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

202 331 1010 main
202 331 0640 fax

APPEAL OF IMPROPER RESPONSE AND DENIAL OF ACCESS UNDER MASSACHUSETTS PUBLIC RECORDS LAW

February 18, 2019

Mr. William Francis Galvin
Secretary of the Commonwealth of Massachusetts
McCormack Building
One Ashburton Place
Boston, MA 02108

By Electronic mail: pre@sec.state.ma.us

Re: Appealing a Denial of Access to Public Records

To Whom it May Concern:

Pursuant to M.G.L c. 66, § 10A(a), we appeal the Massachusetts Office of the Attorney General's (OAG) February 5, 2019 response to our January 18, 2019 request under Massachusetts' Public Information Law (PIL). We include the request, the written response, and the following brief letter detailing the reason for the appeal.

We appeal MA OAG's violations of M.G.L c. 66, §10(a) and (b), withholding, in full, every record responsive to our request seeking correspondence, over a three-and-a-half month period in early 2016, that include one of two OAG employees and one or more of several plaintiffs' tort law firms that, public records show, engaged in a tour of Offices of Attorney General recruiting OAGs to investigate opponents of the "climate" political agenda. OAG justifies its blanket claim of privilege by asserting that to release even one word of any among the responsive records would endanger ongoing investigations. This is implausible.

We note that productions of similar records from several other OAGs not so heavy-handed in their efforts to withhold public records confirm the then-lead plaintiff's attorney relevant to these discussions, Boston-headquartered Matt Pawa, presented an April 2016 PowerPoint slide show to OAGs beyond Massachusetts. Pawa had participated in an organized campaign seeking "a single sympathetic attorney general" to assist the plaintiffs' lawyers' cause of investigating parties opposed to their "climate" political agenda and litigation seeking settlements in the same name. The plaintiff's lawyer's pitch to AGs was titled "What Exxon Knew—And What It Did Anyway", according to public records released by an OAG neighboring Massachusetts.

Coincidentally, around the same time MA AG Healey declared at a Manhattan press conference, *inter alia*, "Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[1] As such, there is little doubt that AG Healey initiated such an investigation — as did others[2] — and the public record suggests that this was at the urging of plaintiffs' lawyers.

That every word of every record responsive to our request inquiring into this is rightly privileged and/or would threaten such investigation, if released in whole or in part, seems exceedingly unlikely.

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[1] https://ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across.

[2] We note that CEI received a subpoena from one of the allied OAGs in the effort that resulted from this recruiting spree, if one that was withdrawn when CEI initiated legal challenge.

That March 29, 2016 press conference was convened by then-New York AG Eric Schneiderman, also apparently after such a presentation by MA OAG's neighbor, Pawa. For example, Illinois' OAG staff corresponded that a major donor, Wendy Abrams, sought "to schedule a meeting with AG re: Exon [sic] Investigation", specifically to introduce that AG and her staff to Mr. Pawa and other plaintiffs' attorneys noted in our request, "to discuss ExxonMobil's practices and if the AG office would be interested in investigating the matter." Of Pawa, staff wrote, "Wendy says he may have been the one to go to the New York AG's office about Exxon."

These, as well as other public records released by California's OAG all found at https://cei.org/AGclimatescheme, most certainly reflect the kind and quality of at least some of the records that OAG is withholding in full in this matter. The same records strongly suggest that the claims that all responsive records are privileged, in full, and that their release in whole or part would endanger an ongoing investigation, are impermissibly sweeping and exaggerated.

OAG's blanket withholding is of correspondence with plaintiffs' attorneys who recruited "sympathetic" attorneys general to launch investigations of opponents of a particular political and litigation agenda. In addition to other public records undermining the facially questionable claim that any information if released would endanger ongoing investigation(s), this blanket withholding in full inherently shields reasonably segregable information from public scrutiny, with no effort to redact and release reasonably segregable information (for example, even the To, From, Date, and typically Subject fields, at minimum, off all electronic correspondence).

M.G.L c. 66, §10(a) and (b), provide, in pertinent part, that:

"(a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, *or any segregable portion of a public record*", and

"(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record…the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. *The written response shall… (iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding*, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law." (emphases added)

For reasons including those described, above, we suggest that **by OAG's February 5, 2019 response OAG improperly withholds records in full, and that OAG is withholding records in full without releasing reasonably segregable non-exempt portions, in both cases without identifying the records and the basis for each withholding, as required**.

Public records are presumed to be public unless they can be shown to be exempt. OAG must identify and establish how each of its withholdings are actually privileged and not simply, e.g., information it doesn't want released for political reasons. OAG has done neither. OAG merely stated, in pertinent part:

> Please be advised that records responsive to your request relate to open investigation(s) being conducted by the AGO and related litigation. As such, the records in our possession and any identification of those records are exempt from disclosure under G.L. c. 4, § 7, cl. 26(f), as they are materials necessarily compiled out of the public view to avoid prejudice to law enforcement efforts and related pending litigation. Disclosure of these records could prejudice ongoing and incomplete investigations by revealing the nature and extent of our information gathering to both targets and other parties - to the detriment of the AGO and the general public, whose interests we represent.

This is implausible and treats the PIL as a withholding statute, not the disclosure statute it inarguably is. This appeal is therefore made "in the dark" as to some specifics, as OAG provided CEI no baseline level of information requisite for CEI to make any determination of the number of records in full, and refused to provide any segregable portions of any responsive records containing information MA OAG deems exempt. These failings cannot prejudice the requester.

Since OAG informs us only of its blanket conclusions about some unstated number of withholdings in full, and given the blanket and potentially sweeping nature of the withholdings, we have no basis to conclude the reasonableness of the withholdings other than of those certain records which we do possess from other sources. Regardless, OAG's refusal to identify its withholdings and justify the withholdings are facially invalid as a matter of law.

Background to the Request

This appeal involves one Public Information Law request that CEI sent to OAG by electronic mail on January 17, 2019. This requested documents dated between January 1, 2016, through April 15, 2016, inclusive, which was sent to or from or copying (whether as cc: or bcc:) Christopher Courchesne and/or Michael Firestone, which also includes any party, be it to, from or copying (again whether as cc: or bcc:), a) mp@pawalaw.com, b) steve@hbsslaw.com c) any

address ending in @sheredling.com, d) any address including Oreskes, and/or e) any address ending in @bordaslaw.com.

On February 5, 2019, OAG produced the denial quoted in pertinent part, *supra*, noting:

> You have the right to appeal this response to the Supervisor of Records pursuant to M.G.L c. 66, § 10A(a), and to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under M.G.L C; 66, §10A(c).

Analysis — Improperly Withholding in Full

As with all withholdings under this law, which is a disclosure statute and not a withholding statute, OAG has the burden of establishing the propriety of any withholdings. As the Secretary of the Commonwealth notes about the above-cited statutory requirements, "A records access officer (RAO) must prove with specificity why it should be allowed to withhold any public record." (http://www.sec.state.ma.us/pre/prepdf/guide.pdf) Further, "the RAO has the burden of showing how the exemption applies to the record and why it should be withheld." Critically in the instant matter, a denial must be supported by the specific basis for withholding each and every one of the records responsive to our request. G. L. c. 66, § 10(a-b).

In the present matter, OAG simply declared all responsive records exempt, in full, claiming that not one jot nor one tittle of any document does not constitute "materials necessarily compiled out of the public view to avoid prejudice to law enforcement efforts and related pending litigation" whose disclosure "could prejudice ongoing and incomplete investigations by revealing the nature and extent of our information gathering to both targets and other parties - to the detriment of the AGO and the general public".

Again, *this is about correspondence with plaintiffs' attorneys who recruited "sympathetic" attorneys general to launch investigations of opponents of a particular political and litigation agenda*, which MA OAG did. The blanket claim of privilege, viewed in this context, is breathtaking.

OAG withheld some unstated number of records in full despite that purely factual and other segregable non-exempt portions "shall" be released per G. L. c. 66, § 10(a-b)(for example, the To, From, Date, and typically Subject fields, at minimum, off all electronic correspondence). **OAG declined to a) identify the records it withheld in full, b) provide reasonably segregable information, including but not limited to purely factual information, and e) explain and justify how no record among those withheld in full contained any reasonably segregable factual information.**

To satisfy its statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. Purely factual information is, on its face and until demonstrated otherwise, segregable and releasable. Withholding factual information is presumptively improper under the PIL barring specific, and appropriate justification the information is privileged. Yet OAG provides no explanation why not one page of one responsive but withheld record contained segregable, releasable information. It does not identify records it withheld in full or or state why records it withheld in full are exempt, in full. OAG provides no description or "specificity" identifying what agency decision, discussion or other privilege justifying the unstated number of withholdings in full, or how or why those other portions of the documents might or might not be subject to the various privileges OAG silently embraces for this indeterminate number of records withheld in full.

This represents conclusory and blanket assertions of privilege yet without expressly identifying the records, or the privilege, and with no demonstration why withholding is permissible, why withholding is appropriate, why the disclosure would be contrary to the public interest, or the impossibility of severing even one record into disclosable and non-disclosable parts. It is simply a blanket and universal refusal, impermissible under PIL.

Conclusion

For these and other reasons OAG's response is unlawful and should be reversed on review pursuant to G. L. c. 66, § 10A, and a response ordered and produced consistent with G. L. c. 66, § 10(a-b).

For the above reasons there should be no restriction on your office reviewing all potentially responsive records and the propriety of their withholding in full.

Requesters seek production of those records responsive to CEI's request at issue which OAG has withheld in full, without redactions (as appropriate), redacted as appropriate and justified and, where a record in fact contains no reasonably segregable factual information, a clear, specific articulation of the information and the basis justifying the withholding in full of that information.

We request that you respond to this appeal with the required bias toward disclosure, consistent with the law's clear intent, and with judicial precedent affirming this bias. This entails providing at the very least specific and sufficient justification for withholdings upon review, or else dropping them all together and providing all responsive information subject to only lawful and sufficiently justified redactions.

We look forward to your response.

Respectfully submitted,

Christopher C. Horner
Senior Fellow, CEI
chris.horner@cei.org
202.262.4458

enc: Copies of request, response