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

March 25, 2019

Mr. William Francis Galvin
Secretary of the Commonwealth of Massachusetts
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By Electronic mail: pre@sec.state.ma.us

Re: Appealing a March 20, 2019 Denial of Access to Public Records — SPR19/0396

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) March 20, 2019, second response to our January 18, 2019 request under Massachusetts' Public Information Law (PIL). MA OAG continues to violate M.G.L c. 66, §10(a) and (b), withholding, in full, every record responsive to our request. We include the request, the written response, and our original request for and arguments in support of our appeal which we incorporate herein by reference.

That request sought correspondence of two OAG employees, over a three-and-a-half month period in early 2016, that includes *the email addresses of* one or more of several plaintiffs' tort law firms, or mention an activist and academic (a historian). Because these records are, by OAG's admission, responsive to our request, they are almost certainly emails with plaintiffs' lawyers during a period of time when they toured OAGs seeking "sympathetic attorney(s)

general" to subpoena private parties' records in aid of planned tort litigation, or with an activist academic working in concert with those lawyers in pursuit of the same investigation (see below).

As noted in our February 18, 2019 Appeal, 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received a subpoena from one of the allied OAGs in the effort that resulted from this recruiting spree, if one that was withdrawn when CEI initiated legal challenge. Appeal, p. 2.

OAG's position is that every word of substance and even the purely factual information in six pages of emails — e.g., simply which plaintiffs' attorneys did these staff correspond with, on what date(s)? — represent information so revelatory and deleterious to law enforcement that release is not in the public interest. In this pursuit, OAG applies a non-existent blanket privilege.

The Public Records Statute requires public access to various records and documents in the possession of public officials unless otherwise exempt. In applying the investigative exemption, the Supreme Judicial Court explained in *District Attorney for the Norfolk District v. Flatley*, 419 Mass. 507, 510-511 (1995) that "generally, the public records statute favors disclosure by creating a 'presumption that the record sought is public.' G.L. c. 66, § 10(c)….The Court went on to recognize 'the absence of a blanket exemption for police records or investigatory materials' and stated that 'a case-by-case review is required to determine whether an exemption applies, *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 289-290 (1979), and that 'there must be specific proof elicited that the documents sought are of a type for which an exemption has been provided. . .'" Id. at 512.[1]

To support the illusory blanket privilege, OAG erects straw men to shield even the purely factual information from invasive public scrutiny: the information "relates to", and "would likely

[1] *Giles v. Gill, Jr., et al.* (Suffolk County Superior Court, Civil Action No. 95-0143 (1996)).

impact" investigations or litigation. These standards appear nowhere in the applicable Massachusetts provision, which OAG does invoke but proceeds to mischaracterize, in lieu of satisfying the actual standards applicable to the request.

Background

Public records show the parties in our request's search terms sought attorneys general investigations of entities which the parties had targeted for litigation. The plaintiffs' firms engaged in a tour of state attorney general offices around the country, recruiting OAGs to investigate those targets during the time period covered by our request. The parties engaged in this campaign after concluding that "a single sympathetic attorney general" (p. 11) could subpoena their targets' records to give their putative litigation an assist.

We attach our February 18, 2019 request for review. We commend to you its discussion of these activities related to the records MA OAG refuses to provide even the most basic information about.

OAG continues to refuse to comply with its statutory obligation to release segregable portions of the six records it claims are responsive, for example purely factual information. Its March 20, 2019 letter was prompted by your Office's March 5, 2019 instruction to provide more information as required by Massachusetts' public records law. The arguments therein do nothing to bring OAG into compliance with the statute, and indeed further undermine its position.

Deficiencies:

OAG does invoke, though it misstates, the standard in G.L. c. 4, § 7, cl. 26(f), an exemption for "investigatory materials *necessarily compiled out of the public view*…the

disclosure of which materials *would probably so prejudice the possibility of effective law enforcement* that such disclosure would not be in the public interest" (emphases added).

OAG instead specifically justifies its withholding on three grounds not found in the Massachusetts code. The first of these is that, in OAG's estimation, requester would find whatever OAG released meaningless. This is not a justification in Massachusetts law for the withholding(s) and OAG is silent on Massachusetts precedent supporting (or rejecting) these standards standard.

Indeed, there is apparently no Massachusetts judicial precedent supporting any of OAG's withholdings and/or rationales. Citing to the federal cases OAG invokes as general propositions also does nothing to undermine the arguments set forth in our original appeal, which we incorporate by reference in support of our appeal of OAG's March 20, 2019 response.

OAG's Invented "relates to" and "would likely impact" Standards

The key language from OAGs letter is (**emphasis** added; citations omitted):

> In this case, the AGO has six (6) pages of e-mails that are responsive to your request. We can give you no further information about these records without compromising our investigation or litigation strategies to the same extent as disclosing the records themselves.
>
> The **senders and recipients, the dates,** and the content of these e-mails **relate to** our ongoing ExxonMobil investigation, or, in one instance, other potential environmental enforcement, and, if released, might not only prejudice the investigation going forward, but **would also likely impact** the related litigation. Further, redaction in this case would render these e-mails meaningless, as the entire bodies as well as the senders, recipients, and dates are exempt from disclosure under G.L. c. 4, § 7, cl. 26(f) as described above.

Distilled, OAG claims that even just "The senders and recipients [and] the dates…of these e-mails relate to [an] investigation, or, in one instance, other potential environmental enforcement,

and, if released…would also likely impact [related litigation].” This is bereft of valid rationales for the withholding(s) in full under Massachusetts law.

Recall that our request is for emails of two named OAG staffers with or using the email addresses of certain plaintiffs’ attorneys who were pleading, at that particular time, for “a single sympathetic attorney general” to investigate and begin subpoenaing records from the tort lawyers’ desired litigation targets, for use in their own desired tort litigation. Also covered are the two aides’ emails mentioning a “climate” activist and professor of history making the same plea.

OAG’s position is that releasing an email with all information redacted except, e.g., the OAG correspondent’s name and the email’s date would probably so prejudice the possibility of effective law enforcement as to not be in the public interest. This is of course absurd, and possibly explains why OAG misstates the applicable statutory standard.

OAG invents two other standards, instead. However, whether an email *relates to* an investigation is legally meaningless. Of course, the specific claim here is surely nothing we contest: encouraging AG investigation was the outside plaintiffs' firms’ and the activist's (Oreskes’) entire point of pleading to AGs to initiate said investigation(s). As such, OAG’s assertion that the withheld correspondence “relates to” subsequent investigation(s) is both tautological and irrelevant.

It is far more likely that release of emails showing correspondence with any of the parties identified in our search terms is embarrassing. That, too, is not a valid rationale for withholding under Massachusetts law.

Whether an email *would likely impact* the investigation OAG did then initiate is also legally meaningless. Like "relates to", "would also likely impact" says nothing meaningful and does not satisfy any relevant standard under Massachusetts law.[2]

The applicable standard is "disclosure of which *would probably so prejudice the possibility of effective law enforcement* that such disclosure would not be in the public interest". G.L. c. 4, § 7, cl. 26(f). The question is not whether information relates to an investigation; it is not whether information would likely impact litigation. It is not even enough for OAG to claim it would prejudice a proceeding. "[T]he inquiry is whether the materials are "investigatory materials necessarily compiled out of the public view," and, if so, whether the agency resisting disclosure has demonstrated that their release "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." *Globe Newspaper Co. v. Police Com'r of Boston,* 648 N.E.2d 419, 425, 419 Mass. 852 (1995).

If the withheld information met that standard, OAG would say that. As seems most likely from the available facts, all withheld information does meet that standard. OAG did not state that it would, let alone support such a claim, as is its burden.

Massachusetts Precedent and the Applicable Standard

Although OAG is silent on any supporting precedent, the Massachusetts courts have spoken on the limitations of § 7, c. 26, and specifically struck down OAG's attempted blanket withholding as well as its "relates to" standard, while articulating a standard far more specific than OAG's proffered "would likely impact".

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[2] *How* would it likely impact the litigation? Is OAG saying, while striving not to say, "It would cast harmful light on such litigation by revealing it to be the fruit of plaintiffs' lawyer lobbying"? That "its release would impact such litigation by revealing something exculpatory, or information shedding unflattering light on how law enforcement came to be used in this way"?

Bougas v. Chief of Police of Lexington, 371 Mass. 59 (1976), addressed a request for information that was "prepared and gathered by police officers in connection with a criminal investigation", concluding, *inter alia*, that § 7 "does not provide a blanket exemption for every document contained in police files". Specifically:

> An agency such as a police department cannot simply take the position that, since it is involved in investigative work and some of its records are exempt under the statute, every document in its possession somehow comes to share in that exemption. There is no blanket exemption provided for records kept by police departments nor does the investigatory materials exemption extend to every document that may be placed within what may be characterized as an investigatory file. There must be specific proof elicited that the documents sought are of a type for which an exemption has been provided. 371 Mass. at 65-66.

The court dispensed with OAG's invented "related to" standard for exemption, remanding the case back to the district court for determination what investigation-related information responsive to the request at issue was and was not exempt.

Reinstein v. Police Comm'r of Boston, 378 Mass. 271 (1979), concerned the ACLU requesting firearm discharge reports from Boston PD. The court noted, "we conceive that protection might with reason be claimed by the department against giving up the identity of confidential sources or revealing secret investigative procedures touching on firearms cases under the departmental rules. But prima facie, there is no ground for uneasiness about letting the plaintiff have the times and places of incidents or the like…" 378 Mass. at 290.

The court proceeded in its Note 19 to cite a litany of "cases in varying settings authorizing disclosure of all or portions of police reports dealing with the legality of police conduct, often against a contention that those reports were exempt as 'investigatory'". Id.

The factual information that can and must be released in redacted emails appear, from AOG's record to date, to be the names of a history professor/activist and/or plaintiffs' attorney who, public records show, recruited AGs during the relevant period and who has openly admitted his plea for "a single sympathetic attorney general", the dates they corresponded, and the Subject field(s).

Although implicit in OAG's current position withholding the correspondents' names, OAG opted against openly declaring as "confidential informants" an activist history professor, or plaintiffs' attorney who had openly pleaded for "a single sympathetic attorney general" to help him kickstart a litigation campaign by subpoenaing private parties' records. Even openly claiming this, going forward, will not explain OAG's position that it must (or can) withhold a redacted email revealing the date and other purely factual information which, again, typically includes the Subject field.

Claiming that releasing the date of responsive correspondence (and nothing else) would endanger an investigation is facially absurd. While we do not concede that Massachusetts' applicable statutory standard permits withholding either the correspondent's name or Subject field in this context, we do note that redacting either one — be it a name(s) of the outside correspondent(s) or Subject field — makes it even *less plausible* that release of the other would so probably endanger law enforcement as to render it ineffective.

OAG simply seeks a blanket exemption from §7, cl. 26(f) that the legislature did not grant, and the courts have rejected.[3]

There simply is no evidence that the purely factual information in the six pages OAG acknowledges exist would in any way, or conceivably even could, prejudice an OAG investigation(s) let alone sufficient to satisfy the §7, cl 26(f) standard. Nor has OAG shown, in any way at any level, that its withholdings and claims satisfy the applicable legal standards. OAG cites no precedent in support of its position and there appears to be none.[4]

OAG's position is simply untenable. Further, it remains unsupported.

Illustrative Example:

OAG does invoke, though it misstates, the statutory exemption G.L. c. 4, § 7, cl. 26(f). This is an exemption for "investigatory materials necessarily compiled out of the public view… the disclosure of which materials would probably so prejudice the possibility of effective law

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[3] Further, OAG's implicit position is that the correspondents were confidential informants. Should OAG seek the shelter that it claims here, it would have to establish yet one more point that it surely can not, that either plaintiffs' lawyer, or the history professor, not in fact what they had openly presented themselves as — activists openly seeking "a single sympathetic attorney general" to begin subpoenaing certain private parties' records (and, less publicly, touring OAGs with a slide show in that pursuit. See February 18, Appeal, p. 2). Instead, OAG must establish, they were in fact confidential informants See *Reinstein v. Police Commissioner,* 378 Mass. 281, 290 (1979) (confidential sources and secret investigative procedures are the sort of material protected by the investigatory exemption). That is, they sought to keep their identity confidential when approaching OAG, that they had been promised or assured that the information would remain confidential and/or that it would not be divulged, and/or that the law enforcement processes and record-keeping requirements for informants had been otherwise followed. See also, e.g., *Doe v. Lyons, et al.* (Suffolk County Superior Court, Civil Action 95-0341 (1996).

[4] We note that it is inarguable that agencies across the Commonwealth, other states, and the federal government routinely release emails with all but purely factual information redacted. Instead, OAG retreats to the federal "Glomar Explorer" FOIA exemption, citing to two opinions in the same proceeding as general propositions to buttress its claim that that the requested information is exempt under *Glomar*. Glomarization is an extreme claim — even if it is today imported into Massachusetts law as OAG's position implicitly assumes, Glomarization is simply not justifiable for correspondence with plaintiff's lawyers recruiting AGs to investigate the plaintiffs' lawyers' targets to help their nascent litigation campaign. That is, at best, abusive.

enforcement that such disclosure would not be in the public interest". It is not an exemption for information that "relates" to an investigation, or that "would likely impact" subsequent litigation.

In addition to misstating the applicable standard, OAG faces other difficulties with invoking 26(f) to keep secret even the purely factual information in the six pages of emails it claims are exempt in full as investigative information. Consider the information released by the New York Office of Attorney General about records responsive to a similar, Freedom of Information Law (FOIL) request.[5]

NY OAG's correspondents in those emails were colleagues of Pawa and Oreskes recruiting the New York AG for that Office's parallel investigation of the one Pawa *et al* sought (and obtained) in Massachusetts.[6] They are Erin Suhr (log, page 1), the executive assistant to political mega-donor and activist Tom Steyer, Subject "Following up on conversation re: company specific climate change information"; on pp. 4-7 of the same index, you see factual information from numerous correspondence re: Subject: "Meeting re: activities of specific companies regarding climate change", with Lee Wasserman, an activist who first denied but subsequently acknowledged having pushed NY OAG to initiate its own investigation(s).[7]

Here we see NY OAG release the outside correspondents and NY OAG division heads, Subjects and dates, despite withholding the rest of the records' content under its equivalent law-

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[5] See https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=3s1_PLUS_ag7V3BP6D3XR8qklcA==, pp 1, 4-7.

[6] As noted in our original appeal, Pawa also appears to have initiated the NY OAG investigation. See discussion, February 18, 2019 Appeal (attached to this Appeal), p. 3.

[7] See, e.g., Katie Brown, PhD, "After Denial, Rockefellers Admit They Targeted Exxon With 'Paid For' Columbia J-School Series", Energy In Depth, November 17, 2016, https://www.energyindepth.org/after-denial-rockefellers-admit-they-targeted-exxon-with-paid-for-columbia-j-school-series/.

enforcement FOIL exemption.[8] Notably, release of the information, while highly embarrassing in that it showed the role of activists in instigating that Office's parallel investigations, did not jeopardize the investigations which, a quick internet search affirms, continue apace.

Nonetheless, OAG is obligated to release purely factual information, and is not permitted to waive that obligation with self-serving inventions such as that the information *relates to* this recruitment of law enforcement for plaintiffs' bar purposes or *would likely impact* any subsequent litigation.

Conclusion

OAG's position is facially implausible, and no less so after its March 20, 2019 response. For the reasons stated above and any others you may encounter in your review, we request your Office instruct OAG to comply with M.G.L c. 66, §10(a) and (b), and produce records redacting all but properly exempt material, citing to and justified by an identified statutory exemption, including releasing all purely factual information, and identify the records, categories of records or portions of records that insists it cannot release, and why it cannot release any specific record, categories of records or portions of a record(s).

OAG cites no applicable standard for exemption and does not justify its position, because its position is not justifiable under Massachusetts law.

[8] Again, here we do not concede the propriety of withholding the content of emails with, e.g, a pleading plaintiffs' lawyer of history professor/activist. To the contrary, OAG's overwithholding, via a blanket privilege even of merely the factual information, suggests further overwithholding.

Thank you in advance and we look forward to your response.

Respectfully submitted,

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enc: Copies of request, response, original appeal