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**APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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JOSEPH M. FERGUSON,	)	
In his official capacity as	)	
Inspector General of the City of	)	Appeal from the Circuit Court of
Chicago,	)	Cook County, Illinois, County
	)	Department, Chancery Division
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09 CH 43287
	)	
MARA S. GEORGES,	)	Hon. Nancy J. Arnold
In her official capacity as	)	
Corporation Counsel of the City of	)	
Chicago,	)	
	)	
Defendant-Appellee.	)	

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**REPLY BRIEF OF PLAINTIFF-APPELLANT**

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## INTRODUCTION

To require the Inspector General to obtain Corporation Counsel approval and legal assistance to enforce subpoenas he issues would nullify the Inspector General's expressly granted subpoena power and strip the Inspector General's office of the independence with which the City Council endowed it. So would allowing the Corporation Counsel to claim the attorney-client privilege with respect to subpoenaed materials, even when, as here, the Inspector General is investigating misconduct within the Office of the Mayor—possibly within the Law Department itself. Thus, the very existence of the City of Chicago Office of Inspector General as a truly independent investigative agency hinges on the outcome of this appeal.

In Part One of this reply brief we respond to the Corporation Counsel's contentions that the Court lacks jurisdiction over this suit and that the Inspector General lacks capacity to bring it, pointing out that Counsel's own principal authority in this regard, plus a recent decision of this Court in circumstances closely analogous to those present here, clearly support both jurisdiction and capacity.

In Part Two we show that the Corporation Counsel fails to respond persuasively to four reasons that explain why the attorney-client privilege should not be made available to government attorneys in the particular circumstances of this case, and why the competing social policies involved here dictate—bearing in mind the Supreme Court's admonition to confine the privilege strictly within the narrowest possible limits—that this Court should not make the privilege available in circumstances in which it has never before in Illinois been deployed.

**I. THE COURT HAS JURISDICTION OVER THIS SUIT, AND THE INSPECTOR GENERAL HAS CAPACITY TO BRING IT.**

The Corporation Counsel's jurisdiction and capacity arguments rest heavily upon *Tanner v. Solomon*, 58 Ill. App. 2d 134 (2d Dist. 1965), which is said to "establish[] that intra-governmental disputes like this one are nonjusticiable." See Response Brief of Defendant-Appellee 7-8 ("App. Br."). As we now show, when considered alongside this Court's opinion in *Burnette v. Stroger*, 389 Ill. App. 3d 321 (1st Dist. 2009), *Tanner* actually supports jurisdiction and capacity here.

In *Burnette* this Court rejected an argument almost exactly like the Corporation Counsel's. An appointed official of Cook County government, the public defender, sued the president of the County Board (the appointing officer) for actions the defender viewed as interfering with the independence of his office. The board president moved to dismiss on the ground that the defender "does not have the power to institute civil litigation," *id.* at 324, pointing out that that no statute "explicitly states that the public defender is an entity that can sue or be sued." *Id.* at 328. Holding that the public defender did have the requisite capacity, this Court said that it would make "no sense to create an entity that could not even defend its right to exist." *Id.* ("Right to exist" was metaphoric; what was at issue was not the literal existence of the agency but an attempt by the county board president to lay off some employees and require others to take furlough days.)

*Burnette* is indistinguishable in principle from this case. There, as here, one agency of a municipal government, headed by an appointed official, sues another agency of the same government for interfering with the independence of his office. The legislative enactment in each case reflects an intention to create an office of municipal government possessed of independence—a fixed term of office, removability only for

cause, broad discretionary powers (there to provide legal services, here to investigate and root out misconduct), and the like. *Compare* 55 ILCS 5/3-4004.2(c) and Municipal Code of Chicago, Ill. (“MCC”) §§ 2-56-020, -130, and -030.

If anything, there are greater indicia of independence here, for the Inspector General but not the Public Defender is expressly given the power to issue subpoenas, MCC § 2-56-040, and there is no analogue in *Burnette* to the formidable duty to cooperate with the Inspector General that is imposed upon all city employees and others (including the imperative that each department’s “premises, equipment, personnel, books, records and papers shall be made available as soon as practicable to the inspector general”). MCC § 2-56-090.

Other indicia of independence include “responsibility for the operation and management of the office of inspector general,” undertaking investigations “on the inspector general’s own initiative,” conducting public hearings “at his discretion” (including administering oaths and examining witnesses under oath), and making it a crime for any person not to comply with a subpoena issued by the inspector general or otherwise to “knowingly interfere with or obstruct one of his investigations.” MCC §§ 2-56-020, -030(b) and (g), and -140.

The legislative intention is further made clear by three, detailed paragraphs in which the Inspector General (not the Corporation Counsel) is not only specifically granted the power to issue subpoenas, but is empowered to make all manner of subpoena-related decisions, including setting response dates, and receiving, considering and negotiating over objections. *See* MCC § 2-56-040. No fair reading of these paragraphs, which refer to the Inspector General several times and not once to the Corporation

Counsel, could lead to the view that the City Council wished—inconsistently with its intention to create an independent investigative agency—to confer the crucial subpoena enforcement power upon the Corporation Counsel.

Indeed, the specific prohibition—“For seven days after receipt of a timely objection to a subpoena, the Inspector General shall take no action to enforce the subpoena . . .”—cannot reasonably be read otherwise than as contemplating that *after* seven days the Inspector General *may* take action to enforce. As to this—inconsistently with the Supreme Court’s admonition not to change the “plain meaning of the words actually adopted by the legislature,” *U.S. Bank Nat’l Ass’n. v. Clark*, 216 Ill. 2d 334, 346 (2005)—the Corporation Counsel is reduced to a semantic distortion: that to “take action to enforce a subpoena” does not mean to file an enforcement action in court, but means instead to “ask the Corporation Counsel to pursue enforcement.” App. Br. 47.<sup>1</sup>

The Corporation Counsel’s attempt to distinguish *Burnette*, App. Br. 45-46, is unpersuasive. That one office was created by statute, the other by ordinance, is irrelevant, for the Corporation Counsel herself acknowledges, App. Br. 23, n.4, that the same interpretive principles apply to both state statutes and municipal ordinances. Moreover, the legislature of a home rule unit of government such as the Chicago City Council possesses the same power to create an independent office of inspector general as the

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<sup>1</sup> In *Department of Public Aid v. Kessler*, 72 Ill. App. 3d 802 (1st Dist. 1979), this Court in effect held that the Illinois Department of Public Aid, authorized by statute to issue but not expressly to enforce subpoenas, could nonetheless enforce its issued subpoenas in the circuit courts. Noting that the absence from the statute of enforcement standards, criteria or procedures was not significant because a court acts as the actual enforcement entity, *Kessler* spoke approvingly of the “procedures for judicial enforcement . . . taken by the IDPA in this case to enforce their subpoena,” which were—exactly as here—the filing of an action in the circuit court. *Id.* at 803-04.

General Assembly possesses to create an independent office of public defender. *City of Evanston v. Create*, 85 Ill. 2d 101, 115 (1981).

That other decisions had previously permitted public defenders to sue, and the existence of partial immunity and indemnity, do not affect at all the force of *Burnette*'s "more important[]", 389 Ill. App. 3d at 328, separate and free-standing "it-would-make-no-sense" argument. (Some indemnity and immunity is in fact provided for city employees. See, e.g., 745 ILCS 10/2-201.) Contending that laying off some employees is a greater interference to the Public Defender's independence than usurping the subpoena enforcement power is to the Inspector General's is not a serious argument.

Far from being inconsistent with *Burnette*, *Tanner* fits comfortably with it, saying, "[T]here are cases in which it has been held proper for one agency of government to resort to the courts to resolve a controversy with another government agency." *Tanner*, 58 Ill. App. 2d at 137. The applicable general rule is set out in one of the cases cited by *Tanner*:

The rule is general that all public officers, though not expressly authorized by statute have a capacity to sue commensurate with their public trusts and duties.

*Mayor of Dearborn v. Dearborn Ret. Bd. of Trs.*, 315 Mich. 18, 24, 23 N.W.2d 186, 189 (1946). Numerous other decisions evidence the generality of this rule. See cases cited in 67 C.J.S. *Officers* §§ 227, 322 (2010).

*Tanner*'s facts are of course radically different from the facts both here and in *Burnette*, for in *Tanner* "one member of a governmental body [was] suing the other members of that same body" (one member of a three-person fire and police commissioner board suing the other members). 58 Ill. App. 2d at 135. Thus, this case clearly belongs in

*Tanner*'s "proper-to-resort-to-the-courts" category, for here the contending parties (as in *Burnette*) are two separate government departments, not individual members of the same department. Read in its entirety, *Tanner* supports the proposition that, although not expressly so authorized by statute, the Inspector General has a capacity to sue commensurate with his express duty to issue subpoenas in the course of an official investigation of possible misconduct in City government.

In effect, therefore, the capacity of the Inspector General to bring this suit flows from two separate but related lines of authority—his right under *Burnette* to defend the independence of his office, and his right under *Tanner* to exercise an implied power commensurate with his express power to issue subpoenas.<sup>2</sup>

With *Burnette*, *Tanner*, and the indicia of independence in the inspector general ordinance thus establishing justiciability and the Inspector General's capacity to bring this suit, the Corporation Counsel's position that she, not the Inspector General, has the power to enforce the subpoena issued in this case leads inexorably to a violation of the Illinois Supreme Court Rules of Professional Conduct ("RPC"), for the RPC clearly prohibit a lawyer from representing contending parties in the same litigation. RPC 1.7(b)(3) and Comment 23. As to representational conflicts generally, this Court has forcefully said:

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<sup>2</sup> Neither of the two federal cases to which the Corporation Counsel refers on this question, App. Br. 9, cites to any Illinois authority—or, indeed, to any authority at all. The city departments to which the two cases refer plainly lack the independence of the Office of Inspector General—for example, their heads serve "at the pleasure of the mayor." See MCC § 2-84-010. The Court need not in this case attempt to draw precisely the indicia of independence line between agencies that can and cannot "defend their right to exist," because the Inspector General's office is so clearly on the right-to-defend side of that line.

If a lawyer's representation amounts to a conflict of interest, the courts have the power to remove the conflict, and the legislature has no power to give any lawyer a right which the supreme court tells the lawyer he may not have.

*Suburban Cook County Reg'l Office of Educ. v Cook County Bd.*, 282 Ill. App. 3d 560, 576 (1st Dist. 1996) ("*Suburban*").

The Corporation Counsel emphasizes that she is the City's lawyer, authorized to conduct all the City's law business, but she fails to pay heed to the conflict of interest her view necessarily entails when applied in the circumstances here, or to the Illinois precedents, including *Suburban*, on the responsibility of the judiciary to resolve such conflicts, even in the face of exclusive representational authority conferred by a legislature. In *Suburban*, the State's Attorney was not only authorized by statute to represent Cook County government, including the plaintiff Regional Office of Education, 282 Ill. App. at 567, but was in fact the sole lawyer so authorized. *People ex rel. Kuntzman v. Nagano*, 389 Ill. 231, 248-49 (1945). Yet this Court specifically approved virtually the identical conflict-resolving procedure that has been followed here—employing outside counsel and then suggesting court appointment of that counsel—saying, "The procedure followed in this case was a proper one." *Suburban*, 282 Ill. App. 3d at 575.

The Corporation Counsel's responses to *Suburban* are unpersuasive. Her question as to whether courts have inherent power to appoint counsel to resolve representational conflicts is definitively answered by this Court's *Tully v. Edgar*, 286 Ill. App. 3d 838, 845-46 (1st Dist. 1997). (In *Suburban* the Court acted on its "own motion." 282 Ill. App. 3d at 568.) Her question as to whether the Inspector General here suitably invoked the court's power borders on frivolous, "waiver" being plainly

irrelevant respecting "a right which the supreme court tells the lawyer he may not have."<sup>3</sup>  
*Id.* at 576.

Here, since a conflict plainly exists ("there obviously is [a conflict]," observed the trial court, Report of Proceedings 37), and the suggestion of judicial appointment was twice made, *Suburban* is a controlling precedent against the Corporation Counsel's contention that she may act as the Inspector General's lawyer in this subpoena enforcement action. Or that the Inspector General is not free to initiate the conflict-resolution procedure, for *Suburban* speaks expressly of invocation of the court's discretion "by either the State's Attorney *or the officials.*" 282 Ill. App. 3d at 575 (emphasis added).

## **II. THERE ARE FOUR REASONS WHY CITY LAWYERS MAY NOT PROPERLY CLAIM THE ATTORNEY-CLIENT PRIVILEGE IN AN OFFICIAL IGO INVESTIGATION INTO CITY MISCONDUCT.**

The Corporation Counsel's brief devotes considerable space to the uncontested matters of the purposes of the attorney-client privilege and the availability of the privilege to the governmental as well as to the private sector. Yet a reader of her brief is left uninformed of the comprehensive, recently articulated views of the Illinois Supreme Court about the "scope" of the attorney-client privilege in Illinois:

- That the privilege "remains an exception to the general duty to disclose."
- That "[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete."

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<sup>3</sup> We have explained in our initial brief, Brief and Appendix of Plaintiff-Appellant 25-26 ("Pl. Br."), why invoking the court's appointment power may not have been necessary here, and we respectfully refer the Court to that explanation.

- That “it is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth.”
- That “[i]t ought to be strictly confined within the narrowest possible limits.”

*Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d. 103, 106, 118 (1982) (quoting 8 Wigmore, Evidence §2291, at 554 (rev. ed. 1961)).

Or that, “The recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy.” *Id.* at 117 (quoting Cardozo, J.).

Or that these views, set out in 1982, were largely restated nine years later. *Waste Mgmt. Inc. v. Int’l Surplus Lines Insur. Co.*, 144 Ill. 2d 178, 190 (1991) (attorney-client privilege rejected in insured’s claim against insurers, stating that attorney-client privilege is not without conditions, that privilege—not duty to disclose—is the exception, and that the privilege “ought to be strictly confined within the narrowest possible limits”).

The acknowledged purposes of the attorney-client privilege and the availability of the privilege generally to the governmental sector are thus analytical starting points, not ending points, in determining whether the privilege may properly be claimed in the specific circumstances of a particular case. When a court turns to such specifics, “It is then the function of a court to mediate between [competing social policies],” a function “the more essential where a privilege has its origin in inveterate but vague tradition, and where no attempt has been made either in treatise or in decisions to chart its limits with precision.” *Consolidation Coal, supra*, 89 Ill. 2d at 117 (quoting Cardozo, J.).

For four separate reasons, each grounded in Illinois law and public policy, the Corporation Counsel cannot properly assert the attorney-client privilege to shield information from an official IGO investigation into possible government misconduct.

**A. The Duty of Cooperation**

In *Waste Management, supra*, the Supreme Court held that an insured's contractual duty to cooperate with its insurance company was "dispositive" of the claim of attorney-client privilege because the cooperation duty negated expectations of confidentiality and, with that element of the privilege wanting, the privilege "does not apply." 144 Ill. 2d at 191-93.

We have explained in our initial brief, Pl. Br. 12-13, why the duty to cooperate is even stronger here than it was in *Waste Management*. What is the Corporation Counsel's response? First to point out that *Waste Management* is a private sector insurance case that does not involve government and government lawyers. But this difference only adds weight to the *Waste Management* precedent as applied here. As our initial brief shows, Pl. Br. 13-15, 16-18, the availability of the privilege is more questionable in the governmental than in the private sector context; the reasons for limiting the privilege in the governmental context do not militate against its availability to private sector clients and lawyers. *Waste Management's* categorical rejection of the privilege because the duty of cooperation negates expectations of confidentiality is thus a powerful reason for reaching the same conclusion in the governmental context.

Next, the Corporation Counsel asserts that the duty of cooperation in *Waste Management* was "broader" than the duty spelled out in the IG ordinance. App. Br. 26. This assertion is entirely without justification, as a quick perusal of the cooperation

language in the two places makes abundantly clear. The Corporation Counsel also says that the ordinance is silent about the attorney client privilege, and its cooperation duty should therefore not be presumed to “override” the privilege. App. Br. 24-25. But so was the contract in *Waste Management* silent about the privilege, yet in this private sector context—where the privilege is at its strongest—*Waste Management* unhesitatingly concluded that the duty of cooperation eliminated the expectation of confidentiality essential to the privilege.

The Corporation Counsel’s argument that a legislative enactment will not be presumed to abrogate a common law privilege absent express language is inaccurate. Modifications of the common law can be “necessarily implied from what is expressed,” *People v. Childress*, 338 Ill. App. 3d 540, 551 (1st Dist. 2003) (citations omitted); *Malfeo v. Larson*, 208 Ill. App. 3d 418, 424 (1st Dist. 1990), an interpretive principle that applies to the attorney-client privilege as well as to other facets of the common law. *See, e.g., United States v. Goldberger & Dubin*, 935 F.2d 501, 504-06 (2d Cir. 1991) (attorney-client privilege must yield to statutory language that “implicitly precludes its application”).<sup>4</sup> Here, not only the duty of cooperation but the multiple indicia of independence in the Inspector General Ordinance implicitly, but compellingly, preclude application of the privilege.

The Corporation Counsel also says she has duties and concerns of “great importance” other than to cooperate with Inspector General investigations, App. Br. 26, but obviously the insured in *Waste Management* also had many concerns other than the

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<sup>4</sup> Among other cases to the same effect are: *Lefcourt v. United States*, 125 F.3d 79 (2d Cir. 1997); *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995); and *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994).

duty of cooperation under its insurance contract, as witness its attempt to avoid disclosure.

In short, the Corporation Counsel quite fails to point to any meaningful reason why the Supreme Court's "dispositive" analysis of the duty of cooperation in the private sector should not apply with even greater force in the governmental context here.

**B. A Shared Common Interest**

A separate ground for the *Waste Management* decision is that where two parties share a common interest, the attorney-client privilege is unavailable to protect communications to an attorney acting for their mutual benefit. 144 Ill. 2d at 193-94. We have explained in our initial brief, Pl. Br. 13, why this separate reason also renders the privilege unavailable here.

The Corporation Counsel's response to this "equally compelling" ground for the *Waste Management* decision, 144 Ill. 2d at 193, is similarly unavailing. It amounts mostly to pointing out once again that, "[e]ven assuming the Inspector General and other City officials have a common interest," Counsel has other interests than cooperating with Inspector General investigations, among which Counsel emphasizes her duty to protect the interests of the City in litigation. App. Br. 27-28.

The parties in *Waste Management* of course also had other interests than the contract between them, some plainly in conflict with their shared common interest. Yet *Waste Management*, in the more-favorable-to-the-privilege private sector context, found a shared common interest to be a separate, dispositive reason for the unavailability of the attorney-client privilege. Moreover, through ordinance and executive order, the City has here calibrated its various interests to include the establishment of an independent

investigative office tasked to identify misconduct within City operations, and it has articulated no exceptions for situations in which the independence accorded the Inspector General might be at odds with other City interests. Finally, paramount among the Corporation Counsel's duties are those imposed upon her to serve the public interest in good and open government. *See In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 294 (7th Cir. 2002) (relationship between public attorneys and public officials “must be subordinated to the public interest in good and open government”) (*“Special Grand Jury 2000-2”*). *See also infra*, Section II (D).

The Corporation Counsel’s concern that disclosure to the IGO would waive privilege claims against third parties is unfounded. The IGO is not an “outside third party,” as Counsel implies. App. Br. 29. The IGO is an independent investigative office, within and part of City of Chicago government, sharing a common interest with the City in protecting the public good. In this context, the City Council has mandated essentially unbounded disclosure to the IGO. MCC § 2-56-090. Both the Inspector General’s posture as part of City government and this legislatively mandated disclosure render the two cases cited by Counsel, App. Br. 28, both of which involve *voluntary* disclosure to *outside* parties, quite inapposite here.<sup>5</sup> Moreover, the IGO is bound by its ordinance to

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<sup>5</sup> In both *Fidelity & Casualty Co. of New York v. Mobay Chemical Corp.*, 252 Ill. App. 3d 992, 1000-01 (1st Dist. 1992) and *In Re Grand Jury January 246*, 272 Ill. App. 3d 991, 997 (1st Dist. 1995) parties under no duty to do so voluntarily disclosed information to third parties in public forums. In *Mobay* the disclosure was but a “bargaining chip to escape indictment and criminal liability.” 252 Ill. App. 3d at 1001.

keep all materials confidential, an obligation which separately puts to rest any concern about waiver as to “outside third parties.”<sup>6</sup>

### C. Undermining Public Trust

In *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521 (1998) (deliberative process privilege unavailable where plaintiffs alleged City of Chicago illegally expanded airport facilities), the Court expressed special concern about governmental privileges because, “if created and applied indiscriminately,” they risk “undermin[ing] public trust in the integrity of the government and its commitment to serving the public interest.” 184 Ill. 2d at 527 (internal quotation marks omitted).

Here it is precisely the unprecedented application of a governmental privilege that is at issue, for never before has an Illinois court held that government lawyers may properly claim the attorney-client privilege in an internal independent investigative agency’s official investigation into government misconduct. If sustained, such an application of the privilege would plainly pose the risk of “undermin[ing] public trust in the integrity of the government and its commitment to serving the public interest”—just the sort of policy consideration to which the Court in both *Consolidation Coal* and *Birkett* had reference. *Id.*

Here, too, the Corporation Counsel’s response is unpersuasive. Of course *Birkett* was about the deliberative process, not the attorney-client, privilege, but the *reasoning* extends to both; concern about undermining the public trust obviously does not stop at the border between the one privilege and the other. And *Birkett* specifically admonishes

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<sup>6</sup> The only exception to this obligation—which is consistent with the shared paramount interest of the public good—is with respect to specified law enforcement agencies. MCC § 2-56-110.

not only against creating new governmental privileges but also against extending existing privileges—“the *extension of an existing privilege* or establishment of a new one.” 184 Ill. 2d at 528 (emphasis added).

#### **D. Duties of Government Lawyers**

Finally, resonating with the Supreme Court’s concern about creating or extending governmental privileges, strong public policy considerations militate against a claim of attorney-client privilege by government lawyers to avoid disclosure in an official internal investigation of government misconduct. The RPC emphasize that the special position government lawyers occupy imports less confidentiality than obtains between private lawyers and their private clients. Thus, Comment 9 to RPC 1.13 states, “[W]hen the client is a government organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.”

Because we are aware of no Illinois precedents that address this “different balance” directly, we referred to a small group of federal cases that does. Among these is a recent unanimous panel decision of the Seventh Circuit Court of Appeals in which, rejecting a claim of attorney-client privilege by a government official, the Court said that “the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law,” adding that “interpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinated to the public interest in good and open government.” *Special Grand Jury 2000-2*, 288 F.3d at 293.

As with respect to the three preceding reasons, the Corporation Counsel's response is underwhelming. Yes there are differing views, as evidenced by dissenting opinions. But a fair reading of these makes clear that much of their focus is on the extraordinary office of the President of the United States; weight is given even in the dissenting opinions to the special obligations of government lawyers. In Illinois, the subordination to the public interest in good and open government, of which the Seventh Circuit speaks, links directly to the comment in RPC 1.13 about striking a different balance respecting confidentiality where the government is the client and government lawyers are involved, and where the "public business" is at stake. *Id.*<sup>7</sup>

The Corporation Counsel's brief places much weight on a bar association disciplinary proceeding involving lawyer employees of the Sanitary District of Chicago, but it is obvious that that case cannot bear the weight assigned to it. *In re Information to Discipline Certain Attorneys of Sanitary District of Chicago*, 351 Ill. 206 (1932). First, while the *Sanitary District* opinion said it found "[n]o good reason" not to apply the privilege in the circumstances there, *id.* at 368, here "good reason" exists in the form of the duty of cooperation that is entirely absent from the *Sanitary District* case.

Second, the Corporation Counsel describes the disciplinary proceeding as if it were an official investigation of the Sanitary District agency, whereas in fact the targets of the investigation were individuals. A truly analogous situation would exist if the Sanitary District had had an independent internal investigative office, and if that office, in an official investigation of the District, had served a subpoena for documents on the

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<sup>7</sup> A recent federal district court opinion, after surveying the several Circuit Court opinions, finds the reasoning of the Seventh Circuit, and of the majority opinions in the Eighth and D.C. Circuit cases, to be "compelling." *United States v. Bravo-Fernandez*, No. 10-232 (FAB), 2010 WL 5260867, \*8-9 (D. Puerto Rico, Dec. 23, 2010).

District's general counsel, who had then claimed the attorney-client privilege as a reason for not complying with the subpoena. Those circumstances would of course implicate the common interest and public trust policy considerations that are present here but—like the duty of cooperation—are also entirely absent from the *Sanitary District* case.

Finally, the *Sanitary District* opinion contains no reasoned discussion of the attorney-client privilege. Were it not for *Consolidation Coal* and *Waste Management*, this alone would not vitiate the case's precedential significance. But with the Supreme Court twice going out of its way "to consider the scope" of the attorney-client privilege some fifty and sixty years later, *Consolidation Coal*, 89 Ill. 2d at 106, it is obvious that the cues in a subsequent attorney-client privilege case must be taken from these later, considered opinions.

The Corporation Counsel also emphasizes her professional responsibility not to make inappropriate disclosure of confidential communications. But this only poses, and does not answer, the question of whether disclosure here would be inappropriate. The RPC specifically authorize disclosure to the extent "necessary to comply with other law or a court order." RPC 1.6 (b)(6). Should this Court determine that the Corporation Counsel must comply with the subpoena served upon her, there would be no violation of professional responsibility in her doing so, and she does not argue otherwise.

Moreover, as a public lawyer the Corporation Counsel has a professional responsibility "not to protect [her] governmental client but to ensure its compliance with the law." *Special Grand Jury 2000-2*, 288 F.3d at 293-94. When it states that defining the obligations of government lawyers is "beyond the scope of these Rules," Comment 9 to RPC 1.13 makes clear that it is a judicial responsibility to determine how the RPC apply

to government lawyers. One consequence of accepting the Corporation Counsel's argument would be that she instead of the judiciary would make that determination.

\* \* \*

In sum, the Corporation Counsel's brief fails to offer a persuasive response to any of the four separate reasons, rooted in Illinois law and policy, that dictate rejection of the attorney-client privilege claim in the circumstances of this case. Underlying these four reasons is the contextual admonition of the Illinois Supreme Court that the attorney-client privilege ought to be "strictly confined within the narrowest possible limits." *Consolidation Coal*, 89 Ill. 2d at 118. This admonition and those reasons counsel strongly against application of the privilege here.

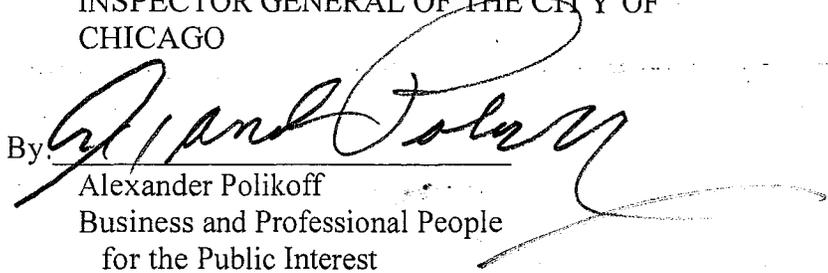
### CONCLUSION

Collectively, four reasons—the duty of cooperation, a shared common interest, the risk of undermining public trust in the integrity of government, and the special duty government lawyers owe to that trust—show clearly how the Court should perform its "mediating" function in this case. Jurisdiction and the standing of the Inspector General to bring this suit being clear, the trial court's order granting the motion to dismiss should be reversed.

Respectfully submitted,

INSPECTOR GENERAL OF THE CITY OF  
CHICAGO

By:

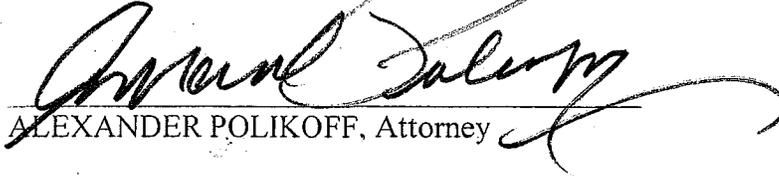


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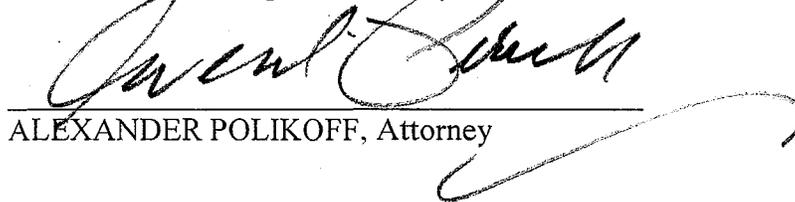
**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 19 pages.

  
ALEXANDER POLIKOFF, Attorney

**CERTIFICATE OF SERVICE**

I certify that I served the Reply Brief of Plaintiff-Appellant by placing three copies in an envelope with sufficient postage affixed and directed to the person named below, at the address indicated, and depositing that envelope in a United States mail box Chicago, Illinois, before 5:00 pm on January 14, 2011.

  
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