



REQUEST UNDER THE VIRGINIA FREEDOM OF INFORMATION ACT

September 27, 2018

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219

BY WEB SUBMISSION

RE: Certain Attorney General Office records relating to a SAAG/pro bono counsel

To Whom it May Concern:

Pursuant to the Virginia Freedom of Information Act, Va. Code § 2.2-3700 *et. seq.*, the undersigned group and individual request copies of any and all records as described herein. The Competitive Enterprise Institute (CEI) is a non-profit educational foundation incorporated in Washington, DC with an established public records transparency practice. The individual signatory is a resident, domiciliary and citizen of the Commonwealth of Virginia. Given the non-profit transparency and journalism activities of the requester, described below, we ask that any limited fees permitted by law be waived.

Background

Your Office, in its September 15, 2017 “APPLICATION OF THE PENNSYLVANIA OFFICE OF ATTORNEY GENERAL FOR THE NYU FELLOWS/SAAG PROGRAM” sent by Donald Anderson to stateimpactcenter@nyu.edu and david.hayes@nyu.edu, wrote, *inter alia*:

“The Virginia OAG has historically employed, and currently employs, fellows funded by law schools. Although the arrangement with the State Impact Program and NYU would be



somewhat different, there are no Virginia-specific limitations or requirements that would apply to the OAG's employment of a NYU fellow as a Special Assistant Attorney General. We have also reviewed the Virginia Rules of Professional Conduct and find no concern about the proposed arrangement, which we understand requires that the attorney's duty of loyalty shall be to the Attorney General and the Commonwealth and its agencies.”

Subsequent to this application, NYU provided draft 10/18/2017 Retainer and Secondment Agreements to provide OAG a “Research Fellow”/“Special Assistant Attorney General”, requesting OAG to certify that “WHEREAS, The [AG OFFICE] has the authority consistent with applicable law and regulations to accept a Legal Fellow whose salary and benefits are provided by an outside funding source.”

The same proposed contract requested OAG certify that “The [AG OFFICE] has determined that NYU’s payment of salary and benefits to the Legal Fellow and the provision of services by the Legal Fellow to the [AG OFFICE] do not constitute an impermissible gift under applicable law or regulation.”

Records Requested

Please provide us within the statutorily prescribed time copies of all records as described, below, which are **dated from August 25, 2017, through March 31, 2018**, inclusive (for requests I - IV*, which time parameter is modified for V), **and its accompanying information¹, including also any attachments:**

¹ This includes public records, and associated public information, see discussion of Data Delivery Standards, *infra*.



- I. any executed version of a a) **Secondment Agreement** with New York University, b) **Retainer Agreement** with New York University, and c) any correspondence transmitting these records to or from OAG.
- II. all **opinions, analyses and/or or determinations concluding that OAG has the legal authority** to hire or otherwise bring into the Office, under any title whether Special Assistant Attorney General or otherwise, **an NYU Fellow or otherwise a privately funded assistant.**
- III. all **opinions, analyses and/or or determinations concluding that a Special Assistant Attorney General, or anything else offered or provided by NYU, does or does not constitute an impermissible gift** under applicable law, code or regulation.
- IV. all **opinions, analyses and/or or determinations concluding that a Special Assistant Attorney General, or anything else provided by NYU, does or does not comply with or violate** applicable ethics, professional conduct or anti-corruption law, code or regulation.
- V. all **correspondence with any address ending with @nyu.edu, and any attachments, that use “ethic” in any form (e.g., ethics, ethical) and/or “Professional Conduct”**, which was sent to or from or copying (whether as cc: or bcc:) **Donald Anderson**. * Unlike the above requests I-IV, this request covers records **dated from August 25, 2017 through March 31, 2018**, inclusive.

Please consider as responsive entire email “threads” containing any information responsive to this request, regardless whether any part of that thread falls outside the cited search parameters.



As this matter involves a significant issue of public interest, please produce responsive information as it becomes available on a rolling basis but consistent with the Act's prescribed timelines.

Given the non-profit transparency and journalism activities of the requester,² we ask that the limited fees that are permitted be waived. In the interests of expediting the search and processing of this Request, CEI is willing to pay fees up to \$200. Please provide an estimate of anticipated costs in the event that fees for processing this Request will exceed \$200. To keep costs and copying to a minimum **please provide copies of all productions to the email used to send this request.** Given the nature of the records responsive to this request, all should be in electronic format, and therefore there should be no photocopying costs (see discussion, *infra*).

We request records on your system, e.g., its backend logs, and do *not* seek only those records which survive on an employee's own machine or account, which are subject to placement in a trash/recycle folder and removal while the record remains elsewhere.

We do not demand your Office produce requested information in any particular form, instead **we request records in their native form, with specific reference to the U.S.**

Securities and Exchange Commission Data Delivery Standards.³ The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

² We also note the federal government has already acknowledged that CEI qualifies as a media organization under FOIA. See e.g., Treasury FOIA Nos. 2012-08-053, 2012-08-054.

³ <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.

To quote the SEC Data Delivery Standards, “Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. *(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)*” (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that your Office determines that a given record contains confidential or private information, or otherwise seeks to withhold information which is responsive to this request, FOIA requires that such records be released with appropriate redactions. In the event that necessity requires your Office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each



PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

In the context of our experience with responsive agencies taking the effort to physically print, then (often, poorly) scan *electronic* mail into (typically, non-searchable) PDF files, we note that production of electronic records necessitates no such additional time, effort or other resources, and no photocopying expense. Any such effort as described is most reasonably viewed as an effort to frustrate the requester's use of the public information.

Lastly, due to experiences with various Virginia agencies, we remind your office of its specific obligations under VFOIA. Please note that Va. Code § 2.2-3704 (B) requires your office to provide a response within five days. Such a response can take several forms:

- 1) Pursuant to § 2.2-3704 (B)(1), you can withhold all responsive records, but only if you "identify with reasonable particularity **the volume** and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records."
- 2) Pursuant to § 2.2-3704 (B)(2), you can provide the records in part and withhold them in part, but only if you "identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records."
- 3) Pursuant to Va. Code § 2.2-3704(B)(3), you can claim that no records exist.
- 4) Pursuant to Va. Code 2.2-3704(B)(4), you can claim an extra seven days are needed to make one of the responses delineated in ##1-3, above.



We understand that certain public bodies are in the practice of requiring payment of fees merely to complete a search for responsive public records, without actually producing or pledging to produce responsive records; this, instead of conducting an initial canvass for some basis for the estimated fee. While this practice, if occurring, is improper, I remind you that Va. Code 2.2-3704(F) allows a public body to “make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.” The statute does not allow a public body to charge for a mere determination that records are exempt and therefore withheld pursuant to Va. Code § 2.2-3704 (B)(1), in which case the public body must nevertheless identify the volume of the records it is withholding and the statutory basis for doing so. Similarly, an agency may claim it has no responsive records pursuant to § 2.2-3704 (B)(3), but it may not charge for such a response.

If you have any questions, or would like to discuss this matter further, do not hesitate to contact me by email. We look forward to your timely response.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Horner", is written over a light gray rectangular background.

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