

Via Electronic Mail and Hand Delivery

March 17, 2014

Ms. Ann L. Schneider & Mr. George Ranney, Jr., Co-Chairs
Northeastern Illinois Public Transit Task Force
2300 S. Dirksen Parkway
Springfield, Illinois 62764

Dear Co-Chairs Schneider and Ranney:

On March 13, 2014, Executive Inspector General (EIG) for the Office of Executive Inspector General for the Agencies of the Illinois Governor (OEIG), Ricardo Meza, provided written comments to the Northeastern Illinois Public Transit Task Force (Task Force). Given the subject matter of these comments, Metra thought it appropriate to provide its own written comments to also assist the Task Force in its efforts to address the serious concerns regarding the current structure of the Northeastern Illinois transit system.

Experience of Metra in Handling and Responding to OEIG Requests

Metra recognizes the need for independent oversight of state agencies, including the Regional Transit Boards (RTBs). Since the OEIG began serving as the inspector general, Metra has cooperated in OEIG investigations. As noted in EIG Meza's comments, Metra recently issued its first Ethics Manual. In doing so, it included a provision that a requests for documents by the OEIG must be provided to Metra's Ethics Officer or an attorney in Metra's Law Department. As discussed below, this provision was implemented by Metra to assist the OEIG in its collection of documents. The provision ensures that Metra's response to the OEIG contains all responsive documents in Metra's possession, while still protecting well-established attorney-client privileges.¹ We believe that it has accomplished this goal.

First, under the State Officials and Employees Ethics Act (Ethics Act), Metra's Ethics Officer is required to "act as [a] liaison[]" between Metra and the OEIG.² Given that the Illinois legislature included this designation as one of the three enumerated responsibilities of an Ethics Officer, having requests for documents go through the Ethics Officer (or if (s)he is not available, the Legal Department) is entirely appropriate.³

¹ Responsive documents would not include those documents properly excluded under the attorney-client privileged or any other applicable privilege.

² 5 ILCS 430/20-23(1).

³ It is Metra's understanding that the requirement that OEIG requests for documents are directed to the Ethics Officer is a policy that, either formally or informally, is in place in other state agencies.

Second, OEIG requests may seek a large volume of documents that are not centrally located. Metra, like most state agencies, does not have a single repository for information and documents. Since the task of gathering said documents from multiple locations and analyzing responsive documents is generally a task that is within the attorneys' responsibilities, the Ethics Officer and the agency lawyers are in the best position to ensure that the agency's responses are comprehensive and appropriate, as opposed to relying upon lay people to respond. In fact, Metra's Ethics Officer is knowledgeable about Metra's operations, can assemble such documents, and is authorized to view sensitive information, such as employee's medical and tax records.⁴

Third, routing requests for documents through the Ethics Officer or Law Department does not relieve Metra of its obligation to turn over responsive, non-privileged documents to the OEIG.⁵ Under the Ethics Act, Metra is required to cooperate with the OEIG and provide information as requested.⁶ Indeed, by having attorneys address these requests for documents, there is a heightened responsibility as attorneys are held to a higher standard of responsibility under the Illinois Rules of Professional Conduct and the Illinois Supreme Court Rules.

Fourth and finally, Metra's policy ensures that documents are reviewed for an applicable privilege prior to being provided to the OEIG. Under the Ethics Act, if the recipient of a request for documents believes that the release of the subject matter of the request might violate existing rights under state or federal law, the recipient has the right to seek a determination from the Executive Ethics Commission (EEC) relative to such rights or protections.⁷ Metra strives to avoid a situation where the OEIG was inadvertently provided documents by a Metra employee that were later subject to a determination by the EEC that those documents should not have been provided. Metra believes that such a scenario could hamper or disrupt an OEIG investigation, as well as be disruptive internally.

Interrelation of OEIG's Work and Metra's Disclosure under the Freedom of Information Act

Metra agrees with EIG Meza's opinion that simply providing documents that are not otherwise confidential to the OEIG does not then cloak them with a veil of confidentiality so as to avoid disclosure of those documents under the Freedom of Information Act requirements. In fact, Metra's current Board of Directors has unambiguously supported transparency and has acted consistently in this regard. As such, Metra's Board of Directors rejects those comments made in July 2013 by a former director and former outside counsel that supported a contrary view. Metra joins with the OEIG in its request to the Task Force to consider offering legislation that would amend the Ethics Act to

⁴ An agency's Ethics Officer is similar to its FOIA Officer, who receives and addresses Freedom of Information Act requests. As noted by the Illinois Attorney General's office, a FOIA Officer receives requests for records, ensure that the public body responds to the requests in a timely fashion, and issue responses under the Freedom of Information Act. <https://foia.ilattorneygeneral.net/pdf/Freedom%20of%20Information%20Act%20Officers.pdf> (last visited March 16, 2014). To the extent that state law requires the designation of a FOIA Officer, and requires periodic training, Metra respectfully suggests that this could be a model adopted in designating Ethics Officers as the designated individual for responding to OEIG requests for documents.

⁵ In one investigation, Metra's Ethic's Officer and Law Department efficiently collected over 52,000 pages of documents and spent over 1,500 hours to respond to OEIG requests.

⁶ 5 ILCS 430/ 20-70, EEC Rules, 2 Ill. Admin. Code Section 1620.300, and Administrative Order #6, 2003.

⁷ EEC Rules, 2 Ill. Admin. Code Section 1620.30(c)(5).

clarify the parameters of the Ethics Act's confidentiality provisions as they relate to OEIG files provided to an affected state agency or RTB.

Changes to Ensure Greater Efficiency, Accountability, Coordination and Transparency

Metra has strived to work with the OEIG in encouraging and nurturing a culture of efficiency, accountability, and transparency. Indeed, Metra has taken significant steps internally in this regard. We note that EIG Meza acknowledged Metra's cooperation in displaying the OEIG fraud reporting posters prominently in its trains. While there may be a loss in potential revenue from advertising, Metra fully believes that the display of these posters is important to both staff and its ridership. To that end, Metra not only displays the fraud reporting posters on the trains, but it displays them in Metra's headquarters and also makes them available to staff.

In his written statement, EIG Meza suggests that the Task Force consider offering legislation amending the Ethics Act to allow an inspector general to seek an immediate determination from the EEC in two instances:

- whether an agency claim of any privilege, including attorney-client privilege, is valid; or
- whether an agency attorney is "uninvolved" in an investigation and may act as a representative for an agency employee.

Metra joins with the OEIG in "recognize[ing] the validity and existence of the attorney-client privilege." The attorney-client privilege is the oldest privilege recognized by Anglo-American jurisprudence and is a cornerstone of the American legal system. As in every organization, without exception, this privilege allows Metra's Executive Director and Board members to seek candid advice on various, difficult issues, and would otherwise not be able to efficiently function without it. Metra respectfully suggests that any proposed legislation requires that such review or determination be made by the Illinois judiciary. Metra believes this is the more sound option given that the courts routinely address such claims and are likely better equipped to handle these matters.

In response to EIG Meza's reluctance to allow the agency's attorneys to represent an individual before the OEIG, an individual's choice to be so represented is not one which should be limited. Moreover, there are legal obligations upon agencies to provide counsel. In assigning in-house attorneys to do so, if possible, offers a cost-efficient way to accomplish this. To the extent that the OEIG is concerned that the individual employee may be a "target" of an investigation which may lead to a "conflict" between the employee and the agency, we suggest that this information be conveyed to the agency. In doing so, the agency would be in an informed position to appropriately analyze whether a conflict exists on a case-by-case basis.

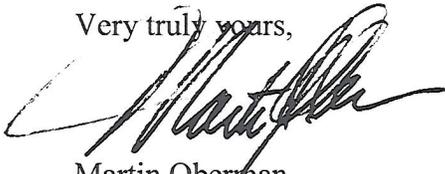
Conclusion

Over the past year, numerous changes have occurred with respect to Metra staff and Metra's Board of Directors to ensure that the events of the recent past do not re-occur. We recognize and support the need for oversight by an OEIG to discourage illegalities and bad acts that threaten any agency. Indeed, this Board has strived to operate in a cooperative, ethical manner with the OEIG to the fullest extent of the law. In the course of these investigations, we are also committed to ensuring that all such necessary investigations are executed by the OEIG in a prompt, expeditious manner, and in a way that

Ms. Ann L. Schneider
Mr. George Ranney
Page 4

avoids unnecessary or repetitive measures that tax the staff of the agency, as well as the staff of the OEIG. As such, to the extent that the Task Force can assist in that mission, Metra welcomes the effort.

Very truly yours,

A handwritten signature in black ink, appearing to read "Martin Oberman", written in a cursive style.

Martin Oberman
Metra, Chairman of the Board