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December 7, 2009

Mr. Stephen Nash
Director, Finance Division
Judicial Council of California
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 9412-4272

Re: Your Response of November 23, 2009

Dear Mr. Nash:

Our Board of Directors wishes to thank you for your response of November 23, 2009 to our request for information. The information of fund balances, sources, and projections which you provided is very helpful for us to understand the current and expected financial status of the branch. Your response is appreciated and is a demonstration of Justice Huffman's stated efforts to ensure greater transparency.

Your response has raised some further questions on our part regarding these funds, particularly in light of allocations made by the Judicial Council on October 23, 2009.

In your report (co-authored by Mr. Overholt) of October 20, 2009 which was presented to the Judicial Council and which served as the basis of the Council's allocations, you state that the "Judicial Council has statutory authority to approve the allocation of funding from statewide special funds for projects and programs that support the trial courts." This is a very broad statement. The Judicial Council's authority is proscribed by certain statutory criteria, particularly with respect to the Trial Court Trust Fund.

As we understand it, the Trial Court Trust Fund is established pursuant to Government Code section 68085. That section requires the apportionment of its proceeds for the purposes stated in that section, including apportionment to the trial courts to fund "trial court operations" as defined by section 77003.

Section 68085 (in subsections (a)(2)(A) and (B)) further provides for direct payment or reimbursement to the Administrative Office of the Courts to fund the costs of operating one or more trial

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courts (including “any expenses related to the operation of the court or performance of its functions, including, but not limited to, statewide administrative and information technology infrastructure supporting the courts”). Under these subsections, disbursement from the TCTF is not limited to the purposes set forth in section 77003. However, payments and reimbursements from the TCTF not limited to “court operations” under section 77003, may only be made under the overriding principle “upon the consent of the participating courts.” (See § 68085(a)(2)(A).)

In the allocation made by the Judicial Council on October 23, 2009, \$72,457,919 was allocated from the TCTF to fund CCMS, Phoenix, ICMS, and the Courts Technology Center Operations. Was this allocation from TCTF made under authority of section 68085(a)(2)(B)? If so, did the AOC ensure that it had the consent of the participating courts as required by section 68085(a)(2)(A)? If so, how was the consent of the participating courts obtained, and from which courts? If the allocation was made under other authority, or if the allocation did not require the consent of the participating courts, would you please provide us with an explanation?

As to the funds allocated from the Trial Court Improvement Fund, that fund is established pursuant to Government Code section 77209. That section requires that the 2% “automation fund” revenues under section 68090.8 paid into the TCIF be devoted to statewide initiatives for the development of automated administrative systems. In the October 23, 2009 allocation by the Judicial Council, \$68,370,291 was allocated for Statewide Administrative and Technology Infrastructure, including CCMS, Phoenix, ICMS, and the Technology Center. We assume that the funded Statewide Administrative and Technology Infrastructure projects and programs are authorized in part by section 68090.8 as the development of automated administrative systems. That section requires that during the development phase of any such system, prior to implementation, and as an apparent condition of implementation, that the Legislature shall make recommendations to the Judicial Council as to the breadth and level of detail of the data to be collected. Has the Judicial Council received these recommendations from the Legislature before proceeding with implementation? If so, may we please have a copy of the Legislature’s recommendations?

Further, as to the TCIF, the 2% automation fund must be allocated to the section 68090.8 program. However, it would appear that revenues from the 2% automation fund for 2009- 2010 were only \$17,959,913, far less than the \$68,370,291 that was allocated for Statewide Administrative and Technology Infrastructure, including CCMS. It appears that the Judicial Council is not limited to the 2% automation fund under section 77209, and may apply additional funds for those Statewide Administrative and Technology Infrastructure projects and programs, if they are projects and programs “approved by the Judicial Council.” Have the Statewide Administrative and Technology Infrastructure projects and programs receiving allocations in the October 23, 2009 allocation, particularly CCMS, been “approved by the Judicial Council?” If so, would you please provide us with a copy of the minutes of the meeting of the Judicial Council where the CCMS project was formally approved by vote of the Judicial Council?

We have the same question as to the allocation of October 23, 2009 from the Judicial Administration Efficiency and Modernization Fund. This fund is established by Government Code section 77213. This section provides broad authority to the Judicial Council to allocate from the fund for projects “approved by the Judicial Council.” The October 23, 2009 allocation from the Modernization Fund for Statewide Administrative and Technology Infrastructure projects and programs, including

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CCMS, was \$30,294,883. Again, we have the same two questions set forth in the prior paragraph.

Finally, we have some questions regarding the State Court Facilities Construction Fund and Critical Needs Account. These funds are earmarked by the Legislature for badly needed court construction. There is on-going debate by some as to whether any portion of these funds should be used in upcoming budget years for operations. Our group has cautioned against anyone taking a categorical position until the Legislature is back in session and the full scope of projected budget shortfalls and their impact can be appreciated. If certain questions were answered as to these funds, it may aid a constructive debate.

As badly needed as the court construction may be, the projects so far designed and proposed by the AOC have square foot costs exceeding \$1,000 per square foot. Although court construction is undoubtedly expensive, these costs appear extraordinary.

In reviewing the final feasibility studies for some of the most imminent and critical projects, it does not appear that the AOC has fully explored the cost benefit of private development. These studies point out many benefits of such an arrangement. Among the benefits stated are:

Private development allows many risks to be transferred to the private sector over the life of the contract.

Components are bundled (design, construction, financing, operation and maintenance) resulting in integrated, efficient service delivery.

Private development brings discipline to the costs and maintenance timeline of the project over its lifetime.

Shifting long-term operations and maintenance responsibilities to the private partner creates incentive to ensure construction quality as the private partner will be responsible for those costs for many years.

There could be no immediate capital costs to the state; the entire project development cost could be financed by the developer.

The project may be completed in a shorter amount of time. The private entity has strong incentive to complete the project quickly because they need the stream of revenue to repay the capital costs. This may result in savings of 8 percent per year for every year the schedule is reduced.

A new court facility could be combined with other appropriate and compatible non-court uses that would provide some subsidy to reduce the state's ownership costs.

Competitive solicitation could give the state the best financing terms and potential for subsidies from redevelopment of current court properties and development of new facilities.

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The state would obtain full equity with options to acquire non-court space for future growth needs, eliminating the current problem of under-building for the future.

This option provides a means to provide a new facility, within the limited resources currently available, by partnering with an experienced real estate and financing entity for the construction of the new courthouse.

As to the drawbacks of private development, the studies state only that this option will require the state to enter into a long-term agreement with an entity for an amount sufficient to fund the development, construction, and annual operations and maintenance costs of the new facility, and that the financing costs may be higher.

In light of budget uncertainties, does the AOC plan to revisit the financing option for competitive private development of court construction that may significantly lower costs? Has the AOC put these projects out for preliminary costing by qualified contractors? Why did the AOC recommend state funding as the finance option without further exploration of the actual costs of private development?

Since the AOC has no construction experience, have the projected costs of the projects been reviewed or vetted by any other agencies of the state that have construction experience, such as the Department of General Services?

Do the project costs include any internal charges for services or administration by the AOC or its staff? If so, how is the rate for any such internal charges determined, and does it exceed the actual cost to the AOC?

For any third party expenditures, what persons or entities by name are receiving funds in the next budget year? How were these contracting parties determined? Was it by competitive bid?

Has any detailed cash flow projection been developed for these funds and projects, and, if so, may we have a copy?

In summary, we are asking the following questions:

- **Was the October 23, 2009 allocation from TCTF made under authority of section 68085(a)(2)(B)?**
- **If so, did the AOC ensure that it had the consent of the participating courts as required by section 68085(a)(2)(A)?**
- **If so, how was the consent of the participating courts obtained, and from which courts?**
- **If the allocation was made under other authority, or if the allocation did not require the consent of the participating courts, would you please provide us with an explanation?**

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- **Has the Judicial Council received the recommendations from the Legislature before proceeding with implementation as required by section 68090.8?**
- **If so, may we please have a copy of the Legislature's recommendations?**
- **Have the Statewide Administrative and Technology Infrastructure projects and programs receiving allocations in the October 23, 2009 allocation, particularly CCMS, been "approved by the Judicial Council?"**
- **If so, would you please provide us with a copy of the minutes of the meeting of the Judicial Council where the CCMS project was formally approved by vote of the Judicial Council?**
- **In light of budget uncertainties, does the AOC plan to revisit the financing option for competitive private development of court construction that may significantly lower costs?**
- **Has the AOC put these projects out for preliminary costing by qualified contractors?**
- **Why did the AOC recommend state funding as the finance option without further exploration of the actual costs of private development?**
- **Since the AOC has no construction experience, have the projected costs of the projects been reviewed or vetted by any other agencies of the state that have construction experience, such as the Department of General Services?**
- **Do the project costs include any internal charges for services or administration by the AOC or its staff?**
- **If so, how is the rate for any such internal charges determined, and does it exceed the actual cost to the AOC?**
- **For any third party expenditures, what persons or entities by name are receiving funds in the next budget year?**
- **How were these contracting parties determined?**

Thank you for your attention to our questions. We note that your November 23, 2009 letter was copied to Mary Roberts. Because our questions implicate statutory authority, we are also directing a copy of this letter to her office. We also realize that some of the questions we have asked may have to be referred to other offices of the AOC. We trust how busy you are at this time, but the questions we are asking may undoubtedly be raised in the upcoming budget discussions by others, so your answers may assist the debate that we all expect shortly. It would be helpful to us if we could have your response well

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before the Judicial Council meets on January 21, 2010, because the response may assist us in making our position known to the Judicial Council before the meeting.

Very truly yours,

Mailed Original Signed

David R. Lampe

Mark R. Forcum
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cc: Mary Roberts