

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF)
RHODE ISLAND, INC.)

VS.)

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

ST. JOSEPH HEALTH SERVICES OF)
RHODE ISLAND RETIREMENT PLAN,)
ET AL.)

MOTION TO COMPEL

HEARD BEFORE THE HONORABLE JUSTICE BRIAN P. STERN ON:

WEDNESDAY, NOVEMBER 29, 2017

APPEARANCES:

RICHARD J. LAND, ESQ.....FOR THE PETITIONER

MAX WISTOW, ESQ.....SPECIAL COUNSEL

CHRISTOPHER CALLACI, ESQ.....UNITED NURSES & ALLIED
PROFESSIONALS

JOSEPH CAVANAGH, III, ESQ.....PROSPECT CHARTERCARE, LLC

STEPHEN F. DEL SESTO, ESQ.....COURT-APPOINTED RECEIVER

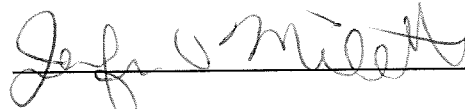
SPECIAL ASSISTANT ATTORNEY GENERALS

JESSICA RIDER, ESQ.

KATHRYN ENRIGHT, ESQ.....FOR THE STATE

C E R T I F I C A T I O N

I, Jennifer W. Milette, hereby certify that the succeeding pages, 1 through 57, inclusive, are a true and accurate transcript of my stenographic notes.



JENNIFER W. MILETTE, RPR
Certified Official Court Reporter

WEDNESDAY, NOVEMBER 29, 2017

AFTERNOON SESSION

1 THE COURT: Madam Clerk, please call the case.

2
3 THE CLERK: Your Honor, the matter before the Court
4 is case number PC/2017-3856, St. Joseph's Health Services
5 of Rhode Island versus St. Joseph Health Services
6 Retirement Plan. This matter is on for a motion to
7 compel compliance with subpoena and to overrule an
8 objection.
9

10 Will counsel please identify themselves for the
11 record?

12 MS. RIDER: Jessica Rider on behalf of the state of
13 Rhode Island.

14 MS. ENRIGHT: Good afternoon. Kate Enright for the
15 Department of Attorney General.

16 MR. CAVANAGH: Good afternoon, your Honor. Joseph
17 Cavanaugh for Prospect CharterCare LLC.

18 MR. DEL SESTO: Stephen Del Sesto, the
19 court-appointed receiver.

20 MR. WISTOW: Max Wistow, special counsel.

21 THE COURT: As the clerk stated, we are here this
22 afternoon for a motion to compel on the subpoena that was
23 issued by the special counsel. The Court has had the
24 opportunity to review the papers, including the November
25 16 partial objection by the Attorney General's office;

1 the November 17th special counsel motion to overrule
2 partial objection and compel a response; November 27
3 Office of Attorney General objection to the motion to
4 compel; and on November 28, the Court received by hand
5 delivery the special counsel's reply. The motion was set
6 down to be heard this afternoon.

7 Counsel, you may proceed.

8 MR. WISTOW: Thank you, your Honor.

9 As is well known to the Court, the pension plan that
10 we are talking about today was put into receivership on
11 August 18th. At the time there was a request by the
12 petitioner St. Joseph's Hospital to reduce all the
13 benefits of the plan participants by 40 percent. The
14 Court has deferred any decision in that regard until at
15 least the first of February. I refer to that because it
16 relates to the immediacy of some of the things we are
17 asking for.

18 We were appointed special counsel to the engagement
19 on October 18. And on November 3, we served the subpoena
20 in question on the Attorney General. So there's nearly a
21 month has gone by. And we have received literally not
22 one document in compliance with the subpoena.

23 I would point out, your Honor, the irony of the
24 situation. Because within less than a week of the
25 petitioner receivership in August, the Attorney General

1 put out a press release. The Attorney General, being my
2 opposition this morning. So on August 24, this press
3 release -- and that appears by the way as footnote number
4 three in the memo, the initial memo we put in.

5 And he said at that time that "He was urging the
6 receiver of the pension fund and the Court to establish
7 and maintain complete transparency throughout this
8 process and to consider every available option to regain
9 financial viability of the pension fund."

10 So, not only has there been no effort by the
11 Attorney General's office to help us in our inquiry. But
12 as recently as -- I guess it was on Monday, our office
13 has been accused expressly of acting in bad faith
14 regarding filing the motion. And that bad faith was
15 based on a supposed agreement which was attached as
16 Exhibit B to the objection.

17 Purposefully, purposefully, I -- I don't like to be
18 this vehement, except I want to defend myself against the
19 charge of bad faith. Purposefully the Attorney General's
20 representatives left out my response the very next day to
21 that letter, where I said flat out, "We find much of the
22 letter," the letter that they based this supposed
23 agreement on, "from Ms. Potington (phonetic) to be
24 factually and legally inaccurate."

25 The tenure of our meeting has led us to believe, and

1 the November 16 letter reinforces that belief, that we
2 must file a motion to compel. We have no agreement
3 whatever with the Attorney General's office in spite of
4 their representations. And by the way, Rule 1.4 of the
5 Superior Court Rules of Practice would require any such
6 agreement to be in writing, which it's not.

7 Now, the Attorney General asks in its submission to
8 this Court, among other things, to extend compliance with
9 the subpoena to February 15th, 2018. And I'd like to
10 quote what -- the reason given by the Attorney General.
11 The Attorney General says that "He is aware that the
12 receiver intends to propose pension benefit adjustments
13 in February 2018. Extending the time for the Attorney
14 General to respond to the subpoena will not interfere
15 with the receiver's proposal, which will be developed
16 based on the information currently available concerning
17 pension resources and the status of plan participants.
18 The investigation to be conducted by special counsel and
19 the pursuit of any claims by special counsel will not be
20 concluded by February 2018."

21 It would make sense that if any damages would come
22 available for the benefit of the pension, those funds
23 could be ejected into the corpus and the receiver's
24 proposal adjusted accordingly at the time.

25 Now, let me say first that I agree that the chances

1 of us recovering funds by February first are remote to
2 say the least. On the other hand, we are beginning to
3 get a handle on some potential claims, where I hope with
4 additional information to be able to advise the receiver
5 in connection with whether or not to do a reduction at
6 that time; to perhaps put it off a little bit further; or
7 alternatively, to do a reduction at a smaller percentage
8 than otherwise might be.

9 On the basis of I'm saying, "Look. Here's what I
10 found, Mr. Receiver. Here's where I think we are going
11 to have a recovery." And, of course, no lawyer is ever
12 going to guarantee any results. But he can take into
13 consideration my recommendations. And this will have
14 potentially a very material effect on the pensions and
15 the plan participants.

16 So, the arguments that AG makes, he says he's not a
17 party. He's not a party. And, therefore, he should not
18 have the same kind of burdens that a party would have to
19 the litigation.

20 But we should compare that, your Honor, with the
21 statement that I read, where he talks about the total
22 transparency; and he wants every available option to be
23 exercised by the Court and special counsel to get the
24 financial viability of the plan in place.

25 But more important than that, your Honor, this is

1 not some third party. You know, he's a public official.
2 We are talking about duties he had with regard to this
3 transaction. And this is not some stranger that we've
4 grabbed in and pulled into this mix.

5 And by the way, I'd like to quote the Court a little
6 bit further from the Attorney General's statement on
7 August 24th, less than a week after the receivership, to
8 show what commitment he is supposed to make to this
9 proceeding, and which he apparently refuses to do. And
10 this is a direct quote from his press release. He says,
11 "I am very concerned and have many questions as to how
12 the pension fund could be insolvent just three years
13 after being funded at 90 percent."

14 While the Attorney General's office is not directly
15 or indirectly involved with the management of the pension
16 fund, "We have engaged with counsel for the petitioner
17 and the court-appointed receiver," which is not true; he
18 never engaged with me, "and will be closely monitoring
19 the legal process and assessing where we have legal
20 standing to intervene."

21 He's not a stranger to this proceeding. He goes on
22 to say, "The men and women who dedicated their careers
23 working in St. Joe's expected that their pension would be
24 there for them when they retired. And rightfully so.
25 Many, if not most, live on fixed incomes and depend on

1 that monthly pension check to survive.

2 "Just as state employee pensioners know all too
3 well, it can be devastating to see your monthly income
4 decrease precipitously because of broken promises. These
5 retirees deserve to know how this happened and what is
6 being done to protect that investment. I urge the
7 receiver of the pension fund," and so on, that I quoted
8 before. That is his publicly stated position.

9 When he gets into court here, not only doesn't he do
10 anything, but he says, "Don't treat me as if I'm a party
11 to this proceeding." Now, he goes on, and he argues that
12 he shouldn't have to produce any of the documents that
13 are on his website. "These are publicly available
14 documents," he says. And all we need to do is click on
15 and there we are.

16 Two problems with that. The case he cites for that
17 proposition is one of the very small minority. We've
18 cited on page three of our reply memo the cases that
19 represent the overwhelming rule in the United States
20 under the Federal Rules which our Rhode Island rules
21 follow. For example, in the Ari v. Archon Information
22 case from the Eastern District of Louisiana in 2012, the
23 Court said, and I quote, "Further, the Court notes that
24 Ari is not absolved of her duty to produce information or
25 documents simply because they are publicly available.

1 Especially whereas here the documents are reasonably
2 accessible and within Ari's possession. Moreover, this
3 obligation extends equally to third parties responding to
4 subpoenas as well as to litigants." That's the
5 In re Refco case from the Northern District of Illinois
6 that I cite, plus the other cases.

7 But more important, your Honor, than who's going to
8 click the button, is the fact that his website is not
9 reliable. It is not complete. There's an affidavit that
10 we submitted to the Court for Mr. Ledsome (phonetic)
11 showing that there is at least one document that we were
12 lucky enough to obtain from some other source. That's
13 not on the website.

14 And that's specifically the response to supplemental
15 questions that were submitted in support of the
16 application for 2014. Now we were just lucky that we had
17 that. If we had just -- were stuck with the
18 representation of the Attorney General --

19 THE COURT: Why -- why don't we, on that issue, just
20 go into it more after the AG has the ability. Because
21 when I read their last objection, I don't know whether or
22 not they are pressing that any more. And I will clarify
23 that with them and we can take that.

24 MR. WISTOW: Okay. Then they go on to talk about
25 relevance. And they say, "Well, you know, we will give

1 you everything that relates to the pension fund that we
2 think relates to the pension fund."

3 And we have two problems with that. Number one is
4 the so-called confidentiality aspect of it. And just to,
5 to -- that list or the so-called confidential material
6 appears as Exhibit 3 in the materials that we most
7 recently filed with the Court.

8 Now, what's astonishing about this, your Honor -- and
9 I don't know how else to categorize it -- is the first
10 eight items on that list are minutes of the board's and
11 committee meetings of the hospitals to approve the very
12 transaction that we are looking at, and include conflict
13 of interest disclosures. Conflict of interest
14 disclosures. Those are supposedly confidential.

15 Now, even more bizarre, your Honor, on page seven,
16 they're claiming that confidentiality applies to an -- to
17 "an expert report analyzing and evaluating the pension
18 plan." It's mind-boggling that they could claim in this
19 context confidentiality. Two items down from that on
20 page seven, there's an entry "Information relating to
21 employee retirement plan. Confidential."

22 Page eight, "Financial supplement to pension information
23 provided previously." All claim to be confidential.

24 Now, they rely on their claim for confidentiality on
25 the Hospital Conversion Act itself. And in Rhode Island

1 General Law 23-17-14-32, it's true that the Attorney
2 General -- it says, "The Attorney General has the power
3 to decide whether any information required by this
4 chapter of an applicant is confidential and/or
5 proprietary. The decisions by the Attorney General shall
6 be made prior to any public notice of an initial
7 application or any public review of any information and
8 shall be binding on the Attorney General, the Department
9 of Health, and all experts or consultants engaged by the
10 Attorney General or the Department of Health."

11 But the very next statute after that clarifies what
12 that means. And that's 23-17.14-32A, which we quoted in
13 our papers. And it makes it clear that what they are
14 talking about is that all other portions of "initial
15 application and supporting documentation shall be
16 considered public records and shall be available for
17 inspection upon request." In other words, the stuff
18 that's deemed confidential is not susceptible to an APRA
19 request. And we are not arguing to the contrary.

20 However, the 23-17.14-34A, which we also quote,
21 gives your Honor the authority to open up and review
22 those documents and order them disclosed. The statute
23 says, "Any preliminary, procedural or intermediate
24 agency, act or ruling with respect to the filing of an
25 application for conversion, including the completeness of

1 the application, confidentiality of any information or
2 documents produced in connection with the conversion of
3 approval or disapproval of a conversion, and conditions
4 or restrictions proposed or determined with respect to
5 the approval of a proposed conversion is immediately
6 reviewable via this Court."

7 So this is exactly the analogy between APRA, the
8 Access to Public Records Act that we have in this state
9 and FOIA, the Freedom of Information Act under the
10 federal law. And I would cite to your Honor a case from
11 the Southern District of Georgia, 2015, which the United
12 States Willis v. Southerncare, which we cited. And I
13 quote, "FOIA determinations and decisions to quash a
14 subpoena are two different analytical animals driven by
15 different considerations. Put differently, for
16 subpoenas, the presence of confidential commercial
17 information counsels caution and concern for the
18 disclosing parties' business interests. But it does not
19 compel quashing as in FOIA."

20 So, I agree with the Attorney General that if a
21 citizen, taxpayer just wrote in and asked for this, he
22 could maintain confidentiality. But that's all.
23 Now, he also goes on -- by the way, Mr. Cavanagh is here.
24 He introduced himself to me as representing Prospect
25 Care. And he has some concerns about confidentiality

1 from Prospect.

2 And I offer now to enter into an agreement with him
3 — if it's okay with -- if it's okay with the Court — to
4 not disclose any information that he considers to be
5 confidential. He will give it to me, without my first
6 giving notice to him that I intend to go to the Court for
7 permission to disclose it. And I'm willing to be held
8 under contempt of court if I violate that.

9 THE COURT: But the Attorney General in their papers
10 — I will hear from them — really posited two issues --
11 two things in terms of confidentiality. One is, it's
12 their position that, look, if you get a waiver from
13 parties, you can put that aside. But the second is, is
14 almost for the Prospect documents where you are talking
15 about is, if the Court orders some type of protective
16 order, that's in place, at least until they can be
17 reviewed and possibly you coming back into court and the
18 Court making a determination in terms of where they
19 should be.

20 MR. WISTOW: That's what I'm offering, if I
21 understood what your Honor is saying.

22 THE COURT: Not just with respect to Prospect. If
23 there's other documents that have been labeled
24 confidential.

25 MR. WISTOW: I have no problem with that, your

1 Honor. The standard procedure -- we are talking about
2 commercial information.

3 THE COURT: Right. Uh-huh.

4 MR. WISTOW: I also will warrant to the Court -- I
5 have no plans to open a hospital in Rhode Island. So the
6 information is not going to be of any particular use to
7 me. We -- we can arrive at an appropriate protective
8 agreement.

9 The next point I want to address -- I will try not to
10 drag this out -- is the relevance. And the AG wants to
11 say they are going to give me everything they think is
12 relevant to the pension. And they are going to decide
13 what's relevant. And I don't accept that.

14 And I will tell you exactly why I don't accept that.
15 First of all, in -- if this were in a suit, an ordinary
16 suit, the standard is not relevance. It's whether or not
17 it's discoverable if it might lead to relevant evidence.
18 But this is a broader situation. This is not a lawsuit.
19 I've been charged with the obligation of investigating
20 what happened here. And I would like to look at
21 everything.

22 What I can say -- I don't rely -- I would not rely
23 on the AG's "determination" because the AG really has
24 shown both in the filing in this Court and in its
25 decision that it has no fundamental understanding of the

1 transaction. They miscategorized the transaction in
2 their footnote seven to their objection, where they
3 talked about the -- "In its simplest form, the structure
4 of the transaction outlined in the initial application is
5 a sale of the assets of CharterCare Health Partners to
6 PMH." That's not so. That's not what happened. That's
7 how frightening it is to have to rely on the Attorney
8 General's categorization of what's important and what's
9 not.

10 Now, by the way, that -- what I just picked out I
11 don't regard to be a quibble. The difference between who
12 is the purchaser, who is the seller. That has very
13 significant potential ramifications in evaluating this
14 entire transaction. The consideration for the sale. For
15 example; what was the allocation between the two
16 hospitals? Between Roger -- that's what was sold, the
17 assets of the hospital not the assets of CharterCare.
18 There's no allocation that we know of yet as to how much
19 of this was for the assets of Roger Williams.

20 This all leads, your Honor, to a possible claim of
21 fraudulent transfer. In the face of obligations owed to
22 these -- I'm not saying I'm going to bring that suit.
23 But if I'm going to look into this, I need to understand
24 these things.

25 And by the way, just so your Honor understands that

1 I'm not completely fancifying this. One thing I can show
2 you -- and I have showed you the papers I hope -- is the
3 Attorney General either was completely misled when he
4 approved this application or concealed something. And
5 what I'm referring to is in his decision, he flat out
6 says that "PMH is proposing to form Prospect CharterCare
7 LLC. PMH will retain an 85 percent ownership interest in
8 Prospect CharterCare LLC. CCHP will be provided a 15
9 percent ownership." That's all true.

10 Then it says though, "The governing structure,
11 however, will be such" -- (phone ringing)

12 Oh, my goodness. I forgot to shut that off.
13 Forgive me, your Honor.

14 THE COURT: Nice ring tone.

15 MR. WISTOW: I remember when cellphones first came
16 out. I was in a trial in front of Judge Torres, and
17 opposing counsel's cellphone went off. And when it went
18 off, it should have been a lesson to me, but your
19 reaction was a lot milder than Judge Torres --

20 THE COURT: I want to put the cellphone behind us.
21 And let's keep going.

22 MR. WISTOW: Okay.

23 Let me make sure it doesn't do that again.

24 (Pause)

25 So, what -- the importance of this is the Attorney

1 General says in his decision – and I submit this is
2 completely wrong – "The governing structure however,"
3 this is of the new joint venture, "will be such that
4 PMH's ownership interest will appoint 50 percent of the
5 membership of the Prospect CharterCare LLC," that's the
6 new for-profit entity, the joint venture, "and CCHP's
7 ownership interest. CCHP," being the entity that owned
8 Roger Williams Hospital and St. Joseph's, "will appoint
9 50 percent of the membership of the proposed CharterCare
10 LLC board. The transacting parties refer to this concept
11 as a 50/50 board.

12 "Prospect CharterCare LLC would operate under a
13 50/50 board composition, which would permit CCHP to
14 retain a significant degree of control in the ongoing
15 ownership and governors of Prospect CharterCare LLC to
16 ensure the continuance of its local mission as well as to
17 provide it with access to the capital and other resources
18 held by PMH," et cetera, et cetera.

19 The president of CharterCare Health Partners, the
20 selling entity, which was going to become a 15-percent
21 owner of the new joint venture and the president of
22 Prospect, the acquiring company, submitted a press
23 release which appeared in The Providence Journal before
24 the Attorney General approved the transaction where both
25 of them categorize the 50/50 board as ensuring local

1 control over the hospital by giving CharterCare "real
2 veto powers." That is completely false. Completely
3 false.

4 And I would like to read you the entire statement.
5 Not the entire but a portion of the statement that
6 appeared in the Journal. "The development and pursuit of
7 innovation and health delivery should not come at the
8 cost of one of the most cherished values in Rhode Island
9 healthcare: that of local control. We are pleased that
10 our proposal will assure preservation of local governance
11 as our joint venture board will have equal representation
12 from CharterCare and Prospect with a local board chair
13 with real veto powers."

14 Your Honor, I submitted as Exhibit 4 that statement
15 by the presidents of the two entities where they touted
16 this. And that was one of the important considerations,
17 obviously, in allowing this whole transaction to go
18 through.

19 But the problem with that statement, even though
20 there's four directors from the CCHP and four from the
21 for-profit, if there's a deadlock, the agreements provide
22 that the -- that the for-profit directors get to decide
23 what to do in nearly every instance. So it's a sham.

24 THE COURT: Uh-huh.

25 MR. WISTOW: Now, I point this out for two reasons.

1 One -- and I admit that on its face it doesn't directly
2 relate to the pension plan. But if I -- I may be able
3 to, among other things that we found, piece all of this
4 together to perhaps, perhaps, base some success on
5 liability on Prospect. And also I point this out
6 because, again, I don't want to have to rely on the
7 Attorney General who is under the impression that
8 obviously -- I hope he was under the impression and
9 didn't conceal it. He was under the impression that
10 there was local control when there was not.

11 So, that's really one of many, many issues. I offer
12 that just as an example. I don't want to completely
13 disclose everything we've come up with so far. But we
14 want to flesh these things out. And our investigation at
15 this point is really embryonic. But frankly, I'm
16 encouraged that there will be a basis for doing
17 something, if I can get the documents that I need.

18 By the way, one of the exhibits to the AG's
19 submission trying to quash the subpoena, Exhibit E, is
20 the decision itself. And I'm just -- there are multiple,
21 multiple, multiple things that the Attorney General had
22 to evaluate. One of them, for example, is whether the
23 proposed conversion contemplates the appropriate and
24 reasonable fair market value, meaning of the assets that
25 were transferred. We really would like to explore that.

1 Again, for the obvious thing about possibly a fraudulent
2 transfer of assets for an inadequate consideration.

3 So, the -- the other thing that is a little bit
4 bizarre is our subpoena asks the Attorney General to turn
5 over to us those documents relating to his express
6 statement to the press about broken promises; saying can
7 you please give us the documents relating to that; and
8 also the documents where he's relating to his "engagement
9 with counsel for the receiver," which to my knowledge
10 never took place.

11 I just want to say one thing in closing. And I
12 promise, your Honor, this is in closing. I don't think
13 there's any more eloquent argument that I can make to
14 compel the disclosure of these documents than the
15 Attorney General made himself on August 24th when he
16 said, "I am very concerned and have many questions as to
17 how the pension fund could be insolvent just three years
18 after being funded at 90 percent." And then he goes on
19 and he talks about the transparency and so forth. No one
20 could be more eloquent in describing the need for this
21 than the Attorney General. And it's ironic that I'm here
22 trying to compel him to do what he publicly said was the
23 right thing to do.

24 Thank you, your Honor.

25 THE COURT: Counsel, before I hear from the state, I

1 just want to clarify something you said from the
2 beginning. Have you received rolling or anything else,
3 any documents in response from the Attorney General at
4 this point?

5 MR. WISTOW: The only thing I've received is the
6 list of confidential materials. That's it. And whether
7 that was -- and that was generated, I believe but I'm not
8 sure, way back when, several years ago. I'm quite sure.
9 But that's the only thing.

10 THE COURT: Thank you very much.

11 Counsel, you may proceed.

12 MS. ENRIGHT: Good afternoon, your Honor.

13 THE COURT: Good afternoon.

14 MS. ENRIGHT: Before we proceed, I just want to
15 acknowledge what this case is about: the pensioners, and
16 that the Attorney General is truly concerned for them and
17 the status of the pension fund. Our goal today is to
18 arrange for an orderly lawful response to this subpoena
19 that will be most helpful to special counsel.

20 The Attorney General would like to specifically
21 address three points that will get us to that place.
22 First, we would like to provide production on a rolling
23 basis with production to be completed by February 15th.
24 Second, we would like the ability to withhold legally
25 protected documents absent a waiver from the transacting

1 parties to these reviews or a court order. Finally, we
2 would like the ability to provide privilege logs.

3 So, first taking the time piece of this, your Honor.
4 Special counsel has requested essentially all of the
5 Attorney General's records and files pertaining to the
6 2009 Hospital Conversion Act reviews merging Roger
7 Williams and St. Joe's into CharterCare Health Partners
8 and secondly the 2014 Hospital Conversion Act review
9 involving Prospect CharterCare.

10 We plan to give all of the documents that aren't
11 legally protected for which we would provide privilege
12 logs. We have attempted to demonstrate the volume and
13 the breadth of the subject matter captured by the
14 requests. There were no statutory criteria to these
15 reviews that address the impact of the deals on the
16 pension.

17 In 2014, there was one question in that 73-page
18 application that specifically referenced the pension.
19 And in 2009, of a 113-page application, there were two
20 questions that specifically referenced the pension. If
21 it is helpful, we can provide the documents responsive to
22 these questions, subject to protection and privilege,
23 within two weeks to commence our rolling production.

24 We will produce whatever the Court orders. But
25 because compliance requires production of what we

1 estimate to be over 100,000 documents or more, the volume
2 of the request is a necessary consideration as we arrange
3 for an orderly and lawful response.

4 THE COURT: Counsel, can I just ask a question about
5 that?

6 MS. ENRIGHT: Yes.

7 THE COURT: I'd like to understand from November 3,
8 when you were served the subpoena until today, why don't
9 we start with has there been staff assigned to, to gather
10 together or identify the materials?

11 MS. ENRIGHT: Yes, of course, your Honor.

12 THE COURT: So, let's talk about that and FTEs or
13 whatever.

14 MS. ENRIGHT: Sure.

15 THE COURT: I need to understand what happened
16 because I'm terribly concerned that there's been nothing
17 produced, and we are at almost the 30-day mark.

18 MS. ENRIGHT: Sure, sure.

19 Upon receipt of the subpoena, one of our initial
20 goals was to meet with special counsel and to immediately
21 organize our office in a way that could respond to this
22 subpoena. We have designated a full-time secretary.
23 We've got three attorneys assigned to this. We have a
24 room full of documents. We have certainly committed a
25 substantial amount of resources to compliance. We have

1 admittedly been tied up with some motion practice in the
2 recent days. But we are in the process of preparing to
3 produce.

4 Until the reply received yesterday evening, we had
5 thought we had reached an agreement to do so on a rolling
6 basis.

7 THE COURT: But whether it's rolling or not, I guess
8 what I'm trying to understand and look at -- you wanted
9 to have a meeting. There's a full-time FTE, which is a
10 secretary, plus three attorneys that to some extent are
11 working on this. So, what are you -- what do you have at
12 this point? Is there a number of documents, a number --
13 have you identified everything that could come in within
14 the scope of the subpoena?

15 And I'm putting electronic documents aside for this.

16 MS. ENRIGHT: Okay. So, we -- it's difficult for me
17 to address that without first addressing the publicly
18 available documents. So I am going to just quickly --

19 THE COURT: That's probably good because I saw a
20 real shift in your papers.

21 MS. ENRIGHT: Yes. We are willing to provide the
22 publicly available documents to special counsel's office.
23 We had suggested because it has been -- business has been
24 conducted this way in the past where parties will look to
25 the publicly available documents.

1 THE COURT: And by the way, I appreciate you
2 mentioned Costa v. Rasch both in your papers. It's not
3 in Westlaw or Lexis. I didn't see it as an exhibit.

4 MS. ENRIGHT: We should have attached it. I
5 apologize.

6 THE COURT: But putting that aside, it's not an
7 issue at this point because you are going to produce
8 them.

9 MS. ENRIGHT: We are going to -- we are going to
10 produce that. And just because I feel it necessary to
11 address the attack on the website, the CDC documents are
12 maintained by Department of Health. So Mr. Wistow's
13 exhibit does reference that there -- and his papers
14 reference that. That document was not available on our
15 website.

16 The change in effective control process is a
17 different process than the Hospital Conversions Act
18 process. Change in effective control is fully within the
19 jurisdiction of the Department of Health. We do not
20 maintain their records on our website. So that can be
21 found there, I would think. I don't know.

22 THE COURT: The bottom-line in terms of the Court's
23 decision is publicly available --

24 MS. ENRIGHT: Exactly.

25 THE COURT: -- information.

1 MS. ENRIGHT: Exactly.

2 THE COURT: So we were --

3 MS. ENRIGHT: On the resources issue.

4 THE COURT: Well, what's been gathered at this
5 point?

6 MS. ENRIGHT: So, at this point, we are starting
7 chronologically -- makes the most sense to us -- with the
8 2009 documents. I don't know what kind of detail your
9 Honor wants to hear. But let me just give you a little
10 bit of housekeeping. What we pull, we then will scan and
11 date stamp. The documents that are being reviewed will
12 start with the 2009 application. And then we will move
13 forward to 2014.

14 Mr. Wistow has requested documents that pertain to
15 our monitoring efforts related to 2014. So, then we will
16 move on to those, which is still an ongoing --

17 THE COURT: So I guess my question is, you are
18 starting with 2009. So what's been accomplished at this
19 point?

20 MS. ENRIGHT: As far as?

21 THE COURT: Has anything been scanned in and date
22 stamped?

23 MS. ENRIGHT: Yes, yes.

24 THE COURT: Has anything been reviewed for
25 privilege?

1 MS. ENRIGHT: We have been reviewing things for
2 privilege, your Honor. But it's -- without this
3 confidentiality piece resolved, it will be helpful to
4 move forward with that. But yes, we have commenced.

5 THE COURT: Because, I guess one of the things I'm
6 wondering, the time frame is that the Hospital Conversion
7 Act talks about that a lot of this information -- other
8 than things that are confidential and others -- are
9 available by the public for inspection.

10 And you know better than I of the position our
11 Attorney General's office has taken about the ten-days
12 and the 20-day extension. So I guess you are saying that
13 you wouldn't even be able to make those available to the
14 public within the 30 days, if this was a public records
15 request.

16 MS. ENRIGHT: Oh, okay.

17 THE COURT: Because I'm having real trouble
18 understanding 30 and 90 days.

19 MS. ENRIGHT: Your Honor, if I may?

20 We do have the public records request pending that
21 relates to this matter from the union. And because of
22 the amount of material, we have had to ask for a short
23 extension of time with that response to Friday. But we
24 are -- we are in the process right now of pulling
25 documents that -- you know, these are almost decade old

1 documents coming out of storage. When it's publicly
2 available documents that, I believe, that is referring
3 to --

4 THE COURT: Yeah.

5 MS. ENRIGHT: -- is the documents that are available
6 on our website that relate to the recent hospital
7 conversions, which would include the application. It
8 would include supplemental exhibits that are not legally
9 protected or confidential or, excuse me, privileged.

10 THE COURT: Okay. So, there are some documents you
11 are representing that have been scanned in and date
12 stamped at this point. There hasn't been really anything
13 done in terms of privilege because you are waiting on a
14 ruling on the confidentiality.

15 MS. ENRIGHT: Except, your Honor, like I -- I just
16 offered, we can move forward with production, you know,
17 the self-imposed deadline of two weeks on those three
18 very relevant questions, with responses to those, and
19 provide a privilege log.

20 THE COURT: Uh-huh. Okay. And there hasn't been --
21 other than possibly a confidentiality log that was in the
22 past, there's been nothing that's been produced by the
23 Attorney General's office from November 3 until today?

24 MS. ENRIGHT: To special counsel.

25 THE COURT: Correct.

1 MS. ENRIGHT: Correct.

2 THE COURT: Go ahead.

3 MS. ENRIGHT: And now if I can just address the
4 confidential documents?

5 THE COURT: Before we get there, just a question I
6 forgot to ask your brother as well.

7 It appears that there were certain modifications. I
8 believe, and correct me if I'm wrong, Attorney Wistow,
9 there was something in your papers that said question two
10 has been eliminated. I believe it said without
11 prejudice.

12 MS. ENRIGHT: Yes, yes. So --

13 THE COURT: Okay.

14 MS. ENRIGHT: Attorney Wistow did reference that
15 there were no agreements coming out of that meeting,
16 which was not our understanding. But if that is an
17 agreement that is --

18 THE COURT: Well, what I am referring to is in the
19 reply --

20 MS. ENRIGHT: The subpoena.

21 THE COURT: There's an exhibit that said that number
22 two is not -- and then I believe you referenced in your
23 papers something about one and three. And I just wanted
24 to know -- I understand two -- is there anything else?
25 Just so I know what's before me, is -- was there any --

1 is there any agreement between the parties on question
2 one and three?

3 MS. ENRIGHT: On one and three, I believe we reached
4 agreement. But I'm -- I would suggest that we consult
5 Attorney Wistow.

6 MR. WISTOW: I would like to put everything on the
7 record, your Honor.

8 THE COURT: I'm sorry?

9 MR. WISTOW: I would -- if there supposedly an
10 agreement, I would like to have it on the record.

11 THE COURT: Okay.

12 MS. ENRIGHT: I think that's what we are doing.

13 THE COURT: We will circle back to it. So it's
14 clear in terms of number two. We will address one and
15 three later.

16 MS. ENRIGHT: Okay.

17 THE COURT: Let me -- one at a time.

18 MS. ENRIGHT: Okay. On the confidential and legally
19 protected documents, your Honor, I think it's relevant at
20 this point to acknowledge that I have been contacted by
21 both Rick Land, who represents the old coentities, and
22 Joe Cavanagh, who has contacted me as a representative on
23 behalf of the new owner Prospect CharterCare. And they
24 have come -- they are present. I don't know if they want
25 to be heard today. But the message from Rick Land was

1 that the old coentities would not object to a waiver of
2 confidentiality. Since he's here, I'm glad he can
3 correct me if I misunderstood. And my conversation with
4 Joe Cavanagh was just limited to a very brief discussion
5 about that this was on for a hearing today.

6 But the transacting parties to a Hospital
7 Conversions Act review have the ability to request legal
8 protection for certain documents. These are not our
9 documents. I just want to reiterate that these are the
10 documents belonging to the third parties. And as
11 articulated in our filings, the applicants' ability to
12 request this legally protected status for certain
13 documents facilitates a comprehensive and thorough
14 regulatory review, which is vital to the regulatory
15 function of the Attorney General.

16 THE COURT: And I understand that.

17 I guess my question is -- so the confidentiality, the
18 statute talks about the AG makes a decision beforehand.
19 It's final at that point. And then you have these
20 documents, which I understand, you know, the public
21 policy behind it is so you can review and make it
22 confidential -- does the Attorney General have the ability
23 to re-visit that once a final determination is made?

24 MS. ENRIGHT: I don't see any provision for that in
25 the statute or any precedent for it. I think that --

1 (phone ringing)

2 MR. WISTOW: Forgive me, your Honor.

3 THE COURT: One more and you lose the phone.

4 MR. WISTOW: I am going to --

5 THE COURT: Just take the battery out.

6 MR. WISTOW: I'm going to blame my grandson who
7 taught me how to --

8 THE COURT: Please, counsel, go ahead.

9 MS. ENRIGHT: The -- what is clear to me is that the
10 statute binds the Attorney General to the confidentiality
11 determination.

12 THE COURT: So, because I was just confused because
13 the November 2 response -- (phone ringing)

14 Why don't you -- Sheriff, why don't you just take
15 it?

16 MR. WISTOW: That's a good --

17 THE SHERIFF: I will just turn it off.

18 MR. WISTOW: Forgive me, your Honor.

19 THE COURT: In your November 2 response, you had
20 sent a response. This was a subpoena issued to St. Joe's
21 and said, "The Attorney General requests notification of
22 any confidential documents produced pursuant to this
23 subpoena. As such production will constitute a waiver of
24 a confidential protections provided by the Attorney
25 General's office."

1 MS. ENRIGHT: My concern with --

2 THE COURT: I thought you just told me it's fine.

3 MS. ENRIGHT: No. My -- the -- it is fine. I just
4 need --

5 THE COURT: Final.

6 MS. ENRIGHT: I just need to be notified.

7 THE COURT: But are you saying that all of a sudden
8 the records that you deemed confidential would no longer
9 be confidential if --

10 MS. ENRIGHT: If disclosed to a third party?

11 Yes.

12 THE COURT: I'm saying the statute. That's my
13 understanding.

14 MS. ENRIGHT: Oh, okay. So, if -- if St. Joe's had
15 responded to that subpoena with confidential documents, I
16 think that our confidentiality is compromised by the
17 disclosure to a third party. And I was requesting notice
18 of that disclosure for our record keeping purposes.

19 And --

20 THE COURT: So you are not necessarily saying that
21 you wouldn't still take a position that it was
22 confidential?

23 MS. ENRIGHT: I think it jeopardizes the
24 confidentiality to release it to a third party.

25 THE COURT: Okay.

1 I raise it because in the two sets of papers, it
2 seems to say two opposite things. So we have -- we have
3 confidential documents. And I think you laid it out
4 appropriately to the Court that there's really two
5 avenues if the Court feels the need to disclose them to
6 special counsel. One is a waiver by the parties and the
7 other is through some type of -- some type of court
8 order.

9 MS. ENRIGHT: And now that both parties are here,
10 maybe there's a possibility of working forward towards
11 some agreement.

12 But, again, our position is that, you know, we
13 cannot produce them in compliance with the statute
14 until -- unless and until that happens, or we have a
15 court order.

16 If I can, at this time, Judge, just re-visit the
17 request one and three?

18 THE COURT: Yes.

19 MS. ENRIGHT: The subpoena references in requests
20 one and three. We had discussed with Mr. Wistow, and I
21 think reached agreement, that we were limiting requests
22 one and three to the 2009 and the 2014 hospital
23 conversions. There was broader language, so that -- that
24 was why we raised that in our wherefore paragraph.

25 THE COURT: Why don't we address that at this point.

1 Is there any agreement on that or no?

2 MR. WISTOW: I'm not sure I understand what the
3 Attorney General is suggesting.

4 THE COURT: Maybe just clarify.

5 MS. ENRIGHT: Okay. So, if I may, the first request
6 relates to all documents relating to the plan. And the
7 third request is for all documents relating to any
8 Hospital Conversions Act Proceeding. That is defined
9 earlier in his definition section with limiting languages
10 to 2014 and 2009. "Including all documents relating to
11 applications, amended applications, supplemental
12 applications, exhibits, supporting documentation, or
13 other documents submitted in connection with Hospital
14 Conversion Act Proceedings."

15 Because we have conducted six Hospital Conversion
16 Act Proceedings within the past few years, we just want
17 to confirm that that's limited to 2009, 2014.

18 MR. WISTOW: Yes, that's right.

19 THE COURT: Very good. Okay.

20 MS. ENRIGHT: Your Honor, in closing --

21 MR. WISTOW: But the documents relating to the plan.
22 If they have any documents that relate to the plan, it's
23 not limited to 2009, 2014.

24 THE COURT: Okay. I'm going to -- it seems rather
25 than doing this -- and I can take the bench again if I

1 need to – the parties can speak at the end of this and
2 see if you can come up with language. And we can put it
3 on the record to clarify.

4 I'm sorry. Go ahead.

5 MS. ENRIGHT: So, in closing, I -- I just want to
6 review the wherefore clause of my most recent filing
7 requesting that the Court allow production of the
8 documents and privilege logs on a rolling basis. We've
9 addressed requests one and three. That no response is
10 necessary as to request number two, which we have also, I
11 believe, agreed to. Number four, to extend the time for
12 the Attorney General to respond with 90 days from the
13 return date or until February 15th; your Honor, with that
14 being the final production, if rolling production is
15 permitted. Materials subject to the confidentiality
16 determination required by the Hospital Conversion Act
17 statute – in the section we spent some time on – may not
18 be produced by the Attorney General absent consent by the
19 parties or court order.

20 Finally, your Honor, special counsel we would like
21 to provide us with – happy to assist with – reasonable
22 search terms for electronic discovery.

23 THE COURT: Let me ask a question on that because I
24 just want to clarify that: reasonable search terms.
25 Have you disclosed to the special counsel in terms of

1 what type of electronic information you have? I mean, is
2 it solely e-mail? For example, in a lot of the state
3 agencies when there's a review conducted, there's
4 proprietary software that's being used. So, you are
5 asking him for search terms. Is there a -- has there
6 been any disclosure in terms of what is being searched?

7 MS. ENRIGHT: So, no. There has been no discussion.

8 THE COURT: So how can you ask him to give you
9 search terms?

10 MS. ENRIGHT: I'm happy to suggest search terms that
11 I --

12 THE COURT: I don't mean that. But isn't the first
13 issue -- what is the universe we are talking about? I
14 mean, are we just talking about the Attorney General's
15 e-mail system? Or are we talking about some other
16 database where a hospital conversion is done? Or are we
17 talking about thumb drives and other things?

18 MS. ENRIGHT: I think I can stop you right at the
19 first option.

20 THE COURT: E-mail?

21 MS. ENRIGHT: I think it's limited to the Attorney
22 General's database system, computer system. I don't --

23 THE COURT: But that may be more than just the
24 e-mails?

25 MS. ENRIGHT: Yes, they could be more than the

1 e-mails.

2 THE COURT: It could be Microsoft Word documents?
3 It could be Excel spread sheets?

4 MS. ENRIGHT: Yes.

5 THE COURT: Very good.

6 And, okay. I want to address one thing you raised
7 in your first papers and a little bit in the second, the
8 whole issue of expert's reports.

9 MS. ENRIGHT: Yes.

10 THE COURT: Under 23-17-14-13, it talks about
11 reports which should be made publicly available.

12 MS. ENRIGHT: Uh-huh.

13 THE COURT: In your papers, you modify that and use
14 the word "final reports."

15 MS. ENRIGHT: Uh-huh.

16 THE COURT: Please tell me your understanding of
17 this.

18 MS. ENRIGHT: So --

19 THE COURT: I just don't want this coming up later
20 on.

21 MS. ENRIGHT: So --

22 THE COURT: The statute says "reports."

23 MS. ENRIGHT: Yes. And -- the reason why I may have
24 put the qualifying word "final" in front is because it
25 would be our position that any draft reports with our

1 expert, who we have legally protected communications
2 with, would be subject to a privilege potentially. So,
3 the final reports pursuant to the Hospital Conversions
4 Act are reports that are publicly available.

5 THE COURT: So -- so, okay, so I understand it. So
6 we may have to address in the future reports because
7 there may be, like you said, there might be something
8 that may be captured under another privilege. There may
9 also be a letter from an outside attorney or an
10 investment banker or actuary or whatever else that's
11 giving you certain information. I guess it just doesn't
12 make -- "final report" is going to have to determine what
13 that means. But that's something I guess you will
14 address in your privilege log.

15 MS. ENRIGHT: Yes, your Honor.

16 THE COURT: Very well.

17 Let me just -- I had made some notes in terms of
18 what type of things we have here. Okay.

19 I think that covers everything.

20 MS. ENRIGHT: Thank you.

21 THE COURT: Thank you very much.

22 Counsel?

23 MR. WISTOW: Your Honor, please. I was surprised to
24 hear that -- I shouldn't say I'm surprised. If we are
25 going to have some kind of rolling discovery, which

1 appears to be the case, I would much prefer to have the
2 documents related to 2014 before 2009. And if they
3 started on 2009, let's have them stop and start on 2014.
4 And let's get those as quickly -- the other thing I'd ask
5 for, your Honor, is it's one thing to talk about rolling
6 discovery. I want to avoid -- and I know your Honor
7 doesn't want to see us again fighting about this.

8 I would like to have some kind of dates. And that's
9 not just some open-ended "rolling discovery" where two
10 days before the deadline, everything comes in. There
11 must be some way of setting some kind of reasonable
12 deadlines.

13 Let me point out, again, this is material that -- I
14 don't understand why I can't get the application
15 tomorrow, literally, and all the materials associated
16 with it.

17 THE COURT: Thank you.

18 The matter before the Court -- counsel?

19 MR. CAVANAGH: Your Honor, if I may be heard
20 briefly?

21 THE COURT: I don't think -- if you filed an entry
22 of appearance or -- I will allow to you do it afterwards.
23 Go ahead.

24 MR. CAVANAGH: Thank you, your Honor.

25 On behalf of Prospect CharterCare LLC, who, I think

1 your Honor's aware, was the resulting entity or the
2 entity that owns and operates the services sometimes
3 referred to as New Co. I -- we've received notice
4 through informal channels of today's proceedings. I
5 wanted to be sure that we came and reserved on the record
6 our rights with respect to the production.

7 We have materials that were submitted under the HCA
8 to the Attorney General back in connection with the 2014
9 transaction. And the -- our reading of the material
10 submitted today led us to conclude that potentially, at
11 least special counsel was requesting an order from this
12 Court that would have compelled production of those
13 materials absent our opportunity to review and be heard.

14 I've not reviewed the materials at this point. Just
15 recently being brought up to speed on these issues. But
16 certainly with that type of relief being requested, I
17 wanted to appear today and reserve our rights, all rights
18 in that regard.

19 THE COURT: Thank you very much.

20 MR. CAVANAGH: Thank you.

21 THE COURT: Attorney Callaci?

22 MR. CALLACI: May I?

23 THE COURT: Please.

24 MR CALLACI: Chris Callaci, on behalf of United
25 Nurses & Allied Professionals.

1 Your Honor, my comments may not be as timely now as
2 they were when I walked into your courtroom an hour ago.
3 I would like them to be on the record. Thank you for the
4 opportunity.

5 Back in August, Senate President Dominick Ruggiero
6 called for the AG to lead an investigation into the
7 collapse of the subject pension plan. And we were -- we
8 were quick to object. The AG is a regulator -- played a
9 pivotal role, obviously, in the approval of the Prospect
10 CharterCare joint venture. And the potential for a
11 conflict of interest was obvious. And, indeed, we were
12 not the only one objecting to the idea that he would be
13 the one to lead the investigation.

14 It did not occur to us back in August, however, that
15 the magnitude of -- what the magnitude would be of such a
16 conflict of interest. And now we are here today, and we
17 well know what the magnitude of that conflict is. We are
18 grateful that the AG is not leading this investigation,
19 that Special Counsel Wistow and his team have been
20 charged in that responsibility.

21 Let me just say a couple of things. The AG's
22 pleadings here are not likely to serve the plan
23 participants very well. In fact, we think that the
24 opposite is true. These kinds of legal maneuvers will
25 more than likely be detrimental to their interests in

1 being able to retire with dignity and with respect. We
2 are deeply troubled by the AG's actions here, which we
3 believe are contrary to his public calls for
4 transparency.

5 We are equally troubled by the appearance of
6 noncooperatation coming from the AG. Special Counsel
7 Wistow uses the following terms in his papers to describe
8 what's going on here. He speaks to the AG as "impairing
9 the receiver's investigation, placing undo burden on the
10 receiver, hamstringing the receiver's investigation, slow
11 walking the production of documents." And I ask a
12 rhetorical question here. Is there really a compelling
13 reason why the AG is refusing to produce a document
14 entitled, "Expert report analyzing and evaluating the
15 pension fund"? It is a thundering obviousity that that
16 would be something that should be forthcoming without
17 delay.

18 This has to be truly heartbreaking for our plan
19 participants to hear this kind of thing about their AG.
20 So, moving slowly here, your Honor, is obviously not a
21 motion -- an option, I'm sorry, for plan participants and
22 their families who are facing an imminent cut -- it
23 appears to us -- in benefits in February. So we stand in
24 support of the motion to compel.

25 THE COURT: Thank you.

1 MR. CALLACI: Thank you.

2 THE COURT: Any of the other attorneys who have
3 entered wish to be heard?

4 I know CharterCare has a -- or St. Joe's, sorry, has
5 a position.

6 MR. LAND: Judge, Richard Land on behalf of St.
7 Joseph's, the petitioner. Your Honor, I will be very
8 brief. I was mentioned by Ms. Enright. My client has no
9 objection to the disclosure of the information. I did
10 send Mr. Wistow a communication yesterday. We would only
11 like to reserve relative to attorney-client privilege
12 materials, which I frankly don't think are included, but
13 Mr. Wistow indicated a willingness to enter into a
14 protective order with Prospect. Perhaps that can cover
15 that issue for us as well. As a general rule, we are not
16 objecting.

17 THE COURT: Thank you.

18 Okay. This Court has considered the papers that
19 have been filed and the arguments of counsel here today.
20 The subpoena in this case was issued to the Office of
21 Rhode Island Attorney General pursuant to orders of this
22 Court dated September 13, 2017, and October 27, 2017,
23 which permitted the special master and special counsel to
24 issue subpoenas. On October 17, prior to the second
25 order, this Court issued an order approving and

1 appointing special counsel. The special counsel's
2 engagement includes gathering information and determining
3 whether or not there exists claims against third parties
4 by the pension plan estate.

5 A subpoena for documents was properly served on the
6 Office of the Rhode Island Attorney General on
7 November 3, 2017. The subpoena was returnable on
8 November 17th at 11 a.m. at the offices of the special
9 counsel. On November 6, a proof of service was filed
10 with this Court. On November 16th, the Office of the
11 Attorney General filed a partial objection to the
12 subpoena. On November 17th, the special counsel filed a
13 motion to overrule the partial objection by the Attorney
14 General and compel a response. On November 27, the
15 Office of the Attorney General filed an objection to the
16 motion to compel. And on November 28, the special
17 counsel filed a reply. His motion has been heard this
18 afternoon.

19 First of all, this Court will note that there have
20 been agreements among the parties to modify the scope of
21 the subpoena, including number two, which has been -- has
22 been taken off the list without prejudice. Numbers one
23 and three are subject to some modifications, as the Court
24 asked during oral arguments. The Court will allow
25 counsel to converse after this is completed. And if

1 necessary, we certainly can put that agreement on the
2 record.

3 There are several issues that were addressed in the
4 motion and in the objection and reply. First, dealing
5 with the production of publicly available documents. As
6 the Attorney General has conceded in their most recent
7 papers and here today, that objection is withdrawn. The
8 Attorney General will provide all publicly available
9 documents that are within the scope of the subpoena to
10 the special counsel.

11 The second issue deals with the Attorney General's
12 objection that the special counsel should be required to
13 provide search terms to serve electronic records. The
14 Attorney General has indicated during oral argument that
15 it has not yet identified which systems electronically
16 stored information is contained that is responsive to the
17 subpoena. So, the Court finds that makes it difficult,
18 if not impossible, to put the onus on the special counsel
19 to provide search terms.

20 Certainly this Court is not adverse in any respect
21 to once identification is complete – again, is it just an
22 e-mail system, an analysis system, thumb drive storage or
23 other electronic media – of working through search terms
24 that may be appropriate.

25 Fortunately on November 6, 2017, the Rhode Island

1 Supreme Court adopted revisions to the Superior Court
2 Rules of Civil Procedure. These new rules deal with
3 electronically stored information, and they are extremely
4 helpful here. In that, the Supreme Court modified not
5 only Rule 26 but other rules to provide for how
6 electronic discovery shall be dealt with. And that's
7 exactly what we have.

8 So, in accordance with the new rules, the Court
9 orders that counsel for the Attorney General, as well as
10 the special counsel, meet and confer in person. The
11 Attorney General's office shall bring with them someone
12 with knowledge of the information technology systems used
13 by the Attorney General. And the special counsel may
14 have available an information technology person as well.

15 The Court finds, and it's been this Court's
16 experience in the past, that many times it's helpful that
17 if the two subject matter experts speak, they can work
18 out a way that the special counsel can get the
19 information he wants. And the Attorney General, in this
20 case, can run certain searches and save a lot of time and
21 expense for everyone.

22 Specifically, the plan and the court order require
23 that comes out of this meeting is one, a discussion of
24 the types of electronic information maintained by the
25 Office of Attorney General; a discussion of the

1 preservation of any electronic information; the format by
2 which the special counsel wishes the information to be
3 produced; the search terms or other methods by which the
4 electronic media will be assessed and searched; the
5 method for serving or preserving claims of privilege or
6 protection of information after production; and general
7 terms that would include a fallback agreement; the method
8 for asserting or preserving confidentiality of
9 proprietary information, if applicable; the date or dates
10 for compliance with the electronic information.

11 This Court will require that if a plan is not
12 submitted to this Court on or before December 7, 2017, at
13 4:30, if the plan is not agreed to, the parties will
14 still submit to the Court the portions of the plan that
15 are agreed to. And each party shall delineate what their
16 final proposal was to each. At that point the Court will
17 review it and make a determination and issue an order
18 with respect to the plan.

19 With respect to confidential documents, this Court
20 may allow for disclosure of these documents at a minimum
21 under the terms of a protective order. This Court finds
22 that the most effective way -- based on the arguments
23 today and hearing from both Prospect and CharterCare --
24 I'm sorry -- and St. Joe's -- is that these documents will
25 be issued to the special counsel under the terms of a

1 protective order. This is the most effective way and
2 efficient way to give the special master and special
3 counsel access to all of these documents.

4 The Court will also then take up at the request of
5 the special counsel whether or not these records should
6 at some point become part of the public record. But
7 rather than going through a process there that may
8 require briefing and other issues, the Court will issue a
9 protective order to allow for the immediate disclosure to
10 the special master and special counsel of those documents
11 that are deemed confidential by the Attorney General's
12 office.

13 The Court would also like to address the issue of a
14 privilege log. What the Court has done or tried to do
15 since the beginning of this matter – once again, we have
16 people here that are plan participants – is to try and
17 help everyone understand the terms of the process going
18 forward. Now we are talking, finally, in terms of the
19 time for production. But even when things are required
20 to be produced, the Office of the Attorney General in
21 this case will be required to produce documents to the
22 special counsel.

23 The law allows but does not require that the
24 Attorney General may raise what we call in the law
25 "privileges." If the Attorney General asserts a

1 privilege with respect to a document, he will not be
2 required at that time to produce that document, even if
3 they are responsive to what the special counsel has asked
4 for.

5 However, the Attorney General, if they assert a
6 privilege – and I'm saying if, because they haven't
7 reviewed all the documents at this point – will be
8 required to prepare something called a privilege log.
9 And in this log, as to each document that they're saying
10 there's a privilege, the Attorney General must provide
11 sufficient information for the special counsel to
12 evaluate whether or not that privilege should apply.

13 If there is a dispute between the special counsel
14 and the Attorney General about whether or not a document
15 should have been produced, the Court, upon request of the
16 special counsel, will convene a hearing and in certain
17 cases may view certain documents through what's called an
18 in camera inspection, which is to look at them in order
19 to help the Court make a decision as to whether or not a
20 privilege applied.

21 So, the Attorney General in their papers raised
22 three of these privileges. So let me tell you what they
23 are because when the documents come back in, there will
24 be a privilege. And it may delineate one, two, three or
25 all of these privileges. And the first one really

1 applies to government agencies. It started with applying
2 to the President of the United States. This was
3 developed way back during the Nixon administration in
4 something called executive privilege.

5 And the courts have found another privilege called
6 deliberative process privilege. And this privilege is a
7 qualified privilege. It may be raised by the Attorney
8 General. What it protects is the internal deliberations
9 of an agency to safeguard the process for agency
10 decisions. The reason behind it is that we don't want to
11 foil the free exchange of ideas within the regulator – in
12 this case, the Attorney General's office – during the
13 course of their decision-making, in this case, about
14 whether to approve or not approve an application.

15 However, there are certain rules you can't just say
16 everything is deliberative. There's two words in the
17 law. One says that it has to be predecisional and the
18 second is it has to be deliberative.

19 Predecisional means it was prepared to assist an
20 agency decision-maker at arriving at his or her decision.
21 Deliberative means making recommendations or expressing
22 opinions on legal or policy matters, as opposed to
23 factual or objective material outside the deliberative
24 process which cannot be withheld.

25 Now, even if deliberative process is asserted by the

1 Attorney General, this Court may be able to review
2 documents and weigh certain competing interests to
3 determine whether or not it should apply. But just
4 realize -- and again, this is the Attorney General's
5 call, but there may be certain documents after
6 applications were filed that internally went into the
7 decision-making process on policy or other things that
8 may come to us as part of a privilege log. It doesn't
9 mean they are not going to be turned over at this point.
10 But it means the special counsel will review them.

11 There's also something called the work product
12 privilege that they've raised. And that's documents that
13 have been prepared or obtained in the anticipation or
14 because of the prospect of litigation, lawsuits. Again,
15 it may be raised or not raised. It's the Attorney
16 General's decision to make. And this is divided into two
17 categories: documents that contain mental impressions of
18 an attorney or their legal theory, and those are pretty
19 much the highest type of exempted disclosure.

20 There's also something called factual work
21 product. And as I said, while this opinion work product
22 or the attorney notes have absolute immunity, factual
23 work product is qualified. This Court can hold a hearing
24 and make a decision based on the set of legal factors of
25 whether or not -- even though there's that work product

1 privilege – certain information is going to be disclosed
2 to the special counsel.

3 Lastly, the Attorney General raises the prospect of
4 what's called the attorney-client privilege. The client,
5 in this case the Attorney General, can invoke that
6 privilege. And that's communications made by a client to
7 his attorney for the purpose of seeking professional
8 advice, as well as the responses by the attorney that are
9 privileged and not subject to disclosure.

10 Fortunately, many of these issues were dealt with by
11 my colleague Justice Silverstein in two very -- cases
12 that received a lot of attention years ago, the lead
13 paint case and more recently in the 38 Studios
14 litigation. And some of these have, including in the
15 lead paint case, many of these issues in terms of
16 privilege have been reviewed. And the opinions are from
17 our Rhode Island Supreme Court which is binding upon this
18 Court.

19 So I just want to be clear that what we are going to
20 talk about, finally, is when these things need to be
21 produced. But I want everyone to understand that the
22 production will come in. And there may also be what are
23 called privilege logs, which are documents that a choice
24 has been made to assert a privilege and then Attorney
25 Wistow or the special counsel will go through a process

1 and have discussion about these.

2 It's -- this is important because what I want
3 everyone to understand is the date that the Court sets
4 for the return of this subpoena -- which again is passed
5 at this point. The Attorney General has properly filed
6 an objection -- may very well not be the end of the issue
7 in terms of what documents are produced from the Attorney
8 General's office because we may get a privilege log, and
9 it may take some more time.

10 Now, subpoenas in this case under court order are
11 issued under the Superior Court rules. And those rules
12 do not indicate the amount of time that shall be afforded
13 the person subject to the subpoena to respond. The date
14 may be put down by the party issuing the subpoena, in
15 this case the special counsel.

16 The Court, however, upon the filing of an objection,
17 which the Attorney General's office did at this point,
18 may determine whether or not there has been a reasonable
19 time for compliance. In this case, the Court must
20 balance the request for more time by the Attorney
21 General's office with the need and timeliness of this
22 information by the special counsel.

23 This Court has publicly stated in other proceedings
24 in this case that there are insufficient funds in the
25 pension plan to pay all members the benefits they are

1 entitled to under the pension plan. In fact, based on
2 the reports of the special master, without a large
3 infusion of assets into the plan, the benefits to some or
4 all or part of the plan members may need to be
5 significantly reduced in February of 2018. I have been
6 very upfront about that.

7 Whether or not there are claims against third
8 parties can only be determined after the special counsel
9 completes or substantially completes their investigation.
10 While the special counsel has issued a number of
11 subpoenas, it is likely that the information obtained
12 from one subpoena may lead to further request and
13 information from other sources.

14 So, for every delay in getting pieces of
15 information, it only delays the special counsel's
16 decision, which is his charge to determine whether or not
17 any assets may be brought into the pension plan.

18 The Court also recognizes that we have a lot of
19 documents here and that the Attorney General must be
20 given the opportunity to gather, review, and produce
21 responsive documents. At the same time, the Court
22 recognizes that the Attorney General's office has been 26
23 days thus far. The Court had pressed the Attorney
24 General's office during oral argument of what steps they
25 have taken during the past 26 days, including how many

1 individuals have been assigned, whether the responsive
2 documents have been identified, the status of privilege
3 logs, and the amount of documents that have been
4 produced.

5 While the Attorney General's office has taken some
6 steps, the Court is terribly concerned where we are after
7 26 days. As I mentioned before, a large group of these
8 documents are deemed public records. And our Attorney
9 General's office has been loud and clear with cities and
10 towns and other parties -- some of those cases before me --
11 that the city and town has 30 days to respond on a
12 publicly available -- even if they have many documents.

13 What we have here is the Attorney General -- I
14 understand the circumstance is slightly different --
15 asking for 90 additional days or actually more than that,
16 if we look at when the subpoena was served on November 3.

17 After weighing these factors, the Court will order a
18 rolling production of documents by the Attorney General.
19 I have ordered, as part of the electronic records, that
20 the parties meet and confer and put together a plan. The
21 order will also require a plan that's agreed to between
22 the special counsel and the Attorney General's office in
23 terms of his priorities in terms of production.

24 The Court, understanding the amount of documents we
25 are talking about here, will extend the Attorney

1 General's compliance day on the subpoena until January
2 the 15th. However, the Court wants not only a plan but
3 the Court wants a weekly update to both the special
4 counsel and a copy to this Court beginning December 5,
5 2017, and weekly thereafter. This way the Court and
6 either the request of the special counsel or on its own
7 initiative can bring the parties back in, because we are
8 not going to be extending that day.

9 On that day, all of the documents that are not
10 privileged will be produced. A full privilege log will
11 be produced. And the Attorney General's office should be
12 in a position that if any of the documents are marked
13 privilege, that they have ready access to them if the
14 Court requires an in camera review or further proceedings
15 in this matter.

16 The Court is going to ask the special counsel to
17 prepare a draft of the appropriate order, circulate it to
18 the Attorney General's office. If the order is -- if the
19 order is agreed to, the Court will sign it. If there is
20 a dispute, the Court will review any competing orders by
21 the end of this week and enter the order.

22 We need to continue this process, and at the same
23 time, the Court completely understands and appreciates
24 the decision that the Attorney General needs to make in
25 terms of what, if any, privileges may be released, will

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be taken with respect to the production.

Thank you very much, counsel.

Court is in recess.

(A D J O U R N E D)

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