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January 24, 2013

Michael P. Farrell
Senior Assistant Attorney General
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814

RE: California Department of Parks and Recreation

Dear Mr. Farrell:

This is to address the referral to our office of the investigation by the Attorney General of the so-called unreported funds at the State Department of Parks and Recreation (Parks). The matter, widely reported in the press, relates to approximately \$20 million that Parks failed to disclose to the State Finance Department from 1998 (or earlier) until the summer of 2012.

The cover letter with the referral to this office states it is “for your [the Sacramento District Attorney’s Office] review.” Later in the letter, it states, “upon review, you may determine whether there is a factual and evidentiary basis to bring criminal charges....”

At the outset, we note that both the reason and the basis for referral to our office is unclear. There is no indication who your office considers to be suspects, and if so, what crime they may have committed. The investigative material forwarded to us consists simply of eighteen witness statement transcripts. Several of those interviewed and listed in the “Organizational and Chronological List of Witnesses Interviewed” list are high ranking state officials (a department director, chief deputy directors, and deputy directors). Extending back at least to the administration of Attorney General John Van de Kamp (three decades ago), the Attorney General’s office has asserted primary jurisdiction for the investigation and prosecution of criminal cases against an elected or high ranking state official. The Attorney General’s Office in this instance clearly asserted that authority when it assigned a deputy attorney general to question individuals regarding the unreported funds. It is thus unclear why the matter has been referred to our office at all, and whether your office intends to retain its historic authority in the prosecution (if that be warranted here) of such cases.

Beyond that point, we have other concerns regarding this referral.

First, this case was not investigated by the Attorney General's Office as a criminal matter. The Criminal Division did not conduct the investigation. Instead, it was done by an attorney in the Civil Division, who personally conducted the witness interviews, prepared the report and submitted it to the Natural Resources Agency. The referral to us contains only transcripts of some of the witness interviews; not the final report (apparently for reasons discussed below), and no supporting or related documentation.

Second, the investigation was not conducted in a manner consistent with or conducive to its use for criminal evaluation purposes. Specifically, the investigation consisted of the interview of 40 current or former state employees.¹ Of these, more than half (at least 21) were interviewed after being ordered to provide their statements under a promise of use immunity.² See *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822; *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704. Such statements, and the products of the statements, cannot be used to prosecute the individual declarants. Thus, your referral package to us does not include the compelled statements. Still, it does not appear that any effort was made in this process to identify and differentiate potential targets or defendants from mere witnesses, nor to assure that statements taken from targets did not serve as the basis for developing further information as the investigation progressed, nor to meaningfully segregate out any such "product" information. The result is that the *Lybarger* matter and non-*Lybarger* matter appear to be hopelessly intertwined, making it unlikely, if not impossible, for anyone to be able to determine what evidence would be admissible against which subjects. As you properly note in your cover letter, this raises serious concerns about the possibility of ever basing a criminal prosecution on this investigative material.

Likewise, it appears that the written report that was the final product of the investigation was not prepared in any way to attempt to segregate or separate from the narrative or conclusions matters which are subject to *Lybarger* use immunity limitations, and matters which are not.

The points above all reflect on the fundamental nature of any review this office is being asked to undertake. Like any prosecution office, the District Attorney's Office receives cases from investigative agencies when the agency has concluded there is cause to believe a crime has been committed which merits prosecution. A referral will come with the agency's conclusion that they have cause to believe a particular crime was committed by a particular suspect or suspects. If the investigative agency feels that a crime has not been committed, then the matter is not forwarded to the District Attorney for possible prosecution.

This referral comes to us without any indication from your office as to what crimes may have been committed, or which persons may be suspected of having committed any crimes. Indeed, the points described above (investigation conducted entirely by the civil division; investigation conducted

¹ The "Organizational and Chronological List of Witnesses Interviewed" provided with the referral lists 39 separate witnesses. However, the "Alphabetical Index of Witness Interview Summaries" posted online lists 40 witnesses. Witness Gayle Bohlmann, Assistant Deputy Director, Administrative Services from June 2009 to June 2010 is not on the Organizational and Chronological list.

² The Organizational and Chronological List specifies which witnesses gave compelled or uncompelled statements. Because she is not on that list, we do not know which type of statement Ms. Bohlmann gave.

without regard to insulating *Lybarger* matter from non-*Lybarger* matter; failure to identify any crime for purposes of review; failure to identify target suspects; failure to retain jurisdiction over high ranking state official suspects) all point to the inference that the Attorney General has concluded this is not a criminal matter.

This is perhaps not surprising, given that the published summaries of the final investigation report by your civil attorney make it clear that (1) while the funds were not disclosed to the Department of Finance, they were consistently reported to the State Controller's Office; (2) there is no indication that any individual profited in any way from the funds; and (3) indeed, there is no indication that the funds were spent at all.

In any event, without such an initial preliminary conclusion on the part of your investigative staff that a crime was committed, the referral of the case to our office for criminal review is simply not appropriate.

We are returning to the Attorney General's Office the material delivered to our office. If your office conducts a criminal investigation and then determines that it appears a crime has been committed, that a specific suspect or suspects are identified as having committed the crime, and that the case can be proved without *Lybarger* information (or its product) from the target suspect(s), our office will then consider whether it is proper to file the charges and issue the warrants that you request.

Sincerely yours,

JAN SCULLY
DISTRICT ATTORNEY

ALBERT C. LOCHER
Assistant District Attorney

cc: Dane Gillette
Chief Assistant Attorney General