GAO GOVERNMENT ACCOUNTABILITY & OVERSIGHT

February 27, 2019

VIA ELECTRONIC MAIL
Mr. Steve Silverman
Bureau Chief
Public Access Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
SSilverman@atg.state.il.us

RE: FOIA Request for Review - 2019 PAC 56591 (2018 FOIA 056206); 2019 PAC 56592 (2018 FOIA 056258)

Dear Mr. Silverman:

I am with Government Accountability & Oversight, a non-profit public interest law firm. On behalf of GAO's client Energy Policy Advocates ("EPA"), also a nonprofit organization, I respond to your February 21, 2019 letter forwarding the Office of the Attorney General ("OAG") response to your February 7, 2019 Freedom of Information Act ("FOIA") further-inquiry letter. We recognize that OAG employs the section 7(1)(f) deliberative-material exemption as a blanket cover to keep any and all communications requested from public scrutiny. EPA maintains its position that the OAG response is wholly inadequate. As with the original denial, both followup denials are blanket, and in full, and as such inherently demand *de novo* review. Further, this blanket denial, in full, restricts EPA's ability to offer more specific rebuttal.

Prior to addressing each request and the related denial individually, EPA recognizes that Mr. James Gignac was not employed at OAG during the timeframe relevant to each request and that there should be no responsive communication to or from Mr. Gignac's OAG account during periods when he was not an employee. We do, however, request that your Office confirm the account was no longer in use after the date of Mr. Gignac's departure rather than assume it.

File No. 2018 FOIA 056206

On December 20, 2018, EPA requested correspondence between James Gignac, Matthew Dunn, and/or Jason James containing the terms "SherEdling", "Sher Edling", "DAGA", "@democraticags.org", "alama@naag.org, and/or "mike.firestone@state.ma.us" from July 1,

2018 through the date the request was processed. As noted earlier, OAG had no correspondence to or from James Gignac. OAG denied the remainder of the request under sections 7(1)(a) and 7(1)(f). EPA has not challenged any information denied exclusively under section 7(1)(a). Again, however, the blanket denial restrict's EPA's ability to address that with any more specificity.

As background, SherEdling is a plaintiffs' law firm that, public records show, is recruiting attorneys general to investigate opponents of a political agenda in the name of "climate change" that, by chance, the plaintiffs' attorneys have also targeted for suit seeking settlement in the name of the same cause. This is of great public interest and not conceivably privileged. Similarly, Matthew Pawa is a plaintiffs' lawyer in exactly the same field during the period covered by these requests, whose recruiting efforts (through a major donor, Wendy Abrams), OAG revealed at least somewhat in records released pursuant to FOIA. For discussion of both campaigns, and exemplars of these very IL OAG emails, see, e.g., "Law Enforcement for Rent", and its Appendix, at https://cei.org/AGclimatescheme. These records were not privileged at the time and others are not privileged simply because OAG is now under new management.

DAGA and NAAG are professional trade groups. The premise that correspondence with these groups are privileged is absurd. Further, for a non-exclusive example, we know that NAAG has also participated in recruiting AGs for taking on highly controversial, privately funded "Special Assistant Attorneys General" in the name of the same cause — "climate" and related litigation — which is of great public interest and hardly privileged (you may confirm this by checking the Office's correspondence received from Albert Lama alama@naag.org and copying Mike Firestone mike.firestone@state.ma.us on August 30, 2018 for an exemplar of such non-privileged correspondence).

5 ILCS 140/1 recognizes that "all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees…[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that is ie being conducted in the public interest." Furthermore, "records in the custody or possession of a public body are presumed to be open to inspection" and "[a]ny public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2.

OAG asserts that responsive information is subject to "deliberative material" exemption found in section 7(1)(f). These deliberative materials are said to be related to potential legal or legislative matters of interest to OAG. Section 7(1)(f) exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated[.]" This exemption has been expanded to include communications between government agencies. *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (2003), quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10, 121 S. Ct. 1060, 1067 (2001).

This blanket application reflects a selective reading of *Klamath*. *Klamath* does not extend the deliberative materials exemption to third party communications where an independent interest is at play. *Klamath*, at 1069. While OAG might have been communicating plans and actions to those third parties, the communication is not protected by section 7(1)(f) and should be subject to public scrutiny. Furthermore, the basis of OAG's claim to exemption is that every (or every reasonably segregable) word of all of the correspondence relates to legal matters, and as such is protected from public disclosure by an attorney-client relationship. The burden of proving any claim to an exemption lies with the party asserting it. But, as the Court in *Illinois Education Ass'n v. Illinois State Board of Education* notes, "the public body may not simply treat the words "attorney-client privilege" or "legal advice" as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue." *Illinois Education Ass'n*, 204 Ill. 2d 456, 470. That 'magic wand' approach certainly seems to be at play here. OAG has not directly asserted attorney-client privilege in this instance but implies it by claiming all deliberative materials are related to either legal or legislative matters.

Section 7(1)(f), like any exemption, must be read narrowly. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997). It "typically does not justify the withholding the purely factual material." *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F. 3d 370, 274 (7th Cir. 2004). As noted in *Kalven v. City of Chicago*, 2013 IL App (1st) 121846 ¶24, 7 N.E.3d 741, 748 (2013), quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010) "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." The burden is on OAG to demonstrate that all documents withheld are part of the deliberative give and take of decision-making. With their sweeping use of section 7(1)(a), OAG has concealed all documents, including those that may be purely factual.

File No. 2018 FOIA 056358

On December 28, EPA requested correspondence between James Gignac, Matthew Dunn, and/or Jason James containing the termsgooglegroups.com, Google doc(s), Dropbox, box.com, and/or SharePoint. OAG again found no responsive documents to or from James Gignac and denied the remainder of the request under section 7(1)(f).

Rather than belabor the points made in the prior section, it is sufficient to incorporate the above by reference, and restate that this blanket claim of exemption in full of all responsive records is impermissibly broad and on its face demands *de novo* review. OAG's position is that every word of every record represents, exclusively, legal research or opinions and/or cannot be reasonably segregated from legitimately exempt information. This must include even dates, times, subjects and parties. This is on its face abusive, not supported (in the portion of the further-further-information letter available to us), and difficult to conceive as being appropriate. In the context of involving plaintiffs' firms trolling for OAG investigations of their targets, the concept of a blanket privilege is absurd. Again, documents and portions of documents containing purely factual statements are not afforded the protection offered by section 7(1)(f). Regardless,

the blanket claim of exemption, in full, of all responsive records is a classic open records "red flag" indicating abuse, and warrants review *de novo*.

Conclusion

OAG's sweeping application of FOIA exemption section 7(1)(f) is contrary to the purpose of the Act. Its invocation requires protection of the need by government to conduct a deliberative back and forth but for actual deliberations as the law defines them and balanced with the need of the public to understand how their government functions. When a public agency brings outside entities with independent purposes into the deliberative process, as OAG did with the parties listed in File No. 2018 FOIA 056206, the public has a right to know. The *Klamath* decision recognizes this important distinction. Furthermore, the deliberative materials exemption applies to just that, *deliberative materials*. Purely factual statements and communications are not afforded the same protections.

Should you have any additional question, please do not hesitate to contact me at ncornettlaw@gmail.com.

Neal Cornett
for EPA

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