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August 15, 2008

BY E-MAIL AND REGULAR MAIL

Kelly G. Keenan, Esq.
Legal Counsel to the Governor
111 S. Capitol Ave,
Lansing, MI 48909

Re; Petition and Charges against the
Honorable Kwame M. Kilpatrick

Dear Mr. Keenan,

We write in response to Ms. McPhail's recent letter dated August 13, 2008. In that letter she persists in the demand that Council members testify. In response to an earlier similar demand, we wrote yesterday as follows:

"I can think of no good reason why members of Council can or should be called as witnesses. The allegations in the petition presently pending before the Governor go to the *Mayor's* official misconduct in failing to disclose to members of Council the existence of a confidentiality agreement. In so doing, the Mayor

incurred and authorized the settlement by obtaining Council's "consent" to the settlement, without disclosure, indeed through deliberate concealment. He did so, it is alleged, by the use of his public trust for personal benefit."

In her August 13, 2008 letter, Ms. McPhail claims that since council member allege "that they were denied 'informed consent' (oddly enough, a medical term) they must be subject to cross examination on that issue." In response, we would point out the following:

1. The notion of a legal requirement for full disclosure, in exchange for valid consent or agreement is not confined to the medical arena. *Rinvelt v. Rinvelt*, 190 Mich. App. 372 (1991). The ethical standards for disclosure to Council required of the Mayor and his agents, in the settlement of the *Brown/Nelthrope/Harris* cases, are echoed throughout the law: "The disclosures required by the act are to be made in 'good faith,' and 'good faith' means 'honesty in fact in the conduct of the transaction.' ... 'The specification of items for disclosure in this act does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions.'" *Bergen v. Baker*, 264 Mich. App. 376 (2004);
2. There has never been the slightest suggestion that there was, in fact, any disclosure to Council members of the mayor's secret "private" deals, nor any knowledge by Council members to that effect; Ms. McPhail has not made a showing of any such disclosure or prior knowledge, nor can she;
3. Even assuming, for purposes of argument, that a Council member or some Council members had such knowledge of the text messages or the confidentiality agreement, it would make no difference. The issue that MCL 198.327 raises is whether the Mayor engaged in official misconduct – whether the Mayor attempted to conceal his text messages by the use of public money and confidentiality agreements to avoid embarrassment and criminal charges.
4. In general, Ms. McPhail's assertion disregards the fact that the ideas of individual members acting separately are irrelevant to the decisions of the Detroit City Council. "A public corporation may act only as a body, properly convened as such. Separate individual action of its members is ineffectual." *City of Corpus Christi v. Bayfront Associates Ltd.*, 814 S.W. 2nd 98 (Texas 1991); 4 *McQuillan, Municipal Corporations* (3rd Ed. 2002) §13.01, p. 803. Further, Michigan courts have been vigilant in protecting high ranking officials from being compelled to testify. *Fitzpatrick v. Secretary of State*, 176 Mich. App. 615 (1989). In order to justify the testimony of such an official, the proponent of the testimony must make a "clear showing ... that such a proceeding is essential to prevent injustice to the party requiring it." *Fitzpatrick v. Secretary of State*, *supra* at 617-18. Claims for the testimony of such witnesses, high ranking government officials, are met with a "heightened scrutiny" in order to limit the "intrusions that would burden the public official' efforts to advance the effective ... operation of the public agency."

Hamed v. Wayne County, 271 Mich. App. 106, at 111 (2006). In this case no such showing has been established. Indeed, as pointed out above, the articulated purpose to call these witnesses is without relevance to the claims against the Mayor.

With regard to the Mayor's claim that this removal proceeding, in effect, forces him to testify against himself, the cases relied upon by Ms. McPhail do not apply to this case. In both *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) are cases in which public employees were punished solely because they refused to waive immunity. Clearly that is not the situation. This proceeding does not punish the Mayor simply because he refuses to waive the privilege against self incrimination. It simply opens his conduct up to scrutiny for a determination as to whether he has engaged in official misconduct and is thereby subject to removal under MCL 168.327. Unlike *Gardner* and *Lefkowitz* there is no threat, indeed no danger, that the Mayor will be forced to testify or punished for refusal to waive his immunity, *alone*. In this respect the situation is closer to that in *Baxter v. Palmigiano*, 425 U.S. 308, where the Court allowed certain inferences to be drawn from a refusal to testify:

“Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution. Had this occurred and had Palmigiano nevertheless refused to answer, it surely would not have violated the Fifth Amendment to draw whatever inference from his silence that the circumstances warranted. Insofar as the privilege is concerned, the situation is little different where the State advises the inmate of his right to silence but also plainly notifies him that his silence will be weighed in the balance.

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment “does not preclude the inference where the privilege is claimed by a party to a Civil cause.” 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961). In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.” *Baxter v. Palmigiano*, *supra* at 318-19

Similarly, this case involves “important state interests other than conviction for crime.” Those interests go to the ability of this State's largest city to function optimally and productively. It is also notable there is Michigan law on point. For example, in *Dullam v Willson*, 53 Mich 392, (1884) the Michigan Supreme Court held:

“to hold , therefore, after the amendment [to the Constitution to grant removal power to the Governor]... the same prosecution and conviction must be had as

before, to authorize the Governor to remove, would render the amendment not only a dead letter, but entirely unnecessary....”

Dullam v. Willson, supra, at 401.

In sum, while this form of discourse, letter writing, is a bit unstructured, I take Ms. McPhail’s recent letters as a form of motion practice and respectfully ask that the Governor deny the Mayor’s motions, contained therein.

Once again, on behalf of our clients, we thank you and the Governor for your patience and attention.

Respectfully,

/S/

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