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December 20, 2017

The Honorable Scott Sifton
State Senator, District 1
State Capitol, Room 427
Jefferson City, Missouri 65101

Dear Senator Sifton:

I write in response to your letter of December 8, 2017. My Office takes very seriously the mandates of transparency and open government enshrined in both the Sunshine Law and Chapter 109 of the Missouri Revised Statutes. All Missourians deserve a state government that is open, transparent, and accountable.

As you know, the prospect of the Attorney General's Office investigating, and potentially taking enforcement action against, state officials whom it also represents raises significant and complex questions of legal ethics. In a 2002 case called *State v. Planned Parenthood*, the Missouri Supreme Court held that "[t]he attorney general, like all attorneys, is prohibited from representing a client if the representation of that client would be directly adverse to another client." 66 S.W.3d 16, 19 (Mo. banc 2002). The Court cited Missouri Rule of Professional Conduct 4-1.7, which prohibits an attorney from undertaking a representation if that representation would "be directly adverse to another client." Mo. Sup. Ct. R. 4-1.7(a)(1). As your letter acknowledges, this Office currently represents the Governor with respect to various matters unrelated to the issues raised in your letter. An investigation of the Governor for purported Sunshine Law violations might appear to constitute a representation adverse to the Governor, which Missouri case law and the ethics rules prohibit.

Previous Attorneys General have grappled with this same problem. The Koster Administration apparently concluded that the ethics rules prevented the Office from undertaking enforcement actions against state officials it otherwise represented. *See* Tessa Weinberg, *Governor, state agencies largely exempt from Attorney General's scrutiny*, COLUMBIA MISSOURIAN (Dec. 11, 2017) (quoting Andrew Hirth, a senior member of the Koster Administration, that actions of the sort that you have requested raise substantial conflicts questions).

Attorney General Jay Nixon attempted to surmount the ethics conflict in the Sunshine Law context by appointing an outside investigatory team to pursue allegations of Sunshine Law violations by then-Governor Matt Blunt. But the Cole County Circuit Court invalidated this

arrangement and directed Nixon either to bring an enforcement action by the Attorney General, or concede that he had a conflict of interest. *See State v. Blunt*, Case No. 08AC-CC00370, July 11, 2008 Order; July 22, 2008 Order; January 5, 2009 Final Order. Attorney General Nixon ultimately "acknowledge[d] . . . a conflict on the part of the Attorney General," and the court appointed its own special counsel, independent of the Attorney General. *State v. Blunt*, Case No. 08AC-CC00370, July 22, 2008 Order; *see also* January 5, 2009 Final Order (explaining that, during a hearing, then-Solicitor General James Layton "reaffirmed that the Office of the Attorney General has a conflict of interest" in the case).

But other examples of past practice suggest there is no true conflict of interest in cases like this one. For example, in *State ex rel. Nixon v. Childers*, the Nixon Administration denied that Rule 4-1.7 prevents the Attorney General from suing a state official that is already a client of the Office. *See* Appellant/Cross-Respondent's Second Brief, *State ex rel. Nixon v. Childers*, No. WD66892, 2007 WL 693420, at *50-88. (The Court did not address this issue in its decision. *See State ex rel. Nixon v. Childers*, 243 S.W.3d 403, 407 n.1 (Mo. App. W.D. 2007).) And past Attorneys General have, on occasion, sued other statewide officials—whom the Attorney General very likely represented in other cases—without any intimation from courts that the situation raised ethical concerns. *See, e.g.*, *State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. banc 2004) (Attorney General brought suit against the Secretary of State); *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849 (Mo. banc 1991) (same).

Moreover, the conclusion that the Attorney General has limited authority to enforce the Sunshine Law against state officials would raise its own set of serious concerns. The Missouri Constitution "vests the office [of Attorney General] with all of the powers of the attorney general at common law." *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. banc 2000). In this role, "[t]he State of Missouri and its citizens are the attorney general's clients," *id.* at 135, and "it is the role of the attorney general to protect the public interest," *id.* One critical component of protecting the public interest is ensuring that state officials comply with the law. "The Attorney General's traditional watchdog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government." *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1211 (Cal. 1981) (Richardson, J., dissenting). In recognition of this traditional watchdog function, the General Assembly has vested the Attorney General with authority to enforce the Missouri Sunshine Law, which applies both to local governmental bodies and to the State Government. *See* § 610.027, RSMo.

Because of the weighty considerations at play—both questions of legal ethics and of protecting the public interest—we have conducted a careful and thorough review of our obligations under the Missouri Rules of Professional Conduct. Based on that review, we have concluded that the Rules do not prohibit this Office from opening an inquiry here, because that action does not involve a conflict of interest under Rule 4-1.7.

As the Supreme Court has held, Rule 4-1.7 does indeed apply to the Attorney General. *See Planned Parenthood*, 66 S.W.3d at 19. But because of the unique—and constitutionally mandated—nature of the Office of Attorney General, "mechanical application of [the ethics]

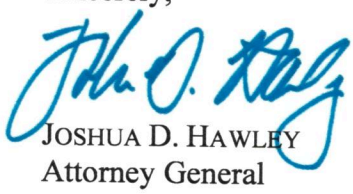
rules is not possible." *Attorney General v. Mich. Pub. Serv. Comm'n*, 625 N.W.2d 16, 33 (Mich. App. 2000).

The Attorney General's clients are first and foremost the citizens of the State. While my Office currently represents the Governor in ongoing litigation, it represents the Governor in those other cases in his official capacity. The real party in interest in each of those cases, and the Office's true client, is the State of Missouri. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Thus, the client in those cases is the same client that the Attorney General represents when he exercises his common-law authority and when he enforces the Sunshine Law: "[t]he State of Missouri and its citizens." *Am. Tobacco*, 34 S.W.3d at 135. There is no direct adversity under Rule 4-1.7 when a lawyer represents the same client in two different matters. *See* Mo. Sup. Ct. R. 4-1.7(a)(1).

Because my Office does not have a conflict of interest in this case, we have opened an inquiry into the issues raised in your letter. And while there is no formal conflict under the Rules of Professional Conduct, we have concluded that it is nonetheless prudent to screen the personnel conducting that inquiry from the Office's ongoing representations of the Governor. We have already implemented that ethical screen, which will remain in effect during the pendency of our inquiry.

As this matter and the experience of past Attorneys General makes clear, legislative action may be appropriate to clarify and strengthen my Office's enforcement authority under the Sunshine Law. I look forward to working with the Missouri Press Association and other key stakeholders to develop proposals to address this issue.

Sincerely,



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