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September 13, 2014
VIA EMAIL AND UPS DELIVERY

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:

In response to your September 11 correspondence, let me first assure you that we continue to take seriously the subpoena issued to Dr. Irving by the Legislative Audit Commission (the "Commission"). We have been expeditiously and diligently reviewing the nearly 7,400 records in Dr. Irving's possession that were culled from over 107,000 records through a process in which the Commission has been intimately involved, and have provided the Commission with regular updates throughout the process. As you also know, Dr. Irving has already produced over 1,000 hard-copy and electronic records – as we understand it, almost half again as much as what the State has produced for various document custodians, combined.

Bear in mind that Dr. Irving is being asked to produce records which the Commission could just as easily obtain from the Office of the Governor – and indeed which, subject to differences in the search terms applied and related issues, are presumably duplicative of records the Commission has already received from the State. Moreover, Dr. Irving has been asked to undertake the tremendous burden of the necessary review and production at her own expense. Nonetheless, we anticipate that the remaining records can be reviewed – and subject to the privilege issue described below – responsive records produced by September 19.

With respect to privilege, as we have communicated on several prior occasions, Dr. Irving is not asserting any privilege with respect to the documents in her possession. Instead, as we have indicated, we have been in communication with John Schomberg, General Counsel, Office of the Governor, who has clearly indicated that in the view of the OGC certain emails within the 7,400 mentioned above are subject to the State's attorney-client privilege. Mr. Schomberg has further indicated that it is the State's right to determine whether or not these records are produced. Yesterday, we received correspondence from Mr. Schomberg, following discussions about whether the State has asserted privilege over documents that are not in fact privileged. In this correspondence, Mr. Schomberg asserts, among other things, that we are prohibited from producing these documents and would be in breach of the Illinois Rules of Professional Conduct were we to produce documents over which the State asserts privilege.

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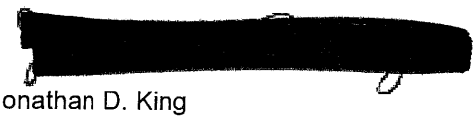
As I specifically mentioned would be the case during our last discussion, I was out of town yesterday. (In fact, I am out of town until tomorrow night.) However, we do anticipate that we will make a further production on Monday, and subject to the foregoing privilege issue, we also anticipate that we will be able to finish reviewing the documents and make our production of emails over which the State is not asserting a privilege by September 19, 2014.

Regards,

DLA Piper LLP (US)



Jonathan D. King

JDK:emr

Enclosure

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

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,

[redacted]

John F. Schomberg
General Counsel