



STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Workers' Compensation Appeals Board
Office of the Commissioners
Post Office Box 429459
San Francisco, CA 94142-9459
Tel: (415) 703-4554

February 16, 2018

Ms Kim, Esq.
Department of Industrial Relations
Anti-Fraud Unit
1515 Clay Street, 17th Floor
Oakland, CA 94612

Kim Card, Esq., Acting Chief Counsel
Department of Industrial Relations
Office of the Director Legal Unit
1515 Clay Street, Suite 701
Oakland, CA 94612

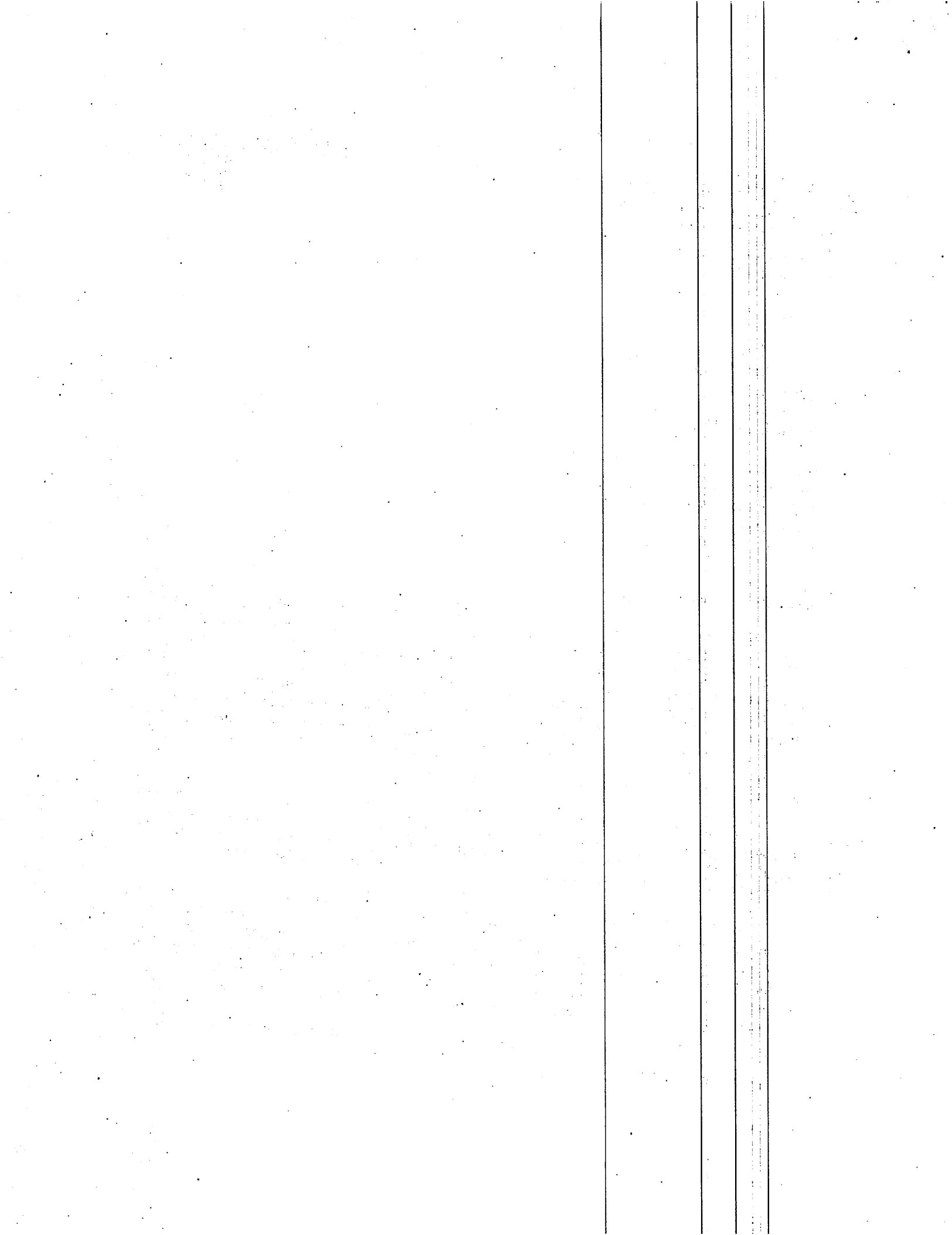
Dear Ms. Kim and Ms. Card,

It has come to our attention that Ms. Kim has accessed and reviewed at least one email chain between Katherine Zalewski, the Chairwoman of the Workers' Compensation Appeals Board (Appeals Board), and Vanessa Holton, the General Counsel for the State Bar of California. We have enclosed with this letter a printed copy of an email sent to Ms. Holton by Ms. Kim, which includes the original email exchange. Ms. Kim was not a party to the underlying email communication. As Ms. Holton is no longer employed by the Department of Industrial Relations (DIR) and was using an AOL email account in this exchange, and has confirmed that she did not provide the email exchange to Ms. Kim, we have concluded that Ms. Kim accessed the email exchange via Chairwoman Zalewski's DIR email account.

While the communication itself is not privileged or consequential, it seems implausible that this was the only email from Chairwoman Zalewski's email account that was accessed. Access to emails of the Commissioners of the Appeals Board by attorneys from your office, which appears before the Appeals Board on contested matters, raises grave legal and ethical concerns.

At the outset, we acknowledge DIR's policy that its employees have no personal expectation of privacy with respect to our DIR email accounts. We are not writing you concerning any such concerns, but rather to address the structural impropriety of the Appeals Board's email being reviewed by DIR attorneys, particularly those who appear before it, without its knowledge or consent. We also are mindful that each of you are licensed attorneys and therefore officers of the court, and are individually subject to all ethical requirements set forth by the State Bar.

As discussed below, we ask that your office immediately and completely explain its conduct in this matter.



I. Overview of the Role of the Appeals Board and the Office of the Director Legal Unit (ODL)

The Appeals Board is a constitutional court that operates statewide as an appellate court of limited jurisdiction to review and decide appeals from decisions issued by workers' compensation administrative law judges. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 111-116, 133-134, 3201, 5300-5302; *Bankers Indemnity Ins. Co. v. I.A.C. (Merzoian)* (1935) 4 Cal.2d 89; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (Zepeda)* (1984) 153 Cal.App.3d 965; *Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376 ["[t]he WCAB...is a constitutional court".])

As you know, attorneys from ODL, and in fact, each of you, appear before the Appeals Board on behalf of the Director of DIR as the administrator of the Uninsured Employers Benefit Trust Fund (UEBTF; Lab. Code, § 3715, et. seq.), the Subsequent Injury Benefit Trust Fund (SIBTF; Lab. Code, §§ 4751, 4753.5), and the Death without Dependents Unit (DWD; Lab. Code, §§ 4706, 4706.5). In addition, the Director administers the Return to Work Fund (RTWF) for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings losses. (Lab. Code, §§ 139.47, 139.48.) Jurisdiction over appeals of those decisions lies first with the trial level Workers' Compensation Administrative Law Judges and then with the Appeals Board.

The Appeals Board and ODL may also be in adversary positions when our decisions are challenged in the Courts of Appeal or the California Supreme Court.

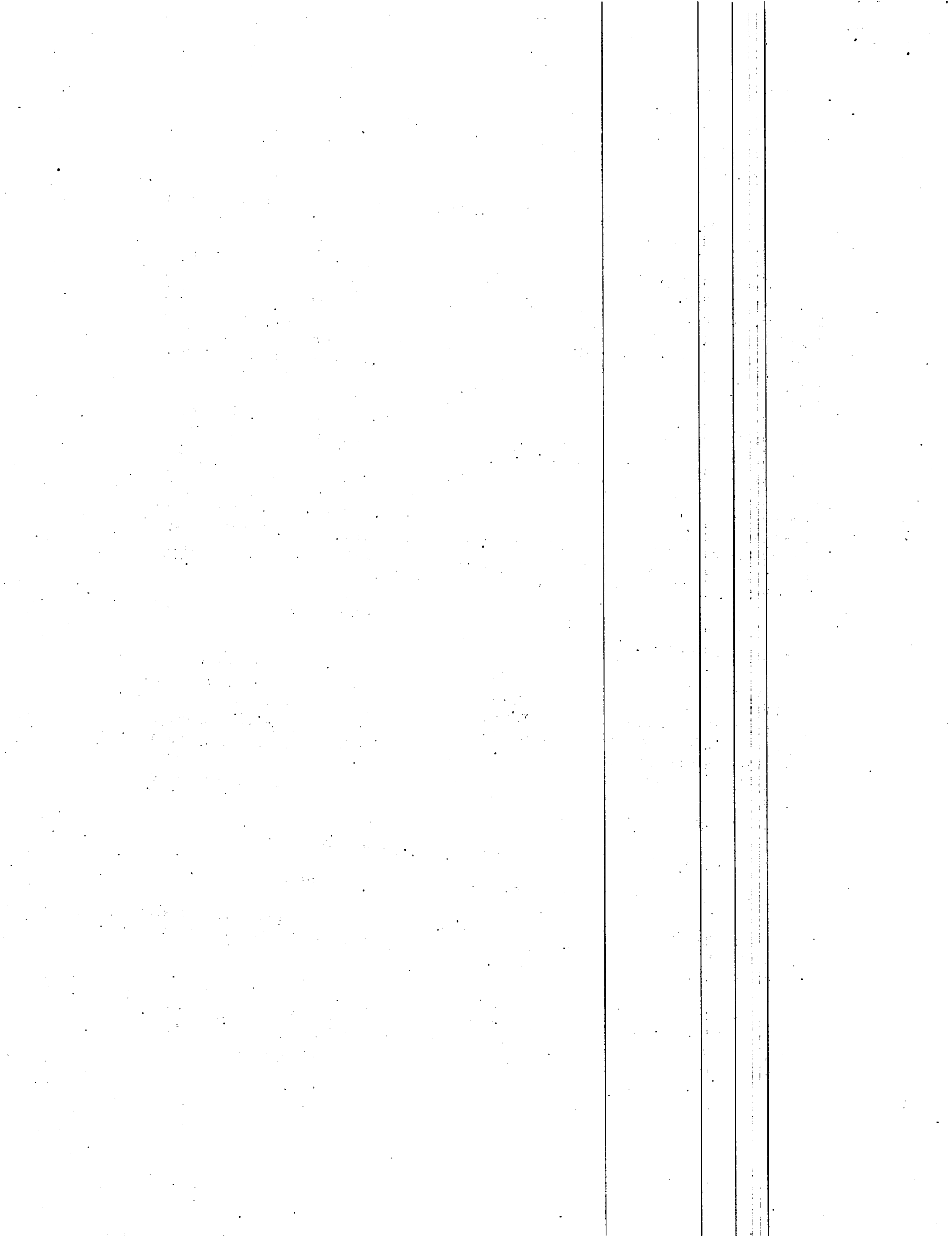
Given ODL's role as either representing a litigant before the Appeals Board or adverse to the Appeals Board on further review, it appears to us highly inappropriate for ODL attorneys to access Appeals Board email. Specifically here, we are concerned that, in reading Chairwoman Zalewski's emails (or any other Appeals Board emails), Ms. Kim and any other ODL attorneys violated several privileges and protections attached to the Appeals Board's communications and work product and created a conflict of interest that threatens ODL's ability to appear before the Appeals Board as well as the independent functioning of the Appeals Board and the due process rights of other parties adverse to ODL.

II. Legal Issues Raised by Ms. Kim's Review of Appeals Board Email

A. Attorney-Client Communications and Work Product

Although the specific email with Ms. Holton was not privileged, many of the Commissioners' emails are protected by the attorney client privilege and should not, under any circumstances, be accessed by ODL attorneys.

The Appeals Board's staff includes attorneys who act as counsel to the Board, providing legal advice regarding cases pending before us, assistance in drafting opinions, and representation in appellate matters. As such, the Appeals Board is the staff attorneys' client and communications between the Commissioners and the attorneys are subject to the attorney-client privilege.



The attorney-client privilege protects "confidential communication between client and lawyer." (Evid. Code, § 654.) "Confidential communication between client and lawyer" refers to "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.)

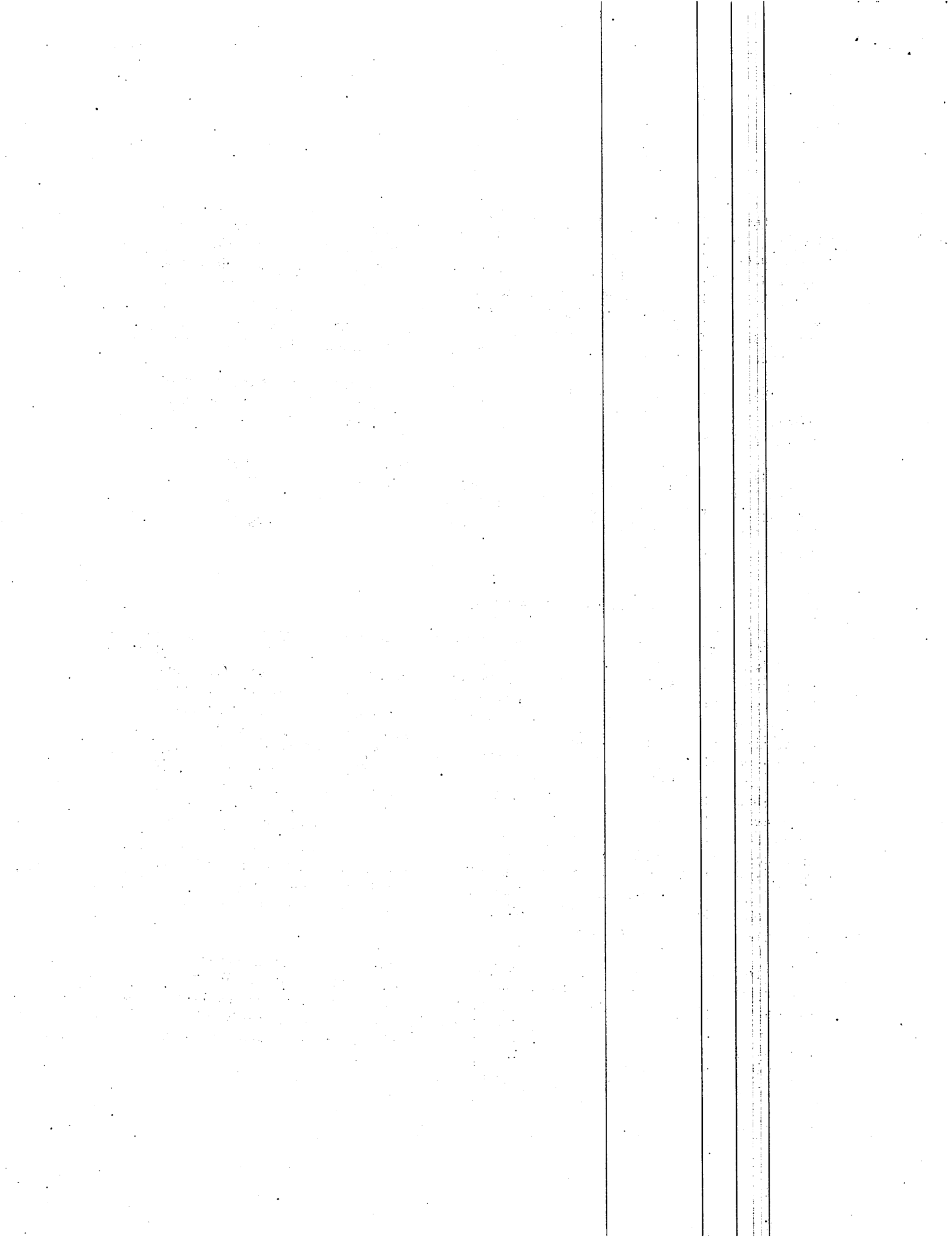
Many communications between the Appeals Board and our staff attorneys take place via email. Review of Chairwoman Zalewski's emails would necessarily include review of emails subject to the attorney-client privilege, which the Appeals Board has not waived.

Moreover, legal advice from our staff attorneys would also fall under the attorney work product doctrine. Although the attorney, not the client, is the holder of the privilege, clients have standing to assert the privilege on behalf of their counsel. (*Meza v. H. Muehlstein & Co., Inc.* (2009) 176 Cal.App.4th 969, 977 [98 Cal.Rptr.3d 422].) Neither of these privileges have been waived.

B. Disclosure of Private Judicial Deliberations

The Appeals Board's email also contains protected judicial deliberations. The Appeals Board is a judicial body. "The Workers' Compensation Appeals Board is a tribunal of limited jurisdiction, with those powers conferred upon it by the Constitution and the statutes of California. [Citations omitted.] [...] The Board finds facts and declares and enforces rights and liabilities. It acts as a court, and it must observe the mandate of the constitutions of the United States and of California." (*Zepeda, supra*, 153 Cal.App.3d at 971.) It is also a public agency as defined in the Bagley-Keene Open Meeting Act ("Bagley-Keene," Gov. Code, §§ 11120-11132). Bagley-Keene allows the Appeals Board to deliberate in private. (Gov. Code, §11126(c)(3) ["Nothing in this article shall be construed to do any of the following: ... (3) Prohibit a state body from holding a closed session to deliberate on a decision to be reached in a proceeding required to be conducted pursuant to Chapter 5 (commencing with Section 11500 [i.e., the administrative adjudication provisions of the Administrative Procedure Act]) or similar provisions of law."]; *Recorder v. Com. Jud. Perf.* (1999) 72 Cal.App.4th 258, 281, fn. 22 ["although state administrative agencies subject to the Administrative Procedure Act are required to conduct their 'adjudicative proceedings' openly (Gov. Code, §§ 11120, 11425.10(a)(3), 11425.20, 54950), the agency may conduct its deliberations in private (*id.*, § 11126(c)(3) ...").])

To the extent that Chairwoman Zalewski's emails contain records of judicial deliberations, those records are private and may not be examined by anyone outside the Appeals Board, and especially not by individuals who, like Ms. Kim and Ms. Card, appear before the Appeals Board as litigants and against the Appeals Board before the Court of Appeal. Access to Appeals Board email by ODL lawyers is a clear invasion of the Appeals Board's deliberations and impairs the independence of the Appeals Board as a deliberative body. It also, in our view, could call into question the basic fairness of the proceedings with respect to ODL's adversary.



C. Ethical Obligations and California's Rules of Professional Conduct

The actions of California attorneys are governed by the Business and Professions Code and by the State Bar's Rules of Professional Conduct. (Bus. & Prof. Code, §§ 6075, 6100, 6075; Rules Prof. Conduct, rule 1-100(A).)

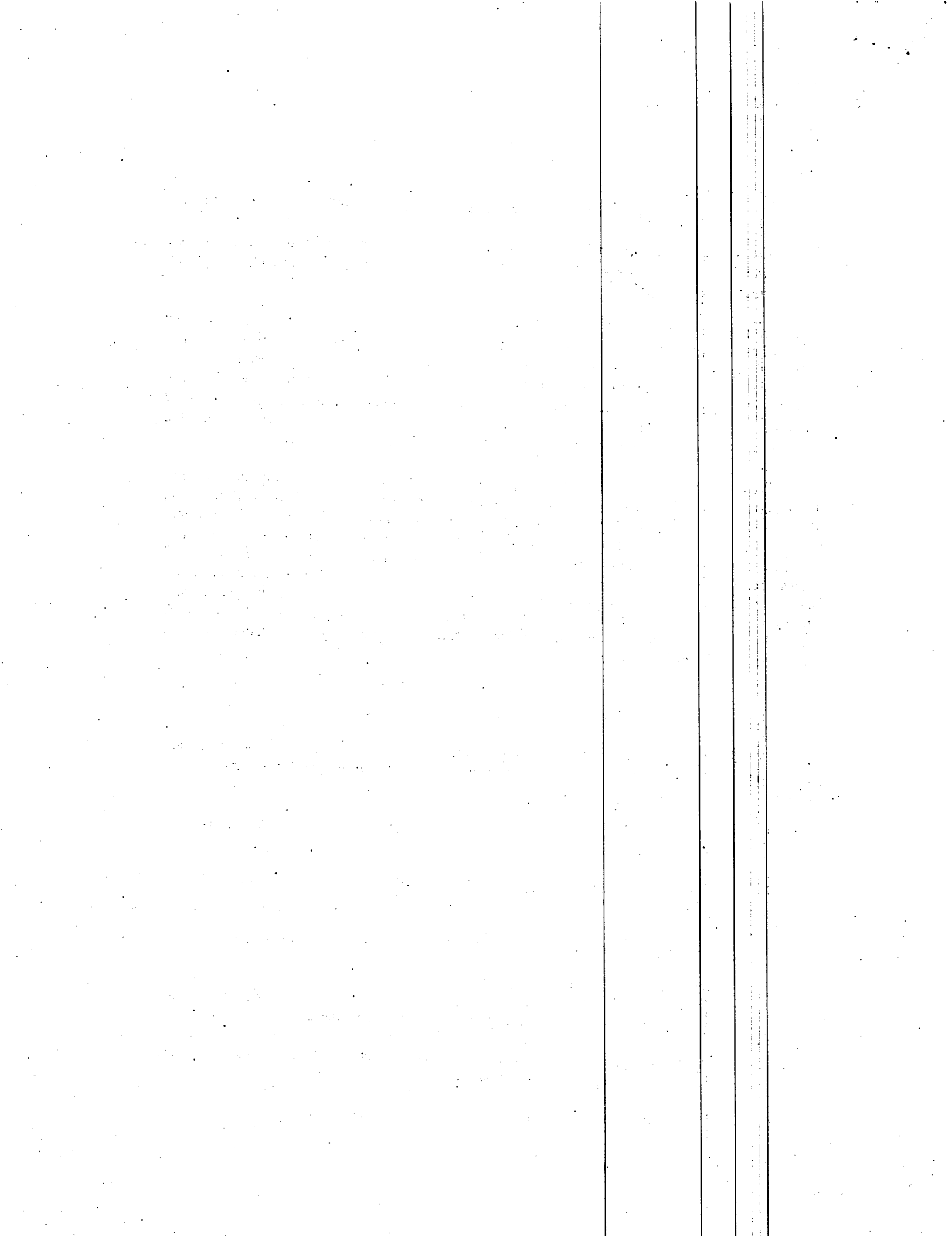
As relevant here, the Business and Professions Code sets forth the following duties: An attorney has a duty to "maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code, § 6068(b).) An attorney may not "encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." (*Id.* at § 6068(g).) Clearly, secretly accessing and reviewing the email accounts of Appeals Board members violates an attorney's duty to "maintain the respect due" to the Appeals Board as a judicial body, as well as the duty to avoid action arising out of "any corrupt motive."

We are, of course, aware that the Appeals Board has no jurisdiction to discipline attorneys; that responsibility is conferred to the State Bar and the Supreme Court. (Bus. & Prof. Code, §§ 6075-6087; *Husted v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-46; *In re Garcia* (2014) 58 Cal.4th 440.) We are likewise mindful of our own ethical duty not to "threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." (Rules Prof. Conduct, rule 5-100(A).) However, as the Commissioners of the Appeals Board, we have an ethical duty to "report[] to the appropriate authority, in respect to a ... lawyer ... who engages in unprofessional, fraudulent or other improper conduct[.]" (Cal. Code Regs., tit. 8, § 9721.32.) Absent a full explanation that demonstrates no wrongdoing, the Appeals Board is compelled to make such a report.

III. Questions from the Commissioners

In order to properly address our concerns, and to ensure that appropriate steps, if any, are taken to resolve them, we need your office to answer the following questions fully and without evasion.

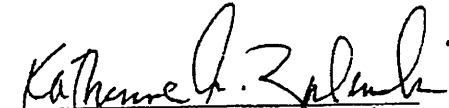
1. Which Appeals Board email accounts have been accessed by Ms. Kim or another ODL attorney or staff member?
2. Who authorized access to Appeals Board emails and what was the reason for the access?
3. Who are all of the individuals who had or have access to Appeals Board emails?
4. Were ODL attorneys or staff given direct access to any email accounts, or were a subset of emails extracted for review? If the latter, what was the criteria for selection of email to be reviewed and who decided that criteria?
5. If copies of Appeals Board emails were extracted, where are those copies stored and who are all of the people with access to them?
6. When did the review discussed above begin, and is it continuing?

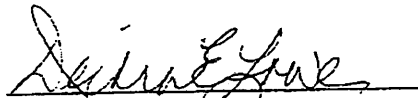



7. Why did Ms. Kim forward that particular email chain to Ms. Holton?
8. What steps are being taken to protect the applicable privileges where they exist?
9. What steps have you taken to ensure that no ODL personnel have direct or indirect access to any emails pertaining to matters in which ODL appears before the Appeals Board?
10. What steps have you taken to ensure that no ODL personnel have direct or indirect access to emails pertaining to matters before the Court of Appeal in which the interests represented by ODL are adverse to the interests of the Appeals Board?


We look forward to your response no later than ten days from the date of this letter.

Very truly yours,


Katherine A. Zalewski, Chair

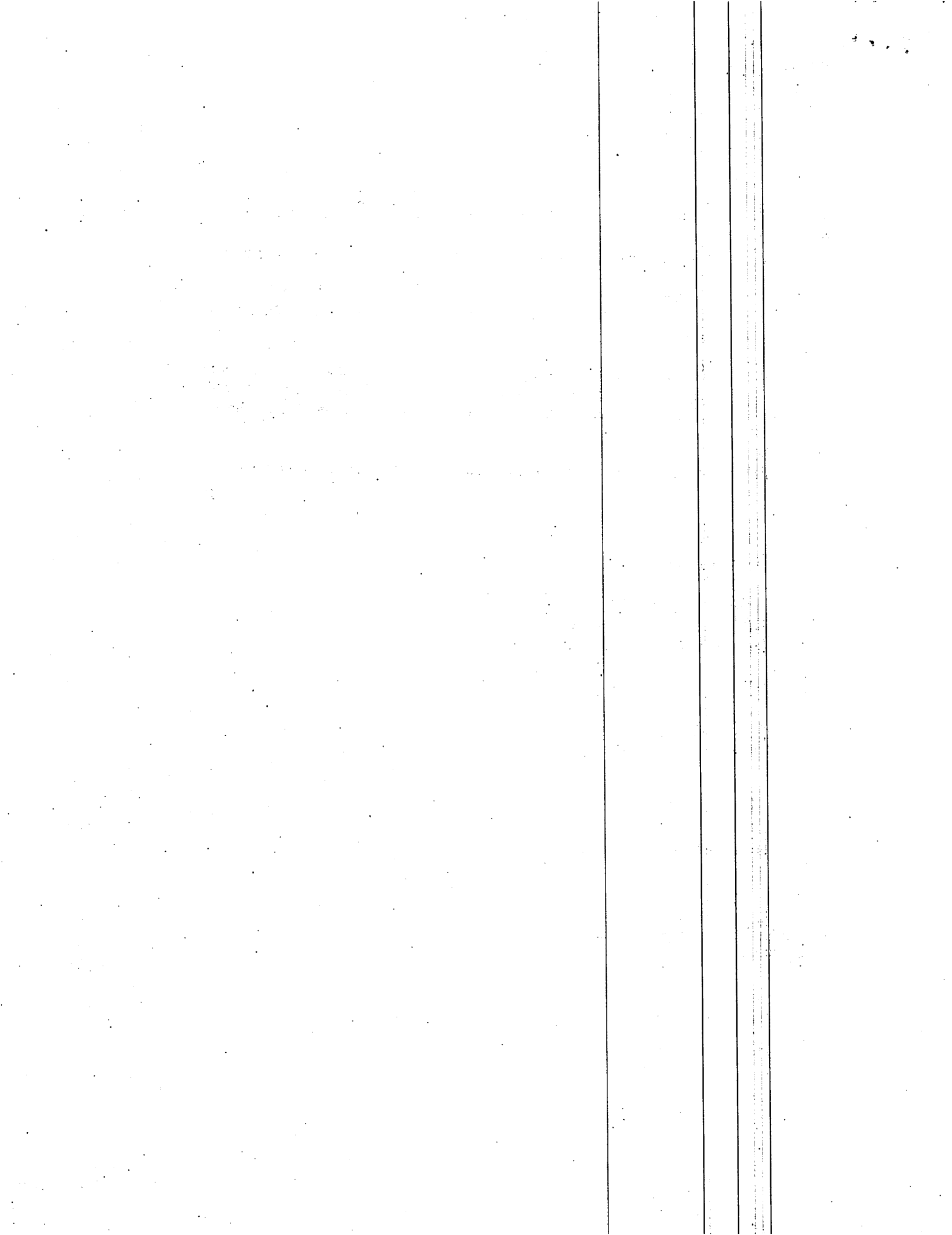

Deidra E. Lowe, Commissioner


Marguerite Sweeney, Commissioner


Jose H. Razo, Commissioner

/abs

Encl.: Email printout



cc: with enclosure

Christine Baker, Director
California Department of Industrial Relations
1515 Clay Street, 17th Floor
Oakland, CA 94612

David Lanier, California Labor Secretary
California Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, CA 95814

Mark Wu-Sam, Esq.
California Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, CA 95814

Vanessa Holton, Esq.
by email

Allison Fairchild, Esq., WCAB Staff Attorney
and C.A.S.E. union representative
455 Golden Gate Avenue, Suite 9328
San Francisco, CA 94102

