

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
Director

November 9, 2010

Via Email and Overnight Mail

Susan K. Leach
Deputy Attorney General
Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Dear Ms. Leach:

I am in receipt of your November 1, 2010, request for the administrative record in 2010 OAL Determination No. 21, OAL File No. CTU 2010-0329-02, which you state that you are requesting "in anticipation of filing a Petition for Writ of Mandate in the Superior Court."

Your November 1, 2010, correspondence is the first notification of such a filing and I was unaware of impending litigation. Without any other facts or information, it appears from the context of your correspondence that the Attorney General has chosen to represent the California Insurance Commissioner and the Department of Insurance in an action against the Office of Administrative Law with respect to the Office's Determination No. 21, wherein this Office determined pursuant to Government Code section 11340.5 that the Insurance Commissioner and the Department of Insurance had issued underground regulations related to the treatment of Iran investments.

As you likely know, we are a very small agency with only 20 employees. While we do have 11 attorneys on staff, these attorneys are engaged in the daily activity of performing our statutory duty, namely reviewing proposed rulemakings. Our attorneys are not experienced in litigation¹. Accordingly, in any litigation against this Office, just as we have in the past, we would request and expect representation from the Attorney General's office as the Attorney General has an affirmative duty to represent state agencies (Government Code section 11040 et seq.). Throughout the years, the Attorney General's office has represented this Office on numerous occasions in actions related to proposed regulations and underground regulation determinations. In fact, the Attorney General is currently representing this Office in an action on appeal regarding an underground regulation petition (Case No. C063268). It appears to me that there is a conflict in the Attorney General representing the Insurance Commissioner and the Department of Insurance in an action against this Office. This Office has no other option but to bring this to your attention and to inform you that it does not consent to or waive the conflict.

¹ Conversely, the Insurance Commissioner and the Department of Insurance has approximately 1,200 employees, of which approximately 100 are attorneys.

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If the Insurance Commissioner and the Department of Insurance believe that there is a legitimate legal claim against this Office, clearly the best course of action, in light of the obvious conflict would be for each respective office to employ outside counsel.

However, in lieu of wasting taxpayer dollars and state resources unnecessarily, I invite both the Attorney General and the Insurance Commissioner to point out where the opinion of this Office was not legally sound and if after review of your legal authorities it is shown that the determination was legally wrong, then this Office would certainly be willing to reconsider its decision.

The Administrative Procedure Act was enacted to require the effected public be given notice and an opportunity to meaningfully participate in the making of the rules that are to govern them. No matter what agency is involved and no matter what praiseworthy objective the agency has in mind, nevertheless, the law calls for the proper procedure to be utilized. Please feel free to contact me directly at (916) 323-6221 to discuss. As public records, the administrative record will be forthcoming.

Sincerely,



Susan Lapsley
Office of Administrative Law, Director

cc: Adam Cole, General Counsel for the Department of Insurance
Andrea Hoch, Legal Affairs Secretary
Jim Humes, Chief Attorney General
Gene Livingston, Counsel for Petitioners