

**Report of Special Counsel Concerning Review of Email Messages
Involving Supreme Court Justices and Office of Attorney General from 2008-2012**

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Report of Special Counsel Concerning Review of Email Messages Involving Supreme Court Justices and Office of Attorney General from 2008-2012

Introduction

Pursuant to my engagement as Special Counsel in the October 20, 2014 Order of the Supreme Court of Pennsylvania, No. 430 Judicial Administration Docket, the Court requested me to review email messages that the Office of Attorney General (“OAG”) had identified as involving both Justices of the Supreme Court and representatives of OAG during the years 2008-2012. As a result of discussions with Attorney General Kane and members of her staff, we determined that both the OAG and I would conduct independent reviews of the email messages in question, but that we would coordinate with each other in conducting these reviews. I acknowledge the excellent cooperation and assistance of Attorney General Kane and members of the OAG legal and technical staff in facilitating my review.

As discussed in more detail below, I report the following based upon my review of the email messages provided by the OAG:

1. Other than the previously disclosed email messages from Seamus P. McCaffery (“McCaffery”) transmitting pornographic materials, there were no email messages of an improper nature sent by any Justice of the Supreme Court to any representative of OAG or from any representative of OAG to any Justice of the Supreme Court.
2. None of the email messages contained any discussion of or information related to any case in the Pennsylvania judicial system, with the exception of proper email messages related to a statewide grand jury investigation and a series of proper email messages related to authorizations to intercept wire, electronic or oral communications (the latter was not with a Supreme Court Justice, but with a Superior Court Judge who, after 2013, became a Supreme Court Justice).
3. There was no reason for any Justice of the Supreme Court to be recused from any case as the result of any email communication or any relationship evidenced by any email communication.
4. The email messages reveal no improprieties involving any judge of any other court.
5. The number of email messages previously reported was larger than actually was the case, because of duplications and because the search methodology identified email messages that originated from sources extrinsic to both the Supreme Court and the Office of Attorney General but involved recipients from both the Court and the Office of Attorney General.

Scope of Inquiry

Chief Justice Castille previously made public that, based upon information provided to him by an OAG forensic investigator, there were approximately 4,000 email messages from late 2008 through May 2012, involving both Justices of the Supreme Court and OAG personnel; and that, 2,800 of these email messages were from McCaffery, 234 of which involved pornography.

The email messages in question are stored electronically on OAG servers. At my request, OAG technical staff made these email messages available to me for review by placing the email messages in Outlook format into folders, organized by Supreme Court Justice. I was able to review these email messages by using a secure method of accessing the OAG network.

I am informed that the OAG identified the email messages for review by searching for email messages in which the address fields included at least one Supreme Court Justice and at least one OAG member. The date range for this collection was January 1, 2008 through December 31, 2012, which is a slightly expanded date range from the date range originally expressed to the Chief Justice and which appeared to coincide with the dates of OAG's Sandusky investigation.

The Outlook program showed that there were a total of 4,803 items in the seven files. The McCaffery folder contained 2,942 items, which by far was the largest folder.

Upon my completion of the review of the items OAG originally made available, OAG requested that I review an additional 1,038 items located on OAG servers that had either been sent from or to a private email account of Justice Eakin under the name "John Smith" on yahoo.com. These items appeared to be from the same time frame as the original items, *i.e.*, January 1, 2008 through December 31, 2012.

At the commencement of my review, it was immediately apparent that the original collection contained a large number of duplicates, with the same email message appearing in more than one of the seven folders and with the same email message appearing multiple times in the same folder. I surmise that this was caused by a combination of factors, including: the method by which emails were stored on the servers; the possibility that there were "blind copies" of certain messages; a number of the messages appeared to be forwarded within OAG; a number of messages included multiple recipients within OAG; and a number of messages involved more than one Justice. In addition to the duplicates, the gross total included three email messages that had been mistakenly attributed to Supreme Court Justices (because of a shared but unrelated surname) and an email message to a Supreme Court Justice that originated from an OAG account but was from a judge supervising a grand jury who had been provided with an email account at OAG. Finally, there were a number of items included in the total that were not email messages, but receipts generated by the email system and system non-delivery messages.

There is more detail below on the numbers of messages.

McCaffery Email Messages

McCaffery and his wife, Lise Rapaport, who served on McCaffery's judicial staff, were prolific senders of email "blasts" to various groups of recipients, including members of OAG and others within the judicial system. The only messages containing pornography were sent by McCaffery from a Comcast account to a small number of recipients that included at least one member of OAG, but did not include any Justices or Judges.

The non-pornographic email "blast" messages from McCaffery and Rapaport were for the most part to multiple recipients, including various Justices and judges, in addition to members of OAG and others. These email "blast" messages consisted of such things as jokes and humorous stories, including some "adult humor;" inspirational stories; items with respect to the military, veterans or the police; stories about pets and animals; sports; and similar types of topics.

In addition to the 2,942 total items in the McCaffery folder (a total that includes a number of duplications), I found, after eliminating duplications within each folder, 484 of the McCaffery-Rapaport email blast messages in the folders for the remaining justices.

I reviewed each of these items involving McCaffery, his wife and others in the same email "threads." Other than the pornography, I found nothing of an improper nature (although many of the messages from Rapaport's court email address might have violated official policies that appear to prohibit judicial staff from using judicial system computer facilities for the purpose of circulating such email messages). In particular, there were no communications regarding any cases, nor email messages disclosing any personal relationships of such a nature that would call into question whether there should have been a recusal or whether the Supreme Court's decision-making otherwise was compromised.

There also were some, but relatively few, email messages from or to McCaffery involving "official business," such as an email message that McCaffery sent to recipients at OAG and to Supreme Court Justices regarding the Veterans Court in Allegheny County and several email messages from and to McCaffery, OAG members and others related to the Pennsylvania Council on Crime and Delinquency. But the overwhelming majority of emails involving McCaffery and Rapaport were of the "blast" variety and of an innocuous nature but unrelated to official business of either the Court or OAG.

Justice Stevens

The second largest number of email messages were in the folder for Justice Stevens. However, during the time frame covered by these email messages (January 1, 2008 – December 31, 2012), Justice Stevens was not a Supreme Court Justice, but a Judge of the Superior Court. I nevertheless reviewed these email messages, and found nothing improper.

The gross number of items for Justice Stevens was 978. However, 29 of these items were not email messages, but system receipts and non-delivery messages. In addition, there 412 duplicates within his folder, lowering the total number to 538.

The largest number of email messages exchanged directly between a judicial officer and anyone at OAG, other than the McCaffery "blast" email messages, involve then-Judge Stevens. There were 220 email messages exchanged directly between then Superior Court Judge Stevens

and individual members of the OAG staff relating to applications and orders authorizing interception of wire, electronic or oral communications pursuant to 18 Pa.C.S. § 5708. Such email communications between a Superior Court judge and members of OAG are necessary and proper.

There were 27 additional direct email exchanges between Judge Stevens and members of OAG. These related to then-Judge Stevens serving as a speaker at the State Police Academy graduation ceremony, inquiries by then-Judge Stevens regarding consumer protection questions issues not related to any cases before the Superior Court and purely social messages that were not of any nature that would raise any questions about then-Judge Stevens participating in any case.

The remaining email messages in the folder for Justice Stevens consisted of 83 “blast” mail messages attributable to McCaffery or Rapaport, 109 email messages generated by the Pennsylvania Bar Association Appellate Courts Committee listserv and 99 email messages that then-Judge Stevens and one other Superior Court Judge, along with OAG personnel, routinely received from the Pennsylvania Senate Judiciary Committee concerning committee hearings.

Justice Eakin

The third largest folder in the original collection related to Justice Eakin. That folder, which did not include messages from or to Justice Eakin’s personal email account, consisted of 415 total items, including 119 duplicates and 5 system receipts and non-delivery notices, resulting in a net total of 291. Of these, 55 related to various CLE programs and an Inns of Court program, 108 related to Justice Eakin’s service as an adjunct faculty member of Widener University School of Law, and 9 related to law alumni activities for Dickinson School of Law – Pennsylvania State University. Nearly all of these originated from sources extrinsic to both OAG and the Supreme Court. The remaining email messages consisted of 96 “blast” messages from McCaffery or Rapaport, 8 messages from a disgruntled person to members of OAG forwarding various messages that person had sent to Justice Eakin, and 15 email messages of a purely social nature not relating to litigation or to any person involved in litigation before the Supreme Court.

The additional 1,038 email messages that were sent to or from Justice Eakin’s personal account are similarly unremarkable. Of the 1,038 email messages (there were no apparent duplications), 133 items were from Justice Eakin. Nearly all were to a small group of friends concerning golfing, fishing, fantasy football, travel and similar purely social issues. There were no discussions of any cases. Although one of the members of this group of friends is a lawyer employed by OAG, this lawyer is not involved in any litigation that would come before the Supreme Court, and a search of the Supreme Court docket disclosed no case in which this lawyer had been involved. None of the messages from this account contained anything of a pornographic nature. Likewise, none of the messages involved any discussion of cases or any legal issues.

The 905 messages that were sent to Justice Eakin’s private account reveal nothing improper by Justice Eakin or by any member of OAG. Most of these messages were originated by individuals not associated with OAG or the Supreme Court. Nearly all of these messages went to larger groups of recipients. There was no effort to present information related to any

case and nothing from any sender or with any content that would indicate a reason for Justice Eakin to recuse from any case.

At the risk of stating the obvious, there is a critical distinction between email messages sent from an account and email messages sent to an account. No person has control of what others send to his or her email account. Indeed, all that is known about the emails that appear in this folder is that they were on the OAG server, because at least one recipient, and in relatively fewer cases the sender, was in OAG. Therefore, while there was one message that contained offensive sexual content, that message was not from someone at OAG or associated with the judicial system, and Justice Eakin did not reply to or forward that message.

Remaining Justices

There is nothing remarkable about the folders for the remaining Justices. There were no other direct communications between members of OAG and Chief Justice Castille, Justice Saylor, Justice Baer or Justice Todd. Apart from one email message from a judge supervising a grand jury to two OAG lawyers involved in that investigation with a copy to the Chief Justice, and apart from the McCaffery and Rapaport “blast” messages, all other email messages in these folders consisted of messages from bar associations, law schools and, in the case of one Justice, both a change of address notice from a trial judge and a few email messages to that Justice and others concerning someone in a hospital.

Actual Number of Email Messages

I assume that the original total of approximately 4,000 email messages expanded to 4,803 when the time frame for the search was enlarged to January 1, 2008 through December 31, 2012, from the original period of late 2008 through May 2012. Nevertheless, this number was inflated. To get an idea of the actual amount of email traffic between current Supreme Court justices and OAG (not including the email messages from Justice Eakin’s personal account), the following calculation is useful:

Gross Number of Items	4,803
Non-email messages (system receipts and non-delivery messages)	-36
Mistaken attribution	-4
Duplicates (duplicates from folders other than McCaffery folder).....	-670
Total McCaffery folder	-2942
McCaffery-Rapaport junk/nuisance email messages in each justice’s folder.....	-484
Adjustment for over-count of email messages from Widener Law School in Justice Saylor’s folder that also appear in Justice Eakin’s folder	-16
Subtotal	651
Email messages in Justice Steven’s folder while serving as President Judge of Superior Court (not including the previously subtracted McCaffery- Rapaport junk emails)	-455
Net email traffic involving current Justices of Supreme Court and OAG	196

As previously discussed, nearly all of this net email traffic of 196 messages in which a current member of the Supreme Court and a current member of OAG appear in the address fields

were originated by third parties, which include such things as mailings from bar associations, mailings related to CLE programs and mailings relating to law schools and law alumni affairs.

To add further context, of these 196 email messages, only 4 were originated by a Supreme Court justice, and all related to an informal dinner including Justice Eakin and a lawyer at OAG who is not involved in litigation.

Of the remaining 192 email messages, only 6 were originated directly from anyone at OAG to the Supreme Court. All 6 related to the same informal dinner attended by Justice Eakin. The only other communication originated by anyone at OAG to a smaller group including a Supreme Court justice was an email message sent by an OAG lawyer to a group of 14 recipients, including Justice Eakin, concerning a course proposal for the 2011 Pennsylvania Bar Institute Annual Criminal Law Symposium.

Of course, the net total would increase if one adds back in the McCaffery emails and the emails in Justice Eakin's personal account. I believe that the OAG might be doing that as part of its review, while at the same time attempting to account for duplicates among the McCaffery and Rapaport email messages. I chose not to do that, because I reviewed all the messages, the only improper messages consisted of the pornographic emails from McCaffery, and the time consuming process of attempting to manually de-duplicate all the McCaffery-related emails simply was not worth the effort under the circumstances. And I opted not to include the email messages from Justice Eakin's personal account because most of the public concern seemed to relate to the original, inaccurate report of 4,000 email messages between the Court and OAG, a total that did not include Justice Eakin's personal account.

Conclusion

My review of the email messages identified by the Office of Attorney General for the period January 1, 2008 through December 31, 2012 in which at least one Supreme Court justice and one member of OAG appear in the address fields demonstrates no improprieties with respect to any Justice or Judge, other than the previously reported email messages from Seamus P. McCaffery transmitting pornographic materials.

Respectfully Submitted,

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