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**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH**

In re:

Utah House of Representatives
Special Investigative Committee

**MEMORANDUM IN SUPPORT OF
THE MOTION OF THE SPECIAL
INVESTIGATIVE COMMITTEE
UNDER § 36-14-5 TO COMPEL
OBEDIENCE TO A SUBPOENA
SUBJECT TO PROTECTIVE
CONDITIONS**

Case No. _____

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PRELIMINARY STATEMENT

This motion is brought by the Special Investigative Committee of the Utah House of Representatives (the “Special Committee”), which the House convened in July of this year to investigate allegations of misconduct against Utah Attorney General John Swallow. The Special Committee seeks an order of this Court under Utah Code § 36-14-5(2)(a)(i) compelling the Office of the Utah Attorney General (the “Attorney General’s Office” or the “Office”) to comply fully with a document subpoena issued by the Special Committee, and imposing conditions to protect certain data recovered pursuant to the subpoena from unwarranted disclosure. The subpoena calls, in part, for the production of certain of Attorney General Swallow’s email communications.¹ The Office, acting through a committee of senior Office personnel, has cooperated with the investigation. Indeed, the Special Committee brings this motion specifically to address certain confidentiality concerns that the Office has raised in its effort to comply with the Special Committee’s subpoena and that are explained below. The Special Committee believes that the proposed order will fully resolve the Office’s concern.

The Office has informed the Special Committee that certain potentially responsive documents, including a large number of emails received by the Attorney General during the period covered by the subpoena, are missing from the Office’s computer system. The Special Committee is thus required to undertake, as its own expense, extensive and costly forensic data recovery efforts.

¹ A copy of the September 25, 2013 subpoena appears as Exhibit A to the Declaration of John L. Fellows (“Fellows Declaration”) in support of this motion. In addition to the document subpoena issued on September 25, 2013, the Special Committee issued a second subpoena, at the request of the Attorney General’s Office, on October 31, 2013, requiring the production, forthwith, of specified electronic media of the Attorney General’s Office on which data responsive to the Special Committee’s original subpoena is or may in the past have been stored. The second subpoena was served on the Office on November 1, 2013. The purpose of the second subpoena was simply to clarify that the Special Committee seeks both specified electronic media of the Attorney General’s Office and the electronic records contained on the media and thereby provide an unambiguous legal basis for the filing of this motion for relief. A copy of that subpoena appears as Exhibit B to the Fellows Declaration.

Specifically, in the course of its investigation, the Special Committee has learned that the following data is missing:

- a potentially large number of emails received by the Attorney General on the Office email system during the period covered by the Special Committee’s subpoena;
- a potentially significant number of calendar entries from the Attorney General’s electronic Office calendar for the years 2009, 2010 and 2011;
- all of the information from the state-provided data devices (*i.e.*, desktop computer, laptop computer, personal data assistant) from before 2013;² and
- information contained on the hard drive in the Attorney General’s personal home computer, which has stopped working;³

In addition to this missing data, the Special Committee has learned that the Attorney General replaced and retired his personal cell phone in 2012: it is unclear whether the Attorney General’s personal cell phone data is retrievable.

The Special Committee has an additional reason for needing access to the servers in the Attorney General’s Office: the lack of a “litigation hold” or “document hold” on potentially relevant information contained on the computers or devices of employees of the Attorney General’s Office until September 2013. Public allegations of wrongdoing about the Attorney General arose in January 2013. Attorney General Swallow himself referred those allegations to the United States Attorney for the District of Utah, also in January 2013. Despite the allegations, and multiple subsequent investigations launched after January 2013, the Attorney General’s

² In late 2012, the Attorney General—who was employed as Chief Deputy Attorney General since December of 2009—asked for and later received a new state-provided desktop computer, a new state-provided laptop computer, and a new state-provided personal data assistant. Each of the data devices he previously had used was retired and the data on those devices was deleted.

³ The Attorney General’s personal attorney has informed the Special Committee that the problem with the drive arose earlier this year, and that efforts by the Attorney General’s personal attorney to retrieve data from that drive were unsuccessful.

Office did not issue a “litigation hold” or a “document hold” order to Office employees until the Special Committee inquired recently about whether such a “hold” order had been issued. That means that, until recently, notwithstanding the known existence of several highly-publicized investigations into these matters, Office employees were under no specific direction to retain electronic and hard copy documents.

This is the context in which the Office’s confidentiality concerns have arisen. To determine what happened to the missing data of the Attorney General’s Office, and to try to recover that data, a forensic computer expert hired and paid by the Special Committee must be given access to the Office’s data storage devices. The Office has told the Special Committee that the Office computers and servers at issue may contain confidential health care information about individuals, the disclosure of which is governed by applicable law.⁴ This information would have been obtained by the Office in connection with its role in certain health care related cases. Such information has no relevance to the Special Committee’s work and the Special Committee has no interest in reviewing it. However, the information is technologically intertwined with the data that is the subject of the Special Committee’s forensic recovery efforts: the Special Committee cannot proceed with its investigation without taking custody of data images that may contain this confidential (but irrelevant) health-related information.

The proposed order submitted with this motion would put in place a procedure under which the Special Committee will seek to recover the missing data and then return it to the Office without reviewing it. That procedure will allow the Office to review any recovered data and produce only relevant non-health-related information to the Special Committee.

⁴ The Special Committee and the Office have reached stipulated agreements to address other confidentiality concerns raised by the Office. As a result, the only issue before the Court on this motion relates to the confidentiality of health-related information that incidentally resides on Office computers but is of no investigative interest to the Special Committee.

Significantly, the Special Committee has not reached any conclusions on these data loss questions, and its inquiry regarding those matters is ongoing. To allow the Special Committee's work to proceed while at the same time addressing the Office's confidentiality concerns, the Special Committee asks that the Court enter the proposed order.

BACKGROUND

I. The Legislature's investigation.

Shortly after he was sworn into office on January 7, 2013, Attorney General Swallow became the subject of public allegations of potential illegal or improper conduct. Other allegations have since emerged, and public attention to these issues has persisted. On July 3, 2013, the Utah House of Representatives passed a resolution creating the Special Committee.⁵ The Special Committee is a "special investigative committee" within the meaning of Utah Code § 36-12-9(1) and is charged with "investigat[ing] allegations against the current attorney general" and related matters, and with "report[ing] to the House findings of fact about the matters investigated and the need, if any, for legislation."⁶ The investigation encompasses allegations of wrongdoing dating to the time Attorney General Swallow joined the Office as Chief Deputy Attorney General in December 2009.⁷

II. Email missing from the Attorney General's Office.

A. The Attorney General's Office reports that an unknown but potentially significant volume of the Attorney General's email from the period covered by the subpoena is missing.

Under Utah Code § 36-14-2, the Special Committee, by its chair, has authority to issue subpoenas. On September 25, 2013, the Special Committee issued a subpoena to the Office requiring the Office to produce, among other things, communications between Attorney General

⁵ See Fellows Decl., Ex. C (H.R. 9001, enacting House Rule HR3-1-202).

⁶ HR3-1-202(7).

⁷ HR3-1-202(8)(a).

Swallow and a number of identified individuals between December 1, 2009 and September 25, 2013. The Office's general counsel assumed responsibility for coordinating the Office's response to the subpoena, and convened, from among the members of the Office's senior staff, an *ad hoc* committee of senior attorneys to assist in that endeavor.

The Special Committee and the Attorney General's Office began discussions regarding the subpoena. At the outset of the discussions, the Office identified a significant issue for the Special Committee's consideration. According to the Office, a potentially large volume of email of Attorney General Swallow from the covered period is missing.⁸ The Special Committee's subsequent investigation has confirmed that a potentially significant volume of email of Attorney General Swallow from the covered period is, in fact, unavailable.⁹

The Special Committee is actively investigating the circumstances and extent of the data loss and seeking to determine whether any of the missing data is recoverable.

B. Additional reports of lost or unpreserved data.

In the course of its investigation, the Special Committee has also learned of other instances in which documents or data that may be pertinent to its investigation have been lost or otherwise not preserved:

- A potentially significant number of calendar entries for the years 2009, 2010 and 2011 have disappeared from the Attorney General's electronic Office calendar.¹⁰
- In late 2012, the Attorney General—who had served in the Office as Chief Deputy Attorney General since December of 2009—asked for, and later received, new state-provided desktop and laptop computers, as well as a new state-provided personal data assistant.¹¹ Each of the data devices he had previously used were retired and all data on them was deleted.¹²

⁸ Melnick Decl. ¶ 4.

⁹ *Id.* ¶ 6(a).

¹⁰ *Id.* ¶ 6(b).

¹¹ *Id.* ¶ 6(c).

¹² *Id.*

- The hard drive in the Attorney General’s personal home computer has stopped working. The Attorney General’s personal attorney has informed the Special Committee that the problem with the drive arose earlier this year, and that efforts by the Attorney General’s personal attorney to retrieve data from that drive were unsuccessful.¹³
- The Attorney General replaced and retired his personal cell phone in late 2012.¹⁴
- Despite allegations of wrongdoing about the Attorney General that arose publicly in January 2013, and the fact that the Attorney General himself referred those allegations to the United States Attorney for the District of Utah that same month, his Office did not issue a so-called “document hold” order to Office employees until the Committee inquired recently about whether such a “hold” order had been issued.¹⁵ That means that, until recently, notwithstanding the known existence of several highly-publicized investigations into these matters, Office employees were under no specific direction to retain electronic and hard copy documents.

The Special Committee is actively reviewing the circumstances and import of each of these events.

III. Investigation of the cause of the missing Office email and efforts to preserve and recover the missing data.

With the cooperation and assistance of the Office, on or about October 15, 2013, the Special Committee’s forensic expert began the process of creating electronic copies, or “forensic images,” of the Office’s relevant electronic media, which is a first step in the effort to recover missing data.¹⁶

These images, once obtained by the Special Committee, may further the Special Committee’s efforts to determine the reasons for the apparent loss of data as well as the Special Committee’s efforts to investigate the underlying facts of this matter. The Special Committee

¹³ *Id.* ¶ 6(d). As noted earlier, the Attorney General has produced the hard drive from his home computer to the Special Committee, which has retained a forensic expert to determine whether data from the drive is capable of recovery. *Id.*

¹⁴ *Id.* ¶ 6(e).

¹⁵ *Id.* ¶ 6(f).

¹⁶ *Id.* ¶ 7.

has not reached any conclusions on these data loss issues, and its inquiry regarding them is ongoing.

IV. The Office’s HIPAA concerns.

On or about October 16, 2013, the Attorney General’s Office identified a legal concern that, in the Office’s view, prevented the Office from releasing the forensic images into the Special Committee’s custody.¹⁷ In the Office’s view, the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, prohibited the Office from providing the forensic images because of the possibility that some of the information contained in the images is protected by HIPAA.¹⁸

Federal regulations under HIPAA generally prohibit a “covered entity”—a health care provider or similar entity—from disclosing “individually identifiable health information.” 45 C.F.R. § 164.502(a); *see also id.* § 164.103 (defining terms). A “business associate,” including an attorney, is also covered by HIPAA if it receives HIPAA-protected information in the course of providing service to a covered entity. *Id.* As explained to the Special Committee by the Office, certain agencies of the State of Utah are required to protect information under HIPAA and those agencies at times provide protected information to the Office, which serves as their counsel. According to the Office, the Office is thus required to protect covered health information from disclosure under HIPAA.

In the Office’s view, providing the forensic images to the Special Committee could constitute a prohibited disclosure of health information under HIPAA.¹⁹ The Office asserts that

¹⁷ Fellows Decl. ¶ 6.

¹⁸ *Id.*

¹⁹ *Id.*

under HIPAA, a judicial order compelling compliance is required before the Office may provide the data to the Special Committee.²⁰

As noted, the Special Committee does not seek to obtain or review protected health-related information.²¹ The problem is that any such information on the Office's computers is technologically intertwined with the potentially relevant data that the Special Committee does seek to recover.

With the Office's assistance, the Special Committee has created (but, because of the Office's confidentiality concerns, not taken possession of or reviewed) forensic images of the relevant electronic media.²² The forensic images remain in the Office's custody.²³ The concerns raised by the Office have halted the Special Committee's effort to recover data.²⁴

The Special Committee thus brings this motion to resolve the Office's asserted concerns.

ARGUMENT

I. The Court has clear authority to enter the requested order and should enter the order so that the Special Committee's investigation may proceed.

While the Special Committee does not share the Office's conclusion that HIPAA prevents compliance with the Special Committee's subpoena and believes that HIPAA's regulations fully authorize compliance with the subpoena,²⁵ the Court need not resolve that issue.

²⁰ *Id.*

²¹ Fellows Decl. ¶ 7.

²² Melnick Decl. ¶ 8.

²³ *Id.*

²⁴ Fellows Decl. ¶ 7.

²⁵ HIPAA authorizes a covered entity to "disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a)(1); *see also id.* § 164.504(e) (permitting disclosure consistent with § 164.512). "Required by law" means "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." 45 C.F.R. § 164.103. Compliance with a subpoena like the one at issue here is mandatory and is enforceable in a court of law. *See* §§ 36-14-1(5) & 36-14-5. Compliance with the Special Committee's subpoena is thus required by law within the meaning of the HIPAA regulations and without the order of this Court that the Office has demanded.

The Special Committee believes that the issuance of an order by the Court as sought in this motion will fully address the concerns raised by the Office.

HIPAA's regulations are explicit that a covered entity may "disclose protected health information in the course of any judicial or administrative proceeding . . . in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(i). An order of this Court issued in connection with this judicial proceeding and requiring the Office to comply with the Special Committee's subpoena will thus permit the Office to release the forensic images. This Court has clear authority to issue such an order under Utah Code § 36-14-5, which permits the Court to "order the person named in the subpoena to comply with the subpoena." The interests of inter-branch comity support the issuance of the order to further the ends for which the House of Representatives convened the Special Committee.

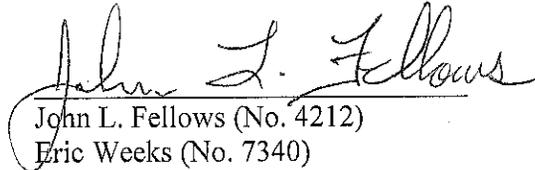
The Special Committee further observes that under the proposed order submitted with this motion, all forensically recovered materials will be returned to the Office without review by the Special Committee. Then the Office will review the recovered material to determine what portion, if any, of the information contained therein is responsive to the Special Committee's subpoena. This procedure completely protects any health-related information from becoming known by the Special Committee, since such protected material will be non-responsive to the pending subpoena. The proposed order thus satisfies HIPAA's purpose of preventing the unnecessary dissemination of protected health information, while allowing the Special Committee to proceed with its investigation.

CONCLUSION

The Court should enter the unopposed relief requested herein.

DATED this 1st day of November, 2013.

Respectfully submitted,



John L. Fellows (No. 4212)
Eric Weeks (No. 7340)

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Legislature of the State of Utah
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Counsel for the Special Investigative Committee of
the Utah House of Representatives

CERTIFICATE OF SERVICE

I certify that on November 1, 2013, true and correct copies of the foregoing memorandum of law and the accompanying proposed order and declarations of John L. Fellows and Andrew Melnick were served on the following by hand delivery and electronic mail:

Brian Tarbet, General Counsel, Office of the Utah Attorney General



**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH**

In re:

Utah House of Representatives
Special Investigative Committee

**DECLARATION OF JOHN L.
FELLOWS IN SUPPORT OF THE
MOTION OF THE SPECIAL
INVESTIGATIVE COMMITTEE
UNDER § 36-14-5 TO COMPEL
OBEDIENCE TO A SUBPOENA
SUBJECT TO PROTECTIVE
CONDITIONS**

Case No. _____

I, John L. Fellows, declare under criminal penalty of the State of Utah that the following is true and correct to the best of my recollection and belief:

1. I hold the position of General Counsel in the Office of Legislative Research and General Counsel of the Legislature of the State of Utah. I submit this declaration in support of the motion of the Special Investigative Committee of the Utah House of Representatives (the "Special Committee") under Utah Code § 36-14-5 to compel obedience to a subpoena subject to protective conditions.

2. Attached hereto as Exhibit A is a true and correct copy of a subpoena issued by the Special Committee on September 25, 2013.

3. Attached hereto as Exhibit B is a true and correct copy of a subpoena issued by the Special Committee on October 31, 2013.

4. Attached hereto as Exhibit C is a true and correct copy of House Resolution H.R. 9001, which enacted House Rule HR3-1-202.

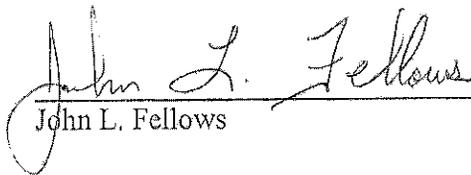
5. The Special Committee has undertaken an effort, in part, to recover data at its own expense from certain of the electronic data devices of the Office of the Attorney General. In

the course of that effort, I understand that the Special Committee's investigators have created forensic images of those devices.

6. It is my understanding that, on or about October 16, 2013, the Office informed the Special Committee that it could not permit the Special Committee to take custody of the forensic images because of a legal concern. The Office informed the Special Committee that certain agencies of the State of Utah are required to protect information under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, and that those agencies at times provide protected information to the Office, which serves as their counsel. The Office further indicated that it is required to protect that health information from disclosure under HIPAA and that providing the forensic images to the Special Committee might result in an impermissible disclosure of protected health information under HIPAA. As a result, it is my understanding that the Office has taken the position that a judicial order compelling compliance with the Special Committee's subpoena is required before the Office can provide the forensic images to the Special Committee. The concerns raised by the Office have halted the Special Committee's efforts to recover data because the Special Committee has not been allowed to have access to the images.

7. The Special Committee does not seek to obtain or review protected health-related information, which is irrelevant to the Special Committee's work, but I understand that such information is technologically intertwined with information that may be relevant to the Special Committee's work.

EXECUTED on this 1 day of November, 2013.



John L. Fellows

Exhibit A

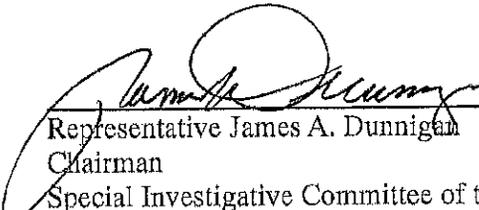
SUBPOENA FOR DOCUMENTS AND INFORMATION

To: Office of the Utah Attorney General
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320

Pursuant to the authority of the Special Investigative Committee of the Utah House of Representatives pursuant to Utah Code Ann. §§ 36-14-1 *et seq.*, you are hereby commanded to produce by Five O'Clock p.m. (5:00 p.m.) on October 11, 2013 the documents and information set forth herein in Schedule A. The documents and information sought herein should be delivered to the Special Investigative Committee, c/o John L. Fellows, General Counsel, Office of Legislative Research and General Counsel, Utah State Capitol Complex, House Building Suite W210, Salt Lake City, UT 84114.

Any contumacy or failure to obey this subpoena may subject you to sanctions and penalties under the law.

Given under my hand, by authority vested in
me, this 25th day of September,
2013.



Representative James A. Dunnigan
Chairman
Special Investigative Committee of the Utah
House of Representatives

SCHEDULE A

Documents and Information to be Produced

1. All documents referring or relating to the performance or requested performance of personal services by any employee of the Office of the Attorney General for John Swallow or any member of his family.
2. All documents referring or relating to the use of official Office of the Attorney General resources by John Swallow or any member of his family for purposes unrelated to official business of the Office of the Attorney General.
3. All documents referring or relating to the policy or practice of the Office of the Attorney General with respect to whether non-career service personnel may engage in private business endeavors for compensation during normal State business hours.
4. All documents referring or relating to the use or requested use by John Swallow or any member of his family of a boat, plane or helicopter controlled by Jeremy Johnson or his wife, Sharla Johnson, or any entity affiliated with either of them.
5. All documents referring or relating to food, lodging, entertainment or travel provided or requested to be provided to John Swallow or to any member of his family by any person or entity that, at the time, was the subject of an official review of any kind by the Office of the Attorney General or that, at the time, had administrative, civil or criminal litigation pending with the State of Utah.
6. All communications between any personnel of the Office of the Attorney General and any of the following:
 - a. Jeremy Johnson; any personnel of I Works, Inc.; or any personnel of any other entity affiliated with Jeremy Johnson;
 - b. Marc Sessions Jenson or any personnel of any entity affiliated with him;
 - c. Jason Powers or any personnel of any entity affiliated with him;
 - d. Tim Lawson or any personnel of any entity affiliated with him;
 - e. Rob Stahura or any personnel of any entity affiliated with him;
 - f. Richard Rawle; any representative of the Estate of Richard Rawle; any personnel of RMR Consulting, LLC; or any personnel of Tosh, Inc., or any entity affiliated with it, including, but not limited to, Check City Check Cashing;
 - g. Jay Brown; any personnel of Brown, Brown & Premsrirut; or any personnel of any other entity affiliated with Jay Brown;

- h. Tim Rupli; any personnel of T.R. Rupli & Associates; or any personnel of any other entity affiliated with Tim Rupli;
 - i. Aaron Christner; Ryan Jenson; or any personnel of any entity affiliated with either of them.
- 7. All calendars that reflect appointments for John Swallow, including, but not limited to, desk calendars, electronic calendars, day planners or wall calendars.
- 8. All documents referring or relating to the Office of the Attorney General's document retention policies, including, but not limited to, any document retention policies applicable to electronic documents or electronically stored information.
- 9. All documents referring or relating to any document retention procedures put into place by the Office of the Attorney General because of the pendency or anticipated pendency of investigations of Attorney General Swallow by the Special Investigative Committee of the Utah House of Representatives, the Utah Lieutenant Governor's Office, any Utah State criminal prosecuting authority, the U.S. Department of Justice or any United States Attorney's Office.
- 10. All documents produced to the Utah Lieutenant Governor's Office, any Utah State criminal prosecuting authority, the U.S. Department of Justice or any United States Attorney's Office, in connection with their respective investigations of Attorney General Swallow.
- 11. All documents referring or relating to the policy or practice of the Office of the Attorney General with respect to the use by non-career service personnel of personal email to conduct official business of the Office of the Attorney General.

Instructions

1. The time period applicable to these requests is December 1, 2009 to the date of this subpoena.
2. The documents and information subpoenaed includes all that is in your custody, control or possession, or within your right of custody, control or possession.
3. To the extent practicable, documents shall be produced in a searchable electronic format (such as delimited text with images and native files, or searchable PDF format). Audio and video files shall be produced in their native format. All materials provided in response to this subpoena shall contain a unique identifying number, irrespective of format.

Definitions

1. **“Communication”** means the transmission of information to an identified person or about an identified subject in any format or medium, including, but not limited to, the following: hard copy documents; electronic documents and all other electronically stored information, including, but not limited to, electronic mail, text messages or instant messages; photographs; or audio or video recordings.
2. **“Document”** means any written, recorded or graphic matter in any format or medium, including, but not limited to, the following: hard copy documents; electronic documents and all other electronically stored information, including, but not limited to, electronic mail, text messages or instant messages; photographs; or audio or video recordings.
3. **“Non-career service personnel”** means any personnel of the Office of the Attorney General who do not fall within the definition of a career service employee set forth in Utah Code Ann. § 67-19-15.
4. **“Personal services”** mean services performed by personnel of the Office of the Attorney General that are outside the scope of their official duties.
5. **“Referring or relating to”** means pertaining in any way to the identified person or subject.

Exhibit B

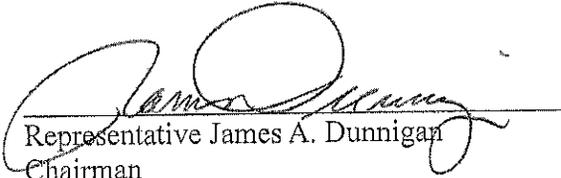
SUBPOENA FOR DOCUMENTS AND INFORMATION

To: Office of the Utah Attorney General
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320

Pursuant to the authority of the Special Investigative Committee of the Utah House of Representatives pursuant to Utah Code Ann. §§ 36-14-1 *et seq.*, you are hereby commanded to produce forthwith the documents and information set forth herein in Schedule A. The documents and information sought herein should be delivered to the Special Investigative Committee, c/o John L. Fellows, General Counsel, Office of Legislative Research and General Counsel, Utah State Capitol Complex, House Building Suite W210, Salt Lake City, UT 84114.

Any contumacy or failure to obey this subpoena may subject you to sanctions and penalties under the law.

Given under my hand, by authority vested in me, this 31st day of October,
2013.


Representative James A. Dunnigan
Chairman
Special Investigative Committee of the Utah
House of Representatives

SCHEDULE A

Material to be Produced

1. A forensic image of all electronic devices, including, but not limited to, servers, hard drives or mobile devices, that may contain or may have contained documents or information responsive to the subpoena issued on September 25, 2013 by the Special Investigative Committee of the Utah House of Representatives to the Office of the Attorney General.

Instructions

1. The documents and information subpoenaed includes all that is in your custody, control or possession, or within your right of custody, control or possession.

Definitions

1. "**Document**" means any written, recorded or graphic matter in any format or medium, including, but not limited to, the following: hard copy documents; electronic documents and all other electronically stored information, including, but not limited to, electronic mail, text messages or instant messages; photographs; or audio or video recordings.

Exhibit C

1 **HOUSE RULES RESOLUTION FORMING SPECIAL**
2 **INVESTIGATIVE COMMITTEE**

3 2013 HOUSE SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Dean Sanpei**

7 **LONG TITLE**

8 **General Description:**

9 This resolution forms by rule a House special investigative committee.

10 **Highlighted Provisions:**

11 This resolution:

- 12 ▶ creates by rule a Special Investigative Committee;
- 13 ▶ provides for a chair of the Special Investigative Committee;
- 14 ▶ addresses quorum and voting requirements;
- 15 ▶ provides for committee member compensation;
- 16 ▶ addresses staffing;
- 17 ▶ outlines committee duties;
- 18 ▶ provides for the holding of meetings;
- 19 ▶ authorizes the committee to adopt guidelines and procedures;
- 20 ▶ requires reporting by the committee; and
- 21 ▶ addresses termination of the committee.

22 **Special Clauses:**

23 This resolution provides a repeal date.

24 **Legislative Rules Affected:**

25 ENACTS:

26 **HR3-1-202**

28 *Be it resolved by the House of Representatives of the state of Utah:*

29 Section 1. **HR3-1-202** is enacted to read:

30 HR3-1-202. Special Investigative Committee -- Creation -- Membership --

31 Compensation -- Staff -- Duties -- Meetings -- Reports -- Termination.

32 (1) There is created a Special Investigative Committee to investigate allegations of
33 misconduct against the current attorney general and matters related to the attorney general that
34 arise as part of the investigation.

35 (2) The Special Investigative Committee shall consist of nine members of the House
36 appointed by the speaker.

37 (3) The speaker shall designate one of the members to serve as chair of the Special
38 Investigative Committee.

39 (4) (a) A majority of the members of the Special Investigative Committee constitutes a
40 quorum.

41 (b) The action of a majority of a quorum constitutes the action of the Special
42 Investigative Committee.

43 (5) Salaries and expenses of the members of the Special Investigative Committee shall
44 be paid in accordance with Section 36-2-2 and Legislative Joint Rules, Title 5, Chapter 3,
45 Expense and Mileage Reimbursement for Authorized Legislative Meetings, Special Sessions,
46 and Veto Override Sessions.

47 (6) (a) The Office of Legislative Research and General Counsel shall provide staff
48 support to the Special Investigative Committee.

49 (b) The Office of Legislative Research and General Counsel or House may contract for
50 outside services to assist in the staffing of the Special Investigative Committee.

51 (7) The Special Investigative Committee shall:

52 (a) investigate allegations of misconduct against the current attorney general;

53 (b) investigate matters related to the current attorney general that arise as part of the
54 investigation; and

55 (c) report to the House findings of fact about the matters investigated and the need, if
56 any, for legislation.

57 (8) (a) The Special Investigative Committee may investigate allegations of misconduct

58 against the current attorney general which conduct occurred while the current attorney general:

59 (i) served as deputy attorney general;

60 (ii) was a candidate, as defined in Section 20A-11-101, for attorney general; and

61 (iii) has served as attorney general.

62 (b) The committee may investigate allegations of misconduct that occurred before the
63 current attorney general became deputy attorney general if:

64 (i) the allegations of misconduct relate to the current attorney general's fitness to serve
65 as attorney general; and

66 (ii) the committee approves the investigation by a majority vote.

67 (9) The Special Investigative Committee shall meet when called by the chair.

68 (10) The Special Investigative Committee shall adopt guidelines and procedures to be
69 followed in the investigation.

70 (11) (a) The chair of the Special Investigative Committee shall provide the members of
71 the Special Investigative Committee a draft of the final report at least 21 days before the day on
72 which the Special Investigative Committee is scheduled to vote to approve the final report.

73 (b) The Special Investigative Committee shall present a written final report to the
74 House when, by majority vote, the members of the Special Investigative Committee approve a
75 final written report.

76 (c) The members of the Special Investigative Committee who do not vote in favor of
77 the final report described in Subsection (11)(a), may present a minority report to the House at
78 the same time that the final report is presented to the House.

79 (d) The Special Investigative Committee shall provide the House periodic accounting
80 detailing the ongoing costs incurred in the investigation.

81 (e) The final report and minority report, if any, shall present the information and
82 evidence gathered by the Special Investigative Committee, and may not include specific
83 recommendations for actions, except for recommendations for legislation, if any.

84 (12) The Special Investigative Committee terminates when it issues a final written
85 report and a minority report, if any.

H.R. 9001

Enrolled Copy

86 Section 2. **Repeal date.**

87 HR3-1-202 is repealed on December 31, 2014.

**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH**

In re:

Utah House of Representatives
Special Investigative Committee

**DECLARATION OF ANDREW
MELNICK IN SUPPORT OF THE
MOTION OF THE SPECIAL
INVESTIGATIVE COMMITTEE
UNDER § 36-14-5 TO COMPEL
OBEDIENCE TO A SUBPOENA
SUBJECT TO PROTECTIVE
CONDITIONS**

Case No. _____

I, Andrew Melnick, declare under criminal penalty of the State of Utah that the following is true and correct to the best of my recollection and belief:

1. I am a shareholder of the Mintz Group, an investigative firm, where I supervise and conduct investigations and also serve as the firm's General Counsel. I submit this declaration in support of the motion of the Special Investigative Committee of the Utah House of Representatives (the "Special Committee") under Utah Code § 36-14-5 to compel obedience to a subpoena subject to protective conditions. The information provided herein is based on my personal knowledge and/or upon the personal knowledge of investigators or legal counsel who also work for the Mintz Group, the Utah-based Lindquist & Associates investigative firm ("Lindquist"), or the law firm of Akin Gump Strauss Hauer & Feld LLP on the matter described below.

2. The Mintz Group, together with Lindquist, has been retained by the Special Committee in connection with the Special Committee's investigation of allegations of wrongdoing by Utah Attorney General John Swallow. I am one of three senior investigators at the Mintz Group with responsibility for supervising the conduct of our investigative work.

3. Akin Gump Strauss Hauer & Feld LLP has been retained to serve as Special Counsel to the Special Committee (“Special Counsel”). Special Counsel, the Mintz Group, and Lindquist have been coordinating and jointly pursuing the investigation at the direction of the Special Committee and the Office of Legal Research and General Counsel of the Utah Legislature.

4. I am advised that on or about September 27, 2013, Special Counsel attended a meeting with representatives of the Office of the Utah Attorney General (the “Office”) regarding the Office’s response to a subpoena issued by the Special Committee on or about September 25, 2013, and that at that meeting, the Office’s representatives reported that a potentially large volume of email from the Attorney General’s official email account is missing.

5. In the course of its work on this matter, the Mintz Group and Lindquist have conducted witness interviews and reviewed documents and correspondence that have been provided in response to Special Committee subpoenas or otherwise made available or transmitted to the Special Committee.

6. While the Special Committee’s investigation is continuing, the evidence to date indicates that:

- a. A potentially significant volume of email from the Attorney General’s official email account is, in fact, missing.
- b. A potentially significant number of calendar entries for the years 2009, 2010 and 2011 are missing from the Attorney General’s electronic office calendar.
- c. In late 2012, the Attorney General asked the Office’s technology staff to replace his state-provided desktop and laptop computers and state-

provided personal data assistant. The Office replaced these devices. Each of the devices the Attorney General had previously used was retired and all data on each of them was deleted.

- d. The hard drive in the Attorney General's personal home computer has stopped working. The Attorney General's personal attorney has stated that the problem with the drive arose earlier this year, and that the Attorney General's personal attorney has attempted to have data from that drive retrieved but that those efforts were unsuccessful. The Attorney General has produced the hard drive from his home computer to the Special Committee and the Special Committee is attempting to retrieve data from that hard drive.
- e. The Attorney General replaced and retired his personal cell phone in late 2012.
- f. Public allegations of wrongdoing regarding the Attorney General arose in January 2013. The Attorney General referred those allegations to the United States Attorney for the District of Utah in January 2013. The Office did not issue a so-called "document hold" order requiring Office employees to retain potentially relevant documents until the Special Committee inquired recently about whether such an order had been issued.

7. On or about October 15, 2013, with the assistance and cooperation of personnel in the Office, the Mintz Group's computer forensics expert began creating so-called "forensic images" of various electronic data storage devices of the Office that may contain copies of the missing email and/or information that would permit the Special Committee to understand the

circumstances under which data became missing. A forensic image is a complete copy of the data on a particular electronic storage device, and may include data that has been deleted but which nonetheless may be recoverable using forensic data recovery techniques. Creating a forensic image is a standard first step in an effort to recover missing data from data storage devices.

8. On or about October 30, 2013, the Mintz Group substantially completed the process of creating forensic images of the relevant data storage devices. The forensic images remain in the Office's custody pending the resolution of the issue presented in the Special Committee's motion. The Special Committee has not taken possession of those images and has not reviewed their content.

EXECUTED on this 31ST day of October, 2013.



Andrew Melnick