January 24, 2022

Via Overnight Mail and Email

The Honorable Ricardo Lara
Insurance Commissioner
State of California
300 Capitol Mall, Suite 1700
Sacramento, CA 95814
CommissionerLara@insurance.ca.gov

RE: Email Deletion Policy Must Be Immediately Suspended to Avoid Appearance of Impropriety

Commissioner Lara:

We were very disturbed to learn this week that in the midst of our ongoing lawsuit over your agency's failure to search for documents related to a pay-to-play scandal, you have adopted a new policy to automatically delete any email received by agency personnel that is more than six months old.

According to an agency FAQ provided to Consumer Watchdog by concerned employees at the Department, the new policy went into effect on January 1, 2022. As of June 30, 2022, email records will be deleted on a rolling basis 180 days after they are sent or received unless manually archived. Emails that are the subject of Consumer Watchdog's Public Records Act litigation could be deleted from the servers and lost forever.

The timing and manner of the policy's implementation creates the appearance of impropriety and is ripe for abuse. This can only be avoided by immediately suspending the program's implementation. Short of a commitment from you to suspend the program and retain all email communications, Consumer Watchdog will have no choice but to bring this matter to the attention of the court.

The new policy was developed following statewide news coverage of a pay-to-play scandal involving Applied Underwriters ("Applied"), the workers' compensation insurer that directed cloaked campaign donations to your 2022 re-election campaign. The contributions were closely timed to your Department's review of the sale of Applied's California subsidiary and other regulatory matters involving the insurer.

Despite your pledge of "transparency" after the scandal became public, the Public Records Act litigation brought by Consumer Watchdog has uncovered that your agency has failed to even search for, let alone produce, communications with individuals "representing" Applied.

New evidence has also recently come to light that you and Special Counsel Bryant Henley hid communications with two former lawmakers-turned-lobbyists, including your friend and political mentor Fabian Núñez and former Assembly Member Rusty Areias.

Remarkably, though Mr. Henley was communicating with the Applied lobbyists while simultaneously overseeing the Department's response to Consumer Watchdog's Public Records Act request, Mr. Núñez's and Mr. Areias's names were not among the search terms used to identify public records for production. We also note that the Department's record retention schedule for the Office of Special Counsel makes Mr. Henley personally responsible for the safekeeping of those records. Moreover, Consumer Watchdog had previously received information that your agency destroyed records relevant to Applied. You should be aware that if government employees falsify or destroy government records they face potential criminal prosecution, including imprisonment for up to four years, pursuant to Government Code section 6200.

The new automatic email deletion policy is not cured by the "litigation hold" procedure discussed in the FAQ to preserve records relating to lawsuits. For example, in the case of Consumer Watchdog's public records litigation regarding communications with individuals representing Applied, how could Department staff possibly know which emails to segregate and retain if your agency takes the position that the emails are not records relevant to the litigation? In other words, because the Department refused to conduct a proper search for records related to all people "representing" Applied, such as Mr. Núñez and Mr. Areias, we expect your lawyers may argue that emails to or from those individuals could be deleted even though they are the very subject of the litigation. Creating a new "document retention" policy that could permit the destruction of evidence in this case before it resolves is the opposite of transparency and would directly contradict your statements about the need for you to restore trust in your office.

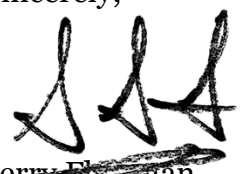
Apart and aside from the mischief it would cause to public records litigation, the new policy is particularly inappropriate for a large, consumer-facing agency like yours that oversees essential services. Email archives provide a critically important record for government regulators and lawyers to bring enforcement actions against bad actors, including by providing crucial documentary evidence. Consumer complaints that span many years, for example, are a primary catalyst for the market conduct studies your agency carries out against abusive insurance company practices. Yet, under the new policy, emails will be automatically deleted within six months unless manually archived by staff. At minimum this policy could lead to inadvertent deletion, and at worst be subject to abuse by leaving it to individuals, who may have an interest in shielding emails from public disclosure, to affirmatively act to archive messages within a relatively short period of time. When an agency like yours is aggressively destroying its email, it appears to be trying to hide something. You must suspend the implementation of the new program immediately until the full impact of this policy on government records can be evaluated.

The new automatic deletion policy has created confusion and concern among Department staff, as it appears to be in conflict with the Department's prior document retention policies. For example, under the prior document retention policy, "general correspondence" involving the Legal Branch must be retained for a minimum of two years. "Internal legal advice" communications involving the Department's Office of the Special Counsel, now headed by Bryant Henley, must be kept for 15 years. Communications regarding "active" matters are to be retained no matter the length of time.

These are not trivial matters. The California Constitution guarantees the public a "right of access to information concerning the conduct of the people's business" and to that end, provides "the writings of public officials and agencies shall be open to public scrutiny." As noted by the California Supreme Court underscoring the importance of the Public Records Act, "individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*C.B.S., Inc. v. Block* (1986) 42 Cal.3d 646, 651). And as the Court of Appeal noted, "[p]ublic disclosure is a critical weapon in the fight against government corruption. Whether there is a real impropriety or merely the appearance of an impropriety, the public has a right to know the particulars." (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 515.)

Please respond by January 31, 2022 confirming you will suspend the automatic deletion policy and retain all email communications.

Sincerely,



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