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December 1, 2016

TO: Assistant Solicitor General Kathryn Sheingold/Division of Appeals & Opinions
Records Appeals Officer for Attorney General Eric Schneiderman

FROM: Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: FOIL APPEAL: Request #160706 –
Assistant Attorney General Adrienne Kerwin & Guidelines, Policies & Procedures

Pursuant to Public Officers Law §89(4)(a) [FOIL], I here appeal the November 3, 2016 letter of Attorney General Schneiderman's Records Access Officer Michael Jerry, responding to my September 28, 2016 FOIL request. For your convenience, both documents are enclosed.

Notwithstanding my FOIL request sought "publicly-available records pertaining to" seven enumerated items, AG Records Access Officer Jerry begins his response by purporting that "portions of [my] correspondence request information rather than records". This is false – and, therefore, his further assertions based thereon are of no relevance to my request:

"FOIL requires the Office of the Attorney General ('OAG') to provide you with records in its possession. FOIL does not require the OAG to provide you with advice or information. Nor does FOIL require that we create records to respond to a FOIL request."

AG Records Access Officer Jerry then attaches three pages which he purports "respond to [my] request". In so doing, he does not identify to which of the seven enumerated items these three pages are responsive – thereby concealing that they respond to only the first two, *to wit*, "publicly-available records pertaining to":

"(1) the professional background, qualifications, and employment history of Assistant Attorney General Adrienne Kerwin;"

(2) Assistant Attorney General Adrienne Kerwin's annual salary during the years of her employment at the Attorney General's office".

EX X-3

As to the five enumerated items for which AG Records Access Officer Jerry provides no records – and as to the three pages he has supplied, responsive to the first two enumerated items – he states:

“Please be advised that some of the records that respond to your request have been withheld in their entirety, or portions have been redacted and appear as blacked out in the documents produced to you. These records are exempt from disclosure pursuant to:

“Public Officers Law §87(2)(a), which provides that records that are exempted from disclosure by state or federal statute are exempt from disclosure under FOIL. The records constitute confidential communication[s] made between attorney and client, which is exempt from disclosure under Civil Practice Law and Rules §4503(a). See *Morgan v. New York State Department of Environmental Conservation*, 9 A.D.3d 586, 587 (3rd Dept. 2004).;

Public Officers Law §87(2)(a), which provides that records that are exempted from disclosure by state or federal statute are exempt from disclosure under FOIL. The records constitute attorney work product, which is exempt from disclosure under Civil Practice Law and Rules §3101(c);

Public Officers Law §87(2)(b), because disclosure of the records would constitute an unwarranted invasion of personal privacy; and

Public Officers Law §87(2)(g), because the records are inter-agency or intra-agency materials.”

Apart from the fact that these four grounds for denying a FOIL request pursuant to Public Officers Law §87(2) are permissive, not mandatory, I do not believe they are applicable to enumerated items #5, #6, and #7 of my FOIL request for “publicly-available records pertaining to”:

“(5) the Attorney General’s guidelines, policies, and procedures pertaining to designation, payment, and oversight of its ‘of counsel’ attorneys;

(6) the Attorney General’s guidelines, policies, and procedures for evaluating conflicts of interest of its attorneys and for retaining outside counsel;

(7) the Attorney General’s guidelines, policies, and procedures for determining the ‘interest of the state’, pursuant to Executive Law §63.1, and its duty to represent plaintiffs and/or intervene on their behalf in citizen-taxpayer actions, pursuant to State Finance Law Article 7-A.”

Indeed, I would note that Public Officers Law §87(2)(g) expressly exempts from the “inter-agency or intra-agency materials” that can be withheld “ii. instructions to staff that affect the public” and “iii. final agency policy or determinations”.

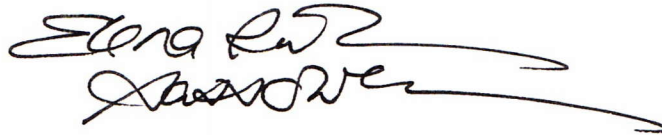
I also question whether any of these four grounds are properly invoked to bar records production responsive to my enumerated items #3 and #4 for “publicly-available records pertaining to”:

“(3) the names of the attorneys in the Attorney General’s office responsible for supervising Assistant Attorney General Kerwin’s work, presently and since March 28, 2014;

(4) the meaning of, and basis for, the ‘of counsel’ designation of Assistant Attorney General Kerwin in the just-commenced citizen taxpayer action *Center for Judicial Accountability v. Cuomo, et al.* (Albany Co. # 5122-16) and in the now-concluded citizen taxpayer action *Center for Judicial Accountability v. Cuomo, et al.*, commenced on March 28, 2014 (Albany County #1788-14).”

To facilitate the expedition mandated by Public Officers Law §89(4)(a), kindly e-mail me your your determination of this appeal at elena@judgewatch.org.

Thank you.

A handwritten signature in black ink, appearing to read "Elena R. J. Sheingold". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Enclosures

cc: AG Records Access Officer Michael Jerry
Robert Freeman/Executive Director, NYS Committee on Open Government