



# AMERICANS FOR LIMITED GOVERNMENT RESEARCH FOUNDATION

10332 MAIN STREET NO. 326 · FAIRFAX, VA 22031 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

January 20, 2015

Kathryn Sheingold  
Records Appeals Officer  
State of New York  
Office of the Attorney General  
Division of Appeals and Opinions  
The Capitol  
Albany, NY 12224

Via email to: [opinions@ag.ny.gov](mailto:opinions@ag.ny.gov)

**Re: Appeal in Freedom of Information Law (FOIL) Request # 140606**

Dear Ms. Sheingold:

I write today to appeal the decision of Benjamin J. Maggi, Assistant Attorney General on my Freedom of Information Law request referenced above. My request was filed on October 20, 2014. A copy of my request is attached as Appendix 1. A copy of the response from Mr. Maggi is attached as Appendix 2.

**Statement of Facts**

In my request, I asked for information in three categories. The response from Mr. Maggi indicated that in categories 2 and 3 there are no responsive records. Mr. Maggi indicated that records do exist in category 1 of the request, but claimed that the records are exempt from disclosure under New York Public Officers Law § 87(2)(e). Section 1 of my request requested the following records:

All records of communications between any officer or employee in the Office of the Attorney General and Kendall Fells regarding the Attorney General's suit against a Papa John's franchisee.

The request included a footnote providing extrinsic evidence, in the nature of a link to a press release from the Attorney General with a quote from Mr. Fells, showing that such communications had occurred.

## **Summary of the Argument**

The response to my FOIL request improperly applied the claimed exemption because (1) there is no possible harm to protected interests that could result from disclosure of some of the records, as will be discussed further below; and (2) even if the release of some of the types of records would harm the protected interests, those records were not segregated from records which if disclosed would cause no harm.

## **Argument**

### **1. The Claimed Exemption was Improperly Applied to Certain Types of Records**

The response from Mr. Maggi made no attempt to describe the types of responsive records that exist for which exemption from disclosure is claimed. Nor did the response provide any analysis as to how the release of these records would “interfere with law-enforcement investigations or judicial proceedings.”

As a result, I have been forced to rely on extrinsic evidence as to the types of records that exist and for which an exemption from disclosure has been claimed. Based on the fact that the Attorney General cited a positive statement from Mr. Fells in his press release, it is reasonable to conclude that there was coordination between Mr. Fells and the Attorney General’s office regarding the press release. It is further reasonable to assume that this coordination resulted in the creation of records regarding the press release.

The response does not differentiate between, nor provide any analysis showing how the requested records would either (1) “interfere with law-enforcement investigations,” or (2) “judicial proceedings.”

No reasonable analysis supports a finding that the release of such records related to the press release would “interfere with law-enforcement investigations or judicial proceedings.”

The act of drafting a press release is a public relations matter, and is in no way related to law-enforcement investigations. Press releases come after law-enforcement investigations; they are not part of the investigatory process. As such, the response has not demonstrated that the release of these records would interfere with law-enforcement investigations.

Further, there is no reason why records relating to the press release would interfere with judicial proceedings. These records were created after the fact and are not part of any investigatory file. As such they would not be relevant, nor likely even admissible,

in prosecuting any claims against the targets of the investigation.

Therefore, records of this type, along with any other similar records should be released because there has been no showing that such release would cause any interference with "law-enforcement investigations or judicial proceedings."

**2. The Attorney General's Office Failed to Segregate and Release Those Records Which if Disclosed Would Cause no Harm to Protected Interests**

As discussed above, the response from Mr. Maggi fails to describe the type of records that are being withheld, thus failing to show that the records are exempt from the disclosure requirements. There is no showing that the Attorney General's office made any attempt to segregate releasable records from any record which may actually be exempt from disclosure. This is improper.

For instance, although some records may be compiled for law enforcement purposes, not all records so collected become exempt from disclosure merely because they were so collected. Therefore, "**portions of such records which contain information which would not interfere with the investigation or proceedings**" are subject to disclosure. Committee on Open Government FOIL-AO-3808, August 6, 1985. (Emphasis added.)

Additionally, records cannot be withheld merely because of some vague fear that such release would interfere with law-enforcement investigations or judicial proceedings. Before records can be withheld, a showing must be made that any such release **would** interfere:

To extent that police activity log contains investigative information compiled for law enforcement purposes, only those portions could, in my view, be withheld that **would** if disclosed result in the harm described in subparagraphs (i) through (iv) of section 87(2)(e); **the remainder, however, would fall outside the scope of that provision.**

Committee on Open Gov't FOIL-AO-4756, September 18, 1987, at 4. (Emphasis added.)

After making a determination that some records are exempt from disclosure, the agency then must segregate and release any records which are releasable. This is case even if the records are part of an investigatory file and "intertwined" with information which may properly be withheld:

Further, judicial decisions indicate that, even though accessible information may

be “intertwined” with deniable information, such as advice or opinion, **the agency must extract from the record those portions that are available.**”

*Id.* (Emphasis added.)

For instance, even if an argument could be made that disclosing the actual communications would interfere with law-enforcement investigations or judicial proceedings, the meta data from any such communications can be segregated from the body of the communications and provided without affecting any law-enforcement or judicial proceedings interests.

### **Conclusion**

Based on the foregoing, I request that those records for which the exemption from disclosure was improperly applied be immediately released. I further request that a full review of all responsive records be undertaken to determine whether portions of the records can be segregated and released.

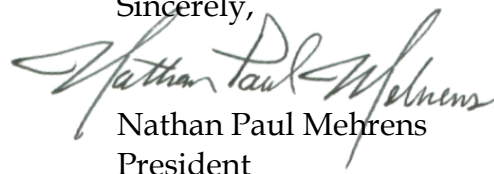
If after this review, in the event that records are withheld, I request to be provided with the following information:

1. Reason each record is not being produced;
2. Type of record withheld;
3. Subject matter of record withheld; and
4. Date, author, and addressee, if applicable of the record.

Further, I request that the above information be indexed by individual record and provide information sufficient for a reasonable person to be able to ascertain whether the record sought is actually exempt from disclosure.

If you have any questions regarding this FOIL request please contact at [Nathan@getliberty.org](mailto:Nathan@getliberty.org). Thank you in advance for your assistance.

Sincerely,



Nathan Paul Mehrens  
President



# AMERICANS FOR LIMITED GOVERNMENT

Appendix 1

10332 MAIN STREET No. 326 · FAIRFAX, VA 22031 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

October 20, 2014

Records Access Officer  
Office of the Attorney General  
The Capitol  
Albany, NY 12224

Via email to: [FOIL@ag.ny.gov](mailto:FOIL@ag.ny.gov)

**Re: Freedom of Information Law (FOIL) Request**

Dear Records Access Officer:

Pursuant to Article 6 of the New York Public Officers Law (FOIL), PUB. OFF. § 87 *et seq.*, and the regulations on records applicable to the New York State Department of Law, N.Y. COMP. CODES R. & REGS. tit. 13 § 120 *et seq.*, I request on behalf of Americans for Limited Government (ALG) copies of the records described below.

These records pertain to communications to or from officials in the Attorney General's office and Kendall Fells of the organization Fast Food Forward.

Please provide copies of any records that exist in any of the following categories and that were created on or after January 1, 2013:

1. All records of communications between any officer or employee in the Office of the Attorney General and Kendall Fells regarding the Attorney General's suit against a Papa John's franchisee;<sup>1</sup>
2. All records of communications between any officer or employee in the Office of the Attorney General and Kendall Fells or any other officer or employee of Fast Food Forward regarding any other subject; and

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<sup>1</sup> See, *A.G. Schneiderman Sues Papa John's Franchisee For Underpaying More Than 400 Delivery Workers; Seeking More Than \$2 Million*, New York Attorney General, October 16, 2014. Available online at: <http://www.ag.ny.gov/press-release/ag-schneiderman-sues-papa-johns-franchisee-underpaying-more-400-delivery-workers> (accessed October 20, 2014).

3. All records of meetings held between any officer or employee in the Office of the Attorney General and Kendall Fells or other officers and employees of Fast Food Forward.

### **Further Definition of Records Sought**

The term "record" should be construed to mean any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voicemails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind of nature. A record bearing any notation not a part of the original text is to be considered a separate record. A draft of a non-identical copy is to be construed as a separate record.

The term "relating" and "regarding" with respect to any given subject, should be construed to mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.

The inclusion and description of particular records in this request should not be construed to eliminate other records that are not described in particular detail if they should exist in another format.

### **Procedure Regarding Records Exempt from Disclosure**

I anticipate that the vast majority of any responsive records will be of the type required to be released under FOIL. In the event that records exist that FOIL does not require to

be released I request that they be released regardless unless the failure to release such records can be justified based upon sound reasoning related to one of the statutory exemptions or exceptions in FOIL and there is a patently manifest danger of significant harm that would occur from release of such records, *e.g.*, danger to health or safety of an individual. In the event that records are withheld I request to be provided with the following information:

1. Reason each record is not being produced;
2. Type of record withheld;
3. Subject matter of record withheld; and
4. Date, author, and addressee, if applicable of the record.

Further, I request that the above information be indexed by individual record and provide information sufficient for a reasonable person to be able to ascertain whether the record sought is actually exempt from disclosure.

### **Request for Waiver of Fees**

The information sought by ALG in this FOIL request will be used to better the public's understanding of how the Office of the Attorney General is spending the taxpayers' money and how it is coordinating with outside advocacy groups as part of its investigation and litigation activity. As such the public good that will occur in disclosing the information sought in and of itself weighs strongly in favor of a fee waiver. Further, the information sought is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. ALG regularly publishes information on the activities, structure, and operations of the federal, state, and local governments. This information is distributed to a large number of diverse individuals across the entire nation. The records sought are of the type which ALG regularly provides to the public through its publications and website, [www.getliberty.org](http://www.getliberty.org). As such granting the request to waive fees is in the public interest.

In the event that a fee waiver is not granted, please inform me before taking any action that would result in the incurrence of fees by ALG.

### **Conclusion**

Pursuant to N.Y. COMP. CODES R. & REGS. tit. 13 § 120.15 please provide the requested records within five business days or provide a "a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied."

I request that any records disclosed pursuant to this request be indexed, to the extent feasible, in such a way as to enable the reader to readily ascertain to which number listed above the responsive records relate. If reasonably possible I request that responsive records be provided in electronic form on either unencrypted CDs or DVDs. If you have any questions as to the medium on which responsive records are to be provided please contact me in advance to sending the medium.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information.

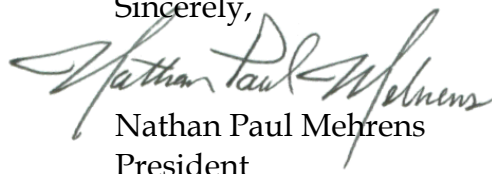
Please send the requested records to me at the following address:

Americans for Limited Government  
10332 Main Street  
No. 326  
Fairfax, VA 22030

If you have any questions regarding this FOIL request please contact at [Nathan@getliberty.org](mailto:Nathan@getliberty.org).

Thank you in advance for your assistance.

Sincerely,



Nathan Paul Mehrens  
President

Ref # ALGFOIL2014-017





STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

BENJAMIN L. MAGGI  
ASSISTANT ATTORNEY GENERAL  
DEPUTY RECORDS ACCESS OFFICER

December 29, 2014

*via e-mail: nathan@getliberty.org*  
Mr. Nathan Paul Mehrens  
Americans for Limited Government  
10332 Main Street, No. 326  
Fairfax, VA 22031

RE: Freedom of Information Law (FOIL) Request # 140606

Dear Mr. Mehrens:

This letter responds to your correspondence dated October 20, 2014, which, pursuant to the FOIL, requested the following:

“[R]e: Ref # ALGFOIL2014-017

Pursuant to Article 6 of the New York Public Officers Law (FOIL), PUB. OFF. § 87 et seq., and the regulations on records applicable to the New York State Department of Law, N.Y. COMP. CODES R. & REGS. tit. 13 § 120 et seq., I request on behalf of Americans for Limited Government (ALG) copies of the records described below.

These records pertain to communications to or from officials in the Attorney General’s office and Kendall Fells of the organization Fast Food Forward.

Please provide copies of any records that exist in any of the following categories and that were created on or after January 1, 2013:

1. All records of communications between any officer or employee in the Office of the Attorney General and Kendall Fells regarding the Attorney General’s suit against a Papa John’s franchisee; [See Footnote 1]
2. All records of communications between any officer or employee in the Office of the Attorney General and Kendall Fells or any other officer or employee of Fast Food Forward regarding any other subject; and
3. All records of meetings held between any officer or employee in the Office of the Attorney General and Kendall Fells or other officers and employees of Fast Food Forward.

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In the event that a fee waiver is not granted, please inform me before taking any action that would result in the incurrence of fees by ALG.

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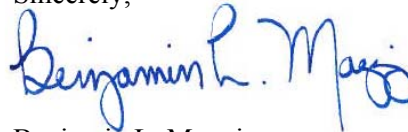
[Footnote 1] See, A.G. Schneiderman Sues Papa John's Franchisee For Underpaying More Than 400 Delivery Workers; Seeking More Than \$2 Million, New York Attorney General, October 16, 2014. Available online at: <http://www.ag.ny.gov/press-release/ag-schneiderman-sues-papa-johns-franchisee-underpaying-more-400-delivery-workers> (accessed October 20, 2014)."

Please be advised that the Office of the Attorney General has conducted a diligent search and has located no records that respond to items 2 and 3 of your request.

Further, please be advised that the records responsive to item 1 of your request are exempt from disclosure and have been withheld pursuant to New York Public Officers Law § 87(2)(e) because the documents requested were compiled for law-enforcement purposes and would, if disclosed, interfere with law-enforcement investigations or judicial proceedings.

You have a right to appeal the foregoing decision. If you should elect to file such an appeal, your written appeal must be submitted no later than 30 days after your receipt of this letter to Kathryn Sheingold, Records Appeals Officer, State of New York, Office of the Attorney General, Division of Appeals and Opinions, The Capitol, Albany, New York 12224. You may reach the Records Appeals Officer at (518) 473-2533.

Sincerely,



Benjamin L. Maggi  
Assistant Attorney General