

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

MICHAEL L. SHAKMAN, <i>et al.</i>)	
)	
Plaintiffs,)	
)	Case No. 69 C 2145
v.)	
)	Hon. Edmond E. Chang
DEMOCRATIC ORGANIZATION OF COOK)	District Judge
COUNTY, <i>et al.</i> ,)	
)	Hon. Gabriel A. Fuentes
Defendants.)	Magistrate Judge
)	

**PLAINTIFFS' RESPONSE TO OEIG'S OPPOSITION
TO THE SPECIAL MASTER'S SUBPOENA**

Plaintiffs, Michael L. Shakman and Paul M. Lurie (on behalf of themselves and the classes they represent), hereby submit this response to the Office of Executive Inspector General's (OEIG) Opposition to the Special Master's Subpoena (Dkt. 7193). The Special Master seeks the production of documents contained in the files of Hiring & Employment Monitoring Division ("HEM") for 10 Advisories that addressed employment actions the Special Master has repeatedly found to raise concerns that agencies under the jurisdiction of the Governor have not eliminated patronage practices or put in place a durable remedy. The Special Master's subpoena seeks information that she reasonably believes is necessary for her to monitor the State's¹ efforts to comply with the Decrees and to report her findings and recommendations to the Court.

A key aspect of the Governor's motion to vacate the 1972 Decree is the argument that OEIG and HEM are part of the State's durable remedy. (Dkt. 6946 at 1, 22 ("The State also has instituted a robust and permanent oversight structure in OEIG and HEM, which ensures that

¹ The terms "Governor," the "Governor's Office," and the "State" are used interchangeable and to mean the Office of the Governor of Illinois and the entities and agencies under the Governor's jurisdiction.

allegations of political discrimination and patronage in hiring and employment will receive thorough review and investigation by an experienced and independent team of oversight professionals.”) The Special Master’s Reports make clear that OEIG and HEM are not yet providing sufficient oversight and enforcement to confirm substantial compliance or a durable remedy. OEIG’s opposition to producing documents sought by the Special Master impedes the Special Master’s ability to monitor and report on those matters. Thus, OEIG impedes the ability of the Court to received data and analysis from the Special that would assist the Court to determine whether, and to what extent, the State has made progress toward substantial compliance with the 1972 Decree warranting termination of judicial oversight. (Dkt. 7104 at 2, 17-21, 39-40.)

OEIG asks this Court to either stay or quash the Special Master’s subpoena. OEIG argues that the State Officials and Employees Ethics Act, 5 ILCS 430/1-1 *et seq.* (“Ethics Act”), prohibits the production of all internal OEIG documents and information because everything OEIG does is investigatory. (Dkt. 7193 at 4-5.) OEIG’s argument is not supported by the plain language of the Ethics Act, is contrary to statements OEIG has made in the past about the role of HEM, violates agreements reached in this case, is contrary to the terms of the Comprehensive Employment Plan, and is contrary to actions taken by OEIG in this case. HEM was specifically designed so that HEM’s work would not to be considered part of OEIG’s investigatory files and reports.

The OEIG also asserts that the information sought is outside of the Special Master’s purview because it pertains to agencies other than the Illinois Department of Transportation (IDOT). Yet this Court’s prior orders provide the Special Master with a scope of authority that goes beyond IDOT and covers all agencies under the jurisdiction of the Governor. Thus, even if these documents were protected by the Ethics Act (they are not), the information sought directly pertains to the Special Master’s ongoing duties under her Rule 53 appointment order and therefore

outweighs any purported state confidentiality interests. The Court should enter an order requiring OEIG to turn over the requested documents to the Special Master.

Before proceeding to the merits, it bears emphasis that OEIG's position is a serious, and, frankly, frustrating obstacle to the parties' mutual goal of ultimate termination of the Decrees. Effective monitoring requires transparency to the monitor. A blinded monitor is an ineffective monitor. The Governor touts the HEM process as evidence that a durable remedy is in place and that the State can police political discrimination without judicial scrutiny. Yet the OEIG seeks to block scrutiny regarding this process, which is a critical path to sunset. Without access to that process the Special Master cannot evaluate its effectiveness, Plaintiffs cannot in good faith support the Governor's position that a durable remedy is in place, and the Court will itself lack critical information it needs to determine when grounds exist to terminate the Decrees.

ARGUMENT

I. The materials sought in the subpoena are not protected by the Illinois Ethics Act.

A. The Ethics Act only protects "investigative files," not compliance materials.

OEIG makes a sweeping assertion that because HEM is part of OEIG and OEIG is an investigatory agency, all materials relating to HEM's work must necessarily be deemed "investigatory" and fall within the Illinois Ethics Act because they also could be within OEIG's files and form the basis of OEIG's findings, recommendations, or determinations. (Dkt. 7193 at 5-6.) OEIG is not an investigatory monolith. It has multiple functions, including, critically, compliance. Its attempt to characterize itself as solely an "investigative agency" is not supported by the plain language of the Ethics Act, which sets forth its compliance functions.

The duties of OEIG are set forth in § 20-20 of the Ethics Act. OEIG is certainly charged with investigating alleged violations of the Act. 5 ILCS 430/20-2(1)-(2). But the OEIG is also

charged with “review[ing] hiring and employment files of each State agency within the Executive Inspector General’s jurisdiction to ensure compliance with *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990), and with all applicable employment laws.” 5 ILCS 430/20-20(9). The Ethics Act makes a distinction between investigating violations of the Act and reviewing hiring and other employment actions to ensure compliance with *Rutan*.

OEIG takes the position that confidentiality should “apply to all work performed by the OEIG.” (Dkt. No. 7193 at 5.) But the Ethics Act provides that only “*investigatory files and reports* of the Office of an Executive Inspector General...are confidential, are exempt from disclosure under the Freedom of Information Act, and shall not be divulged to any person or agency....” *Id.* § 20-95(d) (emphasis added.) The confidentiality provision of the Act is limited on its face to “investigatory files” as opposed to “reviews” of hiring and employment actions and “compliance” related items. The Special Master is not seeking any investigative files. (*See* Dkt. No. 7167 at 5 (“The subpoena does not request OEIG’s investigatory files; rather, it seeks documents relating to HEM’s *compliance* functions.”).)

OEIG’s expansive reading of the FOIA exemption in the Ethics Act collapses under basic principles of statutory construction that when the legislature uses different words for different actions, it must mean different things. *See e.g. United States v. Melvin*, 948 F.3d 848, 853 (7th Cir. 2020) (“We presume that the use of different words in the same statute is evidence that Congress intended different meanings.”); *Illinois Bell Telephone Co. v. Illinois Commerce Com’n*, 362 Ill. App. 3d 652, 661 (Ill. Ct. App. 2005) (“If the legislature uses certain words in one instance and different words in another, it intends different results.”). OEIG’s expansive interpretation would also violate the well-settled principle that under FOIA public records are presumed to be open and accessible and that exemptions are to be construed narrowly. *Rushton v. Dept. of Corrections*, 2019

IL 124552, ¶ 15; *Southern Illinoisan v. Ill. Dept. of Public Health*, 218 Ill. 2d 390, 416 (2006). “[I]nvestigatory files and reports of the Office of an Executive Inspector General” means just that, and not more. If the Illinois General Assembly intended for OEIG’s compliance files to be protected from disclosure it would have said so.

B. HEM’s compliance function was specifically designed to operate outside of the Act’s confidentiality protection of investigations.

OEIG’s current position marks a retreat from its previous agreement to the contrary. In 2015, when the parties to this case considered how to use existing State functions to monitor compliance with the 1972 Decree, the Special Master and Plaintiffs expressed concern about including the compliance function in OEIG if that meant HEM’s work would be kept confidential. The parties, including OEIG, and the Special Master all agreed that the State’s compliance with respect to employment and hiring should not be secret or withheld from the public. Accordingly, OEIG and the State took steps to ensure that HEM’s work would not be part of OEIG investigations, and instead would be a separate compliance and audit unit working outside of the OEIG’s Investigative Division. (Dkt. 7167, ¶ 13.)

OEIG has itself acknowledged that HEM was specifically created to perform the compliance review function, not investigations. OEIG’s 2018 Annual Report described the origins of the HEM Division and its independence from the Investigative Division:

The Ethics Act directs the OEIG to “review hiring and employment files of each State agency within [its] jurisdiction to ensure compliance with *Rutan v. Republican Party of Illinois*... and with all applicable employment laws.” 5 ILCS 430/20-20(9). In keeping with this mandate, in FY2016, the OEIG created the Division of Hiring & Employment Monitoring (HEM), which conducts compliance-based reviews of State hiring and employment procedures and decisions to ensure that they are lawful, merit-based and/or justifiable. HEM conducts file reviews and on-site monitoring of agency hiring decisions, and also works closely with the monitor appointed in the federal Shakman litigation, who is reviewing hiring practices at the Illinois Department of Transportation and other agencies under the jurisdiction of the Illinois Governor. ***HEM operates***

independently from the OEIG Investigative Division.

OEIG 2018 Annual Report at 6 (emphasis added).²

Only a few months ago OEIG described the origin of HEM and the distinction between OEIG investigations and HEM's compliance reviews in its Memorandum on the Plaintiffs' Motion for Clarification Regarding, or in the Alternative, to Expand the Scope of the Special Master's Responsibilities:

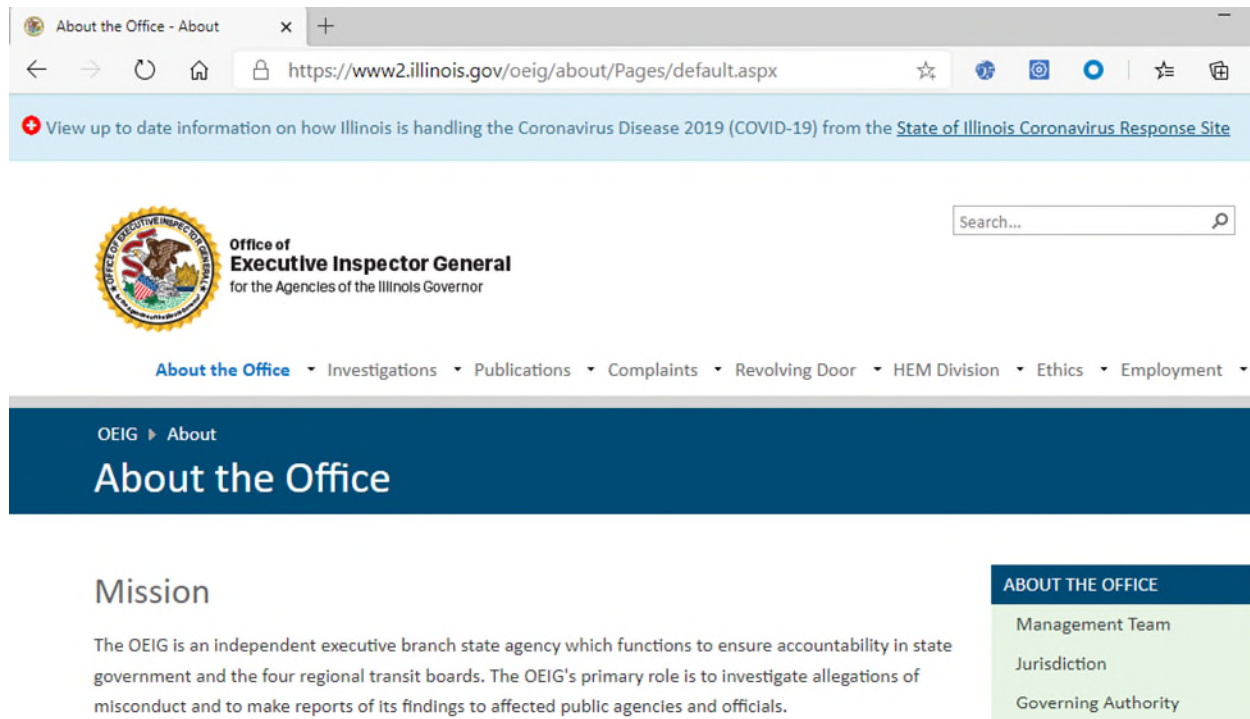
While investigations are necessary and paramount to its oversight role, the ***OEIG also conducts other significant compliance work*** to help improve State hiring processes. In 2015, the OEIG created a separate compliance division known as the Hiring & Employment Monitoring Division (HEM) ***to solely review State hiring and processes*** in order to ensure these are conducted according to competitive hiring rules and policies, and are free from political and other manipulation. HEM reviews and makes recommendations to agencies regarding hiring actions and then follows up through continued monitoring of agency hiring activities. HEM staff work directly with Agency Personnel Officers and staff, the Department of Central Management Services (CMS), and the Office of the Governor to ensure necessary changes are implemented based on its reviews.

(Dkt. 6936 at 2 (emphasis added).)

C. OEIG's public statements distinguish between the Investigative Division and the HEM Division

OEIG's assertion that HEM is part of the investigative function of the office is also inconsistent with its own public statements. OEIG's website separates "Investigations" from the "HEM Division":

² Available at: <https://www2.illinois.gov/oeig/publications/Documents/Fiscal%20Year%202018%20Annual%20Report.pdf>; see also OEIG 2016 Annual Report Message from the EIG (noting the creation of HEM, "which is a compliance-based unit specifically devoted to reviewing State hiring and employment decisions and processes.") available at <https://www2.illinois.gov/oeig/publications/Documents/2016%20Fiscal%20Year%20Annual%20Report.pdf>.



HEM’s homepage explains the history of HEM’s creation and notes that “HEM operates independently from the OEIG Investigative Division.” <https://www2.illinois.gov/oeig/HEM/Pages/default.aspx>. This is an admission that HEM is not part of OEIG’s Investigative Division and that its work is indeed compliance and review based.

In April 2020, HEM issued the first Quarterly Report required under the CEP. HEM once again drew a distinction between HEM’s role and the Investigative Division.³ HEM explained that when a complaint comes to the OEIG, the Investigative Division evaluates it to determine whether it should open an investigation *or* refer the complaint to HEM. *Id.* at 2. The Quarterly Report explains that because HEM’s compliance function is not bound by the procedures that govern investigations, “HEM’s compliance function makes it best suited to respond quickly to allegations

³ Hiring & Employment Monitoring Report at 2-3 available at <https://www2.illinois.gov/oeig/HEM/Documents/HEM%20Report%20-%20First%20Quarter%202020.pdf>.

of hiring violations, as HEM can potentially intervene before, during, or immediately after a hiring violation has occurred.” *Id.* at 6. An OEIG investigation has to be submitted to the Ethics Commission for review before OEIG can disclose the findings of the investigation. *Id.* at 21.

D. The CEP distinguishes HEM’s compliance and advisory role from OEIG’s investigative role.

When discussing the functions of HEM, the Comprehensive Employment Plan, which was the product of robust negotiation between the parties and the Special Master, specifically describes HEM’s role as “monitoring,” “compliance,” “review,” and “advisory” as opposed to “investigations” and “summary reports” – terms used when describing OEIG’s work. (Dkt. 6612-1 at 25-26.) The terms used evidence the conscious decision to separate HEM’s activities from investigations so as to allow for transparency in HEM’s compliance and monitoring role. Consistent with the intent of making HEM’s work transparent and available to the public, the CEP provides that HEM Advisories “shall be made available to the public upon request.” (*Id.* at 25.) The CEP also allows HEM to disclose on-going review to CMS in order to suspend or terminate a hiring sequence if HEM is concerned that sequence violates the CEP. (*Id.* at 21.) OEIG cannot reasonably claim that HEM’s work is investigatory when the it agreed to make HEM Advisories publically available and allow disclosure of HEM’s review while still ongoing to prevent CEP violations. That is clearly inconsistent with OEIG’s present claim that HEM’s work iss solely investigative and covered by the confidentiality provision of § 20-95(d). (*Id.* at 5, 8.)⁴

In sharp contrast, the CEP refers to “OEIG investigations” and indicates that public

⁴ OEIG’s argument that “[d]issemination of information, especially prior to the completion of an investigation, can hinder the OEIG’s ability to assess truthfulness, obtain additional evidence, and make appropriate determinations as to error versus wrongdoing” misses the point. (*See* Dkt. 7193 at 8.) No one is seeking the dissemination of information in OEIG’s investigative files. If the OEIG opens an investigation based on the findings in a HEM Advisory, the files of the Investigative Division remain confidential.

disclosure of OEIG summary reports is far more limited—only “a summary of any OEIG hiring investigation that was founded and published by the Executive Ethics Commission shall be included in OEIG HEM’s quarterly and annual reports.” (Dkt. 6612-1 at 26 (citing 5 ILCS 430/20-52).) The CEP establishes the parties’ understanding (which is supported by the Ethics Act) that HEM’s compliance reviews and advisories are not investigatory and therefore are not covered by the confidentiality provision of the Act.

Based on the plain language of the Ethics Act, the Court should reject OEIG’s attempt to shroud HEM’s compliance and monitoring work in secrecy and hold that HEM’s monitoring and compliance files are not “investigative files” covered by the Ethics Act.

II. The Special Master’s need for the HEM records outweighs any confidentiality interests.

Although the Ethics Act does not protect HEM’s files, even if it did the Court should enforce the subpoena because the Ethics Act does not apply in federal litigation involving claims arising under federal law to materials relevant to the Special Master’s monitoring responsibilities. *See McClendon v. Illinois Department of Transportation*, 64 F. Supp. 3d 1163, 1166-76 (N.D. Ill. 2014). The OEIG acknowledges, as it must, that the Act’s confidentiality provision does not apply in cases where, as here, the claims arise exclusively under federal law. (Dkt. 7183 at 7.) But even if the Court were to assume that there is some basis for treating HEM’s files as confidential, the Special Master’s need for the documents outweighs any confidentiality. *McClendon*, 64 F. Supp. 3d at 1167 (“The court should weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case.”) (internal quotation and citation omitted).

Here, as in *McClendon*, the Court must balance the Plaintiffs’ Constitutional rights and the

public's interest in the need for transparency in the State's hiring and employment practices, after a long history of non-compliance, against OEIG's argument that disclosing HEM's files would quell the reporting of misconduct or adversely impact the integrity of investigations. *Id.* at 1168; Dkt. 7193 at 8. The Special Master's interest in fulfilling her mandate under Fed. R. Civ. P. 53 outweighs OEIG's asserted interest in the confidentiality of its investigative files. *Id.* at 69 ("To recognize OEIG proceedings as privileged, regardless of the purpose for which disclosure is sought, would in effect grant complainants and witnesses absolute immunity from prosecution for all statements made and actions taken in the context of such proceedings."). To the extent OEIG has any legitimate concerns about maintain the confidentiality of any investigations based on HEM Advisories, OEIG can designate the materials as "CONFIDENTIAL – SM EYES ONLY" under the existing Protective Order.

A. The Special Master has authority and a continuing obligation to monitor the employment practices of Agencies under the jurisdiction of the Governor—not just IDOT.

As an initial matter, it is important to highlight that the State and OEIG have taken wholly inconsistent positions with respect to the Special Master. On the one hand, the Governor's memorandum in support of the motion to vacate the 1972 Consent Decree argues that "the Special Master exhaustively has monitored the State's employment policies and practices for the past six years." (Dkt.6946 at 2.) On the other hand, the OEIG contends that the Special Master does not have authority to monitor the State's employment practices outside of IDOT. (Dkt. 7193 at 11.) It cannot be both.

While the State's position that the Special Master has been "exhaustively" monitoring for the past six years lacks support for the reasons set forth in Plaintiffs' papers (Dkt. No. 7104 at 21-26), the Governor is correct that the Special Master's purview includes agencies outside of IDOT.

(Dkt. 3989, Oct. 24, 2014 Order Appointing Special Master pursuant to F.R.C.P. 53; Dkt. 4798, Nov. 28, 2016 Order expanding the Special Master's authority to include all *Rutan*-exempt positions under the jurisdiction of the Governor; Dkt. 5004, May 1, 2017 Agreed Order.) Thus, OEIG is wrong that the HEM files sought in the subpoena differ from the HEM files OEIG previously produced to the Special Master in response to a January 10, 2020 subpoena merely because these involve Agencies other than IDOT. The IDOT vs. non-IDOT distinction is of no moment because the Special Master's authority includes all *Rutan*-exempt positions under the jurisdiction of the Governor.

This Court previously made it clear that the Special Master is to continue her monitoring and reporting duties during the pendency of the States motion to vacate. Consequently, the existence of the motion does not weigh in favor of OEIG's position, it weighs against it. (Dkt. 7167 at 4.) This subpoena should be enforced for the same reasons the Court enforced the Special Master's January 10, 2020 subpoena—it is part of her ongoing duties pursuant to this Court's orders, and the requested documents relate to employment practices that have been the subject of prior reports and areas of concern. (*Id.*)

B. The materials sought are directly relevant to the Governor's pending motion to vacate.

There can be no doubt that the Special Master's subpoena advances a substantial need. OEIG's attempt to distinguish *McClendon*, which is directly on point, by saying that either the Special Master already has what she needs or that she can obtain the information from other sources is wrong.

OEIG's argument that the HEM Advisories are sufficient to provide the Special Master with the information she needs or that she can obtain the information directly from the State misunderstands the Special Master's role. She is charged with not only monitoring the underlying

employment actions, but also with monitoring HEM to determine whether HEM is following its obligations under the CEP and the Ethics Act to review employment actions. The Special Master cannot assess the effectiveness of HEM as part of the State's claimed durable remedy without reviewing the adequacy of HEM's actions. The Special Master needs to know what documents HEM requested, reviewed and relied on in reaching its conclusions; who HEM interviewed or chose not to interview; and whether HEM's findings and conclusion were supported by the facts.

CONCLUSION

There is no basis for staying enforcement of the subpoena. Although the State has filed motions to vacate, a motion to vacate is not an order vacating the 1972 Decree. The State has an on-going obligation to comply with the 1972 Decree for all employment actions effecting current State employees. The Special Master has been tasked with assessing whether the procedures proposed by the State to remedy past violations of the 1972 Decree have been implemented.

For these reasons, Plaintiffs respectfully request that this Court enforce the Special Master's subpoena and hold that the work and files of the Hiring & Employment Monitoring Division (HEM) are not "investigatory files and reports" protected from disclosure by 5 ILCS 430/20-95(d).

Dated: December 7, 2020

Respectfully submitted,

/s/Brian I. Hays

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Certificate of Service

I, Brian I. Hays, an attorney, state that on December 7, 2020, I caused a true and correct copy of the foregoing to be served via e-filing upon all parties of record.

/s/Brian I. Hays