



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

March 28, 2008

Charles J. O'Byrne  
Secretary to the Governor  
State of New York  
Executive Chamber  
The Capitol  
Albany, New York 12224

Dear Mr. O'Byrne:

You have asked for advice concerning District Attorney P. David Soares' request, dated March 24, 2008, that Governor David A. Paterson grant a waiver of grand jury secrecy and all applicable privileges with respect to certain documents provided to the District Attorney's office by former Governor Eliot Spitzer. Because an unrealistically short timeline has been proposed by the District Attorney, we are providing you with this preliminary guidance as to whether Governor Paterson has the power to waive (1) Grand Jury secrecy and (2) those privileges reserved by the former Governor. Additionally, we identify alternative mechanisms that may lead to prompt disclosure of the relevant documents.

**I. Waiver of Grand Jury Secrecy**

Neither Governor Paterson nor anyone else has the power to waive Grand Jury secrecy; only a court may authorize the District Attorney to make public matters that are protected by Grand Jury secrecy. In our view, neither C.P.L. 190.50(7) nor any other provision of law gives the Governor the power to grant a waiver of Grand Jury secrecy. The integrity of the Grand Jury process cannot be compromised. The law is clear. "Evidence obtained by a Grand Jury . . . may not be disclosed to other persons without a court order." C.P.L. 190.25(4)(a) (emphasis added).

The secrecy of evidence obtained by the Grand Jury is a longstanding and essential safeguard of the criminal justice system. As the Court of Appeals has observed:

The Grand Jury has long been heralded as the shield of innocence . . . and as the guard of liberties of the people against the encroachments of unfounded accusations from any source. . . . Accordingly, secrecy has become a vital requisite of Grand Jury proceedings.

People v. Sayavong, 83 N.Y.2d 702, 706 (1994) (citations and internal quotations marks omitted). Grand Jury secrecy protects numerous interests other than those of the individual subpoenaed, including:

(1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations by Grand Jury witnesses if no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.

People v. DiNapoli, 27 N.Y.2d 229, 235 (1970). See also Sayavong, 83 N.Y.2d at 706. Neither the Governor nor any other person can adequately represent, for purposes of waiver, the various interests protected by Grand Jury secrecy.

To the extent one seeks to use evidence produced to a Grand Jury for purposes other than a Grand Jury proceeding, only a court, and not a member of the Executive Branch, can give the permission needed to do so, on a showing of “a compelling and particularized need,” and after finding that the public interest in disclosure outweighs the public interest favoring Grand Jury secrecy. Matter of District Attorney of Suffolk County, 58 N.Y.2d 436, 444 (1983).

This standard is not easily met. For example, the District Attorney of Kings County was unable to obtain release of the Grand Jury minutes and records concerning an investigation into the death of a seven-year-old black youth who was struck by an automobile driven by an Hasidic man, an event that precipitated riots in the Crown Heights section of Brooklyn. The court reached that conclusion despite the District Attorney’s argument that release would curb the community and racial unrest that erupted when the Grand Jury failed to indict the driver of the automobile and restore confidence in his office. See Matter of Charles J. Hynes, 179 A.D.2d 760, 760 (2d Dept 1992) (holding that “those theories do not constitute the compelling and particularized need necessary to overcome the presumption of confidentiality which attaches to Grand Jury proceedings”).

While C.P.L. 190.85 provides a mechanism for a Grand Jury to issue a report “[c]oncerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action,” we understand that this mechanism is not

available to District Attorney Soares with respect to persons who do not currently hold public office. C.P.L. 190.85(1)(a); see Matter of Onondaga County District Attorney's Off., 92 A.D.2d 32, 34 (4th Dep't 1983) (“When a public servant has voluntarily resigned, a Grand Jury report no longer contains a viable recommendation of either removal or disciplinary action and is, therefore, no longer acceptable under the terms of CPL 190.85.”)

In short, the secrecy of the Grand Jury process must be preciously guarded, and the Governor does not have the legal right to waive that secrecy.

We recognize that in this instance important interests could support the disclosure of the Grand Jury materials at issue were the matter brought before a court of competent jurisdiction. Disclosure and transparency are indispensable features of a properly functioning democracy, and they are especially important in the unusual circumstances present here, involving wrongdoing by public officials. If the District Attorney were to make an application to a court for the disclosure of these materials, we believe that, while the bar is high, there would be strong arguments favoring the public’s right to know that would weigh in favor of disclosure.

Again, only a court, and not the Governor, can make that determination.

The District Attorney has informed us in our recent discussions that, with respect to Grand Jury secrecy, the point of his letter to the Governor was to ask the Governor to join him in seeking a court order authorizing disclosure of Grand Jury materials. We will consider that request and respond to it at the appropriate time.

## **II. Waiver of Privileges Asserted by Former Governor Spitzer**

Because the issue of privileges is complex and the law is unsettled, and because District Attorney Soares has not determined whether the former Governor intends to assert the claims of privilege he reserved, we believe it is premature to opine with respect to any privileges he may assert, or Governor Paterson’s authority to waive such privileges. This is especially true in light of the complexity of the issues and their importance not only in this matter but in the future.

However, we offer for your information some preliminary guidance. Our understanding is that the former Governor or his representative produced some of the documents in question to the District Attorney voluntarily and others in response to Grand Jury process, and that the District Attorney agreed to accept documents subject to a limited waiver of applicable privileges. Under that limited waiver, the former Governor reserved the right to assert applicable privileges against anyone other than the Grand Jury and provided the material to the District Attorney for his use in the Grand Jury investigation only, and for no other purpose, e.g., a public report.

Several privileges may be asserted by the former Governor pursuant to his agreement with the District Attorney. Relevant privileges might include the “public interest” privilege (referred to by some courts as “executive” privilege), the attorney-client privilege and the attorney work product privilege, among others. See, e.g., Cirale v 80 Pine St. Corp., 35 N.Y.2d 113 (1974) (discussing

public interest privilege); C.P.L.R. 4503(a)(1) (codifying privilege for confidential communications between attorney and client); see also Matthew W. Arnock, Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials, 35 Cap. U. L. Rev. 983 (2007) (collecting decisions from other states addressing applicability of executive privilege). Each of these privileges may be subject to a different analysis with respect to who may invoke the privilege, what documents are properly covered by the privilege, what considerations may overcome the privilege, and under what circumstances waiver of the privilege may occur.

As a first course of action we suggest that the District Attorney, who initially agreed to the former Governor's request to reserve privileges, now request that the former Governor waive those previously reserved privileges. The District Attorney could have refused to agree to the former Governor's request to reserve privileges, taking the position that such privileges did not apply, as did the State Senate. Given that the District Attorney voluntarily agreed to the former Governor's request, it would be appropriate for him to request that the former Governor withdraw the claims of privilege the District Attorney previously permitted him to reserve. If the former Governor were to refuse that request, a court of competent jurisdiction would have to determine whether and to what extent the claimed privileges apply to the documents at issue, who has the power to waive any such privileges, and how such waivers may occur. Governor Paterson's opinion could be weighed by the court in making that ultimate determination. See Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977) (in a case involving invocation of executive privilege by a former President, the Court takes into account views of the incumbent President because it "must be presumed that [he or she] is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch").

### **III. Disclosure**

Once again, we agree with the District Attorney's goal in seeking to make documents public. While we believe that the former Governor has the legal right to assert the claims of privilege he reserved and to obtain a judicial determination of them, it is the personal opinion of the Attorney General that the former Governor should agree to withdraw his claims of privilege, in the interests of disclosure and transparency and given the unique circumstances presented.

Alternatively, there are at least two other mechanisms by which these documents may become public, without any need to overcome Grand Jury secrecy and without violating the former Governor's reserved right to assert privileges. First, the former Governor has asserted privileges in litigation now pending in Supreme Court, New York County. See Office of the Governor v. Winner, Index No. 406848/07 (Sup. Ct. N.Y. Co.); Dopp v. Winner, Index No. 114958/07 (Sup. Ct. N.Y. Co.). The Senate, unlike the District Attorney, has not acquiesced in the former Governor's claim of privilege, and that question is now pending before the court. To the extent the Senate prevails, it will obtain the documents without the restrictions on Grand Jury secrecy that limit the use of documents

obtained through Grand Jury subpoenas. The documents may well become public through that process.

Additionally, the Public Integrity Commission is apparently in possession of the same documents obtained by the District Attorney, and unencumbered by Grand Jury secrecy. While documents in the possession of the Commission are confidential during the course of their investigation, if the Commission issues a Notice of Reasonable Cause (“NORC”) to proceed with an action, the Commission would have the authority to make documents public in connection with the NORC, in their discretion, unencumbered by either Grand Jury secrecy issues or assertion of privileges, if any, by former Governor Spitzer. In the event the Commission issues a NORC, we encourage them to make the fullest possible disclosure of relevant documents.

In sum, there are at least four possible ways the documents at issue could be made available to the public:

1. District Attorney Soares may obtain a court order authorizing disclosure of documents produced to the Grand Jury;
2. former Governor Spitzer may waive his claims of privilege;
3. the Senate may prevail in its litigation challenging the former Governor’s claim of privilege;
4. the Public Integrity Commission may issue a NORC and disclose documents.

We hope that one or more of these mechanisms will result in disclosure of relevant documents.

Finally, we will be informing District Attorney Soares of our conclusions. In our opinion, if the District Attorney wishes to issue a report he has two options. First, the District Attorney could seek a court order authorizing public disclosure of relevant documents obtained through the Grand Jury process. If successful, the District Attorney would also need to obtain a waiver from former Governor Spitzer of the privilege claims previously reserved, or obtain a court ruling that rejects the former Governor’s claims of privilege.

Alternatively, the District Attorney could produce a report that does not rely on evidence protected by Grand Jury secrecy or subject to claims of privilege. The District Attorney previously conducted a related investigation and collected much evidence outside the Grand Jury process. We believe the District Attorney may well be able to issue a full and thorough report without violating Grand Jury secrecy or confronting privilege issues.

We stand ready to assist you in any way possible.

Sincerely yours,

Andrew M. Cuomo  
Attorney General

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By: Barbara D. Underwood  
Solicitor General

cc: Hon. P. David Soares