



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

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,



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