

## DEPARTMENT OF INDUSTRIAL RELATIONS

Office of the Director – Legal Unit  
1515 Clay Street, Suite 701  
Oakland, CA 94612  
Tel: (510) 286-3800  
Fax: (510) 286-1220



Kim E. Card, Acting Chief Counsel  
Direct Line: (510) 286-3810  
Email: kcard@dir.ca.gov

February 26, 2018

*Via E-Mail and U.S. Mail*

Katherine A. Zalewski, Chair  
Deidra E. Lowe, Commissioner  
Marguerite Sweeney, Commissioner  
Jose H. Razo, Commissioner  
Workers' Compensation Appeals Board  
Office of the Commissioners  
Post Office Box 429459  
San Francisco, California 94142-9459

Re: Your Letter to Me Dated February 16, 2018

Dear Chair Zalewski and Commissioners Lowe, Sweeney, and Razo:

I am writing in response to your letter of February 16, 2018, which was addressed jointly to me and to Mi Kim, Chief of the Office of the Director Anti-Fraud Unit. I was appointed Acting Chief Counsel of the Office of the Director Legal Unit effective January 1, 2018.

I note initially, per my earlier email to Chair Zalewski, that the email chain referenced in your letter was not enclosed with the letter sent to me, and I do not have it.

I am not authorized to address questions 1 through 8 in your letter, and ask that you please address those questions directly to Director Christine Baker or Secretary David Lanier.

With respect to questions 9 and 10, I would like to assure you that I understand your concerns, am aware of and sensitive to potential conflicts of interest, and will certainly take precautions to ensure that no attorney within OD Legal would ever have access to the emails of Appeals Board members on matters in which OD Legal attorneys appear before the WCAB.

I have made inquiries and can tell you the following with respect to earlier time periods and the circumstances under which attorneys in the Office of the Director Legal Unit would have access to the emails of another person in the Department of Industrial Relations.

When there is a labor and employment matter, concerning a current or former employee of the Department of Industrial Relations, that has advanced to the point where there could potentially be litigation (which could be a disciplinary proceeding, an internal investigation in response to a complaint, a response to a DFEH/EEOC administrative complaint filed by an employee, or a civil case), there is a typically a litigation hold placed on the Outlook email folder of the employee and any additional persons who are identified as being potential witnesses and/or potentially having relevant information. This is done to ensure that the DIR meets its obligations to preserve potentially relevant electronic evidence that may exist in the form of emails. When this occurs, the impacted Outlook email folders are imaged and moved to a separate and secure litigation hold server. A litigation hold does not mean that the content of the email folder is either immediately, or ever, actually viewed. It may in fact never be viewed and simply be preserved for a time and then deleted. If it is later determined that actual searches within and review of the emails are necessary as part of a matter in which OD Legal is providing representation to the Department, then an attorney within OD Legal who is on the Labor and Employment team may be granted access, approved by the Chief Counsel, as necessary.

The actual litigation holds are done by personnel in the IT department. I have instructed OD Legal attorneys that litigation holds require the approval of Chief Counsel, and that any actual searching and viewing of the emails requires additional and later approval jointly by the Director, the Chief of Administration, and Chief Counsel.

To create separation between the role of OD Legal attorneys who represent the Director as Administrator of the UEBTF and SIBTF Trust Funds and the Death Without Dependents Unit, in matters before the DWC Division Offices (the WCAB Boards) and the WCAB, OD Legal attorneys from the "North" offices (Oakland and Sacramento) handle Labor and Employment matters arising in any Boards in Southern California, and vice versa (OD Legal attorneys from the Los Angeles office handle Labor and Employment matters that arise in any Northern California Board). This is the practice to ensure that OD Legal attorneys who appear in Boards as counsel in UEBTF, SIBTF and DWD matters do not interact with the Judges in those Boards as either clients, witnesses, or respondents in employment matters. Further, it is my understanding that in the past when Labor and Employment matters may have required production of electronic evidence from WCJ's, OD Legal attorneys would generally inquire of the Presiding Judges, and the Presiding Judges obtain and produce the evidence, without any searching of emails by OD Legal attorneys.

In theory, I suppose it is possible that when reviewing emails as part of a Labor and Employment matters, OD Legal attorneys might see an email from a WCAB Commissioner if that email was directed to another person with the DIR. For example, if there were an investigation of a DFEH complaint made by an administrative support employee at a Board, and if the emails of a DIR employee who served as a supervisor or co-worker of the employee were searched as part of the investigation for purposes of preparing a response, and if a WCAB Commissioner had corresponded with that individual by email, and if the email contained words that were later used in the search, the email might be part of the search results and be viewed. In practical terms, however, the confluence of circumstances and coincidences that would need to occur in order for an OD Legal attorney providing representation to the DIR in a Labor and

Employment matter to actually see an email of a WCAB Commissioner on a matter in which OD Legal provides representation before the WCAB would be very unlikely, if ever, to occur.

The other circumstance in which OD Legal attorneys would have access to DIR emails would be with respect to Public Record Act (PRA) requests. If a PRA request asks for documents that would include emails of DIR employees, and if those emails constitute public records and are not otherwise privileged or subject to a claim of exemption, searches may be conducted, with the knowledge of the DIR employee, for records responsive to the PRA request. Or alternatively, DIR employees with potentially relevant records may be asked to search their own emails and provide the responsive records to the PRA team. It is my understanding that in the past the WCAB has always had its own PRA personnel, and accordingly, OD Legal attorneys have not provided PRA representation to the WCAB and would never have searched the emails of Commissioners in response to a PRA request.

Based on the foregoing, I believe I can accurately represent to you that no OD Legal attorneys would have access to any emails of WCAB Commissioners concerning matters in which OD Legal appears before the WCAB. I will certainly be cognizant of this issue on a going forward basis, and will take precautions as necessary within the circumstances of each individual case.

In specific response to your question 10, which I take as a possible reference to the *Stevens II* matter, I can also assure that I personally have never had access to, nor reviewed, any emails of any WCAB Commissioners, on any topic, ever (other than those have been addressed to me, as in, for example, when Ms. Zalewski and I have previously corresponded about a training). There is no reason that any OD Legal attorney would ever have access to Appeals Board emails pertaining to any matters before the Court of Appeal, either in which OD Legal has provided representation to the WCAB or to the Department in a position adverse to the WCAB.

Sincerely,  
/s/  
Kim E. Card

cc. Christine Baker, Director of the Department of Industrial Relations  
David Lanier, Secretary, Labor and Workforce Development Agency  
Mark Woo-Sam, General Counsel, Labor and Workforce Development Agency  
Mi Kim, Chief, Department of Industrial Relations Anti-Fraud Unit  
(All Via Email)