

APPEAL UNDER THE NEW YORK FREEDOM OF INFORMATION LAW

June 13, 2016

Kathryn Sheingold
Records Appeals Officer
Office of the Attorney General
Division of Appeals and Opinions
The Capitol
Albany, New York 12224

By Electronic mail: opinions@ag.ny.gov

RE: Appeal of June 10, 2016 denial of access to records

Ms. Sheingold:

On behalf of the Free Market Environmental Law Clinic and the Energy and Environment Legal Institute, we appeal Assistant Attorney General Michael Jerry's June 10, 2016 denial, in full, of our Freedom of Information Law Request dated May 5, 2016.

On May 5, 2016, we requested records meeting the following descriptions:

correspondence, including attachments, which was sent to or from (including also as cc: or bcc:) New York Attorney General Eric Schneiderman, and one or more of the following eight individuals, using either his official or his non-official email and text messaging accounts (e.g., GMail, private cell phone as well as State-provided accounts):

- a) Tom Steyer
- b) Ted White
- c) Matt Pawa
- d) Kamala Harris
- e) John Passacantando
- f) Kurt Davies
- g) Steve Coll
- h) Christina Harvey

Which correspondence uses any of these keywords or terms anywhere including in the body or the Subject field(s):

- i) energy
- j) fossil
- k) climate
- l) RICO
- m) Martin Act
- n) fraud
- o) accountability

We further narrowed our request to cover only records dated from February 1, 2015 to the date the request was processed (a date which is now extended by this denial).

In his June 10, 2016 letter, Assistant Attorney General Jerry denied our request, in full, on three separate grounds: First, he believed that some records were exempt as “confidential communication made between attorney and client, which is exempt from disclosure under Civil Practice Law and Rules § 4503(a).” Second, he believed that some records were exempt as “attorney work product, which is exempt from disclosure under Civil Practice Law and Rules § 3101(c).” Lastly, he believed some records were exempt “pursuant to Public Officers Law § 87(2)(g), because the records are inter-agency or intra-agency materials.” Add all of the “some” up and all responsive records are exempt, in his estimation and *categorical* denial.

The June 10, 2016 letter contained no estimate of the number or nature of records in the possession of the New York Office of the Attorney General, or indeed anything suggesting a search was conducted, let alone an assessment of the records reviewed for possible release. As such, we have no means to address how or whether these exemptions cover any particular records the Attorney General’s Office possesses. Nevertheless, we appeal because the categorical

justifications for withholding appear facially unsupportable as applied to correspondence between the New York Office of the Attorney General and private individuals outside the Office.

As Assistant Attorney General Jerry noted, the attorney-client privilege covers communications between an attorney and a client. We specifically requested only correspondence “which was sent to or from” the New York Office of the Attorney General and the following individuals:

- a) Tom Steyer
- b) Ted White
- c) Matt Pawa
- d) Kamala Harris
- e) John Passacantando
- f) Kurt Davies
- g) Steve Coll
- h) Christina Harvey

We note that none of the above individuals are employees of the State of New York. Accordingly, we must ask and, in order to process this request and provide a proper response, NY OAG must answer:

- * What attorney-client relationship exists between these individuals and the NY OAG, and who is the client in any communications between certain activists, major party donors, and one other attorney general and your office which is being withheld as privileged?
- * Was the New York Attorney General’s Office representing these private individuals?

- * How are these individuals covered by NY OAG attorney-client privilege, which has simply been invoked without explanation, essentially throwing a cloak of invisibility over otherwise releasable correspondence of the sort FOIL seeks to make public.
- * In what legal matter are these records implicated, such that these records are privileged as attorney-client communications?

Assistant Attorney General Jerry's second ground for denying our request, categorically and in full, is that some records contain attorney work product. Again, we note the objective questions this begs which must be answered. None of the individuals listed above are employees of the New York Office of the Attorney General. To the extent that the New York Office of the Attorney General shared work product with private individuals outside the Office of the New York Attorney General, any work product privilege would have been waived. We further note that while records in the public domain suggest that New York has a common interest agreement with certain states, there is no evidence in the public realm that California is one of those states; there is no evidence that NY OAG has such a valid agreement with private law firms, private lawyers, or individuals. If it does, OAG needs to cite such any agreements it has, that is, justify withholdings instead of the above-described, categorical effort to preserve otherwise public records under a cloak of secrecy regarding a particular, high-profile activities of the Office.

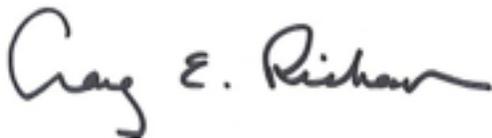
Moreover, the list of individuals above also contains non-lawyers, such as Tom Steyer, Steve Coll, and Kert Davies. Accordingly, we see no legitimate basis for New York to withhold correspondence with these individuals as attorney work product, when that correspondence has already been shared outside the Office of the Attorney General.

Finally, Assistant Attorney General Jerry argues that the records we seek are withheld on the basis that they are inter- or intra-agency communications. This argument is facially absurd. The May 5, 2016 request explicitly sought correspondence from the New York Office of the Attorney General, to certain named individuals who are not New York employees. We sought no records between employees of the Attorney General's Office, nor did we seek correspondence records exchanged between employees of the New York Attorney General's Office and employees of any other New York agency or governmental entity. Additionally, selective release is not permissible.

We expect that you will overturn this categorical, blanket and entirely *unsupported* denial of access to public records. At a minimum, we expect you will provide an estimate of the number and nature of responsive records, and explain with particularity how any of the three justifications for withholding records which the agency has heretofore claimed, apply to any discrete records the office continues to withhold.

We look forward to hearing from you and resolving this matter with regard to our request. If you have any questions please do not hesitate to contact undersigned counsel.

Respectfully submitted,

A handwritten signature in black ink that reads "Craig E. Richardson".

Craig E. Richardson
Executive Director, E&E Legal
Richardson@EELegal.org
703.981.5553

A handwritten signature in black ink that reads "Christopher C. Horner, Esq.".

Christopher C. Horner, Esq.
for the Free Market Environmental Law Clinic
chris@chonerlaw.com
202.262.4458