



REQUEST UNDER THE NEW YORK FREEDOM OF INFORMATION LAW

May 5, 2016

By Electronic mail: FOIL@ag.ny.gov
Records Access Officer
Office of the Attorney General
The Capitol
Albany, NY 12224

Re: Certain OAG records relating to meetings with Fahr LLC, Eco-Accountability

Dear Designated FOIL Records Access Officer:

On behalf of the undersigned, pursuant to New York's Freedom of Information Law (FOIL) (Public Officers Law, Article 6, §84 et seq.), please provide us within five (5) business days copies of any and all records as described:

1) all records which arrange, schedule, discuss or in any way mention October and November 2015 meetings of New York Attorney General Schneiderman, and/or Director of Operations Christina Harvey, with representatives of Fahr LLC, including but not limited to Tom Steyer and Ted White, and all records produced, used or exchanged during these meetings.

This includes email, hard copy (regular mail, messenger, and/or delivery service such as FedEx, DHL, UPS) and text message, Blackberry PIN and SMS correspondence and any attachments, as well as calendar logs, invitations and/or acceptances.

You may limit your search to items entered, sent, exchanged, used or received in October and November 2015.

Mr. Schneiderman, Ms. Harvey, and their schedulers are the parties most likely to possess records responsive to this request.

2) all records which arrange, schedule, discuss or in any way mention a February 2015 meeting of New York Attorney General Schneiderman with representatives of Eco-Accountability including but not limited to John Passacantando and Kert Davies, and all records produced, used or exchanged during these meetings.

This includes email, hard copy (regular mail, messenger, and/or delivery service such as FedEx, DHL, UPS) and text message, Blackberry PIN and SMS correspondence and any attachments, as well as calendar logs, invitations and/or acceptances.

You may limit your search to items entered, sent or received in February 2015.

Ms. Harvey, Executive Deputy Attorney General for Social Justice Alvin Bragg, Executive Deputy Attorney General for Economic Justice Karla Sanchez, Environmental Protection Bureau Chief Lem Srolovic, and Ms. Harvey's scheduler, are the parties most likely to possess records responsive to this request.

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.

While we request that the limited fees allowed by statute be waived, we nevertheless agree to pay legitimate expenses up to \$150.00. If you estimate costs will exceed that please notify us and break down the expected costs.

We request records in electronic form. By the nature of this request *most though not all responsive records are already in electronic format, necessitating little or no photocopying*

expense. For those records provided to NY OAG by Fahr/Steyer/White, or Passacantando/Davies/Eco-Accountability, in hard copy we request you scan and transmit them electronically.

None of the undersigned seek the information for a commercial purpose. The organizations represented below are non-commercial and/or organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. As such, requesters have no possible commercial interest in these records, or commercial motive for this request.

Given the non-profit transparency and journalism activities of the requesters we ask that fees permitted by FOIL be waived. The requested information is of critical importance to the issue of attorneys general and working with private activists to initiate investigation under color of state law of political speech in opposition to the "climate" policy agenda.

We will treat a failure to substantively respond within the statutory period as a constructive denial of our request, consistent with FOIL.

We repeat our request for a rolling production of records, such that the Attorney General's office should furnish records electronically to Dr. Schnare as soon as they are identified, on a

rolling basis if necessary, and any hard copies to Dr. Schnare at 9033 Brook Ford Road, Burke VA 22015. If you have any questions please do not hesitate to contact Dr. Schnare.

Respectfully submitted,



David W. Schnare, Esq.
Director
Free Market Environmental Law Clinic
schnare@fmelawclinic.org
571.243.7975

ON BEHALF OF:

John Servo
Advocates for Prattsburgh

Mary Kay Barton
Citizen Power Alliance

Judi Hall
Cohocton Wind Watch

Sherri Lange
North American Platform Against Wind Power

Robert E. Aliasso, Jr.
Coalition for the Preservation of the
Golden Crescent and 1000 Islands Region

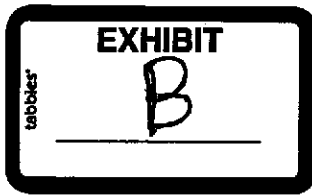
Alan Isselhard
Suzanne Albright
Great Lakes Wind Truth

Roger Caiazza
Liverpool, NY

Linda Makson
Clear Skies Over Orangeville

Sandra Swanson
Stafford Preservationists

Alan Isselhard
Suzanne Albright
Great Lakes Wind Truth



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC L. SCHNEIDERMAN
ATTORNEY GENERAL

MICHAEL JERRY
ASSISTANT ATTORNEY GENERAL
RECORDS ACCESS OFFICER

September 2, 2016

via e-mail: schnare@fmlawclinic.org
David Schnare, Esq.
Free Market Environmental Law Clinic
9033 Brook Ford Road
Burke, VA 22015

RE: Freedom of Information Law (FOIL) Request # 160286

Dear Mr. Schnare:

This letter responds to your correspondence dated May 5, 2016, which, pursuant to FOIL, requested the following:

“[R]e: Certain OAG records relating to meetings with Fahr LLC, Eco-Accountability

Please provide us within five (5) business days copies of any and all records as described:

1) all records which arrange, schedule, discuss or in any way mention October and November 2015 meetings of New York Attorney General Schneiderman, and/or Director of Operations Christina Harvey, with representatives of Fahr LLC, including but not limited to Tom Steyer and Ted White, and all records produced, used or exchanged during these meetings.

This includes email, hard copy (regular mail, messenger, and/or delivery service such as FedEx, DHL, UPS) and text message, Blackberry PIN and SMS correspondence and any attachments, as well as calendar logs, invitations and/or acceptances.

You may limit your search to items entered, sent, exchanged, used or received in October and November 2015.

Mr. Schneiderman, Ms. Harvey, and their schedulers are the parties most likely to possess records responsive to this request.

2) all records which arrange, schedule, discuss or in any way mention a February 2015 meeting of New York Attorney General Schneiderman with representatives of Eco-Accountability including but not limited to John Passacantando and Kert Davies, and all

records produced, used or exchanged during these meetings.

This includes email, hard copy (regular mail, messenger, and/or delivery service such as FedEx, DHL, UPS) and text message, Blackberry PIN and SMS correspondence and any attachments, as well as calendar logs, invitations and/or acceptances.

You may limit your search to items entered, sent or received in February 2015.

Ms. Harvey, Executive Deputy Attorney General for Social Justice Alvin Bragg, Executive Deputy Attorney General for Economic Justice Karla Sanchez, Environmental Protection Bureau Chief Lem Srolovic, and Ms. Harvey's scheduler, are the parties most likely to possess records responsive to this request.

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.

While we request that the limited fees allowed by statute be waived, we nevertheless agree to pay legitimate expenses up to \$150.00. If you estimate costs will exceed that please notify us and break down the expected costs.

We request records in electronic form. By the nature of this request most though not all responsive records are already in electronic format, necessitating little or no photocopying expense. For those records provided to NY OAG by Fahr/Steyer/White, or Passacantando/Davies/Eco-Accountability, in hard copy we request you scan and transmit them electronically.

None of the undersigned seek the information for a commercial purpose. The organizations represented below are non-commercial and/or organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. As such, requesters have no possible commercial interest in these records, or commercial motive for this request.

Given the non-profit transparency and journalism activities of the requesters we ask that fees permitted by FOIL be waived. The requested information is of critical importance to the issue of attorneys general and working with private activists to initiate investigation under color of state law of political speech in opposition to the "climate" policy agenda.

We will treat a failure to substantively respond within the statutory period as a constructive denial of our request, consistent with FOIL.

We repeat our request for a rolling production of records, such that the Attorney General's office should furnish records electronically to Dr. Schnare as soon as they are identified, on a rolling basis if necessary, and any hard copies to Dr. Schnare at 9033 Brook Ford Road, Burke, VA 22015. If you have any questions please do not hesitate to contact Dr. Schnare."

Attached to this e-mail are documents numbered 160286-1 through 160286-23 that respond to your request.

Please be advised that other records responsive to your request are exempt from disclosure and have been withheld for one or more of the following reasons:

- pursuant to Public Officers Law § 87(2)(a), which provides that records that are exempted from disclosure by state or federal statute are exempt from disclosure under FOIL. Records responsive to your request constitute:
 - confidential communication made between attorney and client, which is exempt from disclosure under Civil Practice Law and Rules § 4503(a); or
 - attorney work product, which is exempt from disclosure under Civil Practice Law and Rules § 3101(c);
- pursuant to New York Public Officers Law § 87(2)(e), because the documents requested were compiled for law-enforcement purposes and would, if disclosed, interfere with law-enforcement investigations or judicial proceedings; and
- pursuant to Public Officers Law § 87(2)(g), because the records are inter-agency or intra-agency materials.

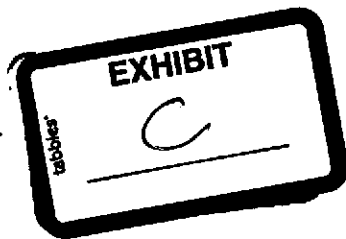
You have a right to appeal the foregoing decision. If you should elect to file such an appeal, your written appeal must be submitted, within 30 days, to Kathryn Sheingold, Records Appeals Officer, State of New York, Office of the Attorney General, Division of Appeals and Opinions, The Capitol, Albany, New York 12224. You may reach the Records Appeals Officer at (518) 776-2009.

Sincerely,



Michael Jerry
Assistant Attorney General

Attachment



APPEAL UNDER THE NEW YORK FREEDOM OF INFORMATION LAW

September 9, 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 September 2, 2016 denial of access to records, Request 160286

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 September 2, 2016 denial, in part, of our Freedom of Information Law Request dated May 5, 2016 which NY OAG assigned the number Request 160286.

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

1) all records which arrange, schedule, discuss or in any way mention October and November 2015 meetings of New York Attorney General Schneiderman, and/or Director of Operations Christina Harvey, with representatives of Fahr LLC, including but not limited to Tom Steyer and Ted White, and all records produced, used or exchanged during these meetings.

This includes email, hard copy (regular mail, messenger, and/or delivery service such as FedEx, DHL, UPS) and text message, Blackberry PIN and SMS correspondence and any attachments, as well as calendar logs, invitations and/or acceptances.

You may limit your search to items entered, sent, exchanged, used or received in October and November 2015.

Mr. Schneiderman, Ms. Harvey, and their schedulers are the parties most likely to possess records responsive to this request.

2) all records which arrange, schedule, discuss or in any way mention a February 2015 meeting of New York Attorney General Schneiderman with representatives of Eco-Accountability including but not limited to John Passacantando and Kert Davies, and all records produced, used or exchanged during these meetings.

This includes email, hard copy (regular mail, messenger, and/or delivery service such as FedEx, DHL, UPS) and text message, Blackberry PIN and SMS correspondence and any attachments, as well as calendar logs, invitations and/or acceptances.

You may limit your search to items entered, sent or received in February 2015.

Ms. Harvey, Executive Deputy Attorney General for Social Justice Alvin Bragg, Executive Deputy Attorney General for Economic Justice Karla Sanchez, Environmental Protection Bureau Chief Lem Srolovic, and Ms. Harvey's scheduler, are the parties most likely to possess records responsive to this request.

In his September 2, 2016 letter, Assistant Attorney General Jerry denied our request in part and granted our request in part.

Mr. Jerry denied access in full to some unspecified number of responsive records. For those records to which we were denied access in full, Mr. Jerry justified the denial on three grounds, but without identifying which grounds for denial applied to which records, or to how many, or the nature of the records being withheld.

First, Mr. Jerry asserted that some unspecified number of other responsive records were exempt from disclosure, in full, as "confidential communication made between attorney and client, which is exempt from disclosure under Civil Practice Law and Rules § 4503(a)," or as "attorney work product, which is exempt from disclosure under Civil Practice Law and Rules § 3101(e)."

Second, Mr. Jerry asserted that some unspecified number of other responsive records were exempt from disclosure, in full, on the grounds that New York Public Officers Law § 87(2)(e) allows withholding of records which would interfere with law enforcement investigations if disclosed.

Lastly, Mr. Jerry asserted that some unspecified number of other responsive records were exempt from disclosure, in full, “pursuant to Public Officers Law § 87(2)(g), because the records are inter-agency or intra-agency materials.”

In addition to not redacting segregable information from this unspecified number of other responsive records, producing redacted copies of non-exempt information, Assistant Attorney General Jerry’s September 2, 2016 letter contained no estimate of the number or nature of allegedly exempt records in the possession of the New York Office of the Attorney General. 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 insupportable as applied to correspondence between the New York Office of the Attorney General and private individuals outside the Office, in addition to being wholly unsupported.

I. Attorney-Client Privilege and Attorney Work Product

As Assistant Attorney General Jerry noted, the attorney-client privilege covers communications between an attorney and a client. However, the terms of our May 5, 2016 request indicate that many responsive records by their nature would have been shared outside the New York Attorney General’s Office. Specifically, it is difficult or even impossible to imagine how records reflecting a meeting between the New York Attorney General’s Office and a private

entity (Fahr LLC or Eco-Accountability), or four private individuals (Tom Steyer, Ted White, John Passacantando, and Kert Davics), could constitute communications between the New York Attorney General and his client, or otherwise satisfy the exemptions NY OAG cites.

Moreover, records of any communications between the New York Office of the Attorney General and Attorneys General in other states would likely not be covered by Attorney Client privilege insofar as any purported common interest agreement between the New York Attorney General and the Attorneys General of other states likely runs afoul of the New York Court of Appeals' recent decision in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, ____ N.E.3d ___, 2016 N.Y. Slip Op. 04439 (June 9, 2016) (holding that a legally-recognized common interest only exists in the context of extant or reasonably anticipated litigation involving the parties exchanging information).

Because many records responsive to our request were inherently and/or otherwise likely to have been shared outside the Office of the Attorney General, in order to process this request and provide a proper response NY OAG must reveal the following in order to justify the particular privileges invoked for any record responsive to this request:

1) Who is the client in any communications which the Attorney General is withholding as privileged?

2) Does the New York Attorney General's Office claim to be or have been, for purposes of claiming privilege for these records, representing any private individuals (i.e., parties with whom the request seeks NY OAG correspondence)?

3) If so, how are these individuals covered by NY OAG attorney-client privilege?

Assistant Attorney General Jerry additionally asserted that some records contain attorney work product. Again, we note the objective questions this begs which must be answered in order to properly invoke this privilege and/or process this request/appeal. It is inherently likely that many responsive records were shared outside the Office of the Attorney General: to the extent that the New York Attorney General's Office 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 New York may purport to have a common-interest agreement with other states and/or private individuals which allows the New York Attorney General to try and move these (inherently shared) records outside of the New York Freedom of Information Law, that common interest agreement is likely of no effect under controlling appellate precedent and as recently affirmed by the State's highest court.¹

II. Law Enforcement Material

Assistant Attorney General Jerry additionally asserts that certain records are exempt from release under the transparency statute because disclosure might jeopardize a law enforcement investigation. However, Mr. Jerry has not provided any information to support this hypothetical, about what sort of law enforcement activity is ongoing or how the records at issue might compromise that investigation. Moreover, statements by the Attorney General himself, as well as reports in the press and records obtained through use of transparency law in other states indicate that the purported "investigation" into ExxonMobil and others is in fact a political

¹ We again note *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, ___ N.E.3d ___, 2016 N.Y. Slip Op. 04439 (June 9, 2016), decided during the pendency of this denial five months in the making, and invite the office, in order to directly or indirectly rely on a purported CIA to shield records responsive to this request from disclosure, to explain how any legally cognizable common interest could exist between the New York Attorney General and any other state or private individual in light of that holding.

coalition to stifle dissent, rather than any legitimate use of law enforcement powers; regardless, we know from such records and other public statements by other AGs that the parties to the purported CIA are not in fact conducting any investigations together, and cited political and policy objectives, a desire to support a climate treaty and obtain new federal regulatory policies, in recruiting members to their coalition, as well as common political interests in purporting to have common interests.

To the extent the Office of the Attorney General maintains its claim that records responsive to this request are exempt from the State's transparency statute as law enforcement material, we suggest a proper processing requires it assert what legitimate use of law enforcement powers it is engaged in and how the records at issue, if released, would impede that investigation.

III. Inter- or Intra-Agency Materials

Finally, Assistant Attorney General Jerry argues that the records we seek are withheld on the basis that they are inter- or intra-agency communications. While some responsive records may indeed be inter-agency or intra-agency deliberative material, Mr. Jerry has not identified which or how many records exist or the parties with whom those records might have been shared. Of course on its face any claim of "inter-agency" or "intra-agency" argument would be absurd if made regarding most records described in the request at issue in this appeal, as they largely describe communications shared outside the Office of the Attorney General, but regardless OAG has provided insufficient information for any assessment of the legitimacy of such a claim as it applies to any particular record(s).

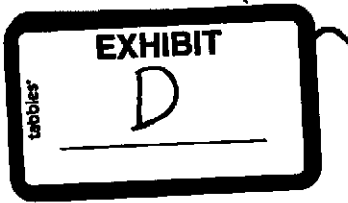
IV. Conclusion

We expect that you will overturn this largely categorical and entirely unsupported denial of access to public records. At minimum, a proper processing and response requires substantially more information than OAG provided, including e.g., an estimate of the number and nature of responsive records, and explanation with particularity how any of the cited justifications for withholding records 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,

David W. Schnare



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

APPEALS AND OPINIONS BUREAU

Telephone (518) 776-2009

September 26, 2016

David W. Schnare
Free Market Environmental Law Clinic
9033 Brook Ford Road
Burke, Virginia 22015

VIA EMAIL: schnare@fmelawclinic.org

Re: Appeal re: Freedom of Information Law Request # 160286

Dear Mr. Schnare:

I write in response to your September 9, 2016 administrative appeal letter in the above-referenced Freedom of Information Law (FOIL) matter.

By correspondence dated May 5, 2016, you requested records arranging, scheduling, discussing, or mentioning meetings between Eric Schneiderman or Christina Harvey and representatives of Fahr LLC, and records used or exchanged during these meetings, from October and November 2015. You also requested records arranging, scheduling, discussing, or mentioning a meeting between Eric Schneiderman and representatives of Eco-Accountability, and records used or exchanged during these meetings, from February 2015.

The Records Access Officer responded by letter dated September 2, 2016. He provided 23 pages of responsive records. He explained that other responsive records were being withheld under Public Officers Law § 87(2)(a) and CPLR 3101(c) as attorney work product and CPLR 4503(a) as confidential communications made between attorney and client; Public Officers Law § 87(2)(e), because the documents requested were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations or judicial proceedings; and under Public Officers Law § 87(2)(g), because the records are inter- or intra-agency materials.

You administratively appeal the withholding of records.

The OAG, a law enforcement agency, is currently engaged in an investigation as to whether ExxonMobil made false, deceptive, or misleading statements about climate change and its impact on ExxonMobil's business. Records responsive to your request were thus properly withheld under Public Officers Law § 87(2)(e)(i). Disclosure of these records would interfere with the OAG's investigation by highlighting areas of investigative concern; revealing the nature of the OAG's strategy; identifying potential witnesses; and notifying individuals and entities with relevant information of what the OAG already has received and thereby giving them the opportunity to destroy or conceal that in their possession not already produced.

Certain responsive records are additionally subject to other exceptions. Many of the responsive records are between employees of the OAG only. Some of these records reflect the impressions, opinions, or suggestions of those employees and were properly withheld under Public Officers Law § 87(2)(g). Some of the OAG-only records include the legal analysis or strategy of attorneys of the OAG and were properly withheld as attorney work product under Public Officers Law § 87(2)(a) and CPLR 3101(c).

FOIL does not require that the OAG provide an estimate of the number of responsive records. See Op. Comm. on Open Gov't No. FOIL-AO-14311. Nor does FOIL require that the OAG explain with particularity how an exception applies to any discrete record withheld. *In re Whitley v. N.Y. Co. District Attorney's Office*, 101 A.D.3d 455 (1st Dep't 2012). I therefore decline to do so.

This is a final agency determination. Please be advised that judicial review of this determination can be obtained under Article 78 of the Civil Practice Law & Rules.

Very truly yours,



KATHRYN SHEINGOLD
Records Appeals Officer

Cc: Committee on Open Government
OAG Records Access Officer