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June 23, 2004

Ms. Carole J. Washburn, Secretary  
Washington Utilities & Transportation Commission  
1300 South Evergreen Park Drive S.W.  
P.O. Box 47250  
Olympia, WA 98504-7250

Re: WUTC v. Cougar Ridge Water System  
Docket No. UW-040367  
Our File 03-346-B

RECEIVED  
JUN 24 AM 8:39  
OFFICE OF THE  
CLERK OF THE  
SUPERIOR COURT  
JULY 1 2004

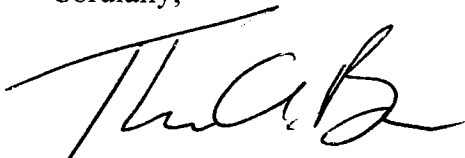
Dear Ms. Washburn:

Enclosed for filing are the original and eight copies of:

- Response to Motion for Summary Determination and Motion to Compel Discovery and Motion to Strike – *Oral Argument Requested*; and
- Declaration of Thomas A. Brown.

By copy of this letter, we are providing a copy to Jonathan C. Thompson, the Assistant Attorney General handling this matter.

Cordially,



THOMAS A. BROWN  
TAB/cm  
Enclosures

cc: Mr. Jonathan Thompson, w/encls.  
Mr. Paul A. Bitar, w/encls.

RECEIVED  
 WASHINGTON STATE COMMISSION  
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 WASHINGTON STATE COMMISSION  
 UTILITIES AND TRANSPORTATION  
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**BEFORE THE WASHINGTON STATE  
 UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET NO. UW-040367
TRANSPORTATION COMMISSION,	)	
	)	<b>RESPONSE TO MOTION FOR</b>
Complainant,	)	<b>SUMMARY DETERMINATION</b>
vs.	)	<b>AND MOTION TO COMPEL</b>
	)	<b>DISCOVERY AND MOTION TO</b>
COUGAR RIDGE WATER SYSTEM,	)	<b>STRIKE</b>
	)	
Respondent.	)	<b><u>ORAL ARGUMENT REQUESTED</u></b>
	)	

COMES NOW the Respondent, Cougar Ridge Water System, by and through its attorney, Thomas A. Brown of the firm Brown Lewis Janhunnen & Spencer, and files this Response to the “**COMMISSION STAFF MOTION FOR SUMMARY DETERMINATION**” and also files this Motion to Compel Discovery, as outlined below. The Respondent Cougar Ridge Water System also moves to strike all references to the connection fee, as raised in the Motion for Summary Determination.

**I. RELIEF REQUESTED**

The Respondent Cougar Ridge Water System asks that the Motion for Summary Determination be either denied or delayed. The Respondent Cougar Ridge Water System further asks that Staff and Staff counsel be compelled to supply certain responses to discovery as outlined herein.

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## II. ISSUES

The following are the issues that are related to the relief sought:

1. On the merits of the matter, discovery has disclosed that the Attorney General's office advised the Commission Staff in January of 2004 that the company was under the threshold, and was not subject to regulation. This information was disclosed by Staff to the public; but was subsequently withheld from the Respondent during discovery. The Staff and its counsel did not disclose during discovery that such an opinion had been rendered or communicated to the public, and it was only discovered by accident in a copy of an e-mail that was inadvertently released.

2. On the merits of the matter, it developed during discovery that the Staff had erred in its determination of whether or not the Cougar Ridge Water System was subject to regulation. This miscalculation or misinformation resulted in a finding that was off by nearly one year in Staff's assessment of when the Respondent's water system "became jurisdictional" (as they put it.)

3. In violation of the underlying statute (RCW 80.04.010), the Commission Staff has implemented a rule that makes the determination of jurisdiction turn on a *fiscal* rather than calendar year. The statute clearly says that the jurisdiction question is based on whether the "... average *annual* gross revenue ..." exceeds "... \$300.00 *per year*, ..." (emphasis supplied). Later on in the same statute, the legislature again refers to "... average *annual* revenue per customer ..." (emphasis supplied).

1 Washington law has always recognized a clear distinction between fiscal years and  
2 calendar years. *Power, Inc. v. Huntley*, 39 Wn.2d 191; 235 P.2d 173 (1951). A fiscal year is a  
3 12-month period that ends with a month other than December.  
4

5 The clear meaning of the legislature when establishing this criterion was a yearly basis,  
6 in the sense of a calendar year. The legislature used both the words “annual” and “per year”  
7 rather than using the phrase “12-month period” or “fiscal year.” Counsel for the Staff asks the  
8 tribunal to change that language from “annual” or “per year” to the language of the rule, which  
9 calls for a calculation of a floating 12-month period.  
10

11  
12 There is no authorization, either in law or regulation, for that approach.  
13

14  
15 4. During the deposition of Mr. Eckhardt, it was revealed that Mr. Eckhardt is the  
16 one that made the decision to pursue formal action with regard to Cougar Ridge. We also  
17 learned that Mr. Eckhardt – in the course of making that decision – personally met with and  
18 consulted with Commission member Showalter specifically regarding the Cougar Ridge Water  
19 System. If true, this demonstrates conclusively that the whole process is tainted because the  
20 merits of the case have already been discussed and reviewed with one of the Commission  
21 members that will ultimately be making the decision that is before this tribunal. Even more  
22 shockingly, when we requested copies of those notes from that meeting, the request was refused  
23 based on the following objection:  
24

25  
26 “Objection. If any exist, the attorney-client privilege prohibits disclosure of the  
27 requested meeting notes.”  
28

29 That objection is patently frivolous and without basis, since no attorney was involved in  
30 this meeting.  
31  
32

1           5.       During discovery, counsel for the Respondent learned that the memorandum of  
2 the Attorney General's office regarding whether jurisdiction attached to the Cougar Ridge  
3 Water System had been supplied directly to the Commissioners. Again, this demonstrates a  
4 situation in which the process is tainted by information being supplied directly to the ultimate  
5 decision maker, even before this matter was pending in this tribunal. Obviously, we requested  
6 a copy of the memorandum when we learned that it had been supplied to the Commissioners,  
7 but that request was refused with the following notation:  
8

9                   "Objection. The attorney-client privilege prohibits disclosure of the requested  
10 memorandum."  
11

12                   This objection is frivolous. That would be like the Attorney General's office supplying  
13 a copy of the memorandum to the Administrative Law Judge, and then claiming we couldn't  
14 see it because it is privileged.  
15

16           6.       During discovery, we requested production of all records relating to Cougar  
17 Ridge. As it turned out during depositions, the following records were not produced, and their  
18 existence was not disclosed:  
19

- 20
- 21                   ▪ The phone logs of James Ward;
  - 22                   ▪ The phone logs of Eugene Eckhardt;
  - 23                   ▪ Materials from the Department of Consumer Affairs that relate to Cougar Ridge;
  - 24                   ▪ Eugene Eckhardt's calendars, which contain information relevant to Cougar Ridge;
  - 25                   ▪ Eugene Eckhardt's "agendas" which contain handwritten notes relating to Cougar  
26 Ridge;
  - 27                   ▪ Eugene Eckhardt's computer files;
  - 28                   ▪ James Ward's computer files;
  - 29                   ▪ The time sheets of both Eugene Eckhardt and James Ward from 2003 and 2004,  
30 both of which contain information relating to Cougar Ridge.
- 31  
32

1 From the depositions of Mr. Ward and Mr. Eckhardt, it appears that all of the above  
2 materials contain critical, relevant information that should be disclosed.

3  
4 7. During the course of the deposition of Mr. Eckhardt, it was revealed that he had  
5 been supplied with written materials setting forth certain "guidelines or suggestions" for  
6 testifying as a witness. Obviously, we requested production of the materials that he had  
7 reviewed in preparation for his deposition, and those were denied to us. The denial reads:  
8

9  
10 "Objection. The attorney-client privilege prohibits disclosure of the requested  
11 material."

12  
13 This objection is frivolous. Counsel is entitled to review written materials that have  
14 been reviewed by a party in preparation for a deposition.  
15

16  
17 8. During discovery, it developed that there was an "employee manual" that  
18 governs the conduct of employees of the Washington Utilities and Transportation Commission.  
19 Among other things, this manual has sections on dealing with the public and sections on the  
20 "mission" of the WUTC. Obviously, when we learned of the existence of this information, we  
21 requested that it be produced. An objection was made to this request, but the office of the  
22 Attorney General indicated that the manual would be made available notwithstanding the  
23 objection. Mr. Thompson is out of town, and we need an opportunity to arrange inspection of  
24 those materials.  
25

26  
27 9. During the discovery process, it developed that there were numerous e-mails that  
28 passed between the staff and the Attorney General's office. We requested production of those  
29 e-mails, but the Attorney General's office objected, and did not supply the e-mails. The main  
30 basis of their objection was the attorney-client privilege. However, it turns out, based on  
31  
32

1 discovery, that the privilege was breached with the opinion of the Attorney General's office  
2 was disclosed to the public in early January, 2004. There is certainly no basis, in law, custom  
3 or practice to allow selective violation of the attorney-client privilege, such as revealing the  
4 information to the public, but withholding it from parties who are litigants before the  
5 Commission.  
6

7  
8 10. Both Mr. Eckhardt and Mr. Ward, during their depositions, admitted that the  
9 question of connection charges had nothing to do with the assertion of jurisdiction.  
10

11 **III. PRAYER FOR RELIEF**  
12

13 The Respondent, Cougar Ridge Water System, prays for the following relief:  
14

- 15
- 16 1. That the Motion for Summary Determination by the Commission Staff be  
17 denied;
  - 18 2. That the Respondent be granted sufficient time to complete discovery, after the  
19 Commission is ordered to turn over the balance of the discovery materials  
20 discussed herein;
  - 21 3. That an Order be issued requiring the Staff and its counsel to supply the  
22 materials discussed herein;
  - 23 4. That the Administrative Law Judge set forth procedures designed to deal with  
24 the improper and unfortunate contacts that have been made by Commission Staff  
25 with members of the Commission itself, which have unfairly and unjustly  
26 prejudiced the Respondent.  
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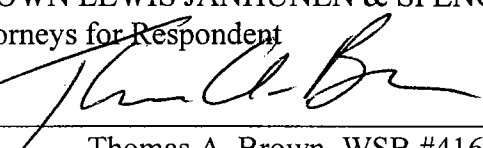
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**Respondent requests oral argument on the pending Motions.**

DATED: June 23, 2004.

Respectfully Submitted,

BROWN LEWIS JANHUNEN & SPENCER  
Attorneys for Respondent

By   
Thomas A. Brown, WSB #4160



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UTILITY AND TRANSPORTATION  
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**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET NO. UW-040367
TRANSPORTATION COMMISSION,	)	
	)	
Complainant,	)	<b>DECLARATION OF</b>
vs.	)	<b>THOMAS A. BROWN</b>
	)	
COUGAR RIDGE WATER SYSTEM,	)	
	)	
Respondent.	)	
	)	

**THOMAS A. BROWN** declares:

- I am the attorney of record for the Respondent Cougar Ridge Water System. I am over the age of 18, am competent to testify to the matters set forth below, and have personal knowledge of those matters.
- On June 15, 2004, the depositions of James Ward and Eugene Eckhardt were taken by the undersigned. Because of time constraints, we were not able to finish the deposition of Mr. Eckhardt. The undersigned has asked the court reporter to transcribe the depositions, and those will be provided to the Administrative Law Judge, as soon as the transcription is complete.
- After the deposition, I served on counsel for the Staff eleven data requests, requesting production of information developed during the depositions of Mr. Ward and Mr.

DECLARATION OF  
THOMAS A. BROWN - 1

**BROWN LEWIS JANHUNEN & SPENCER**  
A PROFESSIONAL SERVICE CORPORATION  
ATTORNEYS AT LAW  
BANK OF AMERICA BUILDING  
SUITE 501  
101 EAST MARKET STREET  
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(360) 533-1600 OR 532-1960

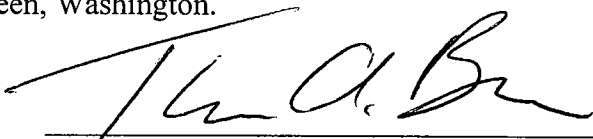
1 Eckhardt. Those requests were reasonable, and were based on information developed during  
2 those depositions. Copies of those requests are attached.

3  
4 4. The very next day, I received the attached responses to those discovery requests,  
5 which are boilerplate, unresponsive objections that do not fairly address the substance of the  
6 requests. Moreover, some of them appear to be frivolous in alleging an attorney-client  
7 privilege where none exists.  
8

9  
10 5. During his deposition, Staff member James Ward confirmed that in late 2003 or  
11 early 2004 he was advised by the Attorney General's office that there was no jurisdiction over  
12 the Cougar Ridge Water System, because the statutory threshold had not been reached. He also  
13 confirmed that he disclosed what he had been told by the Attorney General's office to a  
14 member of the public that had been inquiring regarding Cougar Ridge.  
15

16  
17 I declare under penalty of perjury under the laws of the State of Washington that the  
18 foregoing is true and correct.  
19

20  
21 Dated on June 23, 2004, at Aberdeen, Washington.

22  
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24 \_\_\_\_\_  
25 Thomas A. Brown, WSB #4160

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DECLARATION OF  
THOMAS A. BROWN - 2

BROWN LEWIS JANHUNEN & SPENCER  
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(360) 533-1600 OR 532-1960

Docket No. UW-040367

Cougar Ridge Water System Data Requests to WUTC Nos. 1-11

June 17, 2004

Page 1

**COUGAR RIDGE DATA REQUEST NO. 1 (REQUEST FOR PRODUCTION):**

Please produce a copy of any records generated by the Consumer Affairs Department or the office of Penny Hanson or the office of Vicki Elliott.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 2 (REQUEST FOR PRODUCTION):**

Please produce a copy of phone logs of Eugene Eckhardt and/or James Ward.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 3 (REQUEST FOR PRODUCTION):**

Please produce a copy of the employee manual of the WUTC.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 4 (REQUEST FOR PRODUCTION):**

Please produce a copy of the material reviewed by Mr. Eckhardt relating to guidelines for depositions.

**ANSWER:**

**COPY**

Docket No. UW-040367

Cougar Ridge Water System Data Requests to WUTC Nos. 1-11

June 17, 2004

Page 2

**COUGAR RIDGE DATA REQUEST NO. 5 (REQUEST FOR PRODUCTION):**

Please produce a copy of Mr. Eckhardt's calendars with handwritten notations for the years 2003 and 2004.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 6 (REQUEST FOR PRODUCTION):**

Please produce copies of Mr. Eckhardt's "agendas" for all meetings which in any way involved the Cougar Ridge Water System.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 7 (REQUEST FOR PRODUCTION):**

Please produce a copy of any and all computer files of Mr. Ward or Mr. Eckhardt relating to Cougar Ridge Water System.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 8 (REQUEST FOR PRODUCTION):**

Please produce a copy of time sheets generated by Mr. Ward or Mr. Eckhardt or in the files of Mr. Ward or Mr. Eckhardt for 2003 and 2004.

**ANSWER:**

Docket No. UW-040367

Cougar Ridge Water System Data Requests to WUTC Nos. 1-11

June 17, 2004

Page 3

**COUGAR RIDGE DATA REQUEST NO. 9 (REQUEST FOR PRODUCTION):**

Please produce a copy of the memorandum prepared by the Attorney General's office to the WUTC Commissioners.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 10 (REQUEST FOR PRODUCTION):**

Please produce a copy of any meeting notes generated by Mr. Eckhardt or Commissioner Showalter relating to a meeting concerning Cougar Ridge Water System.

**ANSWER:**

**COUGAR RIDGE DATA REQUEST NO. 11 (REQUEST FOR PRODUCTION):**


Please produce a copy of any and all e-mails to and from the Attorney General's office previously withheld.

**ANSWER:**

DATED: June 17, 2004.

Respectfully Submitted,

BROWN LEWIS JANHUNEN & SPENCER  
Attorneys for Respondent

By   
Thomas A. Brown, WSB #4160

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
RESPONSE TO DATA REQUEST

DATE PREPARED: June 18, 2004  
CASE NO.: UW-040367  
REQUESTER: Cougar Ridge Water

WITNESS: Sally G. Johnston, Sr.AAG  
RESPONDER: Sally G. Johnston , Sr.AAG  
TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 1 (REQUEST FOR PRODUCTION):**

Please produce a copy of any records generated by the Consumer Affairs Department or the office of Penny Hanson or the office of Vicki Elliott.

**ANSWER:**

Objection. The request is overly broad, unduly burdensome, vague, and beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
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TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 2 (REQUEST FOR PRODUCTION):**

Please produce a copy of phone logs of Eugene Eckhardt and/or James Ward.

**ANSWER:**

Objection. The request is overly broad, unduly burdensome, vague, and beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

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RESPONDER: Sally G. Johnston, Sr.AAG  
TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 3 (REQUEST FOR PRODUCTION):**

Please produce a copy of the employee manual of the WUTC.

**ANSWER:**

Objection. The request is vague and beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence. The WUTC maintains manuals for employees covering a wide variety of topics ranging from safety issues to civil service. Without waiving objection, these manuals will be made available to you for your inspection and copying at a mutually agreeable time and place.



WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
RESPONSE TO DATA REQUEST

DATE PREPARED: June 18, 2004  
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WITNESS: Sally G. Johnston, Sr.AAG  
RESPONDER: Sally G. Johnston , Sr.AAG  
TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 4 (REQUEST FOR PRODUCTION):**

Please produce a copy of the material reviewed by Mr. Eckhardt relating to guidelines for depositions.

**ANSWER:**

Objection. The attorney-client privilege prohibits disclosure of the requested material.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
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**COUGAR RIDGE DATA REQUEST NO. 5 (REQUEST FOR PRODUCTION):**

Please produce a copy of Mr. Eckhardt's calendars with handwritten notations for the years 2003 and 2004.

**ANSWER:**

Objection. The request is overly broad, unduly burdensome, vague, and beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
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TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 6 (REQUEST FOR PRODUCTION):**

Please produce copies of Mr. Eckhardt's "agendas" for all meetings which in any way involved the Cougar Ridge Water System.

**ANSWER:**

Objection. The request is beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
RESPONSE TO DATA REQUEST

DATE PREPARED: June 18, 2004  
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WITNESS: Sally G. Johnston, Sr.AAG  
RESPONDER: Sally G. Johnston , Sr.AAG  
TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 7 (REQUEST FOR PRODUCTION):**

Please produce a copy of any and all computer files of Mr. Ward or Mr. Eckhardt relating to Cougar Ridge Water System.

**ANSWER:**

Objection. The request is overly broad, unduly burdensome, vague, beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence. The request further seeks information protected by the attorney-client privilege and work product doctrine.

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RESPONDER: Sally G. Johnston , Sr.AAG  
TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 8 (REQUEST FOR PRODUCTION):**

Please produce a copy of time sheets generated by Mr. Ward or Mr. Eckhardt or in the files of Mr. Ward or Mr. Eckhardt for 2003 and 2004.

**ANSWER:**

Objection. The request is beyond the scope of permissible discovery in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence.

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TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 9 (REQUEST FOR PRODUCTION):**

Please produce a copy of the memorandum prepared by the Attorney General's office to the WUTC Commissioners.

**ANSWER:**

Objection. The attorney-client privilege prohibits disclosure of the requested memorandum.

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TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 10 (REQUEST FOR PRODUCTION):**

Please produce a copy of any meeting notes generated by Mr. Eckhardt or Commissioner Showalter relating to a meeting concerning Cougar Ridge Water System.

**ANSWER:**

Objection. If any exist, the attorney-client privilege prohibits disclosure of the requested meeting notes.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
RESPONSE TO DATA REQUEST

DATE PREPARED: June 18, 2004  
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REQUESTER: Cougar Ridge Water

WITNESS: Sally G. Johnston, Sr.AAG  
RESPONDER: Sally G. Johnston , Sr.AAG  
TELEPHONE: (360) 664-1193

**COUGAR RIDGE DATA REQUEST NO. 11 (REQUEST FOR PRODUCTION):**

Please produce a copy of any and all e-mails to and from the Attorney General's office previously withheld.

**ANSWER:**

Objection. The attorney-client privilege and work product doctrine prohibit disclosure of the requested e-mail messages.