

To: Senator Bill Dix, Iowa Senate Majority Leader
From: W. Charles Smithson, Secretary of the Senate *WCS*
Mary Earnhardt, Senior Aide to the Senate President *ME*
Date: August 15, 2017
Subject: Fact-Finding Investigation Report

During the Anderson versus State of Iowa, et al. trial, Senate Republican Caucus Staff members testified as to several distinct instances of harassment and that said harassment is ongoing. As a result, you took the action of directing the two of us to conduct a fact-finding investigation to determine if “harassment” as defined in the Senate’s Personnel Guidelines is occurring.¹ The specific time frame in question is from December 12, 2012, through the date of each interview.

This investigation included a series of individual interviews between July 25, 2017, and August 7, 2017, with the current Senate Republican Caucus Staff and current full-time staff of the Secretary of the Senate’s office.² The interview schedule is attached as Exhibit A and the digital recording of the interviews is on the flash drive attached as Exhibit B.

We find the following facts and observations:

- I. Knowledge of Harassment Policies:
 - a. Both current and past harassment prevention training is ineffective.
 - b. All staff members have a copy of the Personnel Guidelines for the Iowa Senate and have, at a minimum, read Section 17 relating to harassment.
 - c. There is some confusion as to the phrase “zero tolerance policy” for harassment as reflected in Senate Personnel Guidelines. It had not been phrased that way to some staff members, while other staff members believe it is clear that there is a zero tolerance policy on harassment.³

- II. Senate Republican Caucus Staff Office Environment:
 - a. Of the staff members who were interviewed, only ██████████ stated that ██████████ made a sexually suggestive comment during the 2013 session but was unsure of the exact date.
 - b. ██████████ provided us with copies of handwritten documentation (attached as Exhibit C1-C22) of occurrences of offensive comments within the Senate Republican Caucus Staff office that occurred after December 2012.
 - c. ██████████ specifically noted a sexually explicit story by one of ██████████ fellow Senate Republican Caucus Staff members. ██████████ also indicated that the staff member was asked by ██████████ to stop the story. This occurrence is detailed in Exhibit D1.

¹ For purposes of the investigation and this report, “harassment” includes sexual harassment or any other type of harassment as defined in Section 17 of the Senate’s Personnel Guidelines.

² With one exception, ██████████ is out of the country on vacation leave until ██████████, 2017. We will interview ██████████ upon ██████████ return from vacation and will issue a supplement to this report upon completion of the interview.

³ Section 17 of the Senate Personnel Guidelines could be interpreted as containing a “zero tolerance policy.” Separate from this investigation, the term “zero tolerance” should be limited in its application in order to avoid absurd results. Further discussion on this issue is warranted when future harassment prevention trainings are implemented.

- III. Secretary of the Senate Staff:
 - a. None of the Secretary of the Senate's staff reported feeling personally harassed.
 - b. One member of the Secretary of the Senate's staff did indicate that [REDACTED] had overheard what could possibly be interpreted as harassment. This staff member declined to give any specifics.

- IV. Senate Floor Environment:
 - a. Many of the Senate Republican Caucus Staff members said that there is an environment on the Senate Floor with Senators making sexually suggestive comments or about sexual preferences.
 - b. Most staff members who mentioned this declined to give specific Senators names or details about these instances.
 - c. [REDACTED] did note in an email (attached as Exhibit D2) that [REDACTED] recalled one occasion of [REDACTED] making a sexually suggestive comment during the 2017 Session.
 - d. [REDACTED] detailed a story of [REDACTED] making sexually suggestive comments [REDACTED] surrounding proposed legislation on dense breast tissue. [REDACTED] did not remember the exact date but believed that it occurred prior to the 2017 Session.
 - e. Other instances mentioned by Senate Republican Caucus Staff members involved former Iowa Senate members.

- V. Retaliation:
 - a. Several of the staff members interviewed indicated they possess a fear of retaliation, which is why they did not feel comfortable reporting any instances of harassment. Further, they would be unlikely to report any future incidents, should they arise due to this fear. Other staff members reported that they were comfortable in reporting instances of potential harassment.

We conclude these findings and observations with a note that the task was a very delicate matter that involved colleagues and subordinates. While this may have had a chilling effect on some responses, it does not appear that bringing in yet another entity to conduct further investigation would be productive.

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Subject: Fact-Finding Investigation Report Supplement

As was noted in footnote #2 of the original report, [REDACTED] was unavailable during the initial round of interviews. [REDACTED] has now been interviewed and did not identify any instances of sexual harassment during the time in question and stated that [REDACTED] felt comfortable in reporting future incidents, if they occurred, to Senate Leadership or the Secretary of the Senate.

This concludes the investigation and it does not appear that any provable incidents of "sexual harassment" as that term is defined in Section 17 of the Personnel Guidelines have occurred.



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November 22, 2017

Via email: Charlie.Smithson@legis.iowa.gov

Confidential:
Attorney Client Communication

Mr. W. Charles Smithson
Secretary of the Senate
State Capitol Building
Des Moines, Iowa 50319

RE: Fact-Finding Investigation Report Release

Dear Charlie:

We were asked to review the three page fact-finding investigation summary report ("Investigation Report") you recently provided to Iowa Senator Majority Leader, Bill Dix, on August 15, 2017, concerning the existence of any incidents of sexual harassment in the Senate from December 12, 2012 to the date of the investigation, in violation of the Senate Personnel Guidelines. Specifically, you have asked us to provide our opinion regarding whether the you can redact the names of staff and senators and/or other information in the Investigation Report should it be made public, and if not, what notice, if any, should be provided to the individuals prior to release.

When the Iowa Open Records law, Iowa Code Chapter 22, was first adopted the legislature chose to define the term "public records" broadly. The term "public records" includes "all records, documents, tape or other information stored or preserved in any medium, of or belonging to this state or [other governmental body]". In Section 22.1(1) the legislature defined the term "governmental body" to include state government. This is in contrast to Iowa Code Chapter 21, where a "governmental body" was not defined to include "the state".

However, in *Des Moines Register and Tribune Company v. Dwyer*, 542 N.W.2d 491 (1996), the Iowa Supreme Court held that a senate policy denying release to the public of certain senate long distance phone records was not a violation of Iowa Code Chapter 22, as it fell within the sphere of the senate's prerogative under Article III, section 9 of the Iowa Constitution to determine its own rules of proceedings. This was the case notwithstanding the fact that the policy denying the release was created after the public records request was made for the phone records. Citing the senate's independent authority under Article III, section 9, to create its own rules of proceedings, the Court found the matter constituted a nonjusticiable political question.

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In light of *Dwyer*, we recommend you check to see if the Senate already has a policy or rule in place that may address the release of this type of information. If so, it would likely trump any requirements under Iowa Chapter 22 for disclosure, assuming the policy or rule was found, as in *Dwyer*, to fall within the constitutionally-granted power of the Senate to establish rules of proceedings. If a policy or rule does not exist, the Senate could, if it so chooses, elect to adopt a policy or rule related to the release of investigation records or other related documents. Alternatively, even if the Senate is subject to Iowa Code Chapter 22 related to the release of this Investigation Report, it is our opinion that the Investigation Report, as a whole, could be kept confidential under Iowa Code Section 22.7(11) as containing personal information in confidential personnel records of a governmental body.

For purposes of this opinion, however, we are assuming, based on our communications with you, that the Senate desires and intends to release the Investigation Report and is seeking guidance only regarding what redactions are necessary or appropriate if said Investigation Report is released in order to protect confidential personnel information and avoid potential legal exposure related to the release.

It is our opinion that the Iowa Republican Senate Caucus and Secretary of the Senate employees' names contained in the Investigation Report should be redacted and not be made public under Iowa Code Section 22.7(11) as they are employees of the state and their participation in an investigation related to the conduct or job performance of other individuals would be confidential personnel information. Our opinion that their names are related to investigatory information in confidential personal communications is based on an assessment of the decision of the Iowa Supreme Court in the case of *Des Moines Independent Community School District v. Des Moines Register & Tribune Company*, 487 N.W.2d 666 (Iowa 1992). In that case, the Court held that personal information in essentially in-house, job performance documents were exempt from disclosure notwithstanding the fact that the documents and information were contained in investigation files. The Court found that the nature of the record is not controlled by its place in a filing system. *Id.* at 670.

It is our further opinion that the names of any identified senators, as elected officials, should also be redacted from the Investigation Report, if made public. The public records law protects "personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are *officials*, officers, or employees of the government bodies." (Emphasis added). There is little doubt that senators are "officials" of the state, as the governmental body. Accordingly, it is our opinion that if the names contained in the Investigation Report are confidential personnel records of the employees, the names should also be confidential personnel records of the elected officials listed.

In addition to redaction of the names in the Investigation Report, we also suggest that any information in the Investigation Report that would be "personally identifiable" to any staffer or senator also be redacted. In other words, even if a name were redacted, if other factual information contained in the Investigation Report could easily identify a particular staffer or senator, such identifiable information should also be redacted.

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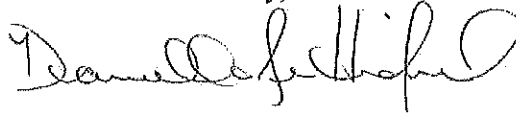
It would be our recommendation that if the Investigation Report is made public, and even if names are redacted, that the staffers and senators identified in the report be notified of such intended release and that names will be redacted.

We trust this addresses your questions. This opinion is intended for those to whom it is addressed, is based on legal research as of this date and the facts as stated in this opinion. We assume no obligation to revise or supplement this opinion to reflect any facts or circumstances that may come to our attention after the date of this letter or any changes in law that may occur after the date of this letter.

If you have any questions or additional concerns, please let us know.

Sincerely,

Ahlers & Cooney, P.C.

A handwritten signature in black ink, appearing to read "Danielle Jess Haindfield". The signature is fluid and cursive, with a large initial "D" and "H".

Danielle Jess Haindfield

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