



**Judicial Conduct Board**  
Commonwealth of Pennsylvania  
Robert A. Graci, Chief Counsel  
717-234-7911

## Press Release

October 16, 2015

**TO: Press**

**FROM: Robert A. Graci  
Chief Counsel**

**SUBJECT: Investigation Regarding Certain Emails Received From Attorney General  
Kathleen G. Kane**

In an internally contradictory statement, Attorney General Kathleen Kane has said that the Judicial Conduct Board had access to all of the emails reported by the Philadelphia *Daily News* in recent news articles. As the Board stated last week, the Board was not provided with all of the information on the Attorney General's servers relating to Justice Eakin's personal email account. The Board stands by its prior statement and Attorney General Kane's press release does not contradict it.

As reported by *WTAE.com* on Monday, October 12, 2015, Attorney General Kane's spokesman said "that the attorney general's office believes it hadn't transferred all of Justice [J.] Michael Eakin's emails from its servers into an 'electronic vault' before misconduct investigators ended their review." The Board's investigation was concluded on December 8, 2014, when the Board voted to dismiss the prior matter which resulted from a self-report by Justice Eakin in which he thoroughly cooperated. A copy of the Board's letter of December 17, 2014, to Justice Eakin advising him of the result of the Board's investigation is attached and is being released publically based on a waiver of confidentiality provided by Justice Eakin.

In the last paragraph of her statement, the Attorney General makes it clear that the Board had in its possession the disc from November 5, 2014. She does not say that the Board and its staff had access to Justice Eakin's private, personal email account in the vault.

The Board did, in fact, receive a disc containing emails and attachments from the Office of Attorney General and logged it in as received on November 5, 2014. That disc did not contain all of the emails that were provided to the Board by the Attorney General on September 28, 2015. That is what the Board said in its statement of October 9, 2015, and it stands by that statement.

Created by constitutional amendment in 1993, the Judicial Conduct Board of Pennsylvania is an independent state agency responsible for reviewing, investigating, and, where warranted, prosecuting complaints of judicial misconduct before the Pennsylvania Court of Judicial Discipline. The Board is comprised of twelve Pennsylvania citizens, half appointed by the Pennsylvania Supreme Court and the other half appointed by the Governor. The Board has three judicial members, three lawyer members, and six non-lawyer lay members. No more than half of the appointed board members may be from the same political party. Appointed board members serve four-year terms without pay and meet regularly to review requests for investigation filed against Pennsylvania judges at all levels.

For further information about the Judicial Conduct Board, visit the Board's Website at [www.jcbpa.org](http://www.jcbpa.org).

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**COMMONWEALTH OF PENNSYLVANIA  
JUDICIAL CONDUCT BOARD**

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HONORABLE ROBERT A. GRACI  
CHIEF COUNSEL

December 17, 2014

717-234-7911

The Honorable J. Michael Eakin  
Justice of the Supreme Court of Pennsylvania  
4720 Old Gettysburg Road, Suite 405  
Mechanicsburg, PA 17055

Re: Judicial Conduct Board File Nos. 2014-647, 2014-650

Dear Justice Eakin:

At its most recent meeting, the Board completed its review of the complaints pending against you at the above complaint numbers, and it voted to dismiss the complaints for lack of probable cause to file formal charges in the Court of Judicial Discipline. Pursuant to Article V, § 18(a)(8), the Board issues this statement to you regarding the actions taken in the conduct of its investigation and the results and conclusions of its investigation.

As you are aware, at the above complaint numbers, the Board investigated your conduct regarding your email exchanges with certain persons employed by the Office of Attorney General (OAG) and others. Allegedly, some of these emails contained pornographic, racist, or inappropriate racially-tinged materials. Complaint 2014-647 was opened on the basis of your self-report to me. Complaint 2014-650 was opened on the basis of a complaint from a private citizen.

**INVESTIGATION SUMMARY:**

The Board first learned in early October 2014 through media reports that former Justice Seamus McCaffery may have participated in sending and receiving pornographic emails with OAG staff. Thereafter, the matter's notoriety intensified following the issuance of a press release on October 15, 2014, by the Administrative Office of Pennsylvania Courts (AOPC) regarding former Justice McCaffery's email sharing with OAG staff. This press release

came on the heels of Chief Justice Castille's personal review of a number of pornographic emails sent by or to former Justice McCaffery, which the OAG had discovered as part of its internal review of the investigation that resulted in the successful prosecution of Jerry Sandusky.

In the wake of the AOPC press release regarding former Justice McCaffery, you revealed to the media that on October 16, 2014, former Justice McCaffery attempted to convince you to get the Chief Justice to retract the earlier AOPC press release. You reported that former Justice McCaffery said that he had in his possession "inappropriate" emails that were sent and received by you from your pseudonymous "John Smith" email account. Former Justice McCaffery told you that he "need[ed] an answer" to his request by noon on October 16, 2014, to prevent the release of your "John Smith" emails to the media. You did not comply with former Justice McCaffery's "request," and, thereafter, a packet of your "John Smith" emails were delivered to the desk of a Philadelphia reporter. Later on that day, the reporter approached you at the opening of the Philadelphia Family Court building and the reporter informed you that he had a packet of emails that were retrieved from your personal account that were "racy."

You, in turn, informed the Board of these events and issued your own October 17, 2014 press release regarding former Justice McCaffery's attempt to pressure you with the "John Smith" emails. Former Justice McCaffery issued his own press release in response, which, in turn, resulted in a second responsive press release from you. Thereafter, the Supreme Court suspended former Justice McCaffery, who ultimately retired from judicial service.

The Board interviewed you on three separate occasions, the first of which occurred on October 17, 2014, the day of your self-report to the Board. The Board also issued a notice of full investigation (NOFI) to you, and you provided a timely response to the issues and questions posed in the NOFI. At approximately the same time that the NOFI was issued to you, the Board issued a subpoena to the OAG for any emails exchanged between you and OAG staff by any email address, including your "John Smith" emails. The OAG complied with the subpoena and provided all emails which included your "John Smith" account address and any official OAG staff member account address.

The Board also issued a subpoena to the OAG for emails exchanged or shared between OAG staff and any judicial officer of the Commonwealth. Pursuant to that subpoena, the OAG provided emails which included your

██████████@pacourts.us email address and any official OAG staff member account address.

### **RESULTS OF THE INVESTIGATION:**

At the outset, it must be noted that, due to the timing of your emailing activity (from approximately 2009 until 2012), the Board examined your conduct under the previous Code of Judicial Conduct, not the current version of the Code. It is further noted that many who have commented publicly on this and other activity recently have referred to proscriptions found in the current Code.

The Board's review of the subpoenaed emails reveals that you received approximately 50 emails in your "John Smith" account over the course of three years (2009-2012) that contained images that can best be described as mildly pornographic or sexually suggestive in the vein of material that appears commonly in *Playboy* magazine. The majority of these emails were sent by a private attorney to a number of individuals, and you and certain members of the OAG staff were included in the list of recipients of those mass emailings. The other pornographic emails you received at the "John Smith" address were sent to you by your personal friends, who also sent them to a member of the OAG's staff who was a mutual friend. None of these emails contain any discussions about court business or pending cases or suggest that the individuals on the list of recipients appeared before you in a court proceeding. Further, you did not receive any material that was illegal, such as obscenity, or any material that contained "racist" images, as had been suggested by Justice McCaffery in the press release that he issued. The Board's investigation determined that you did not *send* any pornographic material to any person from your "John Smith" account.

You were cooperative and helpful to the Board's Investigator during the interviews conducted, and you responded to all of the questions the Board asked in the NOFI. Your response to the questions propounded to you throughout the Board's investigation was consistent in that, although you could not recall receiving the emails described as "racy" at your personal "John Smith" email address, you admitted that you regularly accessed the "John Smith" email address with state-provided computer equipment. The Board appreciated your cooperation with its investigation.

A review of the emails sent by and received by you at your ██████████@pacourts.us address indicates that they constituted proper interactions between you and OAG staff and others in the legal community.

The subject of the vast majority of these emails involved legal education matters in which you, OAG staff, and other lawyers, including criminal defense attorneys, were participants, such as the Pennsylvania Bar Institute's Annual Criminal Law Symposium. These emails did not contain any discussions of pending cases or any other inappropriate communications. You did not send to or receive any pornographic or "racist" material from any person with your "pacourts.us" email address, and none of the communications could be considered an improper *ex parte* communication.

### **CONCLUSIONS:**

Upon review and consideration of the above evidence, the Board concluded that your receipt of a handful of mildly pornographic emails from a private attorney and from members of your personal circle of friends to your personal email address did not constitute a violation of the Constitution or the Code of Judicial Conduct extant at the time the conduct occurred. Therefore, it voted to dismiss the complaints pending against you.

The Board reached this conclusion primarily because there was no evidence to suggest that you *sent* pornographic material to any state employee or that you engaged in any improper *ex parte* communications with employees of agencies that appear before you, such as the OAG. Likewise, the volume of the pornographic emails received by you (approximately 50) from approximately 2009 to 2012 is not so great as to suggest any relationship that would affect your judgment or judicial behavior. Further, the Board recognizes that judges do not forfeit all the privacy that they had enjoyed as private citizens by ascending to the bench. It is clear that the emails that you received at your "John Smith" account were intended to be privately shared among friends. These emails were revealed publically not because you and OAG staff had been engaged in consistently trading pornography as had been intimated in the media but, rather, because both you and certain members of the OAG staff had the dubious distinction of being the recipients of inappropriate emails from a few prolific emailers.

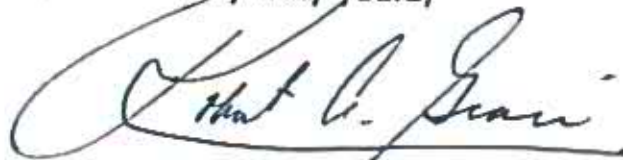
Indeed, the most that could be said of your behavior in this affair was that you did not warn your email contacts away from sending you pornographic or inappropriate material to you *via* email. However, in the Board's view, this lapse in judgment does not rise to the level of sanctionable misconduct, especially when one considers your involvement as only a passive recipient of the emails in question, who received the emails

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over a course of years. In any event, the lack of clarity in the previous Code of Judicial Conduct on the subject of a judge's positive duty to discontinue or discourage another's activity that might cause the judge to violate the Code speaks against any probable cause finding against you for your limited involvement in the inappropriate emails that you received.

With this explanation, the Board advises you that the complaints pending against you at the above-complaint numbers are **DISMISSED** and that the files are now closed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert A. Graci". The signature is written in a cursive style with a large, looping initial "R".

Robert A. Graci  
Chief Counsel

RAG/JPK