



Wisconsin Ethics Commission

Campaign Finance | Lobbying | Ethics
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DATE: December 12, 2017

TO: The Honorable Brad Schimel, Attorney General

FROM: David Halbrooks, Ethics Commission Chair
Katie McCallum, Ethics Commission Vice-Chair

SUBJECT: Report Concerning Violation of the John Doe Secrecy Order

Dear Mr. Attorney General,

We commend the efforts of the Wisconsin Department of Justice to investigate the perpetration of the egregious criminal acts and the violation of court orders that occurred when sealed data was released to the public in violation of the John Doe secrecy order. It is our hope that those responsible will eventually be held accountable. Like so many citizens across Wisconsin, we remain horrified at the extent of the abuse of power and stand ready to assist DOJ in any way we can. However, we wish to clarify points in the report regarding our agency.

Ethics Commission Administrator Brian Bell and Ethics Commission Attorney David Buerger participated in the investigation in a fully cooperative manner. Additionally, the report does not acknowledge major security improvements put in place by staff and Commissioners since authority was transferred from the GAB to the Wisconsin Ethics Commission. The Ethics Commission stands ready to defend the security of the confidential information in our keeping. The following report and attached supporting document address these points, and we wish for you to address them as expeditiously as possible.

HIGHLIGHTS

- **The report contains omissions and inaccuracies regarding the involvement in the investigation by Ethics Commission staff.**
- **The report raises questions regarding the security and custody of records under the Ethics Commission's control. These questions can be answered simply with a review of the improved security measures taken since the Government Accountability Board transitioned to the Ethics Commission. The Ethics Commission staff has taken affirmative steps to eliminate any future security issues.**
- **The report questions why the Ethics Commissioners and staff did not report a crime when The Guardian published leaked GAB documents. We could not have reported a crime because no commissioner nor staff member had ever been read into the secrecy order. There is not a single person in our agency who had knowledge of the content of the leaked documents before they were published, and as such none of us were able to identify that a crime had occurred at the time.**

Wisconsin Ethics Commissioners

Mac Davis | David R. Halbrooks | Katie McCallum | Pat Strachota | Timothy Van Akkeren | Jeralyn Wendelberger

Administrator

Brian M. Bell, MPA

- **The report claims that Brian Bell and David Buerger invoked their right to counsel under the 5th amendment. It was actually the members of the Commission that requested counsel be present.**
- **The report gives the appearance that the Ethics Commission and its staff did not comply with DOJ's record requests. Our staff promptly provided all requested records based on each successive search criteria DOJ identified. We immediately notified DOJ when potentially responsive records were located.**
- **The report comingles a description of the security practices under the GAB with those under the Ethics Commission. Make no mistake, the security deficiencies that previously existed under the GAB have been resolved.**
- **With our new security protocols, any staff member of the Ethics Commission who accesses any data can be identified. We can immediately identify any attempt to obtain and leak confidential information in the future.**

INTRODUCTION

On Wednesday, December 6, 2017, the Wisconsin Department of Justice released a report concerning violation of the John Doe secrecy order, regarding the investigation identified as "John Doe II" which involved the GAB (please see the full report, available online here: http://www.thewheelerreport.com/wheeler_docs/files/1206johndoe_01.pdf).

The Ethics Commission makes the following clarifications to the report regarding references to the Ethics Commission and its staff, which we hope will be addressed by the Department of Justice.

SUMMARY OF OBSERVATIONS

The report indicates that the document transfer and likely leak took place around May 2016, before the Government Accountability Board transitioned to the Wisconsin Ethics Commission, before David Buerger was appointed as Staff Counsel, and before Brian Bell was appointed as Administrator for the Ethics Commission.

Neither Administrator Bell, Attorney Buerger, any of the existing staff (either in current or previous roles), nor any of the Commissioners were covered by any of the John Doe secrecy orders, and thus had no way of knowing with any certainty which records were responsive to that investigation or any other related investigations. The report notes on page 85 that no member of the Ethics Commission reported a crime at the time the Guardian news story ran. The potential crime could not have been reported because staff and Commissioners were not read-into the secrecy order, and there was no way to know whether those records would potentially be records that should be in our custody.

The report also notes on page 85 that Nathan Judnic transferred records to David Buerger, but fails to indicate that Nathan Judnic, being previously read-into the secrecy order and involved in the investigation, should have known what he was providing to Attorney Buerger. Attorney Buerger however could not review the materials and thus did not know what he received from Nathan Judnic.

The report misrepresents the nature of the Ethics Commission's cooperation. Neither Attorney Buerger nor Administrator Bell ever invoked their rights under the 5th Amendment. When Commissioners were notified that DOJ wished to interview the two of them separately, the Commission directed staff to have an attorney present during the interview. This was also done because Attorney Buerger could not act as Attorney for Administrator Bell since he was being interviewed separately. Up until that point, we thought we were cooperating in a joint effort with DOJ to find those responsible for the leak, and then suddenly our staff was being interrogated. They answered every single question asked by DOJ and agreed to participate in interviews. We appreciate DOJ's patience and accommodation of the Commissioners' direction to staff to have representation present for the interviews.

The report also misrepresents the search warrant as permitting a broad search for any remaining GAB records in the GAB offices and refers to a lack of cooperation by staff. We make no statement regarding former GAB investigative staff. We are unaware of any lack of cooperation by our current staff. Please advise us of the actual instances referenced in your report. As for the search warrant itself, the search occurred more than a year after the dissolution of the GAB. The search was conducted in a professional and cooperative manner by all parties. However, the report does not accurately depict the search as authorized by the court. We request that the search warrant be unsealed to accurately depict the DOJ's authority. It is our understanding that nothing was recovered that was responsive to the warrant. The report also makes no mention that DOJ asked for assistance from Ethics Commission staff to provide access to secure areas, to which staff willfully obliged, eliminating the need to force them open. The Attorney appointed by the Office of the Governor, who represented the Commission and its staff, can corroborate all this information.

Further, the Commission and its staff made every effort to cooperate with the investigation and expedite its resolution. The staff voluntarily and aggressively reviewed records that the agency inherited from the GAB. The storage areas where the records were kept were in utter disarray. Staff inventoried and organized those records. Upon identifying a document that was potentially responsive to the investigation, the document was isolated and immediately reported to the DOJ. Again, it is important to highlight that the Commission and its staff were not read-in under the secrecy order, and thus could not know with any certainty whether a record was responsive to the case. The Commission and its staff exercised extreme caution and notified DOJ of any potentially responsive records, and the Chair and Vice-Chair were also promptly notified of any interaction with DOJ.

The report also refers to the initial order from the John Doe Judge to seize records in the possession of the Ethics Commission. We are surprised that the report fails to reflect the efforts of the Ethics Commission and its staff to cooperate with the investigation in a way that would not violate our confidentiality requirements in all other matters before the Commission pursuant to WIS. STAT. §19.50. We appreciated the effort made by DOJ to work with the John Doe Judge to ensure that the order explicitly addressed that cooperation and provided access to records maintained by the Ethics Commission and its staff in a manner that would not violate the confidentiality provisions in the statute. At this time, we request that the court's order be unsealed so that the public may understand the level of caution we took to protect our confidential data unrelated to this investigation.

The report also discusses security, and posits that the Ethics Commission should have greater security measures in place. Under the Government Accountability Board, documents should have been better secured and organized, and there should have been a system for tracking who accessed documents or storage drives. The Ethics Commission and its staff have taken proactive steps to rectify these security concerns from day one. All documents created since the inception of the Ethics Commission are stored electronically on state-owned servers. Access to those files requires pre-approval, and login with a username and password; we can thus track who accesses, edits, copies, or downloads any records. All other physical records, including those that the Ethics Commission inherited from the previous boards, have been inventoried and secured in locked file cabinets or a locked storage room. Only one staff person has access to the keys to those items. This system allows the Ethics Commission to identify any individual involved in any potential leak of documents in the future.

It is important to consider other affirmative steps that the Ethics Commission has taken since its creation to rectify the shortcomings of its predecessor agency. The Ethics Commission has adopted standardized complaint and investigation procedures, established objective and universal audits instead of individual audits, and established a new mission statement that includes a focus on protecting the rights of those in the regulated community. The Ethics Commission has also made great efforts to make public everything it can under the law. Additionally, the Ethics Commission operates under new statutes that prohibit staff and Commissioners from initiating an investigation without a sworn complaint, and require the agency to notify any target of a complaint within five days of the complaint's filing.

Finally, we have a concern about comments by your staff regarding mishandling documents and a file labeled "Opposition Research." It is our hope that these comments were directed to the GAB and not the Ethics Commission. We are not aware of a single allegation of anyone at our agency mishandling any materials. If we are incorrect, please inform us. As for the folder marked "Opposition Research," while provocative, it is our understanding that the file was one of the pieces of illegally seized data rather than a document prepared by a GAB operative.

CONCLUSION

Again, we appreciate your attention to this matter, and urge you to promptly address each of these observations regarding the report. We also request that you issue a statement that acknowledges that the Ethics Commission and its staff fully cooperated with, proactively contacted, and assisted DOJ with its investigation into the leak. We have enclosed a timeline of staff actions, including interactions with DOJ on numerous occasions. We also ask that you review the search warrant as well as the original and revised order from the John Doe Judge granting DOJ access to records of the Ethics Commission and its staff in a manner that would not violate WIS. STAT. §19.50.

Enclosure: Timeline of Staff Actions



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Timeline of Staff Actions RE: John Doe Leak Investigation

Timeline

2016

- June 30 Ethics Commission created. Staff Counsel Buerger interim Administrator.
- July 24 Administrator Bell official start date with Commission
- September 14 John Doe documents published by the Guardian.
- September 26 Met with Special Prosecutor Schmitz to discuss status of JD materials and preparations to comply with WISC order if USSC appeal unsuccessful.
- September 27 Moved JD materials from Nathan Judnic's office to locked cabinet in Commission offices.
- September 29 Changed passwords on all GAB gmail accounts so that only Staff Counsel Buerger had access.
- October 3 USSC rejects final appeal of JD investigation. 30 days to comply with WISC order to return documents.
- October ?? Special Prosecutor Schmitz in office to review hard copy files to determine what is subject to WISC order to turn over.
- October 4 Staff Counsel Buerger sends email to Matt Stippich of Digital Intelligence advising him to notify the Commission if it still has any JD material.
- October 6 Special Prosecutor Schmitz requests letters also be sent to GAB investigators
- October 24 Staff Counsel Buerger sends letters to former GAB members and staff on behalf of Special Prosecutor Schmitz requesting they certify they do not have any JD materials.
- October ?? Signed certifications from former GAB members, staff, and investigators turned over to Special Prosecutor Schmitz.
- October 31 Special Prosecutor Schmitz takes one box of papers containing evidentiary materials, one external hard drive, and four DVDs from Commission files to return to WISC. Remaining files deemed not subject to order and will be maintained in secure storage until destruction is authorized.

2017

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January 27 Phone call with DSG Dan Lennington re: DOJ criminal investigation. Received copy of order amending secrecy order to include DOJ staff. DOJ requests all GAB records in our possession related to JD investigation (email and hardcopy). Advised DOJ of our concerns with § 19.50 as well as other potential privilege or protections as we have not reviewed the requested documents. Lennington to explore alternatives to voluntary production.

January 30 Meeting with DSG Dan Lennington and AAG Schneider re: seeking another amendment to the secrecy order to explicitly permit DOJ staff access to materials covered under § 19.50 and other privileges or protections. We agreed that the proposed draft order would be sufficient for us to release our records to DOJ.

January 31 Received new secrecy order with broader language and specific finding as to § 19.50.

February 1 Turned over two file cabinet drawers of paper records left in our possession by Special Prosecutor Schmitz to SA Strauss and SA Kyra Schallhorn.

February 7 SA Strauss and Digital Forensic Examiner Flessert attempt to retrieve electronic files from segregated space on network drive, but due to technical problems have to come back another day?

February ?? SA Strauss and DFE Flessert return and retrieve electronic files by changing the network path and copying off files.

March ?? Staff uncovers potential additional JD materials

March 15 SA Strauss retrieves small folder of additional JD documents. SA Strauss relays request re: make and model of copiers/scanners available to staff from May-September 2016. Email sent to SA Strauss with make and model numbers of copiers available to GAB staff at the time. Also asked for further instructions on key words for archive email searches for prior staff. Arranged to meet next Tuesday to discuss in-person.

March 21 Met with DSG Lennington and AAG Schneider to narrow down search terms.

March 30 Conducted electronic search of network drive and archived emails. Found a dozen documents that match criteria. Conducting additional searches to ensure full disclosure.

April 26 Request from DSG Lennington for status update on electronic search.

April 27 Advised DSG Lennington of additional electronic files that met search criteria. SA Strauss to come pick up on May 2.

May 2 SA Strauss and another DFE retrieve additional electronic files. SA Strauss requests if agency has access to any building security camera footage. After brief inquiry, replied via email that we have no access to any recordings and referred them to Mullins Group LLC.

May 22 Administrator Bell finds two additional boxes of potential JD hardcopy material in basement storage unit (see May 25 memo). Administrator Bell turned documents over to Staff Counsel for review. Initial review indicated it was partially JD I and JD II material. Secured in locked storage in main office until it could be turned over to DOJ.

May 23 Compared inventory of additional hardcopy materials to index of material turned over to SA Strauss. Determined that at least some material was duplicative, but impossible to determine if 100% duplicative due to the vague descriptions on the DOJ index. Advised DOJ of the discovery and arranged for production of materials.

May 24 SA Strauss and SA Schallhorn retrieved both boxes of additional material.

May 25 Senior Counsel Lennington called with additional questions on possible locations of external hard drives used by GAB staff.

June 7 SA Strauss requests individual interviews with Administrator Bell and Staff Counsel Buerger re: involvement in collection of records. Clarified via email that we would need to talk to the Commission before agreeing as Commission had previously instructed outside counsel before taking individual interviews.

June 12 Requested representation from DOJ

June 20 DOJ declines request for representation due to conflict with investigation.

June 21 SA Strauss request for update on interview request. Advised of DOJ refusal to represent and plans to talk to Governor's office regarding appointment of special counsel.

June 27 Requested appointment of special counsel from Governor's office.

July 6 Governor's office appoints Sam Hall as special counsel for Commission.