

LEGISLATIVE AUDIT ADVISORY COUNCIL

Minutes of Meeting January 26, 2009

A meeting of the Legislative Audit Advisory Council was held on Monday, January 26, 2009, in House Committee Room 3 of the State Capitol Building in Baton Rouge, Louisiana.

CALL TO ORDER AND ROLL CALL

Representative Noble Ellington called the meeting to order at 3:05 p.m. A quorum was present with the following members in attendance:

Members Present

Representative Noble Ellington, Chairman
Representative Charles Kleckley
Representative Anthony Ligi
Representative Cedric Richmond
Senator Ed Murray, Vice Chairman
Senator Nick Gautreaux
Senator Ben Nevers
Senator John Smith

Members Absent

Senator Willie Mount
Representative Neil Abramson

APPROVAL OF MINUTES

Copies of the minutes for the meeting of October 7, 2008, were previously emailed to Council members for review. A motion was made by Senator Nevers that the minutes for October 7, 2008, be approved as read. The motion passed without objection.

EXTENSION REQUEST FOR LOUISIANA DEPARTMENT OF INSURANCE

Steve Theriot, Legislative Auditor, stated that the item on the agenda before the counsel is the extension request for the Department of Insurance (DOI). He stated he had not heard of a extension request coming from the DOI, but in filings by DOI's legal counsel there contained language that evidenced they must have asked for a request and been denied, which was incorrect. The Department head in previous conversations with the legislative leadership was granted an extension until January 31, 2009. At the 31st, the DOI will not be in compliance with the audit law, so the Marionneaux amendment (Act 771) takes effect. From a standpoint of funding purposes, the statute states that any agency that was not in compliance with the audit law would not receive any funding from HB1 or HB2. A hearing in court will be held tomorrow for an injunction, for a restraining order to implement that part of the law which would prohibit the funding part of that, unless a request for an extension is granted by the committee.

Mr. Theriot stated that he has the authority to give the first extension for any agency, but any additional extensions must come from this body. He said from the copy of what was filed that morning, on page 24 states that despite a request from the DOI for a further extension of that deadline, it has been denied by the auditor's office. Mr. Theriot reiterated that maybe it had been misunderstood but that he only has the ability to provide the initial extension request any additional extension request had to be obtained by Audit Advisory.

Senator Gautreaux asked for an update on the PIAL hearing held October 27, 2008. Jenifer Schaye, General Counsel for the Legislative Auditor, said summary judgments were filed by both parties and denied. It was then certified to the First Circuit with briefs filed on January 16, 2009. Senator Gautreaux asked when to expect some kind of decision. Ms. Schaye said the First Circuit runs about one to one and a half years behind on cases because of their case load and they have not yet given us a hearing date.

Representative Richmond said since the matter has been briefed, they could request an expedited hearing for oral arguments. Ms. Schaye said she would be sure to pass on the request to their Department of Justice representative.

Mr. Theriot said that on a number of occasions meetings were held with the Commissioner to discuss access to records. Statements were made that the LLA had access to a locked safe, however, only DOI personnel had access. Mr. Theriot requested on-site access to DOI's computer system to review the approximate 13 million emails, which would help complete LLA's audit. However, if pertinent information was noted it would need to be removed so a finding could be written. DOI's attorney said that he would have to talk to the Commissioner. No response has been forthcoming.

Senator Gautreaux asked Mr. Theriot if the emails were protected or secured on a back up server. Mr. Theriot said some emails are deleted prior to being backed up and may be lost. The interesting part is that the DOI has hired an outside vendor who has had access to those records which we have been denied. That individual has been assisting the DOI's staff in ferreting through documents or emails that DOI considers private.

Senator Gautreaux asked how it can be private if on a public system. Mr. Theriot said that is a good question, but as auditors we must have access to records, auditors must be able to see the actual transactions that occur. Senator Gautreaux stated concern that they can delete them, so who is to say they are not going through deleting what they want to delete right now. Mr. Theriot said that is correct. Senator Gautreaux replied there is no injunction stopping them from deleting the emails, but you can at least tell if/when a record was deleted during that period of time, then they would be in violation if you had a court order.

Mr. Theriot said the DOI does have a back up program for their information, but some emails may have been deleted and would not have access to. Mr. Theriot stated the outside vendor expert had given that information.

Senator Gautreaux asked if the LLA had tried to get court order to prevent DOI from deleting emails. Mr. Theriot stated the DOI's retention capability and the possibility that some emails may be lost had recently been made known. Senator Gautreaux asked how can they retain those emails without being automatically deleted. Mr. Theriot said maybe the Commissioner could speak to that better because he did not recall.

Ms. Schaye said that a lawyer for the DOI stated there is a policy whereby the employee decides what is a business record and what is not. So what Mr. Theriot had referenced earlier, if the individual employee made that decision and then deletes that email prior to their backup, taking it off that day, then it will not be available when they do their ordinary backup.

Senator Gautreaux asked how long have they been fighting. Mr. Theriot said about 1½ years. Senator Gautreaux said then go 1½ years back to decide what is business and what is not. Ms. Schaye stated that is an ongoing basis, so there could already be deletions that would raise the whole issue of completeness.

Senator Gautreaux said his understanding is that deleted items are really never deleted. Ms. Schaye said confirmed the LLA has such a program that can retrieve deleted information. Senator Gautreaux asked what does the law require?

Ms. Schaye said the retention policy is set by legislature. It says that public records, even if not considered to be viewable by the public, are to be kept for 3 years except if the law says there is to be a longer retention period. There are also some rules that the Secretary of State has made that says that every public employee is to be advised that these are to be public records with no expectation of privacy.

Representative Kleckley asked why the auditor needed access to the emails Mr. Theriot said as we began our audit and looking over Citizens Insurance, we became aware of communications between both members of the board of Citizens and employees of PIAL who were communicating with employees of DOI because Citizens prior to just recently had no employees and did not have the capacity to deal with the number of particular issues with the operation of Citizens. The chairman of the board of Citizens at that time was an employee of DOI, who in turn had communication both with Mr. Lisotta, who at that time ran Citizens for PIAL and members of the board. Some of these emails that were going back and forth were very questionable in terms of what was being discussed, such as individuals asking on the rate setting part of Citizens because the DOI used his actuaries and acknowledging the fact that the major insurance carriers would not respond to an outside agency other than DOI's regulator when asking to get information on the market survey as an example which was needed to set rates at Citizens. So the DOI's actuary and whomever else put together this model that they sent around the state to get those requests to comply with the law. As these emails were coming back and forth there was some discussion about how do we set this rate, do we set the rate lower here so we can get more policies for this particular insurer. Now whether or not in

the end any of that actually took place or the trigger was pulled, we do not know because of not being able to have complete access to everything, it is impossible to determine.

Representative Kleckley asked Mr. Theriot if he was just inquiring or wanting to know if the trigger was pulled. Mr. Theriot said any auditor will access risk just like an insurer will when it goes to insure in a particular area, determine the risk of a material misstatement. Obviously if Citizens rates are not set properly then every other policy holder in this state becomes subject to potential surcharge to make up the difference. There also were some allegations in looking at it that there are about 10 factors that are normally considered in structuring this policy. They did not use all of those factors in structuring it out and when they got the information in, they cut off the top rate of all of them. They claim that there were some outliers, but were there really outliers out there -which potentially there could have been. Representative Kleckley requested an explanation on qualifying outliers. Mr. Theriot provided a partial explanation and stated he was not sure how they qualified but it appears that if the rate in one parish was \$1,000 and a neighboring parish rate was \$600, there were some inequities that they could not explain so they wanted to throw out the outlier. Basically they were potentially using flawed information to calculate the actuarial rate. That is where our concern is because it has a major bearing not only on policy holders but also on bond holders. Also, if in fact Citizens becomes competitive in the marketplace, how many policyholders should not have been there which potentially could have a claim that everyone has to bear the burden of.

Representative Kleckley asked Mr. Theriot if he had ever suggested, or anyone in his office ever suggested to the DOI that they wanted their personal emails off their personal computers maybe from their home? Mr. Theriot said not to his knowledge, the only question they asked the DOI was if the *Blackberries* that individuals were using for business purposes were in the state system then that was fine, but if they were not, obviously that was something necessary to see.

Representative Kleckley asked Mr. Theriot if the LLA had ever requested any personal computer from DOI employees' homes or their personal accounts. Mr. Theriot replied that the only account that came into question was from an outside agent who reported there was an outside system being used by the department. In discussions with the Commissioner he said it was his campaign account, although it was not identified as his campaign account that he was communicating with. It seemed like official business to this individual because it was just stipulated Commissioner of Insurance Jim Donelon, and did not state the Campaign Committee for Insurance Commissioner. Although the Commissioner said it was from his campaign account that was the only outside source or allegation that we had from an outside entity that something other than a public computer was being used.

Mr. Theriot further clarified that the issue is about approximately 13 million emails. This is not an observance of each and every email, this is about identifying attributes and auditing smartly so that as we put the attributes in the system those emails containing those attributes will fall out, then we look at those closely. In no way are we concerned about someone's personal life. This is about looking at emails that went across that contain spreadsheets, financial information for the most part, and dealing with the issue of rate setting and how people were getting contracts. Any proprietary contract with an outside insurer we are not allowed to see, that is off limits.

Representative Richmond said what you just said raised some eyebrows. If a regular citizen just sent in a public records request to the DOI asking to see the emails on state issued computers on the state server - besides trade secret, proprietary information - what else bars a public citizen from being able to see any of that information you talked about. Mr. Theriot said he did not think anything. Representative Richmond said the scope is beyond trade secrets, but the fact is that you just do not know what is on the emails that they do not give to you. Mr. Theriot said not being able to see it, obviously he cannot opine upon something he does not know, so therefore - and not suggesting that anything is awry, but like anything else, until you get to see it, you do not know.

Representative Richmond said that transparency has been a big issue for this new administration. His question was that besides trade secret or privileged information was there any other reason that the Insurance Commissioner cited to you for a specific email or group of emails why you cannot look at those. Mr. Theriot said that Commissioner Donelon cited deliberative process between himself and his attorneys, or his staff and his attorneys, HIPAA consideration for individuals and personal information that people may have, as well as proprietary information.

Representative Richmond said getting away from the proprietary information, HIPAA will cover all your health issues. Besides those technical areas - maybe I should just ask the Commissioner, even if for personal information, what statute, what law, what legal basis do we have for not turning those over, besides the fact that it may get a little uncomfortable.

Mr. Theriot said that for approximately 1½ to 2 years prior to their audit Mr. Donelon's attorney at the time, assigned to him from the Attorney General's office, sent a memo to all the employees of DOI citing that there should be no expectation of privacy for any emails on the state computer. Senator Murray confirmed his believe that the auditor has authority to review all DOI documents and that the private contractor was allowed to view what the auditor could not see baffled him.

Mr. Theriot stated the contractor is assisting in putting together the documents or reviewing the documents, extracting, and redacting documents. Mr. Theriot requested of DOI's attorney if the contractor had a background check done. Mr. Theriot then commented on the fact that the contractor did not have the statute protection the auditor has.

Senator Murray asked who has the contract and what kind of firm is it. Mr. Theriot said it was R.J. Mayer & Associates, located in Baton Rouge and as far as he knows it is IT consultants. Senator Murray asked the value of the contract. Mr. Theriot said it is around \$28,000/month. Senator Murray asked the length of time on the contract. Dan Daigle, Director of Compliance for the LLA, said they had not done a great deal of work in this area, but sometime in the middle of 2005 they (R.J. Mayer) began working for the DOI, and was not sure to what extent they are getting paid to do. Senator Murray asked what the spending was to which Mr. Daigle replied we think it varies but we have not done a great deal of work in this area. Senator Murray asked Mr. Theriot if he thinks that entity is being allowed to review the information that he has been prevented from reviewing. Mr. Theriot said he did not know.

Senator Murray asked if Mr. Theriot knew the individual's name actually doing the work for R.J. Mayer and Associates because they might want to have him come before the council. Mr. Daigle said Robert E. Wise is the person doing the work. Senator Murray asked if they have reviewed the contract. Mr. Daigle said no.

Senator Murray asked about the court hearing. Wade Shows, attorney for LLA, stated that the hearing is on the preliminary injunction that is limited strictly to whether an injunction ought to be issued against Mr. Kennedy's office, the Treasurer's Office, and against the Division of Administration (DOA) to keep them from exercising what the law mandates in terms of failure to comply with the audit law. There is no injunctive relief that is being requested at this point against the LLA.

Senator Murray restated that the court tomorrow is being asked to enjoin any decision that this counsel makes if we decide that the DOI is not in compliance with the audit law therefore cannot receive state funds. Ms. Schaye, said they are not enjoining this counsel and confirmed Senator Murray's understanding of the DOI's intent to enjoin the Treasurer and the DOA from following the legislative will. Mr. Shows stated assuming success on the preliminary injunction.

Senator Murray asked if this has been briefed from both sides - the legislature has filed a brief, has the governor's office, and also has the treasurer filed a brief? Mr. Shows said yes, it has been briefed, and they are actually filing some exceptions this afternoon to the request relief. Senator Murray asked Glenn Koepf and Butch Speer to come to the table, to explain the consequences if the court rules tomorrow to enjoin whatever action this counsel may take today. If the court decides to go forward that would essentially tell every other state department or anyone that gets money that they do not have to comply with the law as well.

Butch Speer, Clerk of the House of Representatives, said the consequences certainly send a message to the rest of the state departments and he believes the DOI has made it clear that they believe they are representing other state agencies in this issue. If the court enjoins or stops the Division of Administration from complying with the law, which means they will continue to pay, and there will be no consequence with regard to failure of the Commissioner of Insurance and the DOI for not providing that information to the auditor. Mr. Speer confirmed to Senator Murray that no other entities have filed an *amicus* saying that they share the Insurance Department's opinion.

Representative Karen Carter Peterson after confirming with Mr. Theriot on LLA engagements with CPA firms and how the firms operate under the same contract law applied to the LLA what is the difference between the Department of Revenue or Department of Environmental Quality and the DOI? Representative Peterson noted Mr. Donelon shaking his head no. So why do they comply and the DOI does not?

Mr. Theriot said we audit DHH and DSS, which obviously under HIPAA have exposure. We also audit Department of Revenue but DOI is the only one so far where we have had the issue. We have had isolated differences in some of these departments but in the end we have worked those out and they allow us to do our work. He said the process is not perfect, but we

have never had an agency bow up and not allow us to have access. Representative Peterson asked for the top three reasons why the DOI and the Commissioner is saying you should not have access to it. Mr. Theriot said one is confidentiality with the proprietary information, the other is HIPAA, and the other is personal emails. Representative Peterson asked what he meant by personal emails, because they are still on the public computer. She told Mr. Theriot she only asked what the arguments were, she did not ask him to defend them.

Mr. Theriot said during the course of session last year he even asked if Mr. Donelon was concerned about exposure to litigation, that he would along with him try to add to the statutes something that would hold him harmless regarding personal emails. Mr. Donelon respectfully declined saying that even if something were passed he could not abide by that because this was a federal issue he was concerned about, not a state issue. We have tried any and every avenue that we could think of to get past this.

Representative Peterson said confidentiality applies to the state auditor as a reason to prohibit transmission of this information but it does not apply to a paid \$ 28,000 per month contractor. Mr. Theriot said that was his question. Representative Peterson asked where was written an exception to the confidentiality rule. Mr. Theriot said he was not sure, he had not seen it. Representative Peterson said maybe Mr. Donelon can share that when he comes up.

Senator Gautreaux asked if Mr. Theriot has access to the contract with R.J. Mayer and if the Commissioner would give him a copy. Mr. Theriot said they do not have the contract and said in all fairness had not asked for the contract and not sure if would have access. Senator Gautreaux said that Mr. Donelon shook his head yes. Senator Gautreaux said he was interested to see what their requirements were and if parameters set by their lawyers to exclude certain things, or if it was a general contract to do work for the department.

Mr. Theriot said he is not insinuating that whatever contract with an outside agency or vendor may not have some protection clauses in that contract. His suggestion is that the contract cannot be any more compelling than statute in terms of what it provides his office for viewing information. Senator Gautreaux said in the court case tomorrow were it to be decided in the favor of the Insurance Department, then Councils on Aging, who are quasi government entities which receive public funds, and all these other ones that receive public funds will realize the implications.

Mr. Theriot said that he has shared this with the Commissioner before: if the courts rule that we do not have access to all records at all of these agencies, not only his, but those of which this argument is purporting to represent, then my office will have a scope limitation on being able to audit and will not allow us to express an opinion on the financial statements of any agency that does not allow us to have access to records. What that means in the end, is that the state's CAFR not only will have a qualification, but because of the materiality may not be able to express an opinion on it period, which in essence will harm the credit worthiness of the state in terms of the bond holders. Not only from state agencies, but every local government who issues debt or any local agencies who issues debt which bears the name of Louisiana will bear the brunt of that in some fashion. He said he does not know to what degree, but it would not be positive. As he had said all along for a year and a half prior to issuing the CAFR - the qualification on the CAFR, and those implications to the CAFR - he was not sure how dramatic it would be until we got to the end, but he knew it would not be positive.

Senator Gautreaux said his biggest issue is about the reforming Louisiana and about transparency which has been spoken in every election there was. Every elected official talked about it, and now we are looking at - is there really transparency in the government or not? His other question was if the DOA and the Governor's office each filed their own brief and also did the Treasurer file their own. Ms. Schaye said that the Treasurer filed his own brief, and Treasurer's counsel is present. Senator Gautreaux asked was his brief in support of the law, in support of what they were doing.

Jim Napper, Executive Counsel of the State Treasurer, said they have filed a response to the request for a preliminary injunction and unless they are enjoined, it is the Treasurer's decision to follow the statute. Senator Gautreaux asked what their response was. Mr. Napper said their response was that it was premature because DOI could have asked the council for an extension and if the extension were granted, there is no harm to them during the extension period. An extension was granted making December through the end of this month, and like Mr. Theriot, we have received a pleading this morning that said they wanted another extension. We had not been involved in the request for the extensions and so forth.

Senator Gautreaux asked if anyone were present from the Division or the Governor's office. No one came forth. Senator Gautreaux said that he would like to know where the Governor's office stood and what they actually said in their response to the brief. Mr. Napper

said he has not seen any response. Senator Gautreaux asked if our attorney has seen any response. Ms. Schaye said that they have not filed so far as we have seen. Senator Gautreaux remarked that transparency and following the rules are in high regard with the Governor. Mr. Napper said technically the Governor is not a party to this, just the Division of Administration.

Senator Murray asked Mr. Theriot if the Insurance Department also made a request this morning for another extension. Mr. Theriot said that it came to him in the form of the pleadings that Mr. Donelon's attorney filed in the court that morning. In those pleadings they claim that they had asked, and he read from the pleading "thereafter an extension was granted by the Legislative Auditor through January 31st, 2009, and despite request from the Louisiana Department of Insurance a further extension of that deadline has been denied by the Legislative Auditor". Mr. Theriot reiterated that he had not been approached for an extension beyond the January 31st date, but even so, he is only allowed to do the first extension, and this committee has to give the second extension.

Senator Murray asked Mr. Theriot if he had been asked for another extension other than in the pleading that was before him. Mr. Theriot said that he was not aware of them asking him for an extension. Senator Murray said to keep it clear for the audit council's perspective, assuming he had been asked, what would have been his recommendation to this council about another extension. Mr. Theriot stated that he never wants to deny anyone an opportunity to conform with the audit law if in fact they are willing to earnestly work toward allowing us to have compliance with the audit law, then he is willing to grant an extension, or at least recommend the granting of extension, but short of that. Senator Murray asked for clarification if turning over or making all this information available to him and his office for review was what he meant by willing to cooperate.

Mr. Theriot said as he was told by Mr. Donelon's lawyer the last time they met that he would confer with his client and get back with him, which he never has. The major concern appeared to be that the Commissioner did not want us to take off campus any information that we had encrypted, so we have asked to get into DOI's system, since it has been a year since we had burned these CDs and we have lost custody of those CDs, so we do not know what all has been done since people have been looking at them, both his lawyers and contract employees. Mr. Theriot said if DOI would allow access to those computers, let us do our audit from the computers from what he has, and if in fact we uncover or find information or emails or data that we might need to write a finding, we will need to be able to print that because we cannot write the finding without proof. This is basically the sampling technique that is done, it may be done a little bit different because the area of risk is greater here because of what we already know.

Senator Murray asked if any private insurance company or adjuster or anyone that the department regulates has contacted your office to say that they do not think you should see the documents. Mr. Theriot said not a one. Representative Richmond asked Mr. Theriot what this is costing the taxpayers, how much have you spent to gain access to these records, if you had to quantify an amount. Mr. Theriot said that between the extra man hours it is significant, within medium to high six figures.

Representative Ellington asked Commissioner Donelon to come to the table.

Commissioner Donelon said he appreciated greatly the opportunity to correct much of the misinformation that you were just given. He began by asking the council to take a quick look at the consent agreement entered into a year ago between himself and the Legislative Auditor that would have resolved all issues brought to you here today. To address the last question about how much all of this is costing, it is costing the insurance industry through the payment of fees passed on to policy holders statewide whatever bill the Legislative Auditor sends to us at the conclusion for all of his expenses including his outside counsel, including his inside counsel, including all of his auditors. We get that bill and we have to pay it out of our budget, all of which budget is paid by fees from the insurance industry, all passed on in the way of admissible reimbursement in rates paid by policyholders statewide.

Commissioner Donelon said we would not be here today but for me, probably it would have hit the fan by now and you would have demanded that this happen. He said that he fired Terry Lisotta because he could not do the job of running Citizens, and was in over his head with Citizens in disarray, in meltdown, the phones were not being answered, the policies were not being issued, the claims were not being paid. He said because of that incompetence in late 2006, he called the board in and said we have to do something. Mr. Donelon said that after a nationwide search he hired new management who has created a professional, honest, transparent, efficient operation with 125,000 policies issued out of Metairie and Baton Rouge offices. He continued that approximately 90 days after firing Mr. Lisotta, his 10 year secretary in Metairie brought in a permafile box of records she had kept at her house documenting 10

years worth of expense account abuse by Mr. Lisotta. He called the Legislative Auditor's office, the District Attorney's office, and the Attorney General's office and told them that a criminal investigation and a compliance and/or financial audit needed to be done. That has resulted in full cooperation by our office with the FBI first, the U.S. Attorney second, the criminal division of the Attorney General's office third, giving unfettered access to every document that they were interested in, resulting in a 15 count indictment being handed down against Mr. Lisotta.

Commissioner Donelon said he then entered into the consent agreement which is before the council because the first thing the Legislative Auditor wanted to do, is the same thing his predecessor wanted to do in 2004. He stated that it is not true that this has never been raised before, that they are the first agency to do this. His chief deputy's father had an attempt like this on his school board that he was serving as a member of in St. Helena Parish and refused to give documents. The Legislative Auditor tried this in 2004 with *Dan Kyle v. Public Service Commission* in the First Circuit Court of Appeals which he had the decision right there, and offered to make copies available to the council. He stated that it clearly and definitively shows that attorney client privilege and deliberative process privilege, two of the privileges he had asserted in this effort to get unfettered access to 14 million emails in and out and within his department were protected and the Legislative Auditor is not an investigative body. Mr. Donelon said that if the Inspector General or Attorney General wanted records, they could get them. Also when the FBI and the US Attorney wanted them, he said come get them. Mr. Donelon further explained the Legislative Auditor is not covered by the law that protects attorney client and deliberative process, executive privilege. He stated that he has waived all his attorney client privilege. But separately in the United States Constitution and the State Constitution privacy is protected including government owned computers, as well as government owned telephones. Mr. Donelon explained if calling long distance from your desk in the legislature or from my office in the Department of Insurance, that is public money being spent and they have a right to that. But no public money used if receive and send personal emails, as long as not interfering with your job duties. He said that is permitted by Civil Service Rules, by United States Constitution, by all case law uninterrupted as spelled out in the memorandum that was filed in the 19th Judicial Court that morning on his behalf. He further explained that it is allowed and it is protected and if he deviates from that and waives that protection then he has personal liability for damages that individual state employees would assert and be entitled to compensation for. He said that they cannot reimburse him for it, even if they pass a bill saying they can. He stated that the reasoning behind that is to force public officials to not give up personal information that they may have in their possession.

Commissioner Donelon continued saying that the Legislative Auditor had told his in house lawyers first in August when he was threatened with the cut off of funds to his agency and he hired in his opinion the most reputable, competent attorney in the city of Baton Rouge, David Rubin. He said that he hired Mr. Rubin because it got real serious when they were threatening to shut him down, a state agency, if he did not capitulate to this demand that violates the opinion rendered in the courthouse three stories above where they are housed, in which they told my in house lawyers and told Mr. Rubin they do not recognize and do not acknowledge and do not abide by. He said that they choose to ignore it, but I do not have that luxury. Mr. Donelon said that if he chooses to ignore it, he would do so at the risk of Mr. and Mrs. James J. Donelon's checking account. He said that he is personally liable for release of personal emails, according to the law as explained by Mr. Ward, and by my Assistant Attorney General that filed the first lawsuit that resulted in the compromise that the council sees in front of you, and now by Mr. Rubin.

Mr. Donelon said since the conference call with Mr. Speer, Mr. Koepp, with Senator Chaisson, with Speaker Tucker and the Legislative Auditor at 10:00 a.m. the morning after Christmas, he would be happy to reenter into that agreement and what it says is we will review the 14 million emails that we retrieved at department expense. He added that the emails had already been deleted in accordance with state procedures and laws for the destruction of documents and emails. But they were retrieved at his department's expense. He said he would be happy to make available all but 2,000 of those emails because they have looked at all 14 million and identified 2,000 that are personal emails, attorney client privilege protected, or deliberative process protected. Mr. Donelon said he would drop the proprietary on behalf of the companies because they are on their own. He had sent out a blast email and told them their information was at risk - it was being asked for by the Legislative Auditor, protect yourself if you choose to or not. Mr. Donelon said he is no longer asserting that, but he is asserting personal emails, deliberative process and attorney client.

Mr. Donelon stated that he would read from the conclusion of the memorandum that Mr. Rubin filed that morning in the 19th Judicial District Court. He read, "The issues are significant, if no privileges can be asserted by agencies subject to audit then the Legislative Auditor is free to use the "unfettered access" he seeks to, for instance, to look at personal medical records of patients within the records of the Department of Health and Hospitals. He could access highly sensitive and confidential business plans submitted to the Department of Economic

Development by businesses seeking to locate in Louisiana. He could access the email systems of the Office of the Governor and his legal counsel. He could access confidential appraisals by the Department of Transportation and Development of property to be expropriated. He could access confidential reserve and drilling information of the Mineral Board. He could access communications between the attorney for a city or a parish and any other auditee including confidential advice given to municipal elected officials."

Mr. Donelon said that is a short list of what is at issue here. He admitted that he stood corrected that morning that it would not include his tax return. He said but those millions, or hundreds of thousands, who do online filing in Louisiana are subject, and he found out that the legislature passed a specific provision in the audit law to allow those tax returns to be accessed by the Legislative Auditor. But in your abundance of caution you added "any person divulging such information contrary to the provisions of R.S. 47:1508 (the legislative audit confidentiality statute) shall be punished by imprisonment for not more than 2 years or fined for not more than \$ 10,000 or both". He commented that it is a serious felony if violated, but no such protection applies to personal emails, attorney client privilege, or deliberative process.

Mr. Donelon explained that for the campaign issue, he did what his opponent did - bought a list of email addresses, publicly available of agents statewide. He said he did not know the name of the company that he had hired, but they weekly sent out emails to insurance agents statewide, trumpeting in the case of the one that was turned in to the Legislative Auditor his fight with All State over their effort to illegally not renew 30,000 policy holders in south Louisiana. He said at the bottom of the emails it did not evidence that it was from my campaign, it only stated not paid for with public funds. That is the disclaimer that the political consultant somewhere in America uses on such email communications that he does for his clients. Mr. Donelon said the same day he was also made aware of a threat on the life of one of my department employees. He found out about it because a couple of legislative auditors came over to their office and were asking if the emails sent in his name to insurance agents about his fight with All State were paid with public funds. Mr. Donelon said the answer was of course not, let us look into this and we will give you an answer. He said then the auditors stated that they had information that one of his employees was sexually harassing an agent whose husband caught the emails and was now threatening the life of one of his employees. Mr. Donelon said they need to know more about this because just as they did with state police for over a year, they want to cooperate in catching such a dastardly deed if it is going on and they want to protect all of their employees if there is angry citizen out there that wants to shoot somebody in their building. Mr. Donelon said the auditors instead said they wanted copies of all DOI emails, incoming and outgoing, because they are going to investigate. They don't have that responsibility or right, it belongs to the state police and we asked them to do that, and they did when we raised that issue.

Mr. Donelon said the Legislative Auditor has outside contracts too. He said that the person Mr. Theriot referred to, Mayer or Meyer, whatever the name is, works full time in our building, goes to work every morning, goes home every night from our building. Mr. Donelon said but he is an in house contract, not a civil service employee. Mr. Donelon said copies of all their contracts are in the filing cabinet and all of their contracts are public record. He said that all the auditor has to do is ask one of our civil servants to get them a contract with Mr. Rubin, or Mr. Mayer, or whoever and it will be immediately presented. Contracts are public record and anyone who came to ask for it would be given it instantly. Mr. Donelon said that is what Jenny Benoit, the lawyer who was accused of unprofessional activity on their behalf in this process, to get off of representing them because her title on pleadings resulted in that compromise said the Attorney General. That threat was made a year ago and she backed off but took serious exception to the further allegation made in committee that she acted without the authority of her supervisors, and her supervisor quickly clarified that and dispelled that as a non truth.

Mr. Donelon said tomorrow morning we resolve this and stated that he did not ask for an extension in the pleading entered that morning. He said that the pleading recited a meeting between his attorneys and the Legislative Auditor's staff of 18 that they met with including Mr. Ward and his other attorney, Mr. Rubin and maybe Ms. Bowler three weeks ago. Mr. Donelon said that Mr. Rubin had not put his memorandum together yet and he said "can we get an extension". He said that if he had known, he would have said "not" because he was asked to request on December 26th and at that time when he did ask for it, at the request of the people on that morning after Christmas conference call, he told them that the hearing was set in time before the next time his funds could get cut off. Mr. Donelon said the hearing will be held before that cutoff date. He said if he agreed to ask for this extension he assumed that he would be continued in the right to have a hearing before Judge Hernandez before my funds are cut off again. Mr. Donelon said he was told by Mr. Speer and the Speaker and the President of the Senate and Mr. Koepp, no question about it, we do not play games like that, you will be allowed your opportunity to have your day in court, as we are set to have tomorrow morning at 9:00 a.m.

Mr. Donelan said if the Legislative Auditor wants to go back and reenter into that consent agreement, he is ready to do so. He said that the 14 million emails have been perused and 2,000 have been determined by his lawyers and staff - a committee of them working on them in shifts - to contain personal email information or attorney client or executive privilege. Mr. Donelan said if those are requested by the Legislative Auditor they will be taken in camera, meaning taken by the judge in his chambers and he looks at them and decides if they are relevant to not an investigative audit, because the Legislative Auditor does not have that power, but whether it is relevant to a financial audit. He added that every check, every spreadsheet, every checking account, every financial document has been made available to Mr. Theriot's staff. He said same as the time before, when Mr. Theriot gave us a 100% clean audit the year before all this broke. Mr. Donelan said he would abide by in camera review for determination of any such privileges that are at issue and allow the judge to make that determination. He said as his memo states he is doing this not only on his behalf, but also on behalf of all of the executive branch, all of the executive agencies, whether it is the Department of Natural Resources, or the Secretary of State's office, or the Governor's office. These issues need to be resolved, *Kyle* is the law of the First Circuit of the State of Louisiana, and Supreme Court that sits above them has not reviewed that decision. He said it is the law of Louisiana and it is applicable to the Legislative Auditor and to every agency such as himself being subjected to such an audit.

Mr. Donelan clarified that they reviewed many thousands but not all 14 million emails. He finalized that he covered all of the points that he wanted to make and appreciated the council's indulgence in letting him have this time to address the issues that were presented, and welcomed the opportunity to answer any questions.

Senator Murray asked the Commissioner if he were asking for an extension from the Council today. Commissioner Donelan said no, sir. Senator Murray said in the memo filed on your behalf you cited several examples that your lawyer Mr. Rubin said that some harm could be done if the auditor could go into all areas, such as leases and patients records. Senator Murray asked if he knew the auditor to have tried to do those things before. Commissioner Donelan said not those things, but the exact same issues were raised in *Kyle vs. Public Service Commission* in 2004. Senator Murray said he understood, but he is asking in the memo. Commissioner Donelan said not to his knowledge has he done it in any of those other areas yet.

Senator Murray asked Mr. Donelan if he was relying on attorney client privilege and deliberative process to withhold this information and not make available to the auditor. Commissioner Donelan said he has waived all of his attorney client privilege, but asserts *Kyle v. Public Service Commission* as the law of the land that includes attorney client, but the client can waive attorney client anytime they choose. Mr. Donelan said he did not know what the Public Service Commission did but suspects that they did not waive it. He reiterated that he has agreed to waive his attorney client privilege.

Senator Murray said he thought there were two things relying on. Commissioner Donelan said three: personal emails, attorney client, deliberative process as well as HIPAA, and he added fraud investigations. Senator Murray said on the attorney client that you are not relying on it, you have waived that. Commissioner Donelan said he is relying on attorney client, for the purpose of getting a final decision from the courts as to what is protected and what is not, but he is willing to waive his attorney client privilege. Senator Murray asked Mr. Donelan if the attorney client privilege that you are relying on in the *Kyle* decision - you are the client, and what you have said to your attorney, you are saying should be protected. Commissioner Donelan said under the law. Senator Murray pointed out that the auditor requested these things before you had counsel on this matter.

Commissioner Donelan said no, unless you do not consider his in house counsel as counsel. Frankly the first volley of things requested and made available, they did not even call him at the campaign headquarters and tell him about it, they just gave them - Chad Brown's emails, Robert Wooley's emails, Lauren Teague, my secretary and Wooley's secretary and Chris Faser's emails were just given and then the next day the request went to 'we want all emails' and he was told by the Attorney General assigned to his office, Ms. Benoit, charged with all things public record, that he could not do it.

Senator Murray said so you are referring to Mr. Rubin, you are saying that the attorney client privilege waived is with Ms. Benoit and your in house counsel. Commissioner Donelan said initially yes, but now also Rubin's emails, because he has nothing to hide. Senator Murray said the auditor wants the emails that were in your department from before Rubin became counsel. Senator Murray asked is your in house counsel open. Commissioner Donelan said that they recreated three years worth of electronic transmissions that included attorney client communication on a myriad of issues including All State. He feels entitled to attorney client