

EXHIBIT 3

REC'D APR 13 2009

HARRIS BEACH PLLC
ATTORNEYS AT LAW

677 BROADWAY, SUITE 1101
ALBANY, NY 12207
(518) 427-9700

KARL J. SLEIGHT

DIRECT: (518) [REDACTED]
FAX: (518) 587-0338
KSLEIGHT@[REDACTED]

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CONFIDENTIAL COMMUNICATION
COVERED PURSUANT TO
EXECUTIVE LAW §94(12) AND
PUBLIC OFFICERS LAW §74

April 10, 2009

Bridget Holohan
Associate Counsel
Commission on Public Integrity
540 Broadway
Albany, New York 12207

Re: John J. O'Connor – President of the State University of New York Research
Foundation

Dear Ms. Holohan:

As we have discussed my client, John J. O'Connor, the President of the State University of New York Research Foundation (the "RF") received a correspondence from Executive Director Herbert Teitelbaum dated January 29, 2009 ("the Teitelbaum letter") stating that the Commission on Public Integrity ("Commission") had "received information indicating that you [Mr. O'Connor] may have violated Public Officers Law sections 74(3)(d),(f) and (h)."

The Teitelbaum letter continues stating "[t]he Commission has received information that in 2003 you secured employment for Susan Bruno for which she was not qualified and for which she did little or no work. The Commission has also received information that you permitted Ms. Bruno to work from home, a privilege you did not confer on your other employees."¹ The letter also states that my client could be subject to a \$10,000 civil penalty for a violation of Public Officers Law ("POL") §74(3)(d).

¹ Similar suggestions appeared shortly before the January 29, 2009 Teitelbaum letter in newspaper articles published in the Albany Times-Union. *See, Foundation under scrutiny* (January 4, 2009); *Susan Bruno resume eyed* (January 6, 2009).

THRESHOLD LEGAL ANALYSIS

Although this response to the Teitelbaum letter will contain a robust factual description of the hiring – culminating in Ms. Bruno's employment at the RF commencing on or about May 19, 2003, as a preliminary matter please be advised that it is our position that the Commission does not have jurisdiction over Mr. O'Connor.

Ms. Bruno was hired by the RF and began work nearly five years before the passage of the Public Employee Ethics Reform Act of 2007 ("PEERA") which first applied POL §74 to the RF effective April 25, 2007. Please note for purposes of this record that Mr. O'Connor is not waiving any claims in this regard and does not, by this return correspondence, submit himself to the jurisdiction of the Commission.

Application of PEERA to John O'Connor

As you and the Commission staff and members are obviously aware, a major overhaul of the ethics and lobbying laws took place with the passage of PEERA on March 27, 2007. For purposes of this matter, PEERA for the first time arguably applied POL §74 to Mr. O'Connor as the President of the RF with the addition of the language to POL §74(1) which enhanced the definition of "state agency" to include "corporations closely affiliated with specific state agencies as defined by paragraph(d) of subdivision five of section fifty-three-a of the state finance law or their successors." The RF is one of the enumerated closely affiliated entities at State Finance Law §53-a(5)(d).

The Public Officers Law did not confer any authority or jurisdiction over Mr. O'Connor to the Commission prior to this amendment. In fact, the Commission has conceded its jurisdictional limitations as not extending to closely affiliated non-profit corporations in several of its opinions, as well as acknowledging the unique characteristics of these entities. (See, Advisory Opinion No. 95-2)

There is no question that PEERA cannot be applied retroactively prior to its effective date(s). It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes, and will not be given such construction unless the language expressly or by necessary implication requires it (see, Jacobus v. Colgate, 217 N.Y. 235, 240, 111 N.E. 837 [Cardozo, J.] ["It takes a clear expression of the legislative purpose to justify a retroactive application"]; Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 ["the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"]). In the case of PEERA, the legislature certainly did not intend, expressly or otherwise, to apply POL §74 retroactively to someone in the position of Mr. O'Connor for events which occurred in 2003.

In addition to the substantive charge, the Teitelbaum letter states that Mr. O'Connor could be "subject to a civil penalty in an amount not to exceed \$10,000 for each violation and the value of any gift, compensation or benefit received as a result of such violation" of POL §74(3)(d). We respectfully submit that like the substantive charge, the Commission does not have penalty jurisdiction over Mr. O'Connor. The penalty provisions of POL §74 were added to PEERA and are effective prospectively and cannot have *ex post facto* application to Mr. O'Connor.

Moreover, prior to PEERA, POL §74 violations were required to be referred to THE subject's "appointing authority". In this situation, as President of the RF, Mr. O'Connor's appointing authority would be the board of the non-governmental RF a 501c(3) non-profit corporation, further adding uncertainty to the application of the state ethics law to Mr. O'Connor.

POL Section 74 is Not Intended or Designed to Second Guess Managerial Decisions

In addition to the hiring of Susan Bruno in 2003, the Teitelbaum letter states that the Commission received information that Mr. O'Connor "secured employment" for Ms. Bruno "for which she was not qualified and for which she did little or no work." The Teitelbaum letter continues citing information received that Mr. O'Connor "permitted Ms. Bruno to work from home, a privilege you [Mr. O'Connor] did not confer on your other employees."

First, to be clear the factual information the Commission received in this regard is patently untrue, as will be explained later in this correspondence. However, as a preliminary matter of law it is our position that POL §74 was not intended or designed to second guess the qualifications of personnel, hiring decisions by the management of organizations or agencies, or the deployment of organization or agency resources. Were the Commission to allow the information it received, even if true, to rise to the level of a POL §74 violation, such would be a fundamental departure from the last half century of POL §74 interpretation. It would be the first time the ethics law has been used to second guess an organization's staffing or management decisions.

Moreover, POL §74(2) the precursor to the "Standards" found in POL subsection (3) states as follows:

"Rule with respect to conflicts of interest. No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest" (emphasis added).

When taken into consideration, this critical portion of the Code of Ethics would seem to mandate a finding of a "substantial conflict" either prior to, or in conjunction with, the "Standards" articulated in subdivision (3). In this case, there is no "substantial conflict" with

respect to the hiring and subsequent employment of Ms. Bruno, therefore POL §74 does not apply to Mr. O'Connor in this instance.

Finally, there is no reasonable basis that would allow for an interpretation that Mr. O'Connor's managerial decisions as President of the RF – without more – could ever result in a finding of a violation of POL §74.

FACTUAL PRESENTATION

Despite our steadfast position that the Commission does not have jurisdiction over Mr. O'Connor, under the confidential framework set forth in Executive Law §94(12)(a), the ethical Standards concerning the treatment of confidential materials at POL §74, as well as the shield provided by the Personal Privacy Protection Act, we are afforded a safe harbor and the ability to provide you some background and perspective concerning the "information" you received.

The History of the RF and President John O'Connor

The RF was chartered in 1951 as an independent non-profit educational corporation, governed by its own board of directors for the purpose of assisting in the development of state university facilities by encouraging gifts, contributions and donations for the benefit of the university system; receiving, holding and administering gifts or grants; and to finance the conduct of studies and research in all academic disciplines. There are no gubernatorial appointments to the board or other appointments to the board by any other public officials, either elected or appointed.

The RF created and adopted its original Bylaws in 1952, which have been amended periodically. The Bylaws state that "the board of directors shall manage the operations of the corporation" (see, Bylaws Art. I sec.1). The President of the RF is appointed by the board of directors and serve[s] at its pleasure" (see, Bylaws Art. II, sec. 1). The President serves as the "chief executive officer and shall be responsible for the supervision and operation of the corporation . . ." (see, Bylaws Art. II, sec. 2). Moreover, the President "shall have such powers and perform such other duties as the board may direct or as are reasonably incidental to the office." (see, Bylaws Id).

By Agreement between the RF and the State University of New York (the "University") effective June 1, 1977, the RF agreed to "assist the University in the procurement of funds from the federal government and other authorized sources to support such sponsored programs at the University as the University shall request" (see, Agreement, Part A, paragraph 1). As part and parcel of this Agreement, the parties provided for the administration of sponsored programs,

prepared an annual plan of expenditures and agreed to certain other general provisions (i.e. audits, patent and copyright policies and public liability insurance). The RF was designated as a "contractor" in the Agreement approved by both the Office of the Attorney General and the Office of the State Comptroller (see, Agreement, Part C, paragraph 20; see also, Agreement, Exhibit B).

The RF is a non-profit corporation and was intentionally not designed to be a state agency or quasi-governmental entity.

John O'Connor was hired to be the President of the RF in or about March, 2000. In his role as President, Mr. O'Connor fulfills his responsibilities under the corporation's Bylaws and is responsible for the administration of over \$1B (est. 2008-09) in externally-funded support for over 9,000 contracts and grants with 17,000 employees. Mr. O'Connor is responsible for coordinating operations at 14 affiliated corporations established to facilitate university-industry-government partnerships and to accelerate the growth of research. Mr. O'Connor is tasked with providing high quality, cost-effective administrative support, financial management, computer systems and audit services for all research and related programs, including faculty practice plans at University campuses. Mr. O'Connor does not draw a salary for his work as President of the RF.

The Hiring and Qualifications of Susan Bruno

The RF had a desire to fill the position of Assistant Director for Federal Relations during the general time period of February – May, 2003. The credentials of Susan Bruno were presented as an individual who has the requisite experience to fill the position. Most importantly, Ms. Bruno's credentials included an extended period of work experience as an Executive Assistant in the New York State Assembly (1991-2003). Ms. Bruno participated in a selection process where she was interviewed. Ms. Bruno's work experience and her understanding of government operations were factors in her hiring at the RF. The decision was made to hire Ms. Bruno and the hiring transaction was completed on or about May 19, 2003.

Nearly five years later, in January, 2008, the Albany Times-Union published articles calling into question Ms. Bruno's post-secondary educational background dating back approximately 25 years. Although the RF was not previously aware of the questions surrounding her academic credentials, we believe that it is important to keep in mind that at the time of her hiring, her legislative work experience would have carried more weight when evaluating her qualifications for the position than her post-secondary educational background.

The Work Product of Susan Bruno

Ms. Bruno worked in two positions while at the RF. She was originally hired as the Assistant Director for Federal Relations. Later in her career at the RF, Ms. Bruno became a Special Assistant to the President. In this capacity Ms. Bruno had a wide variety of responsibilities to the RF. These responsibilities included, but were not limited to, the promotion of public events acknowledging advances in research and scholarship, coordination of events for dignitaries,² participating in cooperative ventures between British and American community colleges, and representing the RF at numerous functions (i.e. SUNY Day in D.C.). Ms. Bruno seemed to adequately fulfill her responsibilities in these positions. Ms. Bruno was not an employee of the State University of New York system or any other state agency to the best of our knowledge. Ms. Bruno's employment with the RF ceased effective March 2, 2009.

Mr. O'Connor's observations and anecdotal impressions of Ms. Bruno's interaction with her co-workers at the RF captured a certain awkwardness. The difficulty that Ms. Bruno faced was the burden that she bore by virtue of being the child of a well-known and powerful government official in a government town. Like many offspring in similar situations, the immediate reaction tended to be that any position that she had – particularly with a government bent – was solely a product of her father and not connected to any abilities that she might possess. This unshakeable attribute limited the degree to which Ms. Bruno was accepted by certain co-workers. For the reasons described below, this dynamic was exacerbated by the federal investigation.

The Development of Ms. Bruno's Telecommuting Arrangement

Initially, it is important to acknowledge that the RF has a policy with respect to off-site work or telecommuting. Contrary to media reports, Ms. Bruno was not the only employee or affiliate who participated in telecommuting.

The development of Ms. Bruno's telecommuting arrangement begins with the federal investigation into her father, former Senate Majority Leader Joseph Bruno. As you will appreciate, because the matter is an ongoing federal investigation, we are limited in providing only certain information to the Commission.

The federal investigation into Senator Bruno appears to have begun in earnest in February, 2006 with a grand jury investigation. As you may be aware, the grand jury for the Northern District of New York sits in the federal courthouse in Albany, which is located directly across Broadway from the RF.

As public reporting of the federal investigation grew, some of her co-workers were increasingly withdrawing from interacting with her which was creating a difficult work

² For example, Ms. Bruno was involved in a formal event welcoming President John R. Ryan in May, 2004.

environment. The RF was faced with media reporters, primarily certain reporters employed by the Albany Times-Union, who were calling RF employees at home, tailing Ms. Bruno when she was driving and camping out at a location on Broadway adjacent to the RF and in close proximity to the federal courthouse. Not surprisingly, RF employees who were not aware of the scope of the inquiry were unnerved to work closely with Ms. Bruno. For practical purposes, it seemed Ms. Bruno was in effect stigmatized by the events swirling around her father.

In addition to the federal investigation, Ms. Bruno was coping with the simultaneous and extraordinary difficulties of her mother's deteriorating health condition due to advanced Alzheimer's Disease from January, 2007 through her death on January 7, 2008.

Mr. O'Connor personally observed a dramatic change in Ms. Bruno's ability to cope with her mother and father's situations. As President of the RF, Mr. O'Connor was required to manage the immediate staff which would include dealing with Ms. Bruno's employment situation against the unique backdrop of her parents' respective ordeals. Mr. O'Connor sincerely believed that a combination of on-site work and off-site work (telecommuting) would maximize Ms. Bruno's effectiveness as an RF employee. Ms. Bruno was allowed to work off-site primarily to minimize distractions caused by the federal investigation and the attendant media attention. The transaction allowing Ms. Bruno to telecommute was made and completed in or slightly before May, 2006.

The implementation of this management solution was a decision made by Mr. O'Connor in his role as President of the RF. Even if Public Officers Law §74 applied to this situation, there is no "substantial conflict of interest" or any conduct which could be interpreted as violating any of the Standards set forth in POL §74(3). On the contrary, the solution to the situation combined effective staff management with an appreciation for a matter with a genuine human element.

* * * * *

As set forth in the introduction to this correspondence, we do not believe that the Commission has jurisdiction over Mr. O'Connor concerning the hiring and employment of Susan Bruno. If the Commission disagrees with us, we ask that the Commission articulate what interpretation of PEERA the Commission is relying on to assert jurisdiction over Mr. O'Connor.

Notwithstanding the Commission's lack jurisdiction over Mr. O'Connor, which we do not waive or submit to, we genuinely hope that this robust response to the Teitelbaum letter provides you with sufficient legal analysis and factual background to alleviate any concerns you may have related to this situation.

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HARRIS BEACH ^{PLC}
ATTORNEYS AT LAW

In closing, I respectfully request that the Commission affirmatively advise me if this response suffices to close this matter with the Commission. If you have any questions regarding this matter in the future, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Karl J. Sleight". The signature is written in a cursive style with a large initial "K".

Karl J. Sleight