APPEAL TO SUPERVISOR OF RECORDS

March 1, 2019

Secretary of the Commonwealth
Public Records Division
McCormack Building
One Ashburton Place, 1719
Boston, MA 02108

VIA E-mail: sec.RAO@sec.state.ma.us

Re: Appeal of February 22, 2019 Denial of Access to Public Records

Dear Ms. Connolly:

I am with Government Oversight and Accountability, a non-profit public interest law firm. On behalf of Energy Policy Advocates ("EPA"), also a non-profit organization, I seek review of the Office of the Attorney General's ("OAG") February 22, 2019 response to EPA's February 6, 2019 public records request.

EPA seeks review of the denial on the basis that the exemptions claimed are overly broad. The OAG has withheld all documents, citing statutory exemptions as well as attorney-client privilege. Since OAG informs us only of its blanket conclusions about some unstated number of withholdings in full, and given the 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.

The February 22, 2019 letter denies access to any Office applications to the State Energy & Environmental Impact Center at New York University, any and all opinions, analyses, and determinations regarding the propriety of hiring or bringing into the OAG privately funded attorney as it relates to Massachusetts law. Critically, OAG also withheld, in full, as privileged any correspondence of Mike Firestone containing the term "NYU". Without further specificity, the OAG claims all records sought are either exempted under M.G.L. c. 4 § 7 , cl. 26(a) (citing M.G.L. c. 268B, §3(g), State Ethics Board confidential opinions), M.G.L. c. 4 §7, cl. 26(c) (personnel or medical records; other materials relating to a specifically named individual), or attorney-client privilege.

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).

Massachusetts' law requires an agency to identify any records, categories of records, or portions of records it intends to withhold as well as specific reasons for such withholding including the specific exemption or exemptions. M.G.L. c. 66, §10(b). OAG's response, which is at least in substantial part (see, e.g., item "V", Firestone correspondence including "NYU" anywhere) implausible on its face, fails to provide any explanation as to what exemption applies to what record. Furthermore, OAG provides no explanation of what, if any, search processes were undertaken, how many potentially responsive documents have been located, or what process was utilized to determine which records may or may not be exempted. OAG offers no clue to help solve the unavoidable mystery of how every word or record responsive to EPA's request is exempt or privileged to disclosure.

Again, *this even includes correspondence using "NYU" anywhere*. The blanket claim of privilege, viewed in this context, is thoroughly incredible.

OAG exempted, in full, every word of every responsive record, without providing the rest of what the statute plainly requires of it. 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.**

As such, it is impossible to further asses the extent of OAG's compliance to this request. An illustrative example is the use of M.G.L. c. 4 §7, cl. 26(c), relating to either personnel and medical records any other materials or data relating to a specifically named individual, the disclosure of which may constitute unwarranted invasion of personal privacy. Presumably, this exemption is cited in reference to the requested correspondence of Mr. Firestone containing the search term "NYU" and raises the question of whether every single email using NYU anywhere in fact pertains to the two "Special Assistant AGs" placed in OAG through an NYU Center and, further, to exempt personnel discussions. The vague and blanket application of exemptions and privilege offer little guidance.

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. 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 and 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.

OAG's withholding of responsive records warrants Supervisor of Records review. The *in camera* review your office is statutorily authorized to perform provides an opportunity to evaluate the merits of OAG's withholding.. This requires obtaining and reviewing the suite of records withheld in full and reconciling the withholding with the discrete exemption OAG claims for each record. Further, it requires assessing the plausibility that there is no reasonably segregable information in any one of the withheld records in full.

Best,

Neal Cornett

Neal Cornett
Staff Attorney
Government Oversight and Accountability