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COUNTY OF ERIE

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COUNTY EXECUTIVE

DEPARTMENT OF LAW

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FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

February 12, 2013

VIA HAND DELIVERY ONLY

Teresa M. Fraas, Deputy Comptroller – Audit & Control
Erie County Comptroller's Office
95 Franklin Street, 11th Floor
Buffalo, New York 14202

RE: Request for Legal Opinions dated February 8, 2013

Dear Deputy Comptroller Fraas:

I am acknowledging receipt of your letter requesting legal opinions, which was received by my office on Friday, February 8, 2013, at approximately 5:00 p.m. My office will begin conducting the necessary research to render opinions on the various issues raised in your letter. However, before we do so it would be helpful if you would supply me with some additional information.

Initially, you have requested a legal opinion regarding Internal Audit's authority to access Medicaid and Public Assistance Eligibility files. Thomas Kubinieć, Director of Legal Affairs for the Erie County Department of Social Services, has already taken the lead on researching this issue. In addition to conducting legal research, he has been in contact with the State of New York to inquire as to the accessibility by your office of such information. He is awaiting responses to the inquiries he made to the state. The State of New York conducts audits of such matters on a regular basis to ensure compliance with regulatory guidelines. We as a county need to be sure that disclosure of information regarding any Medicaid and/or Public Assistance recipient does not violate any state law, federal law, state or federal regulation, county law or the County Charter or Code, and that any such disclosure is condoned by New York State. This is a complex issue as it implicates a number of areas of the law that will need to be evaluated to render accurate advice to your office.

In your letter you refer to Medicaid related audits in December of 1996 conducted by the Erie County Comptroller's Office. It would be helpful to my office if you would supply copies of the audits you are referring to, to enable us to review and assess same. If you have them in "pdf" format, please e-mail them to me. Otherwise, hard copies are fine.

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Due to the highly sensitive nature of the information your office seeks to audit, I need to know if the individuals who will be involved in such an audit have had any training regarding the Health Insurance Portability and Accountability Act ("HIPPA") and the confidentiality requirements associated with same. Additionally, do you intend on developing confidentiality agreements for your staff to execute to protect against disclosure of the information sought to be audited? Please provide your training plan, anti-disclosure statements and similar steps your office will take to protect this data from improper disclosure if you are able to obtain the data. Please also provide a copy of your audit plan, since it would be helpful for us to review as well to enable us to provide you with appropriate guidance.

Second, you have requested an opinion regarding the Freedom of Information Act ("FOIA"). FOIA is a law that permits a person the right to access information from the federal government. It does not apply to the County of Erie. I presume that you are instead referring to the Freedom of Information Law ("FOIL"), which is New York State law that permits a person the right to access certain information from the state government. *See* New York State Public Officers Law Sec., 87 *et seq.* The County is subject to County Local Law 8-1978, by which Erie County implemented FOIL.

Specifically, you have inquired into the procedure upon which the FOIL process works within Erie County. A FOIL request should be made to the county department that is the custodian of the particular records that are requested. It is the responsibility of such department to determine if such FOIL request should be approved, approved in part, or denied. If the requesting party then sought to appeal a denial, such appeal should be made directly to the Erie County FOIL Appeals Officer, Timothy Callan, Deputy Budget Director. It is not accurate that an appeal of such a determination would be appealed through the Erie County Comptroller's Office.

Lastly, you have asked if the Erie County Comptroller has subpoena power. *See* Article 26 of the Erie County Charter, Section 2607, which states as follows:

Section 2607. Power to administer oaths and issue subpoenas. The chairman of the county legislature, the county executive, the county comptroller, and such other county officers as may be authorized by law shall have the power to subpoena and compel the attendance of witnesses and the production of books and papers, as the same may be pertinent to their respective offices. Any county officer authorized to hold a hearing or conduct an investigation shall have the power to administer oaths or affirmations in connection therewith.

Accordingly, the Erie County Comptroller is authorized to issue subpoenas which relate to matters pertinent to his respective office. This power is not absolute but rather must pertain to the duties of his office and is further restricted by other laws, regulations and privileges, such as state and federal law that make certain records confidential. In some cases, state law provides substantial penalties for the release of confidential information. For instance, see Section 422 of the New York State Social Services Law pertaining to allegations of child abuse.

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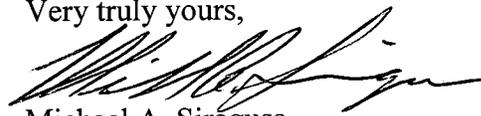
In regard to your desire to search e-mails of County of Erie employees, please advise of the intended scope and nature of your search. In order to determine if such a search is legal, it would be helpful to know what parameters will be implemented. What search terms or key words do you anticipate using to identify e-mails? Do you anticipate using any specific type of personal identifying information (names, Social Security numbers, Tax Identification numbers, sex, ethnicity, age, etc.) Or, in the alternative, are you asking if your office has the authority to review all e-mails county-wide regardless of nature and scope?

How will you protect the identity of county whistleblowers who have been assured confidentiality in exchange for their willingness to assist our government uncover waste, fraud and abuse? In addition, what training will be provided, and what assurances will you receive from your staff that would prevent improper disclosure?

Knowing the answers to the above questions will assist our research efforts by enabling us to determine the nature and scope of permissible inquiry your office would be permitted under the law.

Once I receive a response from your office to this letter, I will begin the research on our end. Please feel free to contact me with any questions. Thank you.

Very truly yours,



Michael A. Siragusa
Erie County Attorney

cc: Thomas Kubiniec, Department of Social Services Director of Legal Affairs