

**CONFIDENTIAL: Attorney Client Communication**

**DEPARTMENT OF LAW**

January 12, 2016

**TO:** Paula Hicks-Hudson, Mayor

**THROUGH:** Mark Sobczak, Chief of Staff *MS 1/13/16*

**FROM:** Adam W. Loukx, Director of Law @L

**SUBJECT:** Smoke Detector Trust Fund - Findings

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FILE COPY

On behalf of the Mayor and pursuant to her authority as set forth in of Section 71 of the Charter, the Law Department has undertaken a comprehensive review of the history of the "Smoke Detector Trust Fund" ("Fund"). While this investigation was prompted by allegations that improper expenditures were made from the Fund, the investigation was not limited to addressing those allegations. Rather, the investigation attempted to undertake a comprehensive look at the history of the fund and its uses. Because available records may not yet accurately provide a complete history of the Fund, I am issuing this report as **preliminary**. If other records are recovered and/or made available, amendments to this report may be required.

**Summary of Findings**

Based upon items reviewed, I make the following preliminary observations:

- Better purchasing controls should be in place;
- Some expenditures from the Fund stretch permissible uses to the limit;
- Alarm fines should more properly be placed in the General Fund as they are definitionally not "trust" funds.

**Summary of Investigation**

**A. Items Reviewed**

For the most part, the investigation of the Fund concentrated upon reviewing available income and expenditure records kept by the Department of Finance and the Toledo Fire and Rescue Department ("TFRD"). The records included, where available, receipts for reimbursed travel expenditures, receipts and purchase orders for equipment and supplies, receipts and brochures for educational and other seminars, grant documents, etc. A CD-

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R disc containing most reviewed documentation is attached to this report. The documents have been redacted and numbered. Any reference in this report to a document on the disc will refer to the page number.

Unfortunately, while records from 2010 forward appear to be fairly complete, back-up records for the City's pre-SAP ROSS system have not been as easily retrievable.<sup>1</sup> Moreover, some earlier records from the 2002-2010 period have been destroyed in accordance with the applicable document retention policies. (See, for instance, Disc pp 223 *et. seq.*)

## B. History of the Fund

The "Smoke Detector Trust Fund" was formally created by Ordinance 219-02, although the Fund had existed *de facto* since the 1980's.<sup>2</sup> Ordinance 219-02 provided in part, as follows:

" That the Smoke Detector Trust Fund shall be under the management of the Fire Chief of the Department of Fire and Rescue Operations. To be sure all expenditures are made in accordance with current purchasing procedures of the City of Toledo and the expenditure is in furtherance of the goals and objectives of the Smoke Detector Trust Fund, such Fire Chief shall review Toledo Municipal Code Section 190.04 the stated purpose of any enabling legislation and the purpose of the Smoke Detector trust Fund is to provide funding for community fire prevention programs, such as providing smoke detectors and other alarm systems, residential fire safety sprinkler systems and public education materials. Said Fire Chief shall then forward the proper voucher or vouchers therefor [sic] signed by the Fire Chief to the Director of Finance for approval."

While putatively created under the auspices of Toledo Municipal Code ("TMC") Chapter 190, in addition to "receiving funds from private donations and fees from the sprinkler seminar registrations," it appears that much of the Fund income has derived from other sources. Most significantly, since 2003 the Fund has received fire false alarm fine monies collected pursuant to TMC Chapter 511.<sup>3</sup> Additionally, it appears that the proceeds of at least one grant was deposited into the Fund. (See, for instance, Ord. 778-03.<sup>4</sup>) At any

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<sup>1</sup> With the help of the City Auditor, some degree of Fund activity history was gleaned from ROSS. However, the retrievable history lacks the supporting documentation of more recent records.

<sup>2</sup> See 2002 Memoranda from Auditor Hiskey for more pre-2002 history of the Fund. Disc pp. 001-004. Also informative, see "Smoke Detector Trust Fund" grant description. Disc. pp 311-312.

<sup>3</sup> TMC § 511.03(a) provides, in part, " All fees collected for false fire alarms shall be deposited in the Smoke Detector Trust Fund (Accounting Code 90-5300-T34201)." This provision was adopted in 2003 by Ordinance 398-03.

<sup>4</sup> Ord. 778-03 "authorize[d] the Mayor to accept a grant from the Federal Emergency Agency (FEMA) in the amount of \$70,000 for the purchase and installation of smoke detectors with lithium batteries in residential homes within the City of Toledo."

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rate, for the periods in which the City still has available records, it appears that by far and away the biggest source of Fund Revenue has been false alarm fees. Disc pp. 235-310.<sup>5</sup>

Available records suggest that the Fund was initially used strictly for the stated purposes set out in Ord. 219-02. However, in or around 2010 the Fund, which was growing more robust from the influx of fine money, began getting used in broader ways. The Fund began, for instance, to pay for travel and continuing education expenses that had previously been borne by the General Fund. This shift was not coincidental as the City administration was pushing all departments to find other payment sources to relieve the pressure on the General Fund. It should be noted, however, that the Fund was still predominantly employed for purchasing smoke detectors and other purposes consistent with the original ordinance, Ord. 219-02.

In 2012 the Fund also began to be used to pay certain expenses associated departmental accreditation. See, for instance, Disc. pp 361, 364, 367, 433 etc.. These expenses included the reimbursement of per diems, hotel costs, etc. of member of the accreditation team. Expenditures were approved by the Chief<sup>6</sup>, submitted to the Department of Finance and paid.

On August 12, 2014 Council adopted Ordinance 344-14, "Amending Ordinance 219-02, by repealing Section 3 and enacting a new Section 3 in order to clarify the purpose of the trust; and declaring an emergency." Ord. 344-14 specifically expanded the permissible uses of fund monies to include "provid[ing] funding for community fire prevention programs, accreditation expenditures, officer professional and management education, and public education materials, and to provide smoke detectors and other alarm systems to citizens of Toledo" [Emphasis added.]<sup>7</sup>

TFRD sought Council authorization on some occasions for expenditures in excess of \$10,000, but there has not been any special authorizing legislation for these expenditures since 2008.<sup>8</sup> While the lack of authorizing ordinances could reflect an absence of expenditures to any single entity in an amount in excess of \$10,000, records suggest otherwise. For instance, so far in 2015 over \$29,000 appears to have been spent on smoke detectors at Lowe's. Similarly, over \$15,000 was spent at Lowe's in 2014, over \$15,000 was spent at Lowe's in 2013 and over \$17,000 was paid to MFS Supply in 2011. (See Disc pp 316-317.) Smoke detector purchases are, however, covered by the "commodities ordinance." (See, for instance, Ord. 51-14.) It is therefore apparent that the smoke detector purchases were made with proper authorization.

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<sup>5</sup>Private donations are still made to the Fund. For instance, a large donation of \$10,000 was deposited on March 10, 2011. It has been claimed that the donation was for purposes of paying educational expenses. I have not been able to find documentation that confirms this.

<sup>6</sup>It should be noted that many of the expenditures referenced predate the current Chief's tenure.

<sup>7</sup>The changes to purpose effectuated by Ord. 344-14 were subsequently repealed by Council in Ord. 552-15.

<sup>8</sup>See Ordinances 301-03, 375-07, 007-08 and 394-08. Of some note as well is Ordinance 107-14 in which Council approved expenditure of \$11,500 out of the Fund to pay costs associated with the emergency warning siren system.

Currently the Fund has a balance of \$110,231.20 and all funds are appropriated as the account was set up in the system as "revenue increasing budget". In other words, revenues received increase the appropriation and unspent amounts carry over from year to year outside of the annual appropriation ordinance.

### Findings

#### **I. Better purchasing controls should be in place.**

It is apparent from the review of available records that more effective checks and balances should be in place to prevent expenditures that are inconsistent with Fund purposes.

For instance, expenditures not related to purposes set forth in Ord. 219-02, provision of "funding for community fire prevention programs, such as providing smoke detectors and other alarm systems, residential fire safety sprinkler systems and public education materials," should not have been approved prior to the passage of Ord. 344-14. In other words, despite arguments that the "original intent" of the Fund was greater than that set forth in Ord. 219-02, monies could only properly be used for the authorized purpose set forth in valid legislation. Expenditures for officer education, travel and related to accreditation should not have been approved prior to the August 2014 passage of Ord. 344-14.

Nor does the ultimate passage of Ord. 344-14 necessarily ratify improper expenditures that occurred prior to passage of the Ordinance. Legislation, such as Ord. 344-14, set forth the "public purpose" justifying expenditure of public funds. Expenditure of public funds must be consistent with an existent legislative act rather than one that is adopted after the expenditure. (See, OAG 82-006.) In other words, as a general rule, legislation can only justify prospective purchases.

Additionally, a source of funds, albeit a somewhat minor source of funds in recent years, was private donations. A person or entity making a private donation should have been able to comfortably believe that their donation would be used for the purpose stated.

Here, it is difficult to realistically suggest that "accreditation expenditures, officer professional and management education" were authorized by Ordinance 219-02. Moreover, there is no ambiguity in the Ordinance language that would reasonably allow a person to think that such expenditures were consistent with the Fund's purpose. Accordingly, expenditures on those items prior to the August 2014 passage of Ord. 344-14 were not proper and payments should have been disallowed.

However, it should not be assumed that simply because an expense was not properly attributable to the Fund that the expense was not for a legitimate public purpose.

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Clearly, for instance, officer education can be a justifiable expense. However, prior to the adoption of Ord. 344-14, these types of educational expenses should have been paid for by the General Fund (or, where applicable, by a grant).

## **II. Some expenditures from the Fund stretch the concept of permissible uses to the limit.**

Some expenditures from the Fund stretch even the most expansive interpretation of Fund purpose. The most obvious example of this is the expenditure of over seven hundred dollars on a dinner at the Final Cut Steak House in 2013. Disc, p.461.

The purpose of the dinner, from a business perspective, was not unusual or sinister. Essentially, it is understood that various Chief level members of the TFRD wanted to host members of the TRFD accreditation team to a dinner and showcase Toledo's new casino. Moreover, the Deputy Mayor at the time is alleged to have known of the meal and the fact that it would be paid for by the Fund.

Certainly, in private business, this sort of "wining and dining" is *de rigueur*. However, the City of Toledo is not a private business. More importantly, however, the dinner expenditure could not be reconciled with the unambiguous Fund purpose that was in place in 2013 and which did not include accreditation expenses. Even, if the argument can be made that the subsequent legislation, Ord. 344-14, ratified previous accreditation expenditures (note the discussion above), it would be a stretch to say that the dinner was a necessary accreditation expenditure.<sup>9</sup>

Finally, use of Fund monies to pay for a luxury meal seems to have been a generally ill-conceived idea. In other words, it looks bad. While the necessity of entertaining important guests may, at some level, seem justifiable, use of a Fund that purports to be held in trust for specific purposes was a bad idea.

## **III. Alarm fines should not be placed in "trust" as they are general fund revenues.**

The Administration and Council should reconsider TMC § 511.03 to the extent that Section authorizes routing fine money to the Fund.

Per TMC § 511.03(a), "[a]ll fees collected for false fire alarms shall be deposited in the Smoke Detector Trust Fund (Accounting Code 90-5300-T34201)." However, the fine

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<sup>9</sup> Allegations have been made suggesting that the Fund was used to purchase alcohol. Clearly, public monies cannot be expended for alcoholic beverages (see, Auditor of State Bulletin 2014-003: "the use of public funds to purchase alcoholic beverages will be considered arbitrary and incorrect"). However, the records, while sometimes showing alcohol was consumed, do not support the allegation that public funds were used to purchase the beverages. Moreover, the documents show that the alcohol purchase at the dinner in issue were paid by private funds. Disc. p 228.

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proceeds are not "assets held by the City in a trustee capacity for individuals, private organizations, other governments and/or other funds" as required by TMC Chapter 190. Nor are the fine proceeds "come from private donations and fees from the sprinkler seminar registrations" as contemplated when the Fund was formally created. See, Ord. 219-02.

Rather, a purpose of the false alarm fees is to reimburse the City for the costs of unnecessary emergency responses. Because the General Fund paid the costs associated with the unnecessary response, the General Fund would, in absence of TMC § 511.03, receive the fine money.

Because the fine money should be credited to the General Fund it should be subject to Charter provisions governing annual appropriations.

The review of the Fund documentation and related discussions reflect, to some degree, systemic issues involving so-called "trusts." The purpose of a trust as set forth in TMC Chapter 190 is frustrated when general revenues are earmarked to trust accounts.

#### Conclusion

TFRD rightly points out that the "process of using the Trust Fund for multiple purposes was implemented prior to [the current] chief." (Disc, p. 332.) There is ample evidence to suggest that the Fund was used more expansively as the General Fund became more challenged and as the Fund became more robust. Moreover, the current chief did submit legislation to address the expanded role of the Fund, albeit after many expenditures had been made. Nevertheless, from a legal standpoint, the expenditures from the Fund should have been restricted to uses allowable by effective legislation at the time of those expenditures.