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STATE OF MAINE  
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April 26, 2011

Mr. Darryl Brown  
Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Re: Correspondence of April 22, 2011, from Clint Boothby, Esq.

Dear Mr. Brown:

I am writing in response to a letter of April 22, 2011 from your personal attorney, Clint Boothby, Esq. That letter indicates that revenue you have derived from Main-land Development Consultants, Inc. during the preceding two years may create a conflict of interest as defined by 38 M.R.S. § 341-A(3)(B) and corresponding federal Clean Water Act regulations. Mr. Boothby also addresses two questions to this Office, the answers to which may inform how you choose to proceed.

He asks first whether this Office can provide written assurance that any documentation he provides to us on your behalf will be protected from public disclosure. As we have conveyed to him previously, we can provide no such assurance. Documents in the possession of this Office are subject to Maine's Freedom of Access Act, 1 M.R.S. § 401 *et seq.* ("FOAA"), which makes them presumptively public records. Unless a document is designated as confidential by statute, or falls within an exception to the statutory definition of "public records," it is subject to public disclosure as a matter of law.

Business records such as those described in Mr. Boothby's letter, which contain client lists and information regarding revenue from individual clients, are not categorically confidential pursuant to any statute, nor are they categorically within any exception to FOAA's definition of public records. The Law Court has recognized an exception to the public records definition for "trade secrets," but that exception is narrow and the determination of what constitutes a trade secret is highly fact specific. *Medical Mutual Insurance Company of Maine v. Bureau of Insurance*, 2005 ME 12, 866 A.2d 117. We should also note that courts are the ultimate arbiters of whether specific documents are subject to public disclosure pursuant to a FOAA request. For all of these reasons, we cannot assure you that these documents, which we have not yet seen, would not be subject to public disclosure if they were submitted to us for our review. To the contrary, it would be prudent for you to proceed based on the conservative assumption that these records would be subject to disclosure upon request.

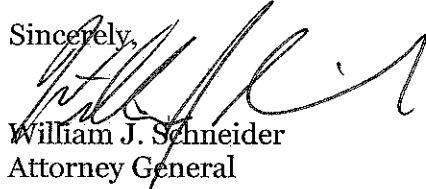
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The second question is whether, if you have a conflict of interest as defined in the governing Maine statute, that conflict could be satisfactorily addressed through recusal or delegation of authority in a manner that would allow you to continue to serve as Commissioner. While recusal and delegation appear to be an option for complying with federal Clean Water Act conflict provisions, we do not believe it is an option under the State law, which is broader and more restrictive. Title 38 M.R.S. § 341-A(3)(B) provides that "a person may not serve as commissioner" whose gross income triggers the conflict threshold set forth in the law. This provision is not limited in its scope to Clean Water Act matters. Therefore, if in fact such a conflict exists, it would undermine your legal authority to act on any matter coming before you as Commissioner. A recusal and delegation arrangement that attempted to resolve such a conflict would leave you with no retained decision-making authority of your own, which is a result that makes no sense and disregards the apparent purpose of the statute. Therefore, if a conflict were to exist, we are not aware of any mechanism that would allow you to continue to serve as Commissioner.

Under these circumstances you have two options: produce the necessary documentation showing the absence of a conflict, or otherwise take action to resolve this matter. In the absence of new information, it appears you are unqualified to serve as Commissioner of the Department of Environmental Protection under Maine law.

I hope you will be in touch if you have any remaining questions.

Sincerely,



William J. Schneider  
Attorney General

cc: Governor Paul LePage  
President Kevin Raye  
Speaker Robert Nutting  
Senator Jon Courtney  
Senator Barry Hobbins  
Representative Phil Curtis  
Representative Emily Cain  
Senator Tom Saviello, Senate Chair, Committee on Energy and Natural Resources  
Representative Jim Hamper, House Chair, Committee on Energy and Natural Resources  
Clint Boothby, Esq.