



Wisconsin Ethics Commission

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DATE: January 21, 2018

TO: The Honorable Tom Tiffany
Wisconsin State Senator, District 12

FROM: Brian M. Bell, MPA
Commission Administrator

SUBJECT: Regarding Questions Prior to Confirmation Vote

Thank you for sharing your questions as well as an opportunity to provide you with answers prior to the scheduled confirmation vote. Please find below a restatement of each question you addressed to me, immediately followed by my answers to each question.

1. *What records did you, (David) Buerger and Molly Nagappala give to Francis Schmitz in November of 2016?*

The Ethics Commission inherited legal custody of all public records pertaining to campaign finance, lobbying and ethics from the Government Accountability Board (GAB) pursuant to 2015 Wisconsin Act 118, [Sec. 266\(4\)](#), including any record GAB had pertaining to the John Doe Investigations. However, at no point did anyone from GAB provide me or anyone else at the Ethics Commission with an overview, let alone an inventory, of the records transferred into our custody.

I was very concerned about the security and organization of records in general from the very beginning of serving as Administrator. At the time the Ethics Commission came into existence, records left behind by the previous agency were poorly organized and improperly secured. The basement storage rooms contained records from both the Ethics Board and Elections Board that were moved from old office locations, as well as records from the tenure of the GAB. The storage rooms covered approximately 500 square feet and contained records dating back to at least the 1970s. Not only were confidential records improperly secured, but the condition of the storage rooms was so disorganized that they presented a safety hazard. Throughout the basement and the third-floor office space, records were inconsistently organized and often commingled with other records.

Ethics Commission staff worked diligently to correct that. Roughly once per month we would halt all other agency activities so that all staff could participate in reviewing, inventorying, and securing records, as well as determining which records should be in the custody of the Ethics Commission or the Elections Commission.

In contrast, I witnessed only a few Elections staff (office operations associate(s) and their public information officer) occasionally reviewing and sorting records. I repeatedly spoke with

Elections Commission Administrator Haas and Staff Counsel Judnic about the unacceptable state of records management, the lack of security, and the requirement to segregate records to the appropriate new commission. They consistently dismissed my concerns as something that would eventually be gotten around to being addressed, and stated that separating and securing records was not as high of priority for them.

When Special Prosecutor Francis Schmitz contacted me regarding the pending Supreme Court order deadline to turn over all evidence to the Clerk of the Supreme Court within 30 days if the United States Supreme Court decided to deny certiorari, I instructed Staff Counsel David Buerger, as the agency's designated record officer, to gather the records and secure them until the Special Prosecutor could review them. At the same time, I notified Elections Commission Administrator Michael Haas and Staff Counsel Nathan Judnic that Mr. Schmitz would be taking custody of records to turn over to the Supreme Court and asked them to work with Staff Counsel Buerger to ensure they, as well as any other Elections Commission staff who might have records in their possession, ensured that all relevant records were properly turned over. I believe that Special Prosecutor Francis Schmitz was also in contact with Mr. Haas and Mr. Judnic regarding the disposition of John Doe records.

Staff Counsel Buerger and I spoke with Molly Nagappala about her knowledge of the location of any records pertaining to the John Doe investigations. She told us that she believed that Elections Commission Staff Counsel, formerly Staff Counsel for GAB, Nathan Judnic had maintained in his office all John Doe investigation records that were in the possession of the GAB, and that he had these records at least since the closure of the investigation. Both Administrator Haas and Staff Counsel Judnic also told us that they believed that Judnic had possession of all GAB John Doe investigation materials.

Staff Counsel Buerger took the records from Staff Counsel Judnic and placed them in a locked filing cabinet in the 212 East Washington office of the Ethics Commission. As neither Buerger, nor myself, were admitted to the John Doe, we could not inventory the records Judnic provided, but simply placed them in secure storage without examination. To this day, I do not have any personal knowledge of what records Judnic provided to us, but I can state with certainty that our staff provided 100 percent of those records to former Special Prosecutor Francis Schmitz in October of 2016.

2. *Did you, David Buerger and Molly sign "written statements" that you/they had turned over to Francis Schmitz all such documents and electronic data within their/your possession and that they/you no longer possess any such documents or electronic data or copies thereof? (As required by the court order?)*

Molly Nagappala was admitted to the John Doe investigation and provided a written certification to Francis Schmitz that she did not possess any further records from the John Doe. Staff Counsel Buerger and I did not sign any written statements regarding the turnover of records to Francis Schmitz, as neither of us were ever admitted to the John Doe investigation, and we were not covered by the Wisconsin Supreme Court order. I did ask Francis Schmitz if Staff Counsel Buerger, myself or any of the Ethics Commission members were required to

sign such an affidavit, and to my knowledge, he verified that no further written statements were required.

3. *What was on the hard drive Nathan Judnic gave to David Buerger? Did Judnic make any specific requests to you or Buerger regarding the hard drive or did he caution anyone about the hard drive's contents?*

Neither myself, nor Staff Counsel Buerger could inventory or examine the records turned over to us by Staff Counsel Judnic. Staff Counsel Judnic did not make any specific requests or caution either myself or Staff Counsel Buerger when he turned over custody of the records. Because Staff Counsel Buerger was not covered by the secrecy order he was not able to determine the contents of the hard drive, or whether it was a hard drive provided to Staff Counsel Judnic by former GAB Staff Counsel Shane Falk.

4. *Who was the last person to have possession of the hard drive before it disappeared?*

Beyond the information provided by the Department of Justice, I have had no knowledge of the existence, location, or any person in possession of the hard drive referenced in the Attorney General's report. I cannot say with any certainty that the hard drive in question was ever turned over to the Ethics Commission. I do know that Francis Schmitz took a hard drive as part of the records he collected from the former GAB office, but I cannot confirm what he did with the records once he took custody of them, nor do I know what was on the hard drive. Based on the assumption that the hard drive Shane Falk reportedly gave to Nathan Judnic was the same hard drive Nathan Judnic gave to David Buerger, that hard drive was secured in a locked file cabinet and turned over to Francis Schmitz. As the Attorney General's report indicates there was roughly 26 months between when Shane Falk allegedly gave a hard drive to Nathan Judnic and when Mr. Judnic gave a hard drive to David Buerger. Again, David Buerger immediately secured all records turned over by Mr. Judnic until Francis Schmitz reviewed and took custody of those records.

5. *If David Buerger was the last person in possession of the hard drive before it disappeared, why is he still employed by the Ethic's Commission?*

David Buerger immediately secured all records turned over by Staff Counsel Judnic in a locked file cabinet, until Francis Schmitz reviewed those records and took custody of the records he believed he needed to turn over to the Supreme Court. Based on the assumption that the hard drive referenced in the Attorney General's report that allegedly contained the leaked documents was the same hard drive that Shane Falk allegedly turned over to Nathan Judnic, and then roughly 26 months later, Mr. Judnic turned over a hard drive to David Buerger, that hard drive was turned over to Francis Schmitz. Beyond the information provided by the Department of Justice, I have had no knowledge of the existence, location, or any person in possession of the hard drive. I do not know that Buerger was ever given the hard drive in question. All materials provided to the Ethics Commission by former GAB staff were subsequently turned over to Francis Schmitz to review and turn over what was required to the Court. The remaining documents that Mr. Schmitz did not take were secured until they were

later claimed by Wisconsin Department of Justice agents as part of their investigation. Mr. Schmitz did not leave any hard drive in the custody of the Ethics Commission.

To be clear, if I were presented with substantiated evidence of an employee of the Ethics Commission having violated a court order, obstructed an investigation, or other actions that would conflict with their ability to impartially and objectively perform their job duties, then I would consider that grounds for suspension or termination of their employment.

6. *What role did the former and present commission members and chairs play in complying with the Supreme Court order and the DOJ investigation?*

Staff Counsel Buerger and I provided the Commission with verbal reports at each Commission Meeting detailing every interaction with Francis Schmitz or the Wisconsin Department of Justice regarding the Supreme Court order and the leak investigation. The Commission directed staff to fully cooperate and proactively assist efforts of compliance with the Supreme Court Order and the DOJ investigation. The Commission also expressed their appreciation for the attentiveness and thoroughness of the staff.

When the Commissioners were informed at their June 7, 2017 meeting that DOJ investigators would likely want to interview Staff Counsel Buerger and myself, they instructed us to notify them when an interview was scheduled and that if DOJ investigators wished to interview us separately we were to notify the Chair and Vice-Chair, so they could request counsel to be present for the interview so that someone else representing the Ethics Commission was present. Staff Counsel Buerger and I notified the Chair and Vice-Chair when DOJ investigators asked to interview us separately. They then requested representation to be present for those interviews. The Office of the Governor appointed the representation requested by the Commissioners.

7. *At any point during the collection of evidence by Schmitz or DOJ investigators, did you voice concerns or seek assistance from the current or former chairs or commission members? If yes, please be specific about the timing, subject matter, person or persons approached and their response.*

Yes, I did voice concerns on multiple occasions. When Francis Schmitz spoke with Staff Counsel Buerger and myself in September and October of 2016 about locating and securing records and the order he received from the Supreme Court, I told him that I was concerned about the security of records and urged him to be diligent in locating all records. When Mr. Schmitz reviewed the records secured in the former GAB office and informed Staff Counsel Buerger that he was taking custody of some records and leaving beyond other records that he believed were not required to be turned over, I expressed again my concerns about the organization and security of records based on the volume of apparently unrelated records which were comingled with the John Doe records. I would characterize his response as being surprised and frustrated by the disorganization, as well as sincerely concerned.

Throughout working in partnership with DOJ investigators (January through December 2017), I repeatedly voiced my concerns about the state of the records left behind by former GAB staff.

I described and showed examples of the disorganization and security issues. I also shared with them the steps that the Ethics Commission staff was taking to better organize and secure both physical and electronic records. I voiced my concerns to the investigators that all John Doe related records were not exclusively isolated from other records, which was making it difficult to know whether all records had been located, secured and turned over. I kept the investigators informed of the Ethics Commission's overall efforts to better organize and secure records. Whenever we found potentially relevant records, we immediately notified the investigators, so they could take custody of them. We continued to find records potentially related to the John Doe investigations in places beyond where former GAB staff had indicated records should have been located, and in places we did not expect to find potentially relevant records. The DOJ investigators responded by sharing with Staff Counsel Buerger and myself that they were grateful for our diligent cooperation, proactive assistance, and good faith effort to support their investigation. Staff Counsel Buerger and I discussed with the investigators that we welcomed their advice on best practices for handling records (confidential, investigator, etc.). The investigators appeared to appreciate our interest in learning about best practices and implementing improvements, and agreed to provide informal training to all Ethics Commission staff.

All of the above information regarding Francis Schmitz and the DOJ investigators was also promptly communicated to the Commission Chair and Vice-Chair via phone, and then to the full Commission at the next meeting. The Commission provided assistance by directing staff to fully cooperate and proactively assist efforts of compliance with the Supreme Court Order and the DOJ investigation. Again, the Commission expressed their appreciation for the attentiveness and thoroughness of the staff. From my very first interactions with the Commission while interviewing for the Administrator position I expressed my commitment to address the legitimate concerns about the previous agency and how it operated. The Commissioners and I have regularly discussed our efforts to better serve the people of Wisconsin and protect the rights of individuals.

8. *The Ethics Commission Chairman claims that you and David Buerger could not help comply with the Supreme Court order or DOJ investigation because you were not authorized to see evidence from the John Doe investigation. Did you ever enlist assistance from Nathan Judnic, Mike Haas or your own employee Molly Nagappala, all of whom were authorized to view documents under the John Doe secrecy order? If not, why?*

Staff Counsel Buerger asked for Staff Counsel Judnic's assistance in initially locating the John Doe records. Nathan Judnic turned over all records that were secured in his office to Buerger, who secured them without further inspection. Francis Schmitz then reviewed those records and separated out the material he believed was required to be turned over to the Court and left the remainder with the Commission in secure storage, where it remained until later claimed by agents of the DOJ.

Staff Counsel Buerger and I asked Molly Nagappala for assistance in locating, securing, and turning over John Doe Records. She told us that she believed all John Doe Records of the former GAB were secured by Staff Counsel Nathan Judnic. I told Molly Nagappala to assist

Francis Schmitz with locating and identifying John Doe records in support of compliance with the Supreme Court order.

I also spoke with Administrator Haas and Staff Counsel Judnic after Mr. Judnic had turned over records to Staff Counsel Buerger and prior to Francis Schmitz collecting GAB John Doe records. I told them I was concerned about the security and organization of records and asked that they direct their staff to search for and immediately turn over any John Doe related records to Staff Counsel Buerger.

After the DOJ investigation began, we followed DOJ's instructions to not discuss the matter with anyone outside of DOJ and the Ethics Commission, including Staff Counsel Judnic and Administrator Haas, due to their participation and knowledge of the GAB investigations. Because Mr. Haas and Mr. Judnic had not made organizing and securing records a high priority, I began looking through the large basement storage room to ensure that there were no records there that should be in the custody of the Ethics Commission. That is when I discovered what the Attorney General's report referred to as the "Falk Files."

9. *Do you know who instructed Nathan Judnic to turn all of the John Doe evidence over to David Buerger and the Ethics Commission rather than returning it to the Special Prosecutor or the Supreme Court directly prior to shutting down the GAB? Specifically, who was involved in that decision? Include all former GAB staff, GAB board members and Elections and Ethics staff and commission members.*

I do not know why Nathan Judnic did not turn over John Doe evidence and records to the Special Prosecutor or to the Supreme Court directly prior to the shutting down of the GAB. I also do not know why Mr. Judnic retained custody of those records as an employee of the Elections Commission, nor do I know which former GAB staff, board members, or Elections Commission staff or members were aware that Mr. Judnic had custody of those records.

I asked Staff Counsel Buerger to locate and secure the John Doe records upon notice from former Special Prosecutor Francis Schmitz that he would need to review them and turn over certain materials to the Wisconsin Supreme Court within 30 days of the United States Supreme Court denied cert. When I was informed that Mr. Judnic, an employee of the Elections Commission was in custody of John Doe records, I immediately directed Staff Counsel Buerger to secure all physical and electronic records, including private Gmail accounts, from Mr. Judnic. Schmitz requested our assistance in this process and in securing the certifications required from the various investigators, staff, and board members who were subject to the Wisconsin Supreme Court order.

Conclusion

Thank you again for providing these questions and allowing me the opportunity to answer them for you prior to the confirmation vote scheduled for Tuesday. I have done my best to be direct, thorough, and forthcoming in answering each of your questions. If there is anything else I can do, please do not hesitate to contact me by phone at (608) 267-0715 or by email at BrianM.Bell@wi.gov. Thank you for your time and your consideration.