

# Attorney-Client Privilege and IG Investigations

A Question of Independence

# Governing Documents?

# Jefferson Parish, LA

- *Legal Communications.* Providing the office of inspector general, **an agency of parish government, with communications by and between any parish attorney** and the Parish Council, Parish President, or any parish officer, employee, department, agency, special district, board, or commission, pursuant to the provisions of this section, **shall not be deemed or construed as a waiver of any attorney-client privilege enjoyed by the parish,** the Parish Council, the Parish President, or any parish officer, employee, department, agency, special district, board, or commission.

# *Cook County, Illinois*

- **No documents or testimony may be sought** from representatives of labor organizations relating to the function of representing an employee subject to investigation, or **for documents or information which are privileged or confidential under State or Federal law**, including but not limited to documents or information maintained under the Mental Health and Developmental Disabilities Confidentiality Act. (§ 2-286)

# Chicago Building Commission

- In addition, nothing in this Resolution may be interpreted to allow the Inspector General to request or require any statement, testimony, action or document that is subject to the attorney client privilege.

What other law is there?

**Not Much.**

# Chicago IG v. Corp. Counsel

# Key Chicago IG Powers

- The Municipal Code grants the IGO two explicit powers that are particularly relevant.
- First, the IGO is empowered to request information related to an IGO investigation from *any* City employee, officer, agent or licensee. § 2-56-030(e) (emphasis added).
- Second, the IGO is empowered to issue subpoenas to compel the attendance of witnesses and the production of documents. § 2-56-030(h).

# Executive Order

- In 2005, Chicago Mayor Richard M. Daley issued an Executive Order which “[s]trengthen[ed] the duties of all City employees to cooperate with and report misconduct to the [IGO] . . . ” and mandated their “full cooperation” with the IGO. Exec. Order No. 2005-2, ¶ 5, ¶ 4 (2005).

**No exemptions for  
lawyers.**

# Ability to Sue?

- The Corporation Counsel said that she had the sole power to decide what suits the City brought, which included enforcement of the IGs subpoenas. She claimed this meant that the IG had no right to hire an attorney.
- The Corporation Counsel claimed that suits between two agencies of the same government were not permitted under state law.

# The IG's Response

# Disclosure is the Normal Rule

- The privilege remains the exception to the general duty to disclose, and that the privilege ought to remain confined within very narrow limits.

# Duty to Cooperate

- The express statutory duty of full cooperation every City officer and employee, including the Corporation Counsel, owes to the IGO means that any reasonable expectation of confidentiality — a core element of the privilege — is entirely lacking.

# Common Interest Doctrine

- Where two parties share a common interest, the attorney-client privilege is unavailable respecting communications to an attorney acting for their mutual benefit.

# Governmental Privileges Disfavored

- Illinois Supreme Court expressed special concern about *governmental* privileges because, “if created and applied indiscriminately,” they risk “undermin[ing] public trust in the integrity of the government and its commitment to serving the public interest.”

# A Different Balance

- Comment 9 to Illinois Supreme Court Rule 1.13 states, “[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for *public business* is involved.”

# Federal Cases

- *A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289 (7<sup>th</sup> Cir. 2002). (Illinois License for Bribes Case)
- *In re: Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (Monica Lewinski case)
- *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8<sup>th</sup> Cir. 1997) (Whitewater case)

# IG's Subpoena Power

- For seven days after receipt of a timely objection to a subpoena, **the inspector general shall take no action to enforce the subpoena** or to initiate prosecution of the person to whom the subpoena is directed. During this seven-day period, the inspector general shall consider the grounds for the objection and may attempt to resolve the objection through negotiation with the person to whom the subpoena is directed. **The seven-day period may be extended by the inspector general in order to allow completion of any negotiations.** The extension shall be in writing addressed to the person to whom the subpoena is directed, and shall specify the date on which the negotiation period will end. Negotiations may include such matters as the scope of the subpoena and the time, place and manner of response thereto. (Municipal Code § 2-56-040)

# *Burnette v. Stroger*, 389 Ill. App. 3d 321,328 (1<sup>st</sup> Dist. 2009)

- Brushing aside the absence of express statutory authority to sue or be sued, **the Illinois Appellate Court said that it would “make no sense to create an entity that could not even defend its right to exist,”** and found that the Public Defender had the capacity to sue to determine the extent of his staffing authority.

# Trial Court's Decision

- The trial court dismissed the case on two grounds:
  - inability of IG to bring the suit (no express statutory authority) and
  - a substantive holding that the attorney-client privilege applied.

# On Appeal, the IG Argued:

“[A]cceptance of that ruling would constitute a significant blow to the accountability in City government for it would hand the Corporation Counsel the ability to routinely trammel the power of the Inspector General by enabling the Corporation Counsel to obstruct IGO investigations into any matter as to which City attorneys assert attorney-client privilege, and by forcing the IGO to disclose confidential matter concerning ongoing investigations to Corporation Counsel before any of its subpoenas could be enforced.

# The Appellate Opinion

- The appellate court held that the IG had the right to sue, at least under the unique circumstances there—given that there was a conflict of interest.
- However, it did not decide whether the attorney-client privilege applied as to the IG against the City.
- The appellate court remanded the case for an in camera review to determine whether the attorney client privilege applied.

# Where does the issue stand now?

- Chicago's IG is largely back in the place it started, an impasse on the substantive issue.
- The issue may well make its way back to the appellate court again.

# Options Besides Litigation?

What can be done if your jurisdiction does not have an ordinance or statute that addresses the issue?

Questions?