



OFFICE OF
INSURANCE COMMISSIONER

March 25, 2014

VIA U.S. MAIL AND ELECTRONIC MAIL

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RE: Edmund C. Scarborough and Walter W. Wolf, No. 13-0084;
Proposal to take judicial notice of Letter from Governor Inslee

Dear Messrs. Singer, Parker and Anderson:

This letter is relative to Respondent Scarborough's Motion to Quash filed January 21, 2014, to which the OIC responded by OIC's Opposition to Scarborough's Motion to Quash filed March 4, 2014 and Scarborough replied on March 11, 2014.

In December 2013 Governor Jay Inslee distributed the attached letter statewide, to state employees, agency directors and possibly other affiliated entities. A copy of that letter is attached hereto. I am proposing to take judicial notice of this letter and would like to provide you with the opportunity to address any issues regarding the application of this letter to Respondent Scarborough's Motion to Quash prior to my entering the final order on the Motion to Quash.

Evidence Rule 201, Washington Rules of Court, which serves as a guide in adjudicative proceedings conducted under Title 34 RCW such as the proceeding herein, provides:

(a) This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

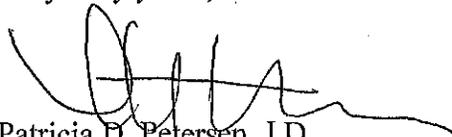
(f) Time of Taking Notice. Judicial notice may be taken at any state of the proceeding.

Referencing the above cited ER 201, case law, e.g., State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991), confirms that a governor's proclamation is a matter of public record in the office of the governor and therefore a proper subject of judicial notice even without a party's request. Citing State v. Bertrand, 61 Wn.2d 333, 341, 378 P.2d 427 (1963), Hoffman states that just as recognition of a foreign government by the United States is a political act accepted as conclusive by state and federal courts, so is such a proclamation by the Governor binding upon this court. In addition, case law, e.g., In re Wells Fargo Mortgage-Backed Certificates Litigation, 712 F.Supp. 2d 958 (N.D. Cal. 2010) holds that courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.

Please provide any argument or input you may have regarding judicial notice or the application of this letter to any issues in Respondent Scarborough's Motion to Quash within the next five business days.

Thank you for your time and consideration.

Very truly yours,



Patricia D. Petersen, J.D.
Chief Presiding Officer

Enclosure: Letter from Governor Inslee

cc: James A. McPhee, Esq.
Michael Miles, Esq.

JAY INSLEE
Governor



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

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MEMORANDUM

DATE: December 20, 2013
TO: Directors of State Agencies, Boards, and Commissions
FROM: Nicholas Brown, General Counsel to the Governor
SUBJECT: **Prohibition on Employing In-house Attorneys**

As you all are aware, the Office of the Attorney General serves as the exclusive source of legal representation for state agencies, boards and commissions. Two statutes outline these duties and the specific functions assigned exclusively to the Attorney General's Office. First, RCW 43.10.030 lists the Attorney General's powers, including representing the state in all court proceedings, advising state officers on all legal questions related to their duties, and drafting contracts and other legal documents. Second, RCW 43.10.040 states that "The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions"

Further, state law prohibits state agencies from hiring attorneys as "in-house counsel," "staff attorneys," or in any other role as a legal advisor. RCW 43.10.067 states that no agency, "other than the attorney general, shall employ, appoint or retain in employment any attorney ... or any other person to act as attorney in any legal or quasi legal capacity" A few agencies with unique roles have specific statutory authority to hire attorneys,¹ but all other agencies are subject to the prohibition.

As these statutes make clear, and as the Washington Supreme Court has repeatedly recognized, legal advice and legal representation generally provided to your agencies must come from the Attorney General's Office, rather than in-house attorneys.

Compliance with these statutes is important for several reasons, beyond the primary need to follow state law. First, *communications between agency employees, including employees who are lawyers, are generally not covered by attorney-client privilege*. Thus, if an in-house lawyer provides legal advice, that advice is subject to disclosure in response to discovery or public

¹ See, e.g., RCW 43.10.067 (UW Law School); RCW 42.17A.130 (Public Disclosure Commission).

records requests. This could potentially undermine the State's position in litigation or negotiations. By contrast, legal advice of assistant attorneys general *is* protected by attorney-client privilege.

Second, it is critical that agencies throughout the state receive legal advice that is both *consistent and independent*. The Attorney General's Office is best suited to fulfill these goals. Assistant attorneys general are in a position to see the laws and obligations that apply to multiple state agencies. In-house attorneys are not. The Attorney General's Office seeks to ensure that one agency does not take a position detrimental to another agency or to broader state interests, and helps resolve legal disputes between agencies. The Attorney General's role in considering broader state interests is integral to good government and is hindered by agencies relying on the advice of in-house attorneys only familiar with issues faced by their own agency. Further, for the State to properly to assess and address legal risks, independent, outside advice is crucial. In-house employees may feel obligated to advise in a certain manner when they are reporting up the chain of command.

Finally, the *employment of in-house attorneys has created confusion* among members of the public, judicial tribunals, and the media. This confusion is exacerbated by staff use of working titles such as "legal counsel" or "staff attorney," or allowing staff to represent that they serve as "attorneys" to the agencies that employ them. As leaders of your respective agencies, it is important that this practice ceases.

Of course, agencies are allowed to employ people who happen to be attorneys as long as they do not perform functions assigned to the Attorney General's Office. I know some agencies employ attorneys in policy, legislative, or other non-attorney roles. I also know that with approval of the Attorney General's Office, agency staff, including attorneys, have come to handle certain administrative hearings. These sorts of pre-approved arrangements raise far fewer concerns. That said, each agency should, over the next few months, review its practices related to employing attorneys and make sure they comply with state law. If your agency has been approved to handle certain administrative hearings internally, make sure that you are doing so within the bounds of the approval provided by the Attorney General's Office. If you are uncertain about what constitutes a legal function or whether your staff is performing approved activities, I suggest you consult with the division chief that Attorney General Ferguson has assigned to your agency. If you do employ attorneys who perform legal functions that should likely be performed by the Attorney General's Office, please work with the Attorney General's Office to find a suitable arrangement to resolve that problem. I would appreciate it if you would keep me apprised as to your progress.

Thank you for your attention to this important matter and please feel free to contact me with any questions.