

COVER SHEET FOR FILING CIVIL ACTIONS
COMMONWEALTH OF VIRGINIA

Case No. _____
(CLERK'S OFFICE USE ONLY)

Richmond City

Circuit Court

Horner, Christopher and

v./In re:

Mark R. Herring

PLAINTIFF(S)

DEFENDANT(S)

Competitive Enterprise Institute

Attorney General of Virginia

I, the undersigned plaintiff defendant attorney for plaintiff defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought.)

GENERAL CIVIL

Subsequent Actions

- Claim Impleading Third Party Defendant
 - Monetary Damages
 - No Monetary Damages
- Counterclaim
 - Monetary Damages
 - No Monetary Damages
- Cross Claim
- Interpleader
- Reinstatement (other than divorce or driving privileges)
- Removal of Case to Federal Court

Business & Contract

- Attachment
- Confessed Judgment
- Contract Action
- Contract Specific Performance
- Detinue
- Garnishment

Property

- Annexation
- Condemnation
- Ejectment
- Encumber/Sell Real Estate
- Enforce Vendor's Lien
- Escheatment
- Establish Boundaries
- Landlord/Tenant
 - Unlawful Detainer
- Mechanics Lien
- Partition
- Quiet Title
- Termination of Mineral Rights

Tort

- Asbestos Litigation
- Compromise Settlement
- Intentional Tort
- Medical Malpractice
- Motor Vehicle Tort
- Product Liability
- Wrongful Death
- Other General Tort Liability

ADMINISTRATIVE LAW

- Appeal/Judicial Review of Decision of (select one)
 - ABC Board
 - Board of Zoning
 - Compensation Board
 - DMV License Suspension
 - Employee Grievance Decision
 - Employment Commission
 - Local Government
 - Marine Resources Commission
 - School Board
 - Voter Registration
 - Other Administrative Appeal

DOMESTIC/FAMILY

- Adoption
 - Adoption – Foreign
- Adult Protection
- Annulment
 - Annulment – Counterclaim/Responsive Pleading
- Child Abuse and Neglect – Unfounded Complaint
- Civil Contempt
- Divorce (select one)
 - Complaint – Contested*
 - Complaint – Uncontested*
 - Counterclaim/Responsive Pleading
 - Reinstatement –
 - Custody/Visitation/Support/Equitable Distribution
- Separate Maintenance
 - Separate Maintenance Counterclaim

WRITS

- Certiorari
- Habeas Corpus
- Mandamus
- Prohibition
- Quo Warranto

PROBATE/WILLS AND TRUSTS

- Accounting
- Aid and Guidance
- Appointment (select one)
 - Guardian/Conservator
 - Standby Guardian/Conservator
 - Custodian/Successor Custodian (UTMA)
- Trust (select one)
 - Impress/Declare/Create
 - Reformation
- Will (select one)
 - Construe
 - Contested

MISCELLANEOUS

- Amend Death Certificate
- Appointment (select one)
 - Church Trustee
 - Conservator of Peace
 - Marriage Celebrant
- Approval of Transfer of Structured Settlement
- Bond Forfeiture Appeal
- Declaratory Judgment
- Declare Death
- Driving Privileges (select one)
 - Reinstatement pursuant to § 46.2-427
 - Restoration – Habitual Offender or 3rd Offense
- Expungement
- Firearms Rights – Restoration
- Forfeiture of Property or Money
- Freedom of Information
- Injunction
- Interdiction
- Interrogatory
- Judgment Lien-Bill to Enforce
- Law Enforcement/Public Official Petition
- Name Change
- Referendum Elections
- Sever Order
- Taxes (select one)
 - Correct Erroneous State/Local
 - Delinquent
- Vehicle Confiscation
- Voting Rights – Restoration
- Other (please specify)

Damages in the amount of \$ _____ are claimed.

11/14/2018

DATE



PLAINTIFF

DEFENDANT

ATTORNEY FOR

PLAINTIFF

DEFENDANT

Graven W. Craig, Esq. (VSB 41367)

PRINT NAME

P.O. Box 68, 202 W. Main Street

ADDRESS/TELEPHONE NUMBER OF SIGNATOR

Louisa, Virginia 23093

graven@craig-law.com

EMAIL ADDRESS OF SIGNATOR (OPTIONAL)

***Contested** divorce means any of the following matters are in dispute: grounds of divorce, spousal support and maintenance, child custody and/or visitation, child support, property distribution or debt allocation. An "Uncontested" divorce is filed on no fault grounds and none of the above issues are in dispute.

**VIRGINIA:
IN THE CIRCUIT COURT OF CITY OF RICHMOND**

CHRISTOPHER HORNER, *et al.*
Petitioner,

v.

CASE No. _____

MARK R. HERRING
ATTORNEY GENERAL OF VIRGINIA,
Respondent.

**AFFIDAVIT OF ATTORNEY IN SUPPORT OF
PETITION FOR MANDAMUS AND INJUNCTIVE RELIEF**

COMMONWEALTH OF VIRGINIA)
) ss
COUNTY OF ALBEMARLE)

Personally appearing before the undersigned and with authority in and for said county and state,
Christopher Horner, Esq., being first duly sworn by the undersigned, deposes and says:

1. Affiant is a resident, domiciliary, and citizen of the County of Albemarle and of the Commonwealth of Virginia, an attorney licensed to practice law in the District of Columbia, and submitted the requests for information at issue in the above-entitled action.
2. Each of the statements of fact, law and argument showing good cause for the petition, as found in paragraphs 1 through 17 of the Petition for Mandamus and Injunctive Relief in the above entitled action, are true, based on knowledge, information and belief.
3. Petitioner reasonably seeks recovery of costs and fees pursuant to Va. Code § 2.2-3713(D).

Further, affiant sayeth naught.



Christopher Horner

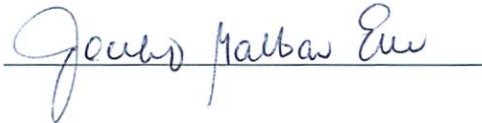
Petitioner

I, JOCELYN EVES, a Notary Public of the County and State aforesaid, hereby certify that Christopher Horner personally known to me to be the affiant in the foregoing affidavit, personally appeared before me this day and having been by me duly sworn deposes and says that the facts set forth in the above affidavit are true and correct.

Witness my hand this the 29 day of OCTOBER, 2018.

My Commission expires:

06/30/2021.



JOCELYN GALBAN EVES
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES JUNE 30, 2021
COMMISSION # 7275454

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

CHRISTOPHER HORNER,)
and)
COMPETITIVE ENTERPRISE INSTITUTE)
)
Petitioners,)
)
v.)
)
MARK R. HERRING,)
ATTORNEY GENERAL OF VIRGINIA)
)
Respondent.)

CASE NO.: _____

SERVE:
Mark R. Herring
Attorney General of Virginia
202 North Ninth Street
Richmond, Virginia 23219

PETITION FOR WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

NOW COMES Christopher Horner and Competitive Enterprise Institute, by counsel, alleging the following:

- 1) This matter is brought under the Virginia Freedom of Information Act (FOIA), Virginia Code § 2.2-3700 *et seq.*, and § 2.2-3713(A) which authorizes this Writ and gives this Court jurisdiction. Venue is proper in this Court pursuant to Va. Code § 2.2-3713(A)(3).
- 2) On September 27, 2018, pursuant to Virginia Code § 2.2-3704, Christopher Horner, in his own right as a citizen of the Commonwealth and together with the Competitive Enterprise Institute (CEI), sent a Virginia Freedom of Information Act (VFOIA) request by electronic submission on OAG’s FOIA web portal and regular mail to the Office of Attorney General (OAG), a FOIA-covered institution, requesting certain records relating to specific, written OAG certifications to New York University’s “State Energy & Environmental Impact

Center” (NYU, or State Impact Center) made on September 15, 2017. See Exhibit 1.

3) Specifically, Petitioners sought, *inter alia*:

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, dated from August 25, 2017, through March 31, 2018.

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, dated from August 25, 2017, through March 31, 2018.

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, dated from August 25, 2017, through March 31, 2018.

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, dated from August 25, 2017 through March 31, 2018, inclusive.

4) On October 5, 2018, OAG provided Petitioners a “no records” response as to items II-IV. OAG also referenced certain records, which it had previously released to Petitioners, as responsive to item V, none of which represented any opinion, analysis or determination of the conclusions made in these September 15, 2017 OAG certifications made to NYU.

5) These claims were made by OAG’s Senior Assistant Attorney General and Chief, Environmental Section, Donald Anderson, in an “NYU Fellow Application” to the State Impact Center. At the latter’s request for written confirmation of OAG’s legal authority to bring in a privately funded and privately employed “Special Assistant Attorney General” to

pursue issues of concern to the donor/employer, and for OAG to identify any legal limitations on doing so,¹ this application stated, *inter alia*:

The Virginia OAG has historically employed, and currently employs, fellows funded [sic] 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.

(emphases added) (See Exhibit 2)

6) On October 17, 2018, again pursuant to Virginia Code § 2.2-3700 *et. seq.*, and again in his own right and together with CEI, by electronic submission on OAG's FOIA web portal and regular mail to the Office of Attorney General (OAG), Mr. Horner sent a VFOIA request to OAG, noting:

We seek the record on which OAG based and made its certifications to NYU. January 30, 2018 correspondence from Mr. Anderson to Mr. Hayes suggests there was indeed an internal review process, presumably during which these inquiries were undertaken, and OAG's ability to make such certifications was concluded. The October 5, 2018 "no records" response suggests possibilities including that our September 27, 2018 request search parameters left a hole through which the records relating to these certifications fell, or that OAG's search was insufficient.

(See Exhibit 3, confirming the request and its search parameters)

¹ In its August 25, 2017 email from David Hayes to, *inter alia*, OAG's Kate O'Holloran, Subject: State Energy & Environmental Impact Center, NYU wrote in pertinent part: "Application Requirements. To be considered for the NYU Fellows/SAAG program, an application must contain the following...3. Budget Proposal and Confirmation of Authority: To be considered complete, applications...also should identify any state-specific limitations or requirements governing the appointment of an employee paid by an outside funding source and include a written confirmation that the attorney general has the authority to hire an NYU Fellow as a SAAG (or equivalent title)."

7) Therefore, Petitioners requested copies of:

“1) **all legal memoranda, analyses, conclusions, or other opinions on which OAG based these September 15, 2017 declarations to NYU** in OAG’s application for a privately funded special prosecutor to pursue issues and legal positions of interest to the donor²; and

2) **all other records**, including but not limited to correspondence and any attachments, *relating to these same September 15, 2017 assertions made and otherwise regarding an “NYU Fellow”*, dated from NYU’s first known (to requesters) approach to VA OAG, *August 25, 2017, through the date you process this request*”. (emphases in original)

8) Petitioners noted that “search” under VFOIA has a particular meaning:

Principles of statutory construction require us to construe the terms “accessing,” “duplicating,” “supplying” and “searching” according to their ordinary meaning. See *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 89–90, 726 S.E.2d 339, 344 (2012). “Search” means: (1) “to look into or over carefully or thoroughly in an effort to find something”; or (2) “to uncover, find, or come to know by inquiry or scrutiny.” Webster’s Third New International Dictionary 2048 (1993). In the context of Code § 2.2–3704(F), “searching” includes “inquiring or scrutinizing” whether a disputed document can be released under federal and state law. (quoting *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330 (2014))(citations omitted).)

We request your Office “identify with reasonable particularity the volume and subject matter of withheld records” pursuant to VA Code § 2.2-3704.”

9) On October 24, 2018, Respondent asserted to Petitioners, “There are no documents responsive to item 1 of your request”, and that “Records responsive to item 2 of your request

² Petitioners cited to, “*See, e.g., NYU Law Fellow Position Description sent to Donald Anderson on December 13, 2017 from Elizabeth Klein, Subject: fellowship program. “Responsibilities include, but are not limited to the following: ...advance progressive clean energy, climate change, and environmental legal and policy positions.” See also, “Basic Eligibility Requirements and Application Process The opportunity to potentially hire an NYU Fellow is open to all state attorneys general who demonstrate a need and commitment to defending environmental values and advancing progressive clean energy, climate change, and environmental legal positions.” August 25, 2017 email from David Hayes*” (cited in Request, FN 1).

have previously been provided to you in the Office's responses to" previous VFOIA requests.

10) No previous OAG record production under VFOIA, whether those specified in OAG's October 24, 2018 letter or otherwise, represented any opinion, analysis or determination of the conclusions made in these OAG certifications made to the State Impact Center on September 15, 2018 prompting Petitioners' request for such records. The sole responsive record provided was the claim itself.

11) In addition to OAG's September 15, 2018 representations to the State Impact Center, the Office of Attorney General asserts in its Special Counsel Policy³ that, *inter alia*, "The Attorney General may appoint a private attorney as special counsel if he finds that it is impracticable or uneconomical for the Office to render service (§§ 2.2-507 and 510)...Prior to employing special counsel, **the Attorney General will determine, in writing**, whether and why it is either impractical or uneconomical to render legal services directly by the Office." (emphasis added)

12) Other provisions of the Virginia Code require that agencies shall be the employer of the personnel necessary for the proper performance of all responsibilities of their agency (Va. Code § 2.2-2814), and that their salaries "shall, except where otherwise specifically provided, be paid out of the state treasury" (Va. Code § 2.2-2814 and § 2.2-100).

13) On information and belief, Petitioners assert that records as described do exist, and OAG did not conduct an adequate and lawful search for records as contemplated by the Virginia Freedom of Information Act and as defined in *Am. Tradition Institute v. Rector & Visitors*.

³ https://www.oag.state.va.us/files/Special_Outside_Counsel_Policy.pdf, viewed October 25, 2018.

14) Petitioners also assert upon information and belief that, regardless of whether OAG conducted a search for records as contemplated by VFOIA, OAG is improperly claiming “no records” exist responsive to Petitioners’ September 27, 2018 and October 17, 2018 VFOIA requests.

15) Petitioners also assert upon information and belief that, regardless of whether OAG conducted a search for records as contemplated by VFOIA, OAG is improperly withholding records requested by Petitioners, which records are not properly exempt from production under Va. Code § 2.2-3700, *et seq.*

16) Under Virginia Code § 2.2-3700 *et seq.*, a single instance of denial of the rights and privileges conferred by the Virginia Freedom of Information Act shall be sufficient to invoke the jurisdiction of this Court and seek mandamus and appropriate attorney’s fees.

17) Any denial of a Virginia Freedom of Information request or improper withholding of documents without justification by an enumerated exemption may be reviewed and overturned by a court of appropriate jurisdiction pursuant to Virginia Code § 2.2-3713(A).

Prayer for Relief

WHEREFORE, the Petitioners respectfully pray, through counsel, that this Court,

a) Order OAG to conduct an adequate and fair search for responsive records, and to produce any such records found after an adequate search to the Petitioners, subject only to legally-allowable withholdings;

b) Enjoin the OAG from seeking fees pursuant to Va. Code § 2.2-3704(F) unless such fees are required to produce discrete responsive records, and such fees are itemized and reviewable by the Petitioners and the Court;

c) Order the OAG, pursuant to § 2.2-3713 (D), to pay Petitioners’ reasonable costs and fees associated with this instant matter, and,

d) Order such necessary and proper injunctive relief or any other relief as this Court deems just and proper.

e) Petitioner hereby waives the seven-day hearing requirement pursuant to §2.2-3713 (C).

Respectfully submitted this 14th day of November 2018,

**Christopher Horner &
Competitive Enterprise Institute**
By counsel



Graven W. Craig, Esquire (VSB #41367)
The Commonwealth Criminal & Traffic Law Group, PLC
P.O. Box 68 - 202 W. Main Street
Louisa, VA 23093
(540) 967-9900
(540) 967-3567 facsimile
graven@craig-law.com e-mail

EXHIBIT

1

1310 L Street, NW, 7th Floor
Washington, DC 20005
cei.org

202 331 1010 *main*
202 331 0640 *fax*



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

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202 331 0640 *fax*



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.

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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.

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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 "C. Horner", with a long, sweeping underline.

Christopher C. Horner
Senior Fellow, CEI
chris.horner@cei.org
1489 Kinross Lane
Keswick, VA 22947
202.262.4458

EXHIBIT

2

Anderson, Donald D.

From: Anderson, Donald D.
Sent: Friday, September 15, 2017 11:21 AM
To: 'stateimpactcenter@nyu.edu'
Cc: David J. Hayes (david.hayes@nyu.edu)
Subject: NYU Fellow Application

Please accept this application of the Office of the Attorney General of the Commonwealth of Virginia to hire a New York University School of Law fellow as a Special Assistant Attorney General through the State Energy & Environmental Impact Center. We appreciate the opportunity to participate in this program.

General Herring has long been committed to the interests that form the core mission of the State Impact Center—clean energy, climate change and more generally environmental matters. That commitment was evidenced early in his term when he submitted comments on EPA's then proposed Clean Power Plan. After the CPP was issued and challenged, General Herring joined the coalition of seventeen other states and seven major municipalities supporting the plan; the OAG has continued to be engaged in that multi-state effort through the present. In June, after the Trump Administration announced that the United States would withdraw from the Paris Climate Agreement, the OAG joined in the coalition of state AGs, Governors and others in issuing a "We Are Still In" statement. General Herring has also been supportive of Virginia Governor McAuliffe's executive actions to reduce carbon pollution in Virginia. Most recently, the OAG joined a coalition of twenty states and localities urging the EPA to retract Administrator Scott Pruitt's unsolicited letter advising states on the CPP.

General Herring's efforts have not been limited to clean energy and power issues. For example, the OAG filed an amicus brief in *America Farm Bureau v. EPA*, a case involving the total maximum daily load cooperatively developed to protect the Chesapeake Bay. The critical issue in the case was whether the Bay states, including Virginia, had the authority to act together to manage and restore the Bay. More recently, General Herring has submitted comments opposing regulatory proposals by the current administration to open Virginia and other east coast states off-shore waters to petroleum exploration and production.

The OAG has achieved this track record of commitment to regional and national environmental issues with limited resources. The Environmental Section of the Office is staffed with six full-time line attorneys, two other line attorneys who spend approximately half their time on environmental matters, and one paralegal. The attorneys are fully booked with representation of numerous Commonwealth agencies, including the Departments of Conservation and Recreation, Environmental Quality, Forestry, Game and Inland Fisheries, Health (Environmental Health Services), Mines, Minerals and Energy, as well as the Division of Consolidated Laboratory Services, the Marine Resources Commission, the Secretary of Natural Resources, and local Soil and Water Conservation Districts. Moreover, Section attorneys have been engaged in substantial major environmental litigation, including the ongoing defense of the Commonwealth's moratorium on uranium mining against constitutional attack and achievement of the largest natural resource damage settlement in Virginia history. The addition of an NYU Fellow would provide a full-time attorney to allow General Herring to participate much more fully in cooperative efforts to advance the agenda represented by the State Impact Center.

If our Office is selected for the program, the NYU Fellow serving as a Special Assistant Attorney General would be incorporated into the Environmental Section. The Section is housed in the Commerce, Environment and Technology Division of the OAG, headed by Deputy Attorney General John W. Daniel. The Section is headed by Senior Assistant Attorney General and Chief, Donald D. Anderson, who reports directly to Deputy Daniel. The NYU fellow would report directly to the Section Chief.

Currently the line attorneys in the Section range in years of experience at the bar from three to twenty years. The current salary range runs from approximately \$70,000 to approximately \$100,000. Assuming the NYU fellow would come into the Office with 5-10 years of experience, we anticipate the appropriate salary would be approximately \$81,500. We understand that, if selected for the program, our Office would work with the State Impact Center to identify, recruit and extend offers to appropriate candidates. That process, and the specific salary and benefit package for a recruit and related arrangements, would have to be determined in cooperation with our finance and human resource directors.

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.

Please let us know if you need additional information to consider this application. And thank you.

Donald D. Anderson
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EXHIBIT

3

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REQUEST UNDER THE VIRGINIA FREEDOM OF INFORMATION ACT

October 17, 2018

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

BY WEB SUBMISSION AND REGULAR MAIL

RE: Certain Attorney General Office records relating to Privately Funded Prosecutors

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. Requester Competitive Enterprise Institute (CEI) is a non-profit educational foundation incorporated in Washington, DC with an established public records transparency practice. The requesting individual signatory is a resident, domiciliary and citizen of the Commonwealth of Virginia. Given CEI's non-profit transparency and journalism activities, described below, we ask that any limited fees permitted by law be waived.

Background

In the Virginia Office of Attorney General's (VA OAG) September 15, 2017 "NYU Fellow Application" sent by Donald Anderson to stateimpactcenter@nyu.edu and david.hayes@nyu.edu, and at the request of Mr. Hayes to confirm in writing OAG's legal



authority to bring in a privately funded special prosecutor, and to identify any legal limitations on doing so,¹ your Office asserted, *inter alia*:

The Virginia OAG has historically employed, and currently employs, fellows funded by [sic] 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.

On September 27, 2018 requesters sent your Office a VFOIA request prompted by these September 15, 2017 certifications, which sought, *inter alia*:

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, dated from August 25, 2017, through March 31, 2018.

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, dated from August 25, 2017, through March 31, 2018.

¹ See, e.g., August 25, 2017 email from David Hayes to, *inter alia*, Kate O'Holloran, Subject: State Energy & Environmental Impact Center: "Application Requirements. To be considered for the NYU Fellows/SAAG program, an application must contain the following:...3. Budget Proposal and Confirmation of Authority: To be considered complete, applications...also should identify any state-specific limitations or requirements governing the appointment of an employee paid by an outside funding source, and include a written confirmation that the attorney general has the authority to hire an NYU Fellow as a SAAG (or equivalent title)." ."



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, dated from August 25, 2017, through March 31, 2018.

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, dated from August 25, 2017 through March 31, 2018, inclusive.

On October 5, 2018 your Office provided requesters a "no records" response as to items II-IV. It also produced certain records in response to item V, however none of these represented any opinion, analysis or determination of the conclusions made in these OAG certifications made to NYU on September 15, 2018 other than the application stating conclusions themselves.

Records Sought

We seek the record on which OAG based and made its certifications to NYU. January 30, 2018 correspondence from Mr. Anderson to Mr. Hayes suggests there was indeed an internal review process, presumably during which these inquiries were undertaken, and OAG's ability to make such certifications was concluded.² The October 5, 2018 "no records" response suggests possibilities including that our September 27, 2018 request search parameters left a hole through which the records relating to these certifications fell, or that OAG's search was insufficient.

As such we ask that you provide us, within the statutory period of time, copies of:

² "I have been waiting for formal approval to proceed, which I have now been assured is coming." January 30, 2018 email from Donald Anderson to David Hayes and Elizabeth Klein, Subject: RE: Meeting in Richmond.



- 1) **all legal memoranda, analyses, conclusions, or other opinions on which OAG based these September 15, 2017 declarations to NYU** in OAG’s application for a privately funded special prosecutor to pursue issues and legal positions of interest to the donor³; and
- 2) **all other records**, including but not limited to correspondence and any attachments, *relating to these same September 15, 2017 assertions made and otherwise regarding an “NYU Fellow”*, dated from NYU’s first known (to requesters) approach to VA OAG, *August 25, 2017, through the date you process this request*;

We note that “search” under VFOIA has a particular meaning:

Principles of statutory construction require us to construe the terms “accessing,” “duplicating,” “supplying” and “searching” according to their ordinary meaning. See *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 89–90, 726 S.E.2d 339, 344 (2012). “Search” means: (1) “to look into or over carefully or thoroughly in an effort to find something”; or (2) “to uncover, find, or come to know by inquiry or scrutiny.” Webster’s Third New International Dictionary 2048 (1993). In the context of Code § 2.2–3704(F), “searching” includes “inquiring or scrutinizing” whether a disputed document can be released under federal and state law.⁴

We request your Office “identify with reasonable particularity the volume and subject matter of withheld records” pursuant to VA Code § 2.2-3704.

³ See, e.g., NYU Law Fellow Position Description sent to Donald Anderson on December 13, 2017 from Elizabeth Klein, Subject: fellowship program. “Responsibilities include, but are not limited to the following: ...advance progressive clean energy, climate change, and environmental legal and policy positions.” See also, “Basic Eligibility Requirements and Application Process The opportunity to potentially hire an NYU Fellow is open to all state attorneys general who demonstrate a need and commitment to defending environmental values and advancing progressive clean energy, climate change, and environmental legal positions.” August 25, 2017 email from David Hayes (FN 1, *supra*).

⁴ *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330 (2014)(citations omitted).

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.

We 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.

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.

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.

Given CEI's non-profit transparency and journalism activities,⁵ we ask that the limited fees that are permitted be waived. In the interests of expediting the search and processing of this Request, requesters are 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.**⁶ The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

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

⁵ 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.

⁶ <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.



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

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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.

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 "C. Horner", with a long, sweeping horizontal stroke extending to the right.

Christopher C. Horner
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