

# **EXHIBIT M**

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December 23, 2016

*Via email to counsel of record*

Stephen M. Medlock  
Mayer Brown LLP  
1999 K Street, N.W.  
Washington, DC 20006-1101

Re: *Benisek v. McManus*

Mr. Medlock,

This letter responds to your letter of December 22, 2016, in which you memorialized our telephone conference that was held on December 20 and 21, 2016. This letter provides clarifying information in response to certain statements and corrects certain incorrect statements contained in the December 22 letter.

First, your letter sets forth your understanding that Ms. Katz and I have accepted service of deposition subpoenas on behalf of Senator Miller and Speaker Busch. Federal Rule of Civil Procedure 4(j)(2)(B) provides that service of process on state entities is to be made in accordance with governing state law. Under Maryland Rule 2-124(k), service of compulsory process on State officials is to be made on the Attorney General or his or her designee. The Attorney General has designated Assistant Attorneys General within the Civil Division of the Office of the Attorney General as authorized to accept compulsory process on State officials. Ms. Katz and I, in addition to being counsel to the defendant officials of the State Board of Elections in this case, are Assistant Attorneys General in the Office's Civil Division. Accordingly, we are authorized by statute and the designation of the Attorney General to accept service of these subpoenas. We forwarded the subpoenas to the Assistant Attorneys General who represent President Miller and Speaker Busch, Sandra Brantley and Kathryn Rowe. You have accurately stated that the GRAC members who have been subpoenaed for deposition in this matter intend to seek protective orders quashing those subpoenas on grounds of legislative privilege.

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Second, your letter misstates several aspects of our conversation concerning preservation of documents, as follows:

- a. Your letter sets forth your understanding that Ms. Katz and I “have not been able to locate a copy of any document preservation notice provided to relevant individuals or state agencies regarding the 2011 Congressional Plan.”

On the contrary, we informed you that we had located a preservation notice sent by then-Assistant Attorney General Daniel Friedman, counsel to the General Assembly, in response to litigation that was commenced against Governor O’Malley in October 2011 concerning the 2011 congressional redistricting.

- b. Your letter states that Ms. Katz and I “stated that, as part of the normal course of business, all state email accounts, including those used by members of the GRAC, are subject to an ‘auto-delete provision’ that automatically deletes all emails within 60 to 90 days of receipt unless the user takes some step to manually archive them, such as saving particular emails or a .pst file to the desktop. Thus, emails in the possession or custody of the Governor, the Governor’s office, state legislators, and state agencies related to the 2011 Congressional Plan were deleted.”

During the telephone conference, we explained the general status of e-mail in many executive branch agencies of Maryland State government. We have no specific knowledge whether e-mails in the possession or custody of the Governor, the Governor’s office, state legislators, and state agencies related to the 2011 Congressional Plan were deleted. We know that not all such e-mails were deleted; many have been produced to you. With respect to the State Board of Elections, not only were no responsive communications found, but the agency believes there to have never been any such communications. In any event, Defendants will supplement their discovery responses consistent with the federal rules to the extent any responsive communications are located.

- c. Your letter sets forth that Ms. Katz and I “stated that emails for different state agencies are stored on multiple email systems and servers. You were not aware of the number of servers and email systems that may contain electronically stored information responsive to Plaintiffs’ RFPs. However, each of the state email systems all have ‘litigation hold’ modes that will suspend the regular course deletion of emails for particular users. This litigation hold mode capability was not activated with respect to this case or with respect to emails concerning the 2011 Congressional Plan.”

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We are not aware of the number of servers and email systems that may contain electronically stored information sought by Plaintiff's RFP 1 and 2 only to the extent that such RFPs sought "All" such emails. As noted in our objection, we do not believe that it is properly within the scope of discovery outlined in Fed. R. Civ. P. 26(b)(1) to request communications statewide. Therefore, while we have given you this general information to help you understand what may or may not be available through non-party subpoenas or other avenues, our systematic survey of email availability is limited to the State Board of Elections. Any electronically stored information in the form of e-mail at State Board of Elections resides within the Google mail system and servers unless preserved by an individual custodian in another form.

Again, it is our general understanding that in state government, across email systems there are litigation hold functions and this is what we expressed in our teleconference. We further expressed that we had no knowledge whether or when any litigation hold policies had been activated specific to automatic e-mail retention with respect to this litigation or the 2011 Congressional Plan statewide. We have since learned that the State Board of Elections migrated from Microsoft Exchange to Gmail on January 19, 2013. Our best information, as of the date of this letter, is that there was no litigation hold in place with respect to 2011 congressional redistricting on the date of the migration, which was nearly nine months before this litigation was commenced.

- d. Your letter states that Ms. Katz and I "explained that members of the GRAC typically did not retain hard copies of the documents that were distributed at GRAC meetings. These documents were collected at the end of the meetings. You believe that some of these documents, such as meeting agendas, have been destroyed, while other documents, such as informational binders, are in the possession of the Department of Planning. To the extent that you have not already done so, by December 30, please produce all binders and paper documents that were distributed at GRAC meetings that are responsive to Plaintiffs' first set of requests for production."

At the outset, counsel for Defendants have no knowledge that any documents distributed at GRAC meetings and retained by the Department of Planning have been destroyed. As a courtesy to Plaintiffs during the joint stipulations process and formal discovery, we have coordinated with colleagues who represent the Department of Planning to produce copies of approximately 3,000 pages of hard copy documents retained by the Department of Planning and over 550 electronic files of documents retained by the Department of Planning relating to the 2011 congressional redistricting. Further, due to pre-planned family vacations and school closures between the date of your letter and December 30, your request that Defendants produce additional documents within the possession of the

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Department of Planning by December 30 is not feasible. Counsel for the Defendants will have to arrange with counsel for the Department of Planning to obtain, review, and copy any such documents. Accordingly, the Defendants will provide these documents, as a continuing courtesy to Plaintiffs, by close of business on January 13, 2017.

Third, regarding the Defendants' responses to Plaintiffs' First Set of Requests for Admission, your letter states that Ms. Katz and I "confirmed that Defendants' basis of knowledge in responding to the Requests for Admission was limited" to certain documents. We made no such confirmation. To the extent necessary and appropriate under the federal rules, we will provide further information about our reasonable inquiries when we supplement the responses, as we have agreed to do, on January 13, 2017.

Fourth, with regard to data collection, I have by letter dated December 22, 2016, explained to you the burdensome nature of searching Governor O'Malley's files in the State Archives. In that letter, I explained that the State Board of Elections does not have possession, custody, or control of the materials that Governor O'Malley gifted to the State Archives upon departure from office. I further explained, as the archivist had informed you in response to your public information act request, that the accessioning process of the State Archives has not been completed with respect to the former Governor O'Malley papers. This means that the files have not been sorted into public and non-public files to which access restrictions would attach. There are 592 cubic feet of materials, which, at an estimated 3,000 to 5,000 pages per cubic foot, ranges from 1,776,000 to 2,960,000 pages of material. Some of this material is organized by date and some is not. The boxes were not transmitted to Archives with individual-level custodian information. The procedure to access material not yet accessioned by the Archives is burdensome. I further explained to you that Archives treats requests for material from state agencies in the same manner as requests from the public, unless the records are the agency's own records needed for conduct of regular business. The Archives search and copy fees would apply to a state agency. The Assistant Attorneys General involved in such a search would be representing the Archives and the former Governor, not the requesting agency.

Fifth, your letter misstates that Ms. Katz and I informed you that Jeanne Hitchcock and James King deleted emails. With regard to Jeanne Hitchcock, the Office of the Attorney General assisted Ms. Hitchcock in responding to the subpoena served on her in connection with this matter. Ms. Hitchcock searched for hard copy and electronic documents and found none. Counsel for Defendants have no information that Ms. Hitchcock deleted emails and made no such assertion to you. Rather, we explained to you that Ms. Hitchcock sent and received emails over her State government email address when she served on the GRAC and that she no longer has access to those emails.

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With regard to James King, counsel for Defendants never made the assertion that he deleted emails. Mr. King is represented by the Office of the Attorney General in connection with this matter. Although he has not been served with a subpoena in this matter, as a courtesy to Plaintiffs, Mr. King had searched for hard copy and electronic documents pertaining to or related to his service on the GRAC. He was unable to locate any such documents.

As a continuing courtesy to Plaintiffs, Ms. Katz and I requested that Ms. Hitchcock, Mr. King, and Richard Stewart conduct additional searches using the Plaintiffs' First Set of RFPs as a guide. Ms. Katz and I reiterate our position that we are engaging in this practice as a courtesy to Plaintiffs and to obviate the need for additional non-party discovery. Further, to the extent that the former GRAC members maintained copies of records pertaining to their service on the GRAC that are not otherwise protected by privilege, we believe those records would be publicly available. We sought to locate any such documents and provide those that were not protected by privilege in our continued effort to help expedite non-party discovery as a courtesy to Plaintiffs. As of the date of this letter, Mr. King has located two potentially responsive emails. The Office of the Attorney General will review these emails for privilege and provide any that are not protected by privilege to Plaintiffs by January 6, 2017. Again, the Office will undertake these efforts as a courtesy to Plaintiffs.

Further, counsel for Defendants had provided Plaintiffs' first set of discovery requests to Ms. Brantley and Ms. Rowe, counsel to President Miller and Speaker Busch. We understand that you have been in contact with Ms. Brantley and Ms. Rowe concerning the document subpoenas served on President Miller and Speaker Busch and have agreed to a response date of December 30, 2016. Again, as a courtesy to Plaintiffs, the Defendants requested any documents responsive to the discovery requests and in the possession of Speaker Busch and President Miller, and the Defendants were denied access to any such documents.

Given your insistence that any such courtesy extended to the Plaintiffs is an admission that the Defendant officials of the State Board of Elections maintain control over documents in the possession, custody, or control of independent State agencies, members of the General Assembly, former GRAC members, or other former State officials or employees, and your stated intention to use this courtesy as a rationale for seeking relief from the Court, counsel for Defendants believe that we can no longer extend such courtesy on behalf of the Defendants without prejudicing them. As Ms. Katz and I explained in our telephone conference with you on October 6, 2016, this courtesy arose out of our willingness to engage in informal discovery mechanisms to limit or eliminate the need for third-party subpoenas and to expedite any third-party subpoena requests to other potential fact-witness State agencies and officials through coordination with colleagues within the Office of the

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Attorney General. During that call, we explained that the Maryland Office of the Attorney General, unlike the offices in some other states, provides representation to all State entities and State officials and employees. The scope of this representation is set forth by statute in Md. Code Ann., State Gov't § 6-106.

Toward those stated ends, Ms. Katz and I spent many hours working with our colleagues in the Attorney General's Office to locate, review, and produce documents during the joint stipulations process and have continued that courtesy during formal discovery, in a concerted and we had hoped cooperative attempt to expedite discovery in this case, based largely on Plaintiffs' counsels' insistence that this litigation move as swiftly as possible. Ms. Katz and I have provided you with substantial detail of the extent of these efforts to allow you to pursue additional material relevant to your claims through formal party and non-party discovery. Further, Ms. Katz and I have offered to engage in informal discovery with you even after we learned that you had made ex parte contact with persons represented by counsel in connection with this matter. Ms. Katz and I find it quite unfortunate and unreasonable that you have stated your intention to use that courtesy as a sword against the Defendant officials of the State Board of Elections by seeking some unstated relief from the Court.

Finally, given your admission during the December 21 telephone conference that during the joint stipulations process, completed in mid-November, you formed the belief that President Miller, Speaker Busch, and the other GRAC members were represented by the Office of the Attorney General in connection with this matter, we now believe that you misrepresented yourself in your letters of December 6 and 9, in which you disclaimed any knowledge of this representation. We now view as essential to avoid unfair prejudice to the Defendants disclosure of all contacts you had with these persons, other members of the General Assembly all of whom are represented by the Office in connection with this matter, and any other current or former State officials who are represented by the Office in their official capacity in connection with this matter, and any notes or other tangible item created as a result.

Best,

*/s/ Sarah W. Rice*

Sarah W. Rice  
Assistant Attorney General