals or who otherwise worked on the matters under investigation. An investigator should also interview citizens who have knowledge of the underlying allegations. For example, this could include participants in the jail tours.

Were the Firm to conduct these interviews, it would follow its usual practice of assigning at least one attorney to plan the interview and ask questions, accompanied by a retired agent of the Federal Bureau of Investigation who has substantial expertise in interviewing witnesses and providing reports of the same. These reports are then reviewed, finalized, and compiled for purposes of preparing a final written report should the client request it.



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With respect to records, we currently believe that we may already have many of the most important contemporaneous communications. However, a thorough investigation will involve a complete review of certain collections, and keyword searches of other collections that contain a large volume of material, only a very small portion of which will turn out to be relevant. Other records that contain data, such as timecard and log-in information, can also be cross-referenced with emails and other materials. Generally, these steps would be largely completed before most of the interviews would begin.

As we conceive of this investigation, it would be substantial and thorough, although not among the most elaborate or time-consuming inquiries that can be necessary with respect to large public or private entities. Accounting for work schedules of potential interviewees and the time needed to review most of the records in advance of interviews, we believe that the work could be completed within approximately ten weeks after initial authorization.

### **C. Options for completing the investigation**

Greene County has two primary options for completing the investigation. It could retain the Firm or another law firm to complete the investigation, or alternatively, it could invite the State Auditor to investigate. At any time, other entities could take concrete steps to investigate some of all of the subject matter of this review. This includes the Missouri Ethics Commission (*see* page 14, *infra*), the Missouri Secretary of State, or law enforcement. The discussion below addresses each option in terms of competency, cost, and timing.

One other consideration—disclosure and confidentiality—may not be an essential factor at this stage. The Commission can certainly choose to disclose the entirety or any part of an investigation, from ultimate conclusions and recommendations to the facts that were uncovered. It can also choose to use the



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investigation for purposes of litigation; to implement policy recommendations; or to uncover facts for sharing with responsible authorities such as the Secretary of State or the Missouri Ethics Commission. Depending on the Commission's intent and other factors, the investigation and associated attorney work product can also remain confidential.

The Auditor's report must be public as a matter of law, but the Auditor is required to respect the confidentiality of materials from the auditee the office examined and is prohibited from revealing information secured in the course of the audit, other than that information which is permitted in her final audit report. However, the Auditor is required to report to the appropriate official facts in her possession which pertain to the apparent violation of penal statutes or apparent instances of malfeasance, misfeasance, or nonfeasance by an officer or employee.

Furthermore, while the Auditor must protect the identities of whistleblowers who report to the Auditor's office, there is no freestanding requirement of confidentiality for those individuals' names to the extent they must provide evidence in related proceedings or investigations. For all of these reasons, while disclosure and confidentiality rules are important in this area, they are less important to the choice of an investigator/auditor than some may suppose.

### **1. Law firm investigation**

Were this Firm or another law firm to complete the investigation, it would likely follow the course outlined in Section B, above. The Firm, or other law firms, will charge either an hourly rate, a fixed rate, or some combination thereof for an investigation of this type. Typically, a private firm can work more quickly than a governmental entity. To the extent any entity or person refuses to provide documents or information, the Firm lacks subpoena power—a power the Auditor has. However, our experience to date does not indicate any resistance or reluctance to preserve and protect documents, and in



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our estimate it is unlikely that subpoenas would be needed for this particular investigation.

Additionally, the Firm does not conceive of this inquiry as a financial or performance audit. It is not primarily an inquiry into the existence or observance of financial or operational controls among county administrators. Rather, it is a factual and legal inquiry that seeks to (1) identify the recent actions and communications of county officials; (2) ascertain specific facts about those actions that are relevant to various standards under Missouri's campaign finance law; (3) draw legal conclusions as a result of a factual-legal analysis; and (4) make any appropriate recommendations. Therefore, the inquiry called for here is more akin to a legal investigation than an audit.

In that legal investigation, the Firm would report its results to the County to the extent and in the format requested by the County. The findings and conclusions of the report could then be used and disclosed by the County in its discretion. Disclosure could be made to the public at large, or to officials who have subject matter expertise in election and campaign finance, such as the Secretary of State or Missouri Ethics Commission.

## **2. Auditor Nicole Galloway's offer to "audit"**

State Auditor Nicole Galloway has publicly urged the Commissioners to authorize her office to perform an audit. This call has been documented in one letter, dated December 6, 2017. The Firm has reviewed this letter. Due to the paucity of other written communications, the Firm has also reviewed the multiple press releases and comments to the media the Auditor has made about the subject of the investigation. These statements include the following:<sup>2</sup>

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<sup>2</sup> These statements appeared in the Springfield News-Leader on December 11, 2017. The most recent version was corrected on December 11, 2017, and on December 22, 2017, could be located at the following link: <http://www.news-leader.com/story/news/politics/2017/12/11/greene-county-private-law-firm-public-auditor/935527001/>



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- “Our obligation is to Missourians...A private firm’s obligation would be to their client—the commissioners.”
- By hiring the Firm to make an initial review and recommendation, and by not immediately inviting Galloway to investigate, “[t]his action does not indicate interest in pursuing a public, independent review into the troubling allegations of the misuse of public resources.”
- An assertion that the State Auditor “is the best entity to conduct an independent investigation into the allegations” because it “has extensive experience investigating fraud and corruption within public entities.”
- A statement that the Auditor’s office is the “only entity with the legal requirement to protect whistleblowers,” and a suggestion to the general public that whistleblowers may not “want to come forward” as part of the Firm’s ongoing review.<sup>3</sup>

On December 15, 2017, news media unexpectedly reported that the Auditor had publicly announced that an “audit” would be performed for “free.” The Firm was unable to locate any written communication to the Commissioners—or any direct communication of any kind—explaining the terms or consequences of this offer, or explaining the legal authority under which it was made. For this reason, the Firm contacted Paul Harper, counsel to the Auditor, on December 21, 2017.

Harper responded by email with two examples in which the Auditor had conducted “limited scope” audits of the Cass County Tax Increment Financing Commission (Report No. 2016-042) and the City of Viburnum (Report No. 2017-043). The Firm assumes based on this response, but has not confirmed, that the Auditor

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<sup>3</sup> To be clear, the Firm is not prepared to express any view as to whether the Auditor’s public statements have interfered with the Firm’s initial review, and the Firm has no knowledge that whistleblowers or others with information have withheld information or cooperation from the Firm due to the Auditor’s comments.



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performed both limited scope audits for free. Harper did confirm that “[i]f the commission accepts the auditor’s request from the letter dated December 6, 2017, this office will not bill the county.”

The Firm also asked Harper to confirm the legal authority for this offer by citing the rule, statute, or constitutional provision that allows the Auditor to satisfy the cost of the audit from its appropriations from general revenue. He responded, “The Auditor is given discretion to perform her duties under the Missouri Constitution, Chapter 29 [this is a statutory section], and legislative appropriations.”

Our own limited review to date casts some doubt on this assertion. Based on the plain language of the applicable statutes, as well as two opinions from the Attorney General’s Office interpreting those statutes, the county that is audited “shall” pay for the costs of that audit. *See* § 50.057, RSMo. According to the Attorney General’s Office, regardless of whether an audit is conducted at the request of the County Commission or in response to a citizen petition, “the county must pay for the cost of the audit.” Op. Atty. Gen. No. 293, Holman, 6-15-67. “[I]f an audit is made by the State Auditor under the provisions of either Section 29.230 or Section 50.055 . . . the plain intent of both statutes is that the county requesting the audit is obligated for the entire cost incurred by the State Auditor in making the audit.” Op. Atty. Gen. No. 327, Holman, 7-20-67. Based on this review, it is at best unclear whether the Auditor has authority to audit the County at no cost. It is even less clear who will bear the burden of paying for the audit if the County is not charged.

In view of this uncertainty, the Firm asked Harper to estimate the Auditor’s bill in the event Auditor Galloway lacks authority to transfer the cost of the audit to the rest of the state by pulling funds from its general revenue appropriation or from other unknown sources. Harper did not provide an estimate, and repeated that the “office will not bill the county.”



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The Firm also asked Harper about the start time and estimated completion of the audit. He responded: "This office can commit to beginning the audit in January. The time to perform the audit will depend on a number of factors and I cannot commit to a specific end date at this time."

The Firm has also considered the degree to which the Auditor does, in fact, have representative experience in this area. The Firm first reviewed the two matters cited by Mr. Harper. In the Cass County matter, the Auditor investigated concerns that local taxing districts were not receiving enough revenue from TIF districts due to errors in reporting local assessments. In the Viburnum matter, which was primarily investigated by law enforcement, the Auditor reviewed allegations that certain municipal fees and bills were not properly recorded or paid, where several municipal functions were performed by a single employee and there was no system in place to check for criminal fraud. In the Firm's view, neither of these matters bears a reasonable relationship to the substantive areas of law, or the type of investigation, at issue here.

Further, in reviewing the public audit reports issued by Auditor Galloway during her tenure (as well as those recently conducted by her predecessors), the Firm could not identify any matter in which the Auditor performed a factual and legal investigation on matters involving campaign activity, or compliance with laws regarding campaign finance and political campaigning in proximity to the workplace. That is not surprising, because the State Auditor's role is typically to conduct either a financial or performance audit. An investigation into the legal and factual issues involved in this case, primarily related to campaign finance law and § 115.646, does not fit squarely into either of these well-defined roles. Indeed, an "audit" pertaining to the subject matter of the complaint is unusual, if not unprecedented. It is generally, if not exclusively, the purview of the Missouri Ethics Commission to investigate these types of allegations.

The Auditor's likely response, as expressed in her spokesperson's comments to news media while the Commission was deliberating, would be that she is inherently



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qualified based upon her public pre-investigation conclusion that this matter involves “fraud” and “corruption,” and her office has “extensive experience investigating fraud and corruption within public entities.” The Commission may well wish to consider the merits of this more generalized claim.

In short, the Firm concludes that there is at least some chance that the Auditor’s review would be free, as the office may keep its promise not to “bill” the County for this particular matter, and no taxpayer or official may challenge that decision. That would be a significant reason to forego a legal investigation and rely instead on the Auditor’s “limited purpose audit.” If the Auditor is required to charge the County, however, there is no way of knowing the cost, as the Auditor will not provide an estimate. The Auditor seems to have committed to beginning the audit in January, but will not provide an estimated end date. Finally, the Commissioners will want to carefully review the degree of the Auditor’s competence to achieve the Commission’s goals of a complete and full investigation, given her numerous pre-audit public statements and opinions, and given the availability of publicly available information which indicates the kinds of matters she typically handles.

**Recommendation regarding response to the Missouri Ethics Commission and State Auditor (Engagement Point 1)**

With respect to point (1), it is our conclusion that this Firm should not make a response to the Missouri Ethics Commission on behalf of Greene County itself. Rather, the individual Commissioners, who were the addressees of the MEC’s correspondence, should respond in their official capacities as they see fit through their own counsel. It is our tentative opinion that it would be appropriate for each Commissioner to be represented by independent counsel.

If the Commissioners desire to commit this investigation to the Auditor as a “limited scope audit,” we respectfully suggest that a scope of work be memorialized in





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a written agreement with that office before work begins on the project.<sup>4</sup> We are willing to undertake that task.

### Conclusion

In the past two weeks, this Firm has acted to identify and locate responsive records, which it understands have been preserved and segregated by the County. It has also identified the major witnesses. The Firm believes the areas of factual inquiry fall into three categories, and will likely require a close review of documents and somewhere between 12 and 25 witness interviews.

If a law firm handles this matter, it would likely take approximately 10 weeks to complete the review. A firm will likely use attorneys who are conversant with Missouri campaign finance law and investigations of public entities; the Auditor's office would certainly have staff who handle public investigations, although the timing of an Auditor review is much less clear. Further, there is at least a possibility that no authority would challenge the Auditor's decision not to collect the costs of the audit from the County and to instead charge it to her appropriations from the state's general revenue, the plain text of the law notwithstanding. A free audit, if it stands, would save the County substantial expense in legal fees to private law firms. All of these considerations must be balanced, there is no one correct answer, and the Firm believes the Commission should ultimately choose between an Auditor "limited scope audit" and a law firm investigation and legal analysis based on considerations of competency, cost, and timing.

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<sup>4</sup> It is unclear whether such an agreement would be enforceable should the Auditor later wish to investigate other areas, some of which may fall outside of the Auditor's promise not to "bill" for the "limited scope audit."



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It was our pleasure to work on this matter and prepare this brief review. Please let us know if you have further questions, and we are happy to meet with you in person to further discuss our analysis.

Sincerely,

Edward D. Greim