



OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

VIA E-MAIL and U.S. MAIL

September 17, 2014

The Honorable Jason Barickman, Co-Chair
The Honorable Frank J. Mautino, Co-Chair
c/o Jane Stricklin, Executive Director
Legislative Audit Commission
622 Stratton Building
Springfield, IL 62706

RECEIVED
SEP 23 2014
BY: _____

Dear Senator Barickman and Representative Mautino:

This letter is in response to the Legislative Audit Commission's ("LAC") September 11, 2014 letter request, asking the Office of the Governor to respond to 14 questions. Those responses are below:

- (1) How many emails has the Governor's Office withheld on a claim of attorney-client privilege from the group of emails/documents sent to the Commission in July?**

As requested and as addressed below, per the LAC's request, we are currently working on a privilege log. We will number each protected document on the log, to provide a total number of documents withheld.

- (2) Please confirm that you are not withholding any responsive documents based on any other basis.**

We are asserting attorney-client privilege. We will note in our privilege log whether any additional privileges (e.g. attorney work product) apply.

(3) Does Toni Irving possess documents that the Governor's Office does not currently possess?

Ms. Irving does not have any State-maintained electronic documents that the State does not currently possess. The State does not know what, if any, hard copy documents Ms. Irving possesses beyond the 170 pages (many of which are copies of State emails and attachments to the same) that were produced by her attorney and posted on the LAC's website.

(4) Does the Governor's Office or CMS possess emails of the following former employees: Jack Lavin, Malcolm Weems, Toni Irving, William "Billy" Ocasio, Reshma Desai, Andy Ross, or Warren Ribley? If yes, did the Governor's Office search these emails in response to the LAC's request for documents?

CMS maintains the email systems for the State offices, departments, and authorities that employed the above current and former State employees (i.e. the Office of the Governor, the Office of Management and Budget, the Department of Central Management Services, the Illinois Violence Prevention Authority (since abolished), and the Department of Commerce and Economic Opportunity).

As detailed in the attached July 11, 2014 Letter, detailing the Office of the Governor's production, as with any document request that comes into the Office of the Governor, we searched Governor's Office emails. See Exhibit A. Thus, the Office of the Governor's production included non-privileged, responsive emails on the Office of the Governor's email system. As with any other document request, whether it be for litigation, FOIA, or an administrative proceeding, such as this one, the Governor's Office searches and is responsible for its own documents and not for those of other State entities.

(5) In the August 27, 2014 letter to the Commission, you indicated that after reviewing the emails that Mr. King provided, you sent them back to him divided into four categories. How many emails were in each category?

As detailed in Mr. King's August 14, 2014 letter, the Office of the Governor provided Mr. King with a list of attorney names. He then provided our Office with those emails to review for privilege. The results and numbers for that review are below. The below reflect the total number of emails that Mr. King provided. His August 14, 2014 letter refers to "1,394 potentially privileged emails," however it is our understanding that number includes both emails and attachments to those emails.

- (a) Responsive, Non-Privileged: 173
- (b) Responsive, Privileged: 238
- (c) Non-Responsive, Non-Privileged: 186
- (d) Non-Responsive, Privileged: 7

- (6) By September 24, 2014, please provide a privilege log for all documents being withheld on a claim of privilege from the file sent to the LAC, and a privilege log for all documents being withheld on a claim of privilege from the Irving file.**

We are currently working on a privilege log for both the Office of the Governor's and Ms. Irving's production to the LAC. While we will use our best efforts to complete both logs by September 24, 2014, putting together a privilege log is a time-intensive process. We will notify the LAC should we need additional time to complete either log. We will first prioritize the log for the Office of the Governor.

- (7) Please provide legal support for why you believe the Governor's Office did not waive the attorney-client privilege by allowing Toni Irving to take the documents when leaving her position with the Office.**

Please see the attached September 12, 2014 letter to Jonathan King, Ms. Irving's attorney, addressing this issue. See Exhibit B.

- (8) Who gave Toni Irving the documents?**

Ms. Irving received her State of Illinois emails and the State of Illinois documents from her "P:" drive from Jose Ibarra, the Office of the Governor's Chicago Office Manager.

- (9) What did Toni Irving ask the IT department to give her, and how and in what format was it provided?**

Ms. Irving was provided with disks with her State of Illinois emails, in PST format, and with State of Illinois documents from her "P:" drive.

- (10) Mr. King has asserted the [sic.] two of the nine PST files Toni Irving obtained from the Governor's Office appear to be unreadable. Can the IT department in the Governor's Office reproduce the documents that were on the unreadable PST files?**

CMS, which maintains the email systems for many State offices, departments, and authorities, including the Office of the Governor, can reproduce the files Toni Irving obtained from the Governor's Office. CMS can also attempt to repair the two PST files that appear to be unreadable. However, it is worth noting, as to Ms. Irving's State of Illinois emails, that these are the exact same State of Illinois emails that the Office of the Governor searched and produced from, as reflected in its July 11, 2014 production letter. See Exhibit A.

(11) Who at the Governor's Office knew at the time Toni Irving received the documents that she was being given those documents?

To the best of our knowledge, the following people were aware that Ms. Irving was being provided with the disks, described above: Tony Rodriguez, IT Coordinator; Jose Ibarra, Chicago Office Manager; Steve Humphrey, Fiscal Administrator.

(12) If you did not know at the time, when did you learn that Toni Irving received documents?

To the best of my recollection, I became aware that Ms. Irving received the disks, described above, in late June 2014, when I was first contacted by Ms. Irving's attorney, Jonathan King.

(13) Did anyone in the Governor's Office instruct Toni Irving at any time regarding how to handle/protect the documents?


Not to our knowledge.

(14) Did the Governor's Office maintain its own set of the documents Toni Irving took?

No.

As stated, above, we are working diligently on completing the privilege logs requested by the LAC and will notify the LAC should we require additional time to complete that time-intensive process.

Sincerely,



John F. Schomberg
General Counsel

Enclosures

Exhibit A



OFFICE OF THE GOVERNOR

JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

VIA HAND DELIVERY

July 11, 2014

The Honorable Jason Barickman, Co-Chair
The Honorable Frank J. Mautino, Co-Chair
c/o Jane Stricklin, Executive Director
Legislative Audit Commission
622 Stratton Building
Springfield, IL 62706

Dear Senator Barickman and Representative Mautino:

On June 27, 2014, you sent a June 25, 2014 letter request to the Office of the Governor for:

Any inter-agency and third party communications (including emails, letters, and memoranda) relating to the planning, strategy, development, implantation [*sic*], management, organization, and operation of the Neighborhood Recovery Initiative (including any predecessor entities relevant to the Audit) that were sent or received by the following persons from March 2010 through September 2012: Jack Lavin, Malcolm Weems, Toni Irving, William (a/k/a "Billy") Ocasio, Reshma Desai, Andy Ross, and Warren Ribley.

Enclosed is a disc of responsive, non-privileged emails (including attachments and calendar invites) from Office of the Governor emails. More specifically, this production reflects the responsive, non-privileged emails from the following searches:

- (1) All Governor's Office emails (including attachments and calendar invites):
 - (a) to, from, or copying Jack Lavin, Malcolm Weems, Toni Irving, William (a/k/a "Billy") Ocasio, Reshma Desai, Andy Ross, and Warren Ribley,
 - (b) dating from March 1, 2010 through September 30, 2012, and
 - (c) containing any of the following terms: "NRI" or "Neighborhood Recovery Initiative"

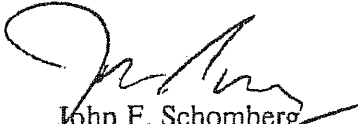
- (2) All Office of the Governor emails (including attachments, and calendar invites):
- (a) to, from, or copying Jack Lavin, Malcolm Weems, Toni Irving, William (a/k/a "Billy") Ocasio, Reshma Desai, Andy Ross, and Warren Ribley,
 - (b) dating from March 1, 2010 through October 5, 2010, and
 - (c) containing any of the following terms: "Violence Prevention Initiative," "VP initiative," "Save Our Youth," "Neighborhood Recovery Plan," "Safe Communities Initiative," "Mentoring Jobs Plus," and "Mentoring Plus Jobs."

We based the second search, above, regarding pre-Neighborhood Recovery Initiative terms, on communications we had with Legislative Audit Commission Executive Director Jane Stricklin.

In all, there are more than 2000 emails and calendar invites included in this production. This number does not include the numerous attachments that are also being produced.

If you have any questions, please feel free to contact me at 312-814-2121.

Sincerely,



John F. Schomberg
General Counsel

Enclosure

Exhibit B



OFFICE OF THE GOVERNOR

JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

VIA E-MAIL and U.S. MAIL

September 12, 2014

Jonathan King, Esq.
DLA Piper LLP
203 N. LaSalle St, Suite 1900
Chicago, IL 60601

Dear Mr. King,

You have recently raised questions regarding our respective attorney obligations as to the State of Illinois emails, containing protected attorney-client communications, that are in former State employee, Toni Irving's, possession. Likewise, you have asked for any law providing guidance in this area.

In short, as further detailed below, the privilege attached to State of Illinois emails is only the State of Illinois' to assert and only the State of Illinois' to waive. Likewise, under the Illinois Rules of Professional Conduct, attorneys can only disclose privileged information if authorized or required. The Rules of Professional Conduct also prohibit unwarranted intrusions into privileged relationships such as that between the State of Illinois and its attorneys.

As you know, the attorney-client privilege is established in both Illinois Supreme Court case law and in the Illinois Rules of Professional Conduct. "The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 585 (2000); Illinois Rules of Professional Conduct, § 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client"). Without the attorney-client privilege, courts are concerned about the chilling effect it would have on clients ever seeking legal advice and, in the absence of consulting with an attorney, the concern that out of legal ignorance, clients could fail to follow the law.

As stated by the Illinois Supreme Court, "people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." Illinois Rules of Professional Conduct, Preamble, ¶ 8. The concept of protecting attorney-client communication has not only been long-embraced by Illinois' state courts, but by the U.S. Supreme Court, as well, stating that the attorney-client privilege is "to encourage full and frank

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

“[T]he attorney-client privilege extends to communication of a government organization.” Restatement (Third) of Law Governing Lawyers, § 74 (2000); In re Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 291 (7th Cir. 2002) (“in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client.”); Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612, 621 (7th Cir. 2010) (“The public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law.”). Just as with private organizations, that privilege “runs to the office, not to the employees in that office.” *Id.* at 294. Thus, “when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well.” Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985). As a consequence, “[d]isplaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.” *Id.* at 349.

Therefore, the attorney-client privilege attached to the protected State of Illinois attorney-client communications in Ms. Irving’s possession is only the State of Illinois’ to assert or waive. It is not up to former managers, such as Ms. Irving, or their attorneys to assert, to not assert, or to waive privilege. In fact, as detailed above, the case law says quite the opposite and the Rules of Professional Conduct prohibit the same.

Pursuant to the Illinois Rules of Professional Conduct, as to privileged documents, “A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.” Illinois Rules of Professional Conduct, § 1.6, Comment 3. Likewise, a lawyer may not “disregard the rights of third persons,” including “unwarranted intrusions into privileged relationships.” *Id.*, § 4.4, Comment 1.

Although, as detailed above, whether a document is privileged is something to be determined by the State of Illinois, which holds that privilege, please note that in the government context, a client is not necessarily limited to just an agency. In fact, a client can be an entire branch (e.g. the executive branch) of government or the government as a whole. See Illinois Rules of Professional Conduct, § 1.13, Comment 3 (“although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.”). Additionally, even if one were to interpret that a client was limited to a particular agency—which is hardly the case here, where the Office of the Governor manages its agencies and the now-abolished Illinois Violence Prevention Authority was co-headed by the Department of Public Health and the Office of the Attorney General—then privileged communications would still be protected under the common legal interest doctrine, under which attorney-client privilege attaches to communications between third parties who share a common

September 12, 2014

Page 3 of 3

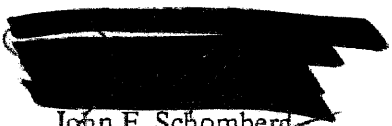
legal interest. See, e.g., Dunnet Bay Constr. Co. v. Hannig, No. 10-3051, 2012 WL 1599893, at *3 (C.D. Ill. May 7, 2012) (finding that “the Governor and the agencies of Illinois government under the control of the Governor had a sufficient common legal interest . . . to apply the privilege to the confidential communications among their representatives.”).

Finally, as to whether attorney-client privilege is broken once someone becomes a former employee or if a former employee retains documents received while in State service, “[o]nce the attorney-client privilege attaches to a communication, the communication retains the protection of the privilege even after termination of the attorney-client relationship.” United States v. White, 970 F.2d 328, 334 (7th Cir. 1992). Furthermore, the United States District Court for the Northern District of Illinois has found that communications with a former employee remain privileged and quoted the 7th Circuit in noting that “every circuit to address this question has concluded that the distinction between present and former employees is irrelevant for purposes of the attorney-client privilege.” Goswami v. DePaul University, No. 12 C 7167, 2014 WL 1307585, at *2 (N.D. Ill. March 31, 2014) (holding the privilege applies and quoting Sandra T.E., 600 F.3d at 622 n.2). Thus, whether Ms. Irving has maintained documents as a current or former employee, the privilege remains and is the State’s to assert.

We hope that the above brings clarity to the current situation. As reflected in our July 16, 2014 letter to you and in your August 14, 2014 letter to the Legislative Audit Commission, you provided us with searched emails containing certain State of Illinois attorney names. We have reviewed the same and on July 25, 2014 noted for you those emails that are protected attorney-client communications and that the State of Illinois is asserting privilege over.

Please let us know if you have any questions.

Sincerely,



John F. Schomberg
General Counsel