



REQUEST UNDER THE NEW YORK FREEDOM OF INFORMATION LAW

May 5, 2016

Records Access Officer
Office of the Attorney General
The Capitol
Albany, NY 12224

By Electronic mail: FOIL@ag.ny.gov

RE: Certain Attorney General Correspondence/Records

Records Access Officer,

Pursuant to New York's Freedom of Information Law (FOIL) (Public Officers Law, Article 6, §84 *et seq.*), the undersigned groups request copies within five (5) business days of any and all records as described herein. The Free Market Environmental Law Clinic (FME Law) and Energy & Environment Legal Institute (E&E Legal) are both non-profit educational foundations incorporated in Virginia, with offices in Washington, DC, with established public records transparency practices. Consistent with FOIL, we will treat a failure to substantively respond within the statutory period or produce responsive records a constructive denial of our request.

Please provide us **copies of all 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**

Responsive records will be dated from February 1, 2015 through the date you process this request.

The keywords and parties ensure that any such correspondence is work-related, and thereby subject to disclosure under NY FOIL, regardless of the email account used.

FOIL's requirement that we "reasonably describe" the records is thereby met. If you have information to help narrow this request, please feel free to contact the undersigned.

We request NY OAG begin rolling productions within the statutory period for compliance and otherwise demonstrate its intention to comply with this request pursuant to FOIL, as opposed to a form letter with a promise of production at some later date.

Public Interest in Responsive Records

Through our experience promoting governmental transparency, we have discovered widespread collaboration between environmentalist pressure groups and ideologically or politically aligned state or federal employees. We now are aware that this extends to law

enforcement, including particularly the New York Office of Attorney General. Similarly, we have unearthed extensive use of non-official email accounts by government regulators and other officials to conduct certain work-related correspondence with select groups and/or on select topics. We are aware that New York State government is no exception to that practice.

Our findings have led to widespread media interest and congressional oversight and, as such, public education. A quick internet search confirms the reach these findings have obtained. NY OAG is likely aware of similar public education flowing from the recent release of public-record correspondence related to the campaign by Attorney General Schneiderman to use the Racketeer Influenced and Corrupt Organizations Act (RICO Act), related laws and the Martin Act to investigate those who engage in public debate regarding the accuracy of claims made to promote the “climate” agenda, or claims made regarding renewable energy.

We have reason to believe that records responsive to this request will further educate the public, with documents equally relevant to these public debates and the OAG-led campaign in the form of communications between the Attorney General, the aide he has tasked as liaison, and parties that have long advocated for the use of state power against political dissent. These include those that have worked closely with NY OAG generally and, we state on information and belief, personally with AG Schneiderman.

All Requested Records are Agency “Records”

The NY FOIL leaves no ambiguity as to whether the requested documents are “records” for purposes of FOIL. This is facially apparent for emails sent or received on the officials’ state-provided account(s). In regards to state employees using private email accounts to conduct certain of their public business, there is similar, level ground. Multiple Committee on Open

Government Advisory Opinions, heavily citing to controlling authorities, join other sources affirming that any account used at any time for State work-related correspondence is also covered.¹

As regards the notions of “crossover” between governmental and non-governmental activities, and the impropriety of “prescreening” of records — in this case, allowing the individual with sole control over this non-official account, which he opted to use for work-related purposes, to conduct the initial search-and-screen, unsupervised — these issues are

¹ See e.g., FOIL-AO-15893 April 6, 2006 <http://docs.dos.ny.gov/coog/ftext/fl5893.htm> (“‘If a town councilman uses his private email address (not paid for by the town) to conduct business for the town, does that require those emails that pertain to material matters of town business constitute a public record subject to foil requests?’ From my perspective, email kept, transmitted or received by a town official in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official ‘uses his private email address’ and his own computer.”)

Also, we note FOIL-AO-17490 January 08, 2009 <http://docs.dos.ny.gov/coog/ftext/fl7490.html> (“The state’s highest court has rejected the notion that an agency can choose which documents it considers ‘records’ based on where they are received or stored (*Capital Newspapers v. Whalen*”, described in advisory opinion FOIL-AO-15072 <http://docs.dos.ny.gov/coog/ftext/fl5072.htm>). Also, “Based on the definition of ‘record’ in the Freedom of Information Law it has long been the opinion of the Committee on Open Government that records that come into the possession of an official in his or her capacity as an official are records subject to the Freedom of Information Law. Records received at an official’s home address can be equated to email records received on an official’s private or home computer. Consistent with the opinion expressed above, it is our opinion that records emailed to a private or home address are records subject to the Freedom of Information Law,” as described in advisory opinion FOIL-AO-15893 <http://docs.dos.ny.gov/coog/ftext/fl5893.htm>).

We further note FOIL-AO-16602 June 5, 2007 <http://docs.dos.ny.gov/coog/ftext/fl6602.htm> (“[I]t has been consistently advised that disclosure of items that related to the performance of public employees’ duties must ordinarily be made available to comply with the Freedom of Information Law. ... While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and [sic] employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found, as a general rule, that records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., *Farrell v. Village Board of Trustees*, 372 NYS 2d 905 (1975); *Gannett Co. v. County of Monroe*, 59 AD 2d 309 (1977), aff’d 45 NY 2d 954 (1978); *Sinicropi v. County of Nassau*, 76 AD 2d 838 (1980); *Geneva Printing Co. and Donald C. Hadley v. Village of Lyons*, Sup. Ct., Wayne Cty., March 25, 1981; *Montes v. State*, 406 NYS 2d 664 (Court of Claims, 1978); *Powhida v. City of Albany*, 147 AD 2d 236 (1989); *Scaccia v. NYS Division of State Police*, 530 NYS 2d 309, 138 AD 2d 50 (1988); *Steinmetz v. Board of Education, East Moriches*, supra; *Capital Newspapers v. Burns*, 67 NY 2d 562 (1986)].”)

discussed in authorities provided at, e.g., FOIL-AO-17045 March 17, 2008 (<http://docs.dos.ny.gov/coog/ftext/f17045.html>), FOIL-AO-18052 March 24, 2010 (<http://docs.dos.ny.gov/coog/ftext/f18052.html>), FOIL-AO-16103 August 9, 2006 (<http://docs.dos.ny.gov/coog/ftext/f16103.htm>), FOIL-AO-16969 January 30, 2008, (<http://docs.dos.ny.gov/coog/ftext/f16969.html>), and FOIL-AO-15097 January 4, 2005 (<http://docs.dos.ny.gov/coog/ftext/f15097.htm>).

Typically, the use of such accounts triggers a requirement that the employee copy their agency-assigned account or provide hard copies to their office. Since employees choosing to use non-official accounts for certain official correspondence rarely take that step, searching the accounts is warranted and proper if it is likely that responsive records exist on non-official email accounts (or equipment).² As you are aware, the covered agency must search for records sought under the Freedom of Information Law [§89(3)] when records can be found with reasonable effort.

² See, e.g., NOAA FOIA#2010-00199 (“NOAA searched the email and offices of all individuals in the NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions.” (August 17, 2012 Letter from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks to Competitive Enterprise Institute, p. 2); see also, *CEI v. EPA*, D.D.C. C.A. No. 12-1497, filed 9/11/12.

In the states, for example, the State of Colorado produced emails of former DNR and DPHE official James Martin from non-official email accounts used for work-related purposes, pursuant to the Colorado Open Records Act, which, like the Freedom of Information Act and FOIL, covers “agency” records. See Colo. Rev. Stat. § 24-72-202(6)(a)(I) (covers “public records,” defined to cover “writings made, maintained, or kept by the State [or] any agency”). Also, the Illinois attorney general issued a binding opinion that communications on a private email account “pertaining to public business” were public records, with that state’s FOIA having a definition of “public records” similar to the relevant federal definition (including “all . . . documentary materials pertaining to the transaction of public business, regardless of physical form”) and its legislature having similarly intended a bias toward disclosure. See Public Access Opinion No. 11-006, November 15, 2011, <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-006.pdf>. Similarly, “26 states view the use of private emails for government business as public records.” Steven Braun, Mitt Romney Used Private Email Accounts to Conduct State Business While Massachusetts Governor, Huffington Post, March 9, 2012, available at http://www.huffingtonpost.com/2012/03/09/mitt-romney-emails_n_1335712.html.

With all such non-official accounts being inherently under the sole control of the employee who chooses to use such a non-assigned account for certain work-related correspondence, we raise the issue of the search being free from conflict in order to be sufficient, and the requirement that these agency records be properly maintained and request prompt attention to the matter.³

³ See e.g., FOIL-AO-18052 addressing NY State Archives, March 24, 2010 <http://docs.dos.ny.gov/coog/text/fl18052.html>, stating in pertinent part (ellipses in original): “[W]e emphasize that government agencies and their employees cannot destroy records at will. The ‘Local Government Records Law’, Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines ‘record’ to mean:

...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications.

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...

2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods...

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and school district officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. The provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives.

In light of a municipality's responsibility to retain records for certain periods, perhaps it would be wise to adopt a policy applicable to those instances in which public officials and employees utilize home or personal accounts to conduct public business, to require that copies of such communications be forwarded to the municipality's records management officer on a regular basis. In cases where personal accounts are utilized for public business, perhaps periodic transmissions would alleviate both the public's concern that records were hidden and the clerk's responsibility to request copies for retention purposes, as outlined above.”

We note that a state court in Virginia just this week, in a case co-requester FME Law tried, agreed with us that proceeding in such fashion failed to constitute the required “search” under the Commonwealth’s FOIA law (*See Final Order Christopher Horner & The Competitive Enter. Inst. v. The Rector and Visitors of George Mason Univ.*, CL15004712-00 (City of Richmond Cir. Ct, April 22, 2016)).

Furthermore, as there is no express requirement in FOIL that employees use only the official email account provided them, covered employees subject to transparency laws (as well as record-maintenance and preservation laws) who elect to use such unofficial channels assume that such searches of their non-official account used for work-related correspondence will occur. Indeed, these factors make such searches more, not less, reasonable.

The New York State Court of Appeals has repeatedly emphasized that the Freedom of Information Law should be construed expansively. In *Gould v. New York City Police Department* [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, stating in pertinent part:

“To ensure maximum access to government records, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption’ (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, ‘[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld’ (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)”.

As such, and to assist with reconciling production with exemplars in our possession and available to us, we also request the Office of the Attorney General affirm that it searched all folders in the relevant official and non-official accounts, including but not limited to “Sent,”

“Deleted,” “Trash,” “Work” (if Mac and/or ME.com), as well as iCloud or other Cloud repositories, BOX, Google Docs/Drive used at any time for work-related records by the identified employees. Further, Blackberry PIN messages remain stored on the device until affirmatively deleted which, if the record is not copied to an official repository, constitutes removal or destruction of the record.

If no responsive records are found, we request the required certification to that effect.⁴

We request a rolling production, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released.

We do not seek duplicates of responsive records.

We do not seek correspondence reflecting only the sending or forwarding of press releases, if no other commentary or substantive commentary is added at any place in the email thread (consider *e.g.*, “interesting” or “FYI” as not being substantive comments).

We understand **we owe the State the cost of material, required to satisfy this request.**

We agree to pay legitimate expenses up to \$250.00. If you estimate costs will exceed that, please notify us immediately and break down the expected costs.

We request records in electronic form if available. By the nature of this request *most responsive records should be in electronic format, necessitating no photocopying expense.* Of course, we agree to pay for the actual cost, which should be limited to the disc(s) on which you

⁴ See, *e.g.*, <http://docs.dos.ny.gov/coog/ftext/13543.htm> <http://docs.dos.ny.gov/coog/ftext/f12223.htm> <http://docs.dos.ny.gov/coog/ftext/f8898.htm> “Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency “shall certify that it does not have possession of such record or that such record cannot be found after diligent search.”

copy the records (“the actual cost of production of documents produced in electronic form”) and, as necessary, postage.

None of the undersigned seek the information for a commercial purpose. FME Law and E&E Legal are organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a “Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[]”). As such, we also have no commercial interest possible in these records.

For example, E&E Legal is also a media outlet for these purposes⁵: like other requesters it not only serves as a regular source of public information and substantive editorial comment

⁵ Examples of open records-derived publications by E&E Legal requesters include, Horner: [*The FOIA coping response in climate scientists*](#), WATTS UP WITH THAT, Jan. 21, 2014 (where ATI/E&E Legal disseminated FOIA-obtained information from NASA, University of Arizona and EPA on many additional occasions, see <http://wattsupwiththat.com/?s=horner>); [*The Collusion of the Climate Crowd*](#), WASHINGTON EXAMINER, Jul. 6, 2012. See also, Christopher Horner: [*Yes, Virginia, you do have to produce those ‘Global Warming’ documents*](#) (with David W. Schnare and Del. Robert Marshall), WASHINGTON EXAMINER, Jan. 5, 2011; David W. Schnare, [*FOIA and the Marketplace of Ideas*](#), E&E Legal Letter (Sept. 2013); [*Why I Want Michael Mann’s Emails*](#), THE JEFFERSON JOURNAL, The Thomas Jefferson Institute for Public Policy, Dec. 7, 2011. Information is also disseminated in issue-specific pages of E&E Legal’s website, see, e.g. [“FOIA Requests”](#) section.

Others include Horner: [*Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*](#), BREITBART, Oct. 17, 2013; [*Most Secretive Ever? Seeing Through ‘Transparent’ Obama’s Tricks*](#), WASHINGTON EXAMINER, Nov. 3, 2011; [*NOAA releases tranche of FOIA documents -- 2 years later*](#), WATTS UP WITH THAT (two-time “science blog of the year”), Aug. 21, 2012; [*The roadmap less traveled*](#), WATTS UP WITH THAT, Dec. 18, 2012; [*EPA Doc Dump: Heavily redacted emails of former chief released*](#), BREITBART, Feb. 22, 2013; [*EPA Circles Wagons in ‘Richard Windsor’ Email Scandal*](#), BREITBART, Jan. 16, 2013, [*DOJ to release secret emails*](#), BREITBART, Jan. 16, 2013; [*EPA administrators invent excuses to avoid transparency*](#), WASHINGTON EXAMINER, Nov. 25, 2012; [*Chris Horner responds to the EPA statement today on the question of them running a black-ops program*](#), WATTS UP WITH THAT, Nov. 20, 2012; [*FOIA and the coming US Carbon Tax via the US Treasury*](#), WATTS UP WITH THAT, Mar. 22, 2013; [*Today is D-Day -- Delivery Day -- for Richard Windsor Emails*](#), WATTS UP WITH THAT, Jan. 14, 2013; [*EPA Doubles Down on ‘Richard Windsor’ Stonewall*](#), WATTS UP WITH THAT, Jan. 15, 2013; [*Treasury evasions on carbon tax email mock Obama’s ‘most transparent administration ever’ claim*](#), WASHINGTON EXAMINER, Oct. 25, 2013, [*Peeking behind the Green Curtain*](#), WASHINGTON TIMES, FEB. 17, 2015.



about this information to numerous national (and/or local) media outlets but also applies substantive editorial input in its own publications disseminating public information.

In addition to coverage of its FOIAs in print publications, E&E Legal regularly disseminates its findings on broadcast media. Our counsel appear regularly to discuss their work on energy and environmental issues, including open-records efforts, on national television, as

well as national and local radio shows. E&E Legal and FME Law are also regularly cited in newspapers and trade publications for their open records efforts.⁶

The requested information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with government activities on this critical subject, or as the United States Supreme Court once noted in the context of the federal FOIA, what their government is up to.

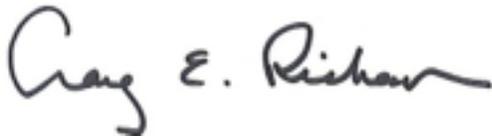
⁶ Print examples, only, to the exclusion of dozens of national electronic media broadcasts, include, *e.g.*, Dawn Reeves, EPA Emails Reveal Push To End State Air Group's Contract Over Conflict, INSIDE EPA, Aug. 14, 2013; Editorial, Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests, WASHINGTON EXAMINER, Jan. 28, 2013; Michal Conger, Emails show green group influence on EPA coal rule, WASHINGTON EXAMINER, Jan. 9, 2014; C.J. Ciaramella, Sierra Club Pressed EPA to Create Impossible Coal Standards, WASHINGTON FREE BEACON, Jan. 10, 2014; C.J. Ciaramella, Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs, WASHINGTON FREE BEACON, Jan. 15, 2014; Stephanie Paige Ogburn, Climate scientists, facing skeptics' demands for personal [sic] emails, learn how to cope, E&E NEWS, Jan. 21, 2014; Anthony Watts, New FOIA emails show EPA in cahoots with enviro groups, giving them special access, WATTS UP WITH THAT, Jan. 15, 2014; Stephen Dinan, Obama energy nominee Ron Binz faces rocky confirmation hearing, WASHINGTON TIMES, Sept. 17, 2013; Stephen Dinan, Top Obama energy nominee Ron Binz asked oil company employees for confirmation help, WASHINGTON TIMES, Sept. 17, 2013; Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts, WATTS UP WITH THAT, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, Obama energy nominee in danger of defeat, WASHINGTON TIMES, Sept. 18, 2013; Stephen Dinan, Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate, WASHINGTON TIMES, Sept. 12, 2013; Stephen Dinan, Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules, WASHINGTON TIMES, Sept. 22, 2013; Conn Carroll, FOIA reveals NASA's Hansen was a paid witness, WASHINGTON EXAMINER, Nov. 7, 2011; NASA Scientist accused of using celeb status among environmental groups to enrich himself, FOX NEWS, Jun. 22, 2011; Editorial, The EPA: A leftist agenda, PITTSBURGH TRIBUNE-REVIEW, Jan. 18, 2014; John Roberts, "Secret dealing"? Emails show cozy relationship between EPA, environmental groups, FOX NEWS, Jan. 22, 2014; Elana Schor, Proponents pounce on emails between EPA, enviros on pipeline, E&E NEWS, Jan. 23, 2014; Mike Bastasch, Analysis: Green Hypocrisy in Keystone XL pipeline opposition, DAILY CALLER, Feb. 6, 2014; Mark Tapscott, Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups, WASHINGTON EXAMINER, Jan. 23, 2014; Editorial, EPA has ties to radical environmentalists, DETROIT NEWS, Feb. 13, 2014; Michael Batasch, Report: EPA coal plant rule tainted by secretiveness, collusion with green groups, DAILY CALLER, Mar. 10, 2014; Jennifer G. Hickey, Legality of EPA Rules Questioned by Environmental Litigators, NEWSMAX, Mar. 21, 2014; Michael Bastasch, Confidential document reveals the Sierra Club's plan to shut down the coal industry, DAILY CALLER, Mar. 26, 2014; Michael Bastasch, Conservative group sues EPA over its 'IRS-like' tactics, DAILY CALLER, Apr. 1, 2014; Stephen Dinan, Conservative group sues EPA over open-records requests, WASHINGTON TIMES, Apr. 1, 2014.

We repeat our request for a rolling production of records, such that the State should furnish records electronically to undersigned counsel Schnare as soon as they are identified, on a rolling basis if necessary, and any hard copies to his attention at:

Energy & Environment Legal Institute
722 12th Street Northwest #400
Washington, DC 20005

If you have any questions please do not hesitate to contact undersigned counsel.

Respectfully submitted,



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