

Dear Council Members:

As you know, APA has received several requests to disclose the attorney notes taken during the interviews conducted by David Hoffman and other Sidley Austin LLC attorneys in preparation of the Independent Review (“IR”) report.

In seriously considering these understandable requests, the Board sought legal advice from our outside litigation counsel, David Ogden and Jeannie Rhee of WilmerHale, who have served as counsel to APA in the IR matter, and also from Mr. Hoffman. The Board then considered the broader practical and policy implications of these requests beyond the legal risks.

The following is a summary of our deliberations related to this complex matter:

1. Consistent with the terms of its agreement with Sidley, APA has made public Mr. Hoffman’s work product consisting of the final IR report, errata and documents accompanying the IR report. APA does not own the attorney interview notes and they have never been provided to APA. While APA could ask Sidley to waive its interests in the notes and provide them to APA for disclosure and waiver of privilege, such action would be contrary to Mr. Hoffman’s advice, as well as that of WilmerHale. In addition, it would be counter to the original agreement.
2. Mr. Hoffman did not tape the interviews. As described above, APA does not have the Sidley attorneys’ notes from the interviews and thus we do not know the nature or the content of the notes. Opening the interview files would release all information both pertinent and not pertinent to the issues under consideration. This would include personal information about interviewees or other information provided by individuals.
3. The doctrine of legal privilege protects from disclosure in litigation certain information that flows from the attorney-client relationship. In general, legal privilege covers both attorney-client privilege, which APA controls, and attorney work product privilege that addresses the interests of both the law firm and the client. This protection is generally lost when such information is disclosed to others outside that relationship. In this case, protecting interview notes and related materials gathered in the process of developing and writing the IR report was important in undertaking this project. The retention letter APA entered into with Mr. Hoffman to serve as a completely independent investigator set forth both the well-established protections for legally privileged materials in any attorney-client relationship, as well as additional conditions regarding confidentiality to assure the complete independence of the review process Mr. Hoffman undertook.
4. Our legal counsel has advised us that it would be highly unusual in any legal setting –let alone an independent review such as this –for there to be voluntary waiver of legal privilege and disclosure of all of the underlying attorney notes and other internal work product developed in the course of an attorney’s review. In this case, due to the confidential and independent nature of Mr. Hoffman’s undertaking, further protections of attorney work were required to ensure that individuals would be forthcoming and that Mr. Hoffman was not in any way constrained in weighing, assessing, or following any and all investigative leads. The APA Board has been advised that it is unlikely that Mr. Hoffman –or any lawyer experienced in this type of review --would have agreed to serve as an independent reviewer without protections for their iterative investigative steps along the way, as reflected in their underlying work product.
5. Both Mr. Ogden and Ms. Rhee, as well as Mr. Hoffman, opined that the notes and other sought-after materials are privileged and should not be disclosed. To disclose them would waive their privileged status irrevocably. All legal counsel advised the Board that protecting such information is in the best interests of APA and waiver would pose uncertain but real legal risk. This would also apply to unintentional consequences and for all participants interviewed, including many not mentioned in the report.

Taking all of these factors into account, as well as our understanding of the various reasons that

individuals have requested the release of these notes, the Board concluded that it is not the best course of action for the organization-as-a-whole or for all those interviewed to disclose confidential interview materials beyond what is in the 542-page report and its exhibits.

We recognize that many individuals and groups may be displeased/disagree with this decision. The value of transparency, especially in light of the IR findings remains a strong value both of the Board and of APA. However, the rules of law are not the same as those of psychology and transparency assumes a different meaning when dealing with legal matters. At times, these values and rules may be in conflict with each other.

The primary fiduciary responsibility of the Board is to protect the organization and the total membership and to act in the organization's best interests. Taking all factors into account, the most prudent decision for the organization is not to request the disclosure of the attorney notes taken during the interviews conducted by David Hoffman and other Sidley Austin LLC attorneys in preparation for the IR. Board members who were interviewed by Sidley attorneys for the IR did not vote on this matter.

The final IR report is an important assessment of the relevant issues regarding the history of APA's policy statements on detainee interrogation, and it is now completed. The IR report cites over 1,100 supporting documents, many of which are contemporaneous emails and records of the events in question. Over 200 interviews of 148 people were conducted, not all of whom were mentioned in the IR report. Those interviewed were afforded an opportunity to object to the accuracy of the report, particularly regarding references to them, and Mr. Hoffman issued an errata sheet and revised IR report in response to comments submitted to him. In addition, there is a website available at <http://www.apa.org/independent-review/responses.aspx> where individuals mentioned in or who have personal knowledge of the events discussed in the IR report are welcome to share their perspective on the report, findings, and interpretations.

Sincerely,

The APA Board of Directors