

PROSECUTOR SEEKS M'KAY UNIT FILES

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Subpoenas Restricted Data
on Interviews at Attica—
Panel Scores 'Betrayal'
NYTimes

By MICHAEL T. KAUFMAN

The special state prosecutor preparing criminal cases in connection with last year's prison rebellion at Attica has subpoenaed the records of 3,000 confidential interviews conducted by the state's fact-finding commission on the uprising.

The subpoena was served last Tuesday on Arthur Liman, the general counsel to the State Commission on Attica. Yesterday, Mr. Liman, angrily called the act "an incredible betrayal" and said it violated an agreement between the two state investigating units not to compromise each other. He said he would move in court to quash the subpoena.

Robert E. Fischer, the deputy attorney general, who ordered the subpoena, defended it yesterday, saying there was nothing in state law that made the McKay Commission files "privileged."

In addition to the subpoena, Mr. Fischer's staff yesterday filed an affidavit in State Supreme Court in support of his application for an injunction barring Mr. Liman from de-

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stroying the records of his interviews. The affidavit quoted Mr. Liman as having told two of Mr. Fischer's investigators that he would destroy the records before he would turn them over to anyone outside the McKay Commission.

Hearing on Sept. 20

The affidavit also cited newspaper reports quoting Mr. Liman as saying that he would be ready to go to jail rather than turn over records of interviews that were taken under a promise they would be kept confidential.

THE NEW YORK TIMES, SA



Associated Press
Arthur Liman, counsel to
Commission on Attica.



United Press International
Robert E. Fischer, special
state prosecutor.

Argument on the motion for an injunction is scheduled for Sept. 20 before a State Supreme Court justice in the upstate village of Warsaw. Mr. Liman said he would at that time also move to quash the subpoena that orders him to appear with the records before the Wyoming County grand jury on Sept. 27.

Originally, the subpoena, which also listed Robert McKay, the chairman of the commission and the dean of New York University's law school, sought the appearance of Mr. Liman and the records next Thursday, a day after the McKay Commission's 511-page report is to be made public. Mr. Fischer agreed to a week's delay.

From his office at the law firm of Paul, Weiss, Rifkind, Wharton and Garrison, where he is a partner, Mr. Liman said he was "outraged" and "saddened" by Mr. Fischer's action.

'Betrayal' Is Charged

"As our report shows," he said, "betrayal was a very significant factor of what happened at Attica. The idea that the epitaph for what happened at Attica should be shrouded in betrayal by a state agency makes me very sad for the state."

Mr. Liman said that from the outset, when the two separate panels were appointed by Governor Rockefeller last fall, it was apparent that conflict could arise from their parallel investigations into the disorders in which 11 guards and 32 inmates had died. A series of meetings was held and at one of these last November, he said, ground rules were established that prevented either agency from subpoenaing files of the other.

Mr. Liman said that in addition to himself, Mr. McKay, Mr. Fischer and Attorney General Louis J. Lefkowitz were present at that meeting. He would not say if any memorandum of agreement existed.

McKay Is 'Outraged'

Mr. Fischer and Mr. Lefkowitz declined comment yesterday about this meeting, saying the matter was before the courts. Mr. McKay said that there were many meetings, of this kind, which blurred together, but that he was certain that it was the understanding of everyone involved that the investigations of both state

units would remain separate and distinct.

"I'm outraged, I can't believe the state will stand behind Fischer," Mr. McKay said.

Mr. Liman said that the basis for the understanding, which he insisted had been agreed to by Mr. Fischer, was that the work of fact-finding would have been impossible unless guarantees of protection could be given to the 3,000 inmates, correction officers, state policemen and National Guardsmen interviewed.

"During the course of the investigation, we represented to 3,000 people that they should waive their constitutional rights on self-incrimination and talk to us because we were assured by Fischer that their confidentiality will be respected," Mr. Liman said. "Then to subpoena the files — there couldn't be a bigger betrayal."

Miranda Rule Cited

Refusing to comment on the matter of the agreements, Mr. Fischer said he would talk only about aspects involved in the affidavit filed yesterday, as this was now a publicly available document.

The deputy attorney general, who was appointed to supersede the Wyoming County District Attorney in bringing the Attica prosecutions, said his office could not make use of any potential by self-incriminatory statement in the McKay Commission files because the courts would nullify such material under the Miranda rule. This rule states that a confession cannot be used unless the suspect is first told that what he says can be used against him.

But he added that the affidavit pointed out that the major reason for subpoenaing the files was to determine whether they contained any exculpatory material that could show that persons under suspicion were not guilty.

Liman Takes Issue

The affidavit contends that under state and Federal law such material must be furnished to a defendant. "Certainly," the document states, "the District Attorney and the grand jury are entitled to satisfy themselves pre-indictment that no exculpatory material unknown to them is in the hands of the McKay Commission, a state agency."

Mr. Liman, however, took issue with this, saying that the normal channel for exculpatory evidence was through defense counsel at the time of trial. "What assurance is there that Fischer would not use information in the files to prosecute?" he said. "He's asked for a wholesale production of our files."

Mr. Liman added: "Mr. Fischer knows the names of all the inmates, the correction officers, the National Guardmen who were at Attica. He has a larger staff than we do, working with the state police, and he's had a year to conduct his investigation. He has had as much access to witnesses as we have."