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Kathleen Baydala Joyner
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Fulton County Daily Report
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Re: Statement of Attorney General Olens on Ethics Commission Matters

Dear Ms. Joyner:

As you have requested, I have reviewed

1. the Memorandum of Record dated July 17, 2012 written by Holly LaBerge, Executive Secretary, Georgia Government Transparency & Campaign Finance Commission ("Ethics Commission") (Attachment 1) and related correspondence from her private attorney, Lee Parks, dated July 11 and July 16, 2014;
2. the Statement of Attorney General Olens on Ethics Commission Matters, regarding the LaBerge Memo, released July 15, 2014 (Attachment 2);
3. discovery requests and responses obtained by you from the Fulton County Clerk and from the Office of the Attorney General in the cases of Sherry Ellen Streicker v. Georgia Government Transparency & Campaign Finance Commission and Stacey Kalberman v. Georgia Government Transparency & Campaign Finance Commission, Holly LaBerge and Patrick Millsaps; and
4. various other documents posted publicly on the internet.

The Attorney General's Statement raises more questions than it answers as to whether Mr. Olens and the attorneys under his supervision conducted themselves in accordance with their duties as public officials and as licensed attorneys.

- In my opinion, the Attorney General should immediately release to the public documents relating to his determination in August 2013 that no criminal investigation should be made relating to the facts disclosed in the LaBerge memo; such

documents relate to his duties as a prosecutor and therefore attorney client privilege would not prevent making them available to the public.

- It is also my opinion that the Attorney General should immediately request specific permission from the Georgia Government Transparency & Campaign Finance Commission to release to the public documents from his office relating to his decisions in August 2013, and thereafter, not to disclose the LaBerge memo to the plaintiffs or to the court during the Kalberman, Streicker and Hair lawsuits.
- If the Commission refuses to give that permission, the Attorney General should consider releasing these documents pursuant to Georgia Rule of Professional Conduct 1.6, which allows a lawyer to release information otherwise protected by client confidentiality to the extent necessary to respond to assertions that the lawyer has acted unethically. Comment 16 to Rule 1.6 indicates that the lawyer can defend himself without waiting for the commencement of an action or proceeding formally alleging misconduct.
- Finally, these documents can be produced pursuant to Rule 1.6(b)(1)(iii) if the Investigative Panel of the State Disciplinary Board initiates an investigation into the conduct of the responsible attorneys in the office of the Attorney General. State Bar Disciplinary Rule 4-203(a)(2) provides that the Investigative Panel has the power and duty "to initiate grievances on its motion." Internal Rule 5(e) of the Investigative Panel further provides that "When the Office of the General Counsel receives information that appears to invoke the disciplinary jurisdiction of the State Bar of Georgia, but no grievance form is filed, the information should be brought to the attention of the Panel for the Panel to consider instituting a grievance on its own motion pursuant to Bar Rule 4-203."

According to the LaBerge Memo, on July 16 and 17, 2012, while various complaints alleging misconduct by Nathan Deal during his 2010 gubernatorial campaigns were pending before the Ethics Commission, she received text messages on her personal cell phone while on vacation from Chris Riley, the Governor's Chief of Staff, and Ryan Teague, the Governor's Executive Counsel. LaBerge copied these text messages into her memo. On July 16, 2012, Riley explicitly engaged in negotiation with LaBerge regarding the pending complaints. In his first text message he asked "can [we] resolve all DFG [Deal for Governor] issues by Monday?" LaBerge replied by text saying, "A realistic counter [offer] by noon tomorrow is the best chance of a resolution." Riley wrote back by text, saying "That will be difficult, Ryan [Teague] said two of [the] issues, legal fees and aircraft are not even on the table for discussion. How can we give you a realistic counter [offer] when not all issues are ready?"

Between 6:31 am and 6:42 am on July 17, 2012, LaBerge and Teague exchanged 6 text messages, finally agreeing to talk by telephone that afternoon. According to the memo, Teague called LaBerge on her personal cell phone at 1:04 pm on July 17, 2012 and “made an offer of \$1,500 settlement, no admission of violations and everything else to be dismissed.” When LaBerge responded indicating that the offer was too low, according to the memo, Teague replied by saying, “it was not in the agency’s best interest for these cases to go to a hearing Monday [July 23, 2012]; nor was it in their best political interest either and that our rule making authority may not happen if the complaints were not resolved prior to Monday.”

The LaBerge memo concludes with the statement that she “felt it necessary to inform the Chairman of the Commission, Kevin Abernathy, about what had transpired” and that after she relayed “the texts and phone conversation, Kevin [Abernathy] stated that he would be passing this along to the Vice-Chairperson, Hillary Stringfellow and fellow commissioner, Kent Alexander.”

Six days after the July 17, 2012 telephone conversation between LaBerge and Teague, on July 23, 2012, the Commission conducted a formal hearing of the pending complaints against Deal and voted 3-1 to dismiss four of the complaints and to settle the three remaining complaints with the payment of \$3,350 in administrative fees for a series of “technical defects.”

According to the Attorney General’s Statement, his office was given the LaBerge memo in August 2013 but did not disclose its existence or contents to the plaintiffs or to the court during the Kalberman case, which resulted in a jury verdict in April 2014, nor during the Streicker case, which was settled in June 2014. Although not mentioned in the Statement, apparently the existence or contents of the memo were also not disclosed to plaintiff or the court prior to settling John Hair v. Georgia Government Transparency & Campaign Finance Commission in June 2014 or prior to obtaining a pre-litigation release of all claims from an Ethics Commission staff attorney, Elizabeth Murray-Obertein, in June 2014.

Decision not to pursue criminal investigation

According to the Attorney General’s statement, the week that the LaBerge memo was received, it was reviewed by “our chief prosecutor ... to determine if any criminal laws had been violated if the allegations in the memorandum were true.” Mr. Olens states that he was made aware of the memo after the chief prosecutor concluded his review “and determined that the allegations in the memorandum did not constitute crimes under state law.” These statements raise serious questions:

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Re: Statement of Attorney General

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1. Who made the initial determination that the LaBerge memo should be reviewed to decide whether, if true, it contained evidence that one or more crimes had been committed? What statements in the memo raised such concerns?
2. Apparently in determining that no “crimes under state law” had been committed, no investigation was done beyond reading the memo itself. Why, for example, was no inquiry made as to whether representatives of the Governor, including Ryan and Teague, communicated with any of the Commissioners prior to the Commission’s decisions in his favor on July 23, 2012?
3. Who were the potential criminal suspects, and the potential crimes, considered by the chief prosecutor in his review of the memo? Were LaBerge and any of the Commissioners considered as potential suspects, for example, on suspicion that their actions in resolving the complaints against Deal were influenced in violation of the law? If LaBerge or any of the Commissioners were potential suspects, how was a determination made that conflict of interest rules did not prohibit the office of the Attorney General from investigating its own clients in the Kalberman and Streicker cases for potential crimes, especially for conduct closely related to facts at issue in the civil cases? Was appointment of a special prosecutor to review the possibility of criminal investigation considered in light of this conflict of interest?
4. What potential crimes under state law were considered in determining that the “allegations in the memorandum” if true did not provide evidence of such crimes? What elements necessary to find criminal violations were missing from the information provided by the memorandum?
5. The Attorney General’s Statement indicates that the “allegations in the memorandum did not constitute crimes under state law.” Was there consideration of providing the memorandum to federal law enforcement agencies for their independent review of whether the memorandum raised suspicion that any federal law had been violated?

The chief prosecutor was surely acting on his own authority and responsibility to enforce the criminal laws of Georgia in reviewing the LaBerge memo, and not as a lawyer for the Kalberman and Streicker defendants. Therefore any documents he received, reviewed and created in the process of determining that no criminal investigation should take place are not protected by any attorney-client privilege held by those civil defendants. Providing such documents for public review would be an important first step by the office of the Attorney General toward answering the questions listed above.

Decision not to disclose the LaBerge memo in the Streicker case

On June 8, 2012 the plaintiff in the Streicker case sent to each individual Commissioner and to LaBerge the First Requests for Production of Documents. (Attachment 3.)

- Request 10 requested production of “All documents concerning the violation of any law, rule or regulation by Georgia Governor Nathan Deal at any time, including all complaints filed with the Defendants, all files concerning the investigation of such complaints, and all documents obtained as part of such investigations.”
- The Definition section stated that “document” is used to mean “every writing or record of every type and description ... including without limitation ... communications, including intra-agency communications and correspondence ... notes and memoranda ... summaries; minutes and records of telephone conversations ... [and] reports and summaries of negotiations”.
- The word “concerning” was defined as “referring to, reflecting, evidencing, or supporting.”
- Plaintiff stated explicitly that all the Requests were to be deemed “continuing” and “If, after producing documents, you obtain or become aware of any further documents responsive to these Requests, you are required to produce those documents.”

On January 28, 2013 Senior Assistant Attorney General Bryan Webb (who represented the Ethics Commission and LaBerge at the Kalberman trial) served Defendant's Responses and Objections to Plaintiff's First Request for Production of Documents. (Attachment 4). In response to Request 10, Webb stated that “Documents responsive to this request have been produced on the disc accompanying these responses.” Although “General Objections” appear at the beginning, the Response does not ask that Plaintiff clarify or specify what was to be produced in response to Request 10 specifically or indicate that any document that could fall within the description of Request 10 was being withheld on the basis of objection or privilege or any other reason.

In his Statement, the Attorney General says that after receiving the LaBerge memo, “our civil trial team reviewed the memo to determine if it was subject to the pending discovery requests. ... [O]ur civil lawyers determined it was not responsive to the discovery request in the civil litigation.” The Attorney General goes on to refer to discovery requests in both the Streicker and Kalberman cases.

The Attorney General quotes from Request 10 in the Streicker case but then defends the failure to produce the LaBerge memo in that case by saying “The memo was not about violations of law, rule or regulation, it was not a complaint, it was not concerning the investigation of a complaint, and it was not a document obtained as part of an investigation.” He goes on to say: “I recognize that this may seem like a technical response. Let me be clear – I wish that a request had been issued to which the memorandum was responsive.”

The Attorney General and his staff clearly recognized that the LaBerge memo was potentially relevant to the Kalberman and Streicker cases. The theory of both cases was that Governor Deal had worked behind the scenes to remove both Kalberman and Streicker from their positions at the Ethics Commission after they began actively to investigate the complaints against him and then arranged for his own hand-picked candidate, LaBerge, to take over the Commission. It is apparently undisputed that before Kalberman left the Commission Ryan Teague contacted LaBerge to discuss her becoming the new Executive Secretary, the same Ryan Teague described in the LaBerge memo as threatening the Commission if the complaints against his employer, Governor Deal, were not resolved within the next few days. Assistant Attorney General Webb apparently recognized the centrality of this issue when he reportedly said in his opening statement to the Kalberman jury: "Let me make one thing perfectly clear. The defendant in this case is not the governor, governor's office or the governor's counsel ... There were no strings being pulled." (Greg Land, "Opening Arguments are Laid out in Ethics Trial," Fulton County Daily Report, April 1, 2014.)

Given the enormous public interest in the Kalberman and Streicker cases and the potential impact on the outcome of those cases if the LaBerge memo was revealed, presumably the civil trial team at the Attorney General's office conducted a very careful analysis, documented in one or more memos that could be reviewed by Attorney General Olens personally, in recommending that the LaBerge memo not be disclosed. Among the issues that should have been addressed in such a memo are the following:

1. When on January 28, 2013, the Attorney General stated in its response to Request 10 that it had produced "all files concerning the investigation of such complaints [filed with the Ethics Commission concerning Nathan Deal]" what were considered to be "files concerning the investigation"?
2. According to the Ethics Commission website, "after the complaint has been filed" the Commission staff "will conduct an investigation" and "in the course of the investigation" the Commission staff will "make recommendations for case resolution." (<http://ethics.georgia.gov/enforcementcompliance/complaint-resolution-procedure/> Updated 2/12/12) If "files concerning investigation" include staff recommendations for case resolution, would a memo from the Executive Secretary regarding settlement negotiations normally be placed in such a file?
3. According to the same Ethics Commission website, "After the investigation stage the case is scheduled for a preliminary hearing before the Commission." The LaBerge Memo was dated six days before the Commission hearing on the Deal ethics complaints. Were those complaints still in the investigation stage as of the date of that memo, and if not, would a new and different Commission file have been created in which the LaBerge Memo would have been appropriately filed?

4. If the LaBerge Memo was not placed in any of the Commission files that were produced in response to Request 10, but should have been so filed, should the LaBerge Memo be produced when the Attorney General's office subsequently became aware of it, pursuant to Plaintiff's request that "If, after producing documents, you obtain or become aware of any further documents responsive to these Requests, you are required to produce those documents."
5. Why did the first part of Request 10 asking for "all documents concerning the violation of any law, rule or regulation by Georgia Governor Nathan Deal" not apply to the LaBerge memo, particularly since the definition of "documents" included "intra-agency communications and correspondence ... notes and memoranda ... summaries; minutes and records of telephone conversations ... [and] reports and summaries of negotiations"? Would the analysis be different if Request 10 had more clearly stated "all documents concerning any *alleged* violation" of law by Nathan Deal, and if so, is it a good faith interpretation of Request 10 to read it as referring only to documents concerning actual or proven violations of law by Deal? Was the January 28, 2013 production in Response 10 based on reading Request 10 as only applying to documents concerning actual or proven violations of law by Deal?

Decision not to disclose the LaBerge memo in the Kalberman case

On March 26, 2013 the plaintiff in the Kalberman case served the Ethics Commission with its First Request for Production of Documents (Attachment 5). Request 2 stated "Please produce the Commission's entire investigative file concerning Nathan Deal, including all correspondence relating to that investigation into alleged ethical violations committed by his campaign for governor in the 2010 election cycle."

On April 19, 2013 plaintiff in the Kalberman case served Holly LaBerge with its First Request for Production of Documents (Attachment 6). Request 2 stated: "Please produce any and all correspondence, including emails ... concerning any issue relating to this lawsuit filed by Plaintiff, including correspondence pertaining to, without limitation, ... the Commission's investigation into alleged ethics violations by Nathan Deal (the "Deal Investigation"). Request 5 stated: "Please produce any and all correspondence, including emails ... between yourself and any employee or representative of the State of Georgia's Governor's Office, since July 1, 2011."

On June 14, 2013 Senior Assistant Attorney General Bryan Webb served Responses and Objections to Plaintiff's First Request for Production of Documents on behalf of both the Commission and LaBerge. In Response to Request 2 to the Commission for "the entire investigative file," Webb stated that the Commission "will produce such

documents.” (Attachment 7) In Response to Requests 2 and 5 to LaBerge, Webb stated that LaBerge “will produce such documents (Attachment 8).

In his Statement, the Attorney General says that Kalberman “requested ‘correspondence’ between Ms. LaBerge and the Governor’s Office,” apparently referencing Kalberman’s Request 5 to LaBerge but omitting the phrase “including emails.” The Attorney General then goes on to say: “The memo is not correspondence; it is a document written by Ms. LaBerge and retained by her. It did not become correspondence when she gave us a copy 13 months later.”

The decision not to disclose the LaBerge memo in response to the Kalberman discovery should have been carefully documented for the same reasons discussed above in relation to the Streicker case. Such a memo should have addressed at least the following issues:

1. The text messages included in the LaBerge memo were clearly written communications between LaBerge and representatives of the Governor’s Office. Request 5 specifically requested “correspondence, including emails.” Should the text messages not be produced for no other reason than that they were received on LaBerge’s phone through its text messaging software rather than its email software?
2. Were the text messages not to be produced because they were embedded in a document that was a memo to file rather than itself being an item of correspondence?
3. If the text messages were to be produced in response to a request for “correspondence, including emails,” should they produced without also producing the memo in which they were embedded?
4. Was there consideration of whether the LaBerge memo should be produced in response to Request 2 to the Commission for “the entire investigative file”? If not, why not? If production in response to this request was considered, were the same questions about the meaning of “file” considered as discussed above in relation to the Streicker case?

The Attorney General states that his office advised LaBerge in late 2013 that production of her memo would be “responsive” to a federal subpoena issued to her, in contrast to his office’s conclusion that the memo was “not responsive” to the discovery requests in the Kalberman and Streicker cases. Presumably the Attorney General is referring to a subpoena issued to LaBerge by Assistant United States Attorney Christopher Bly dated November 25, 2013 to produce “all documents ... related to Georgia Government Transparency & Campaign Finance Commission Case Numbers 2010-0033(a) - (c)”

which defined documents as including but not limited to “note, correspondence of any form, letters, electronic mail, memorandums ... recorded statements” (Attachment 9). Why was production of the LaBerge memo required in response to this subpoena but not required in response to Streicker Request 10 for production of “All documents concerning the violation of any law, rule or regulation by Georgia Governor Nathan Deal at any time, including all complaints filed with the Defendants, all files concerning the investigation of such complaints, and all documents obtained as part of such investigations”?

Attorney General Duties to Governor Deal

Governor Deal has publicly stated that he was unaware of the LaBerge memo until it was sent to the Commission and released to the media this month.

1. In August 2014 when the Attorney General received the LaBerge memo, was consideration given as to whether the Governor should be notified of its content? Presumably the Governor would have wanted to know that his Chief of Staff and Executive Counsel had been accused by the Commission’s Executive Secretary of attempting to negotiate issues relating to his personal legal matters and, of course, that Teague had allegedly threatened the Commission on his behalf.
2. If the Attorney General’s office considered disclosing the LaBerge memo to the Governor, did it also consider that it needed consent from Holly LaBerge, in her official capacity as Executive Secretary, or from the Commission to do so? If yes, was such consent requested?
3. If consent to disclose the LaBerge memo to the Governor was requested and denied, did the Attorney General’s office consider whether the Commission officials who refused to allow the Governor to be informed were refusing to act in violation of their legal obligations to the Commission and the State of Georgia, such that the Attorney General should “proceed as is reasonably necessary in the best interest of the organization”? Georgia Rule of Professional Conduct 1.13(b).

Attorney General’s Representation of the Governor’s Office in Kalberman

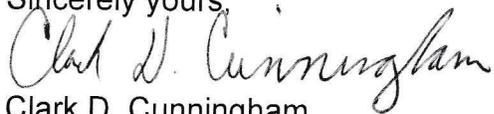
On March 17, 2013 the Attorney General filed a motion on behalf of the Governor’s Office in the Kalberman case in response to subpoenas issued to both Governor Deal and Ryan Teague. (Attachment 10). In footnote 1 to the Brief in Support of Motion to Quash, the Attorney General stated that “the Office of the Governor, of course, adamantly objects [to] Plaintiff soliciting any information from Mr. Teague that could encroach on the attorney-client privilege he shares with the Governor.”

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1. Prior to agreeing to represent the Office of the Governor in the Kalberman case, did the Attorney General consider whether he could continue to withhold from one client, Governor Deal, information of importance to that client obtained from another client, the Commission?
2. The Attorney General's brief argued that "Plaintiff did not endeavor to pursue discovery from any member of the Governor's Office," a point that was relied upon by the Court in ordering that Governor Deal should not be required to testify. (Attachment 11). Did the office of the Attorney General consider the possibility that this argument might appear deliberately deceptive if became known that the Attorney General had withheld evidence that if produced clearly would have led the plaintiff to pursue discovery against the Governor's Office?

In saying in his Statement that "I wish that a request had been issued to which the memorandum was responsive" but in effect his hands were tied by his duty "to work with our clients" and represent them "zealously" the Attorney General seems to be offering an excuse contrary to standards of lawyer professionalism. As the questions above indicate, it was clearly possible in good faith to interpret one or more of the discovery requests in the Kalberman and Streicker cases as applying to the LaBerge memo. The ethical rules allow lawyers use their own professional judgment in deciding to be fair and candid in responding to discovery requests. See, e.g., Georgia Rule of Professional Conduct (GRPC) 1.2(a) and accompanying Comment 1 ("[A] lawyer is not required to ... employ means simply because a client may wish that the lawyer do so. ... [T]he lawyer should assume responsibility for technical and legal tactical issues.") This is especially true for lawyers representing government organizations. The ethical rules encourage government lawyers to question the conduct of the officials they represent and to use their own judgment if necessary for the best interests of the government. See GRPC 1.13(b) and Comment 6.

Sincerely yours,



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