

HEARING DATE: DECEMBER 18, 2017 @ 9:30AM

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF
RHODE ISLAND, INC.

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v.

C.A. No.: PC-2017-3856

ST. JOSEPH'S HEALTH SERVICES OF
RHODE ISLAND RETIREMENT PLAN,
AS AMENDED

**THE DEPARTMENT OF ATTORNEY GENERAL'S EMERGENCY MOTION TO
ESTABLISH A PROCEDURE FOR INADVERTENT DISCLOSURE OF DOCUMENTS**

NOW COMES the Rhode Island Department of Attorney General (the "Attorney General"), pursuant to Rhode Island Superior Court Rules of Civil Procedure 45 and 26, and hereby files this Emergency Motion to Establish a Procedure for Inadvertent Disclosure of Documents for privileged and legally protected¹ documents provided by the Attorney General to Special Counsel in response to the subpoena served on the Attorney General on November 3, 2017 (the "Subpoena"). The Attorney General requests an emergency hearing to establish this procedure without delay to facilitate the orderly and efficient production of documents that has already commenced. Accompanying this motion is a Proposed Procedure for Clawback of Inadvertently Disclosed Documents. Attachment A.

Following service of the Subpoena, the Attorney General and Special Counsel discussed the establishment of a clawback agreement. However, the Attorney General and Special Counsel

¹ Legally protected materials include documents deemed confidential during the Hospital Conversions Act processes or documents that contain information that was subsequently deemed confidential during Hospital Conversions Act processes pursuant to R.I. Gen. Laws § 23-17.14-32.

cannot agree on an orderly process addressing the inadvertent disclosure of documents during the production of documents in this matter. A defined process is being proposed to accommodate the smooth production of documents, to identify how such documents are handled, and to minimize disputes. The Attorney General has made a good faith attempt to resolve this matter, to no avail, necessitating the instant motion that requires this Honorable Court's intervention. The Attorney General believes that an established procedure to address inadvertently disclosed documents will greatly aid the production given the volume of documents to be addressed in this matter.² Although Special Counsel and the Attorney General have agreed to a Proposed Case Management Plan Regarding Electronically Stored Information ("ESI") and a Confidentiality Order, they do not provide for the process outlined in the attached Proposed Procedure for Clawback of Inadvertently Disclosed Documents.³ The purpose of the Proposed Case Management Plan Regarding Electronically Stored Information was to establish a plan governing the production of ESI, as required by this Honorable Court. The purpose of the Confidentiality Order was to establish a procedure for protection of confidential documents (as defined by R.I. Gen. Laws §23-17.14-32) so that these documents could immediately be disclosed to Special Counsel. While both proposed orders contain a paragraph for inadvertent disclosure, neither provides for a defined process to address inadvertently disclosed documents which the Attorney General believes is essential given all the considerations and issues in this matter.

² Despite the filing of this motion, the Attorney General continues to review and gathering responsive documents. As of December 13, 2017, the Attorney General has produced four (4) boxes of documents and a response to Request No. 5 of the Subpoena, totaling approximately 9000 pages. The Attorney General expects to receive five (5) more boxes of documents to review and will provide those as expeditiously as possible.

³ Both proposed orders have been filed, but have not yet been entered by the Court.

WHEREFORE, the Attorney General respectfully requests that this Honorable Court order a procedure for inadvertent disclosure of documents, as more fully described in the Proposed Procedure for Clawback of Inadvertently Disclosed Documents.

Respectfully submitted,

STATE OF RHODE ISLAND
BY ITS ATTORNEY,

PETER F. KILMARTIN
ATTORNEY GENERAL

/s/ Kathryn Enright

/s/ Jessica D. Rider

Kathryn Enright #7208

Assistant Attorney General

Jessica D. Rider #8801

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 13th day of December, 2017, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Diane B. Milia

ATTACHMENT A

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF
RHODE ISLAND, INC.

v.

ST. JOSEPH'S HEALTH SERVICES OF
RHODE ISLAND RETIREMENT PLAN,
AS AMENDED

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C.A. No.: PC-2017-3856

**THE DEPARTMENT OF ATTORNEY GENERAL'S PROPOSED PROCEDURE FOR
CLAWBACK OF INADVERTENTLY DISCLOSED DOCUMENTS**

NOW COMES the Rhode Island Department of Attorney General (the "Attorney General"), pursuant to Rhode Island Superior Court Rules of Civil Procedure 26 and 45, to propose a process (the "Process") related to the clawback of the inadvertent disclosure of any privileged and/or legally protected materials¹ during the course of production of documents and electronically stored information ("ESI") in response to the subpoena served by Special Counsel on the Attorney General on November 3, 2017 (the "Subpoena").

Rules 26(b)(7) and 45(c)(3)(C) of the amended Superior Court Rules of Civil Procedure, as set forth in RI Superior Court Order 17-0006, contain nearly identical language regarding ESI.

Rule 26(b)(7): *Claim of Privilege or Protection after Production of Electronically Stored Information.*

- (A) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis of the claim.

¹ Legally protected materials include documents deemed confidential during the Hospital Conversions Act processes or documents that contain information that was subsequently deemed confidential during Hospital Conversions Act processes pursuant to R.I. Gen. Laws § 23-17.14-32.

(B) After being notified of a claim of privilege or of protection under paragraph (A), a party shall immediately sequester the specified information and any copies it has and:

- (i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or
- (ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

(C) If a party that received notice under paragraph (B) disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

Rule 45(c)(3)(C): If electronically stored information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for the claim. After being notified of a claim or of protection, a party shall immediately sequester the specified information, including any copies, and:

- (i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or
- (ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

If a party that received notice of a claim of privilege or of protection disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

The provisions of Superior Court Rules of Civil Procedure set forth above apply to both document and ESI production in connection with the Attorney General's response to the Subpoena.

The following process will manage the inadvertent disclosure of privileged or legally protected materials.

- 1) With regard to any document inadvertently disclosed in the course of the production, inclusive of any ESI, which the Attorney General contends may be privileged or legally protected, such disclosure does not operate as a waiver of any privilege or protection.

- 2) Both Special Counsel and the Attorney General maintain a duty to promptly notify each other in the event that it is discovered that a privileged or otherwise legally protected document or ESI may have been inadvertently disclosed.
- 3) Once the Attorney General communicates notification to Special Counsel, or receives notification from Special Counsel that a privileged or legally protected document or ESI has been inadvertently produced, the Attorney General must then identify the document or ESI on a privilege log or confidentiality log within ten (10) business days to allow for any challenge to the privilege or confidentiality asserted.
- 4) If the Attorney General sends a document or ESI, which the Attorney General subsequently identifies as privileged, the Attorney General must notify the Special Counsel as soon as such privilege is identified and request that the document or ESI be returned. Special Counsel must then return the document or ESI to the Attorney General and destroy any and all copies of the same.
- 5) If the Attorney General sends a document or ESI, which the Attorney General subsequently identifies as legally protected,

the Attorney General may promptly on discovery, furnish a substitute copy properly marked, along with written notice to the other persons that such document is deemed confidential and should be treated as such in accordance with the provisions of this order. Each receiving person must treat such document as Confidential Material from the date such notice is received.

See Order, submitted as Proposed Confidentiality Order December 7, 2017.

- 6) Documents and ESI produced in relation to the subpoena are also subject to the agreed upon Proposed Confidentiality Order and the agreed upon Proposed Case Management Plan Regarding Electronically Stored Information.

Respectfully submitted,

STATE OF RHODE ISLAND
BY ITS ATTORNEY,

PETER F. KILMARTIN
ATTORNEY GENERAL

/s/ Kathryn Enright

/s/ Jessica D. Rider

Kathryn Enright #7208

Assistant Attorney General

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/s/ Diane Milia
