

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of ANDREW M. CUOMO,

Petitioner,

v.

OFFICE OF THE NEW YORK ATTORNEY GENERAL, and LETITIA JAMES, as Attorney General of the State of New York,

Respondents.

VERIFIED PETITION

Index No:

Petitioner, former Governor of New York State Andrew M. Cuomo (“Governor Cuomo”), by and through his undersigned counsel, for his Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules, alleges as follows:

PARTIES

1. Petitioner Governor Cuomo is currently a resident of the state of New York and served as the Governor of the State of New York from January 1, 2011 until August 24, 2021.
2. Respondent Office of the New York Attorney General (“the OAG”) is a New York state agency within the meaning of Pub. Officers L. § 86(3), with its principal offices located in Albany and Manhattan.

3. Respondent Letitia James (“Respondent James”) is the duly elected Attorney General of New York and head of the OAG, and Respondent James is sued herein in her official capacity.¹

NATURE OF THE ACTION

4. Governor Cuomo brings this special proceeding to challenge Respondents’ August 30, 2023 and September 20, 2023 constructive and actual denials of his July 25, 2023 Request made, through counsel, under the Freedom of Information Law (“FOIL”), N.Y. Pub. Officers L. § 84 *et seq.*, seeking a narrow subset of the materials (the “Requested Materials”) underlying the OAG’s investigation into, and subsequent publicly released August 3, 2021 Report (“Report”) regarding, sexual harassment allegations made against Governor Cuomo. The OAG conducted the investigation pursuant to N.Y. Exec. L. § 63(8) following a March 1, 2021 referral from Governor Cuomo, which directed that a public report be issued at the conclusion of the investigation. Despite Respondent James’s August 3, 2021 public promise to release those materials, Respondent James has no intention of releasing those materials. Indeed, the OAG repeatedly informed Governor Cuomo’s counsel that they will not release the Requested Materials, citing to various privileges. Governor Cuomo needs the Requested Materials, which consist of witness statements to the OAG, to defend himself in two sexual harassment lawsuits that stem directly from the OAG’s investigation and Report.

5. Moreover, the public has both a right and interest in knowing the work of Respondents and Respondents’ full basis in making the significant and impactful decisions in issuing the consequential Report and causing the resignation of their democratically elected

¹ For purposes of this action, Petitioner considers Respondent James and the OAG to be one and the same, and to both be in equal possession of the records sought herein by Governor Cuomo. Any reference to Respondent James herein shall be read to include the OAG, and vice versa.

governor. See *FOIL Overview*, N.Y. STATE COMM. ON OPEN GOV'T (Jan. 18, 2024), <https://opengovernment.ny.gov/freedom-information-law> (“The Freedom of Information Law. . . . reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker.”); New York Daily News Editorial Board, *Shine A Light: Release Documents From Cuomo Sexual Harassment Investigation*, NY DAILY NEWS (Aug. 3, 2022), <https://www.nydailynews.com/2022/08/03/shine-a-light-release-documents-from-the-cuomo-sexual-harassment-investigation/> (“[T]he production of the highly consequential 165-page report, which makes many unconditional statements about what Cuomo did, deserves more scrutiny.”); see also New York Daily News Editorial Board, *Make it Public: The Underlying Documents From the Cuomo Probe Must Come to Light*, NY DAILY NEWS (Aug. 3, 2023), <https://www.nydailynews.com/2023/08/03/make-it-public-the-underlying-documents-from-the-cuomo-probe-must-come-to-light/>.

6. Governor Cuomo’s July 25, 2023 FOIL Request for the Requested Materials sought a narrow universe of documents: (i) “[n]otes and interview memoranda reflecting statements made by the 179 witnesses who the OAG interviewed during the course of its investigation” and (ii) “[f]or the [41] witnesses whose testimony to the OAG as part of the investigation was publicly released by the OAG in redacted form, copies of the unredacted transcripts and/or unredacted video testimony for those individuals.”. See Affirmation of Rita M. Glavin (“Glavin Aff.”), Ex. 1. In essence, Governor Cuomo is seeking witness statements made to the OAG.

7. Governor Cuomo has repeatedly asked the OAG for the Requested Materials since the Report was released more than two years ago, but Respondent James has

steadfastly refused to produce that evidence despite her August 3, 2021 public promise to release it.

8. Governor Cuomo is a defendant in two federal discrimination lawsuits brought by plaintiffs who were complainants in the OAG's investigation of Governor Cuomo, and those lawsuits rely directly and explicitly on the Report's findings, as well as the purported statements of witnesses interviewed by the OAG as part of the investigation that led to the Report. The first lawsuit, brought by an anonymized New York State Trooper, is entitled *Trooper 1 v. New York State Police et al.*, 22-cv-00893 (E.D.N.Y.) ("Trooper 1 Action") and the second lawsuit, brought by Charlotte Bennett, is entitled *Bennett v. Cuomo et al.*, 22-cv-7846 (S.D.N.Y.) ("Bennett Action"). Governor Cuomo needs the Requested Materials to defend himself in both the Trooper 1 Action and the Bennett Action, because those prior witness statements directly relate to the allegations in those lawsuits. Governor Cuomo vehemently denies having sexually harassed anyone, and the witness statements relating to the allegations in both actions are critical to his defense.

9. Despite being served in July 2022 with a federal subpoena in the Trooper 1 Action by Governor Cuomo ("Trooper 1 OAG Subpoena") for the Requested Materials, among other things, Respondent James has relentlessly fought against producing the Requested Materials, claiming undue burden, "sovereign immunity," and various privileges. *Cuomo v. Office of the New York State Attorney General*, 22 mc. 3044 (LDH)(TAM) (E.D.N.Y.), ECF No. 18, No. 51. Respondent James's ongoing refusal to release the Requested Materials, including prior witness statements, to Governor Cuomo has been and continues to be a denial of fundamental due process. To defend himself in the Trooper 1 Action and the Bennett Action, Governor Cuomo needs the prior statements that the relevant witnesses made to the OAG about the very allegations that have

been included in those lawsuits. Respondent James refuses to even release Trooper 1's April 13, 2021 witness interview memo or the interview memos of the other twenty-four New York State Troopers interviewed as part of the OAG's investigation. As of the date of filing, litigation regarding the OAG Subpoena is ongoing in the Trooper 1 Action. Glavin Aff., ¶ 28.

10. On August 22, 2023, Governor Cuomo also served the OAG with a federal subpoena in the Bennett Action ("Bennett OAG Subpoena") for among other things the Requested Materials, and the OAG has similarly steadfastly refused to produce the witness statements at issue in that subpoena. Glavin Aff., Ex. 18. At a January 4, 2024 court conference, the OAG informed the judge that they would not even produce any witness interview statements that mention Charlotte Bennett, citing various privileges.

11. Because of Respondent James's obstinate refusal to comply with a properly served federal subpoena seeking witness statements, Governor Cuomo made the July 25, 2023 FOIL Request that is the subject of this Article 78 petition. On August 20, 2023 the OAG FOIL Records Access Officer responded via email that the OAG "estimate[d]" being able to *begin* producing responsive documents in *six months' time*—March 1, 2024, *approximately seven months after receiving Governor Cuomo's FOIL Request and almost two years after receiving the Trooper 1 OAG Subpoena for the Requested Materials*. Glavin Aff., Ex. 2. Notably, the OAG's response did not commit to producing any of the interview memos for the 179 witnesses interviewed as part of the OAG investigation, or any unredacted witness transcripts as specifically requested in the FOIL Request. On September 6, 2023, Governor Cuomo lodged an administrative appeal of the August 20 constructive denial, asserting, *inter alia*, that the August 30, 2023, determination was flatly unreasonable under N.Y. Pub. Officers L. § 89(3) and amounted to constructive denial. Glavin Aff., Ex. 3.

12. The OAG denied Governor Cuomo's administrative appeal on September 20, 2023. Glavin Aff., Ex. 4.

13. Denial of a FOIL request by a state agency permits an individual to challenge that determination in the New York Supreme Court by way of a special proceeding. N.Y. Pub. Officers L. § 89(4)(b).

14. No previous application for the same or similar relief has been made.

15. The OAG should be compelled to produce the Requested Materials expeditiously particularly given that the witness interview memos have already been reviewed and redacted by Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb") precisely so that they could be produced. The records at issue are not so voluminous that they would require many more months before the OAG *might* begin to produce something. And, most importantly, Respondent James has already made clear that the OAG will not produce the Requested Materials, even in response to valid federal subpoenas. To the contrary, the OAG attorneys have specifically informed the courts in the Trooper 1 and Bennett actions that they will not produce the witness interview memos or the unredacted transcripts in connection with subpoenas issued in those cases. *See* Glavin Aff., Ex. 21 at 66:14-16, 70:16-22, 85:3-86:15, 87:11-89:4, 112:6-15, 121:15-24, 123:8-21; Glavin Aff., Ex. 14 at 13:21-18:25, 23:11-24:3, 34:17-37:11, 45:11-24, 47:23-48:20; 49:22-50:2; Transcript of Status Conference held before the Hon. Sarah L. Cave on Jan. 4, 2024, *Bennett v. Cuomo*, 22 cv. 7846 (VSB)(SLC), ECF No. 166 at 46:10-20, 49:21-50:21, 51:23-52:22, 55:8-24; 56:7-57:17.

16. The OAG's statement that it "estimate[s]" it may be able to begin producing records in March 2024 is nothing more than a stall to fend off and delay this inevitable Article 78 proceeding. The amount of time is not only unreasonable, but the OAG's representation is

disingenuous given the OAG's consistent and public refusal to produce the Requested Materials for the last year despite being served with two federal subpoenas seeking those records.

17. Pursuant to CPLR 506(b), venue is proper in this Court because: (1) the FOIL Request is returnable in New York County at the office of Governor Cuomo's attorneys (who made the FOIL Request on Governor Cuomo's behalf); (2) Respondent James has an office at 28 Liberty Street in Manhattan; (3) the Respondents' constructive denials were sent via email to Governor's Cuomo's attorneys, who are in New York County and (4) upon information and belief, Respondent James, and the First Deputy Attorney General work primarily out of the OAG office at 28 Liberty Street and were involved in the constructive denial of Governor Cuomo's FOIL Request.

STATEMENT OF FACTS

A. The Report Regarding Sexual Harassment Allegations and Respondent James's Refusal to Produce the Underlying Evidence

18. On March 1, 2021, Governor Cuomo made a referral to Respondent James, pursuant to N.Y. Exec. L. § 63(8), specifying that Respondent James select an "independent law firm" to "conduct an inquiry" into allegations of sexual harassment made against him and that a public report be issued at the conclusion of the inquiry. Glavin Aff., Ex. 5.1 at 154. On August 3, 2021, Respondent James held a televised press conference to announce the "Report of Investigation Into Allegations of Sexual Harassment by Governor Andrew M. Cuomo." Glavin Aff., Ex. 5. That Report, which is materially inaccurate, incomplete, biased, flawed and misleading, discussed and made findings regarding Governor Cuomo's interactions with certain women while he was Governor.

19. The Report was the culmination of a supposedly "independent" investigation (the "Investigation") carried out by attorneys selected and deputized by Respondent

James in March 2021 to act as Special Deputy Attorneys General to Respondent James's First Deputy Attorney General: Joon Kim of Cleary Gottlieb and Anne Clark of Vladeck, Raskin & Clark P.C. ("Vladeck"). Ms. Clark is a plaintiff's attorney who routinely represents plaintiffs in sexual harassment cases. Mr. Kim is a former federal prosecutor who investigated the Executive Chamber under Governor Cuomo several years before Respondent James selected him, and he had personally interviewed Governor Cuomo in connection with the Investigation.

20. Prior to the commencement of the Investigation and issuance of the Report, Governor Cuomo had publicly stated his intention to run for a fourth term as New York State governor in 2022. Respondent James did not disavow any intention that she would run for governor in 2022 against Governor Cuomo, despite obvious conflict of interest concerns.

21. During Respondent James's August 3, 2021, extraordinarily prejudicial press conference announcing the Report, she declared that the Investigation found that "Governor Andrew Cuomo sexually harassed current and former New York State employees" and "created a hostile work environment for them." Glavin Aff. Ex. 6. Respondent James further stated: "these 11 women were in a hostile and toxic work environment, and that we should believe women and that what we have is an obligation and duty to do is to protect women in their workplace;" "I believe women;" and "all of us should be focused on keeping women safe, believing women, and allowing women to speak their truth. And that's exactly what this [Report] does." *Id.*

22. Respondent James further stated: "The investigators independently corroborated and substantiated these facts through interviews and evidence, including contemporaneous notes and communications. **This evidence will be made available to the public.**" *See Id.* at 1:32 (emphasis added).

23. The Report purported to catalogue allegations by eleven women, including those by a New York State Police Protective Services Unit member known as “Trooper 1,” and credited their allegations—regardless of lack of corroboration, contrary evidence, and/or without consideration of critical context to various events described in the Report. According to the Report, investigators “issued over 70 subpoenas for documents and other information, and received over 74,000 documents” and “interviewed 179 witnesses and took testimony under oath from 41 of them.” Glavin Aff., Ex. 5 at 15. Although Respondent James promised at her August 3, 2021 press conference that she would release the evidence, Glavin Aff., Ex. 6 at 1:32, the OAG disclosed only a tiny subset of those materials—111 exhibits—on the day the Report was released. *See* Glavin Aff., Ex. 5.1, 5.2, 5.3. No witness interview memos or transcripts were released at that time. Respondent James’s inflammatory press conference had its intended effect: a press frenzy ensued and, within hours, numerous members of the New York State Assembly called for Governor Cuomo’s impeachment and President Joseph Biden called for Governor Cuomo to resign *despite admitting he had not read the Report*. *See* Allie Malloy, *Biden Calls on New York Gov. Andrew Cuomo to Resign After Report Details Sexual Harassment Allegations*, CNN (Aug. 3, 2021), <https://www.cnn.com/2021/08/03/politics/joe-biden-andrew-cuomo-reaction/index.html>.

24. The Report was a one-sided, deeply flawed ambush of Governor Cuomo, who denies having sexually harassed anyone. In numerous instances, the Report accepted as true certain highly suspect allegations, even though the investigators had not thoroughly probed those allegations and ignored material evidence that undermined the allegations and credibility of complainants. Respondent James and her office brusquely deflected legitimate concerns and criticisms regarding the Investigation and Report, dismissing those concerns as “attacks, lies, and conspiracy theories” and a “charade[.]” Press Release, New York State Attorney General,

Statement from Attorney General's Office in Response to Rita Glavin's Comments (Aug. 20, 2021), <https://ag.ny.gov/press-release/2021/statement-attorney-generals-office-response-rita-glavins-comments>

25. Governor Cuomo's counsel made public and written requests for access to the evidence on August 5, 2021, August 6, 2021, and August 9, 2021. Yet, he was denied such access. Glavin Aff., Ex. 7. On August 10, 2021, one week after the release of the Report, and in the face of refusals by the OAG and the New York State Assembly Judiciary Committee to provide him access to the evidence, Governor Cuomo announced his resignation effective August 24, 2021. See Marina Villeneuve, *Gov. Andrew Cuomo Resigns Over Sexual Harassment Allegations*, AP (Aug. 10, 2021 6:08 p.m.), <https://apnews.com/article/andrew-cuomo-resigns-17161f546bb83c32a337036ecf8d2a34>.

26. Respondent James subsequently backtracked from her public promise to release the evidence, stating that on September 1, 2021 she would not release the underlying evidence at the request of several district attorneys who were conducting investigations based on the Report. @NickResiman, Twitter (Sep. 1, 2021 3:41 p.m.), https://twitter.com/NickReisman/status/1433152936994033666?ref_src=twsrc%5Etfw (Quoting Respondent James: "We cannot release it, we would like to release it because we believed in transparency. The districts attorneys have asked us not to release the transcripts and we are cooperating with them.")

27. On October 29, 2021, Respondent James declared her candidacy for governor. Less than two weeks later, and despite the ongoing investigations by district attorneys, Respondent James selectively released to the public the transcribed sworn testimony of just *eleven*

witnesses—Governor Cuomo and ten complainants—and exhibits used in their testimony (albeit with numerous redactions). Glavin Aff., Ex. 8.

28. On November 29, 2021, while still in the midst of her short-lived gubernatorial campaign, Respondent James selectively released to the public on the OAG’s website only sixteen additional witness interview transcripts (albeit with numerous redactions), this time from Executive Chamber staff members who worked closely with Governor Cuomo, some outside advisors to Governor Cuomo, and his brother Christopher Cuomo.

29. There was no legitimate law enforcement reason for Respondent James to selectively release certain transcripts in the manner she did. To the contrary, there were ongoing investigations by district attorney offices based on the Report and a pending criminal charge (since dismissed on the merits) against Governor Cuomo, all based upon the Report issued by Respondent James. By publicly releasing transcripts, Respondent James improperly broadcast to witnesses the testimony of other witnesses regarding their recollection about the same events—all while investigations of those allegations were pending.

30. Respondent James ended her campaign for governor on December 9, 2021, and announced that she was instead running for re-election as Attorney General.

31. In late December 2021 and January 2022, all district attorney offices with open investigations of Governor Cuomo based on the Report closed those investigations without bringing any charges. The sole misdemeanor criminal complaint lodged against Governor Cuomo by Albany County Sheriff Craig Apple—who filed that charge without consultation with or authorization by the Albany County District Attorney—was dismissed on January 7, 2022 after the Albany County District Attorney concluded that his office “cannot meet our burden at trial.” Press

Release, Albany County District Attorney David Soares, *Statement from DA David Soares* (Jan. 4, 2022),

32. In connection with the misdemeanor charge lodged by Sheriff Apple against Governor Cuomo, the OAG produced approximately 30 witness interview memos from the Investigation to the Albany County District Attorney. The District Attorney in turn provided that limited set of memos to Governor Cuomo. These OAG interview memos contained exculpatory evidence not referenced or discussed in the Report, which directly undermined the Report's conclusions and supported Governor Cuomo's denials of sexual harassment and contained information that materially undermined the credibility of certain complainants. The memos also demonstrated that the OAG selectively decided who and how they questioned certain witnesses during the forty-one transcribed interviews to avoid inconsistencies and/or disclosure of exculpatory evidence and information that undermined the credibility of complainants. The OAG witness interview memos provided to Governor Cuomo as part of discovery in that criminal case had been redacted for privilege, and neither the OAG nor the Albany County District Attorney argued that those as-redacted memos were protected by any attorney-client privilege, work-product privilege or any other privilege.

33. On January 20, 2022, Respondent James released the remaining fourteen transcripts of the forty-one transcribed witness interviews (albeit with numerous redactions). Those transcripts contained material evidence that undermined the Report's factual findings and the credibility of certain complainants, as well as demonstrated the flawed and biased nature of the Investigation in suppressing and disregarding the evidence from certain material witnesses.

B. The OAG Denies The New York Daily News FOIL Request for the Witness Interview Memos

34. On August 24, 2021, *The New York Daily News* Editorial Board opined that the Report “has serious problems” and criticized Respondent James for not releasing the evidence. Daily News Editorial Board, *No Heroes Here; Cuomo Should’ve Resigned, but Attorney General’s Report has Serious Problems*, NY DAILY NEWS (Aug. 24, 2021), <https://www.nydailynews.com/2021/08/24/no-heroes-here-cuomo-shouldve-resigned-but-attorney-generals-report-has-serious-problems>.

35. On February 7, 2022, *The New York Daily News* made a FOIL request to the OAG for (1) the interview memos of the 179 witnesses interviewed as part of the Investigation and (2) a list of the witness names and dates of those interviews. Glavin Aff., Ex. 9. Daily News Editorial Board, *Produce the Documents: All the Evidence of the Cuomo Probe Must Come to Public Light Now*, NY DAILY NEWS (Feb. 7, 2022), <https://www.nydailynews.com/2022/02/07/produce-the-documents-all-the-evidence-of-the-cuomo-probe-must-come-to-public-light-now/>.

36. On February 28, 2022, the OAG refused to produce the witness interview memos to *The New York Daily News*, claiming they were exempt from disclosure under FOIL because those memos were privileged under both the attorney work-product privilege and attorney-client communications privilege. Glavin Aff., Ex. 9.

37. On March 30, 2022, *The New York Daily News* administratively appealed the denial of its FOIL request for the interview memos, arguing that: (1) no attorney-client privilege attached to the interview memos because there was no attorney-client relationship in connection with memos that were simply a summary of factual statements by a witness; and (2) the work-product doctrine did not attach because the memos were simply a summary of factual statements by a witness and the memos were not prepared in anticipation of litigation. On April

11, 2022, the OAG denied the appeal. *Id.* In refusing to release the interview memos, the OAG cited both attorney-client and work-product privileges, as well as FOIL exceptions for “unwarranted invasion of personal privacy” for witnesses and “intra-agency materials.” Glavin Aff., Ex. 10.

38. On August 3, 2022, *The New York Daily News* criticized the OAG’s denial of its FOIL and called on Respondent James to release the documents on which the Report was based. Daily News Editorial Board, *Shine a Light: Release Documents from the Cuomo Sexual Harassment Investigation*, NY Daily News (Aug. 3, 2022), <https://www.nydailynews.com/2022/08/03/shine-a-light-release-documents-from-the-cuomo-sexual-harassment-investigation/>; see also Daily News Editorial Board, *New York Attorney General Tish James Plays FOIL Flimflam With Cuomo Probe Records*, NY Daily News (Sep. 5, 2023), <https://www.nydailynews.com/2023/09/05/new-york-attorney-general-tish-james-plays-foil-flimflam-with-cuomo-probe-records/>.

C. Respondent James’s Repeated Refusal to Comply with Governor Cuomo’s Subpoenas to Produce the Requested Materials

39. On February 17, 2022, Trooper 1 filed a civil action alleging harassment and discrimination against the New York State Police, Governor Cuomo and others in the United States District Court for the Eastern District of New York. Glavin Aff., Ex. 11. Trooper 1’s complaint alleges that “[b]etween 2013 and 2021, the Governor of the State of New York, Andrew Cuomo, sexually harassed” Trooper 1 and others, and Trooper 1 relies heavily and almost exclusively upon the Report in making her allegations. *Id.* Trooper’s 1 complaint spends dozens of paragraphs directly incorporating and regurgitating allegations regarding each of the other complainants from the Report. *Id.* ¶¶ 1–5, 13, 75–149. Trooper 1’s counsel has publicly stated that Trooper 1 will seek to introduce the OAG Report at trial. Glavin Aff., Ex. 14, at 49:13-52:18.

40. Because the Trooper 1 Action incorporates the Report's findings with respect to allegations regarding all eleven complainants discussed in the Report, on July 7, 2022 Governor Cuomo served the Trooper 1 OAG Subpoena, demanding materials and evidence underlying the Investigation and Report. Glavin Aff., Ex. 12. The Trooper 1 OAG Subpoena called for production of the Requested Materials.

41. After Respondent James refused to comply with the Trooper 1 OAG Subpoena, on October 5, 2022, Governor Cuomo moved to compel the OAG's compliance. *See Cuomo v. Office of the New York State Attorney General*, 22 mc. 3044 (LDH)(TAM) (E.D.N.Y.) ECF No. 1–3. On November 8, 2022, Respondent James cross-moved to quash the Trooper 1 OAG Subpoena arguing, among other things, that: production of the materials posed an “undue burden” on the OAG; the materials were not relevant to the Trooper 1 Action; the OAG's sovereign immunity prevents a federal court from ordering the OAG to comply with a third-party subpoena; attorney-client and attorney work-product privilege applies to the witness interview memos and other materials; and a law enforcement privilege applies to the materials called for by the subpoena. *Id.*, ECF No. 18. With respect to the witness interview memos and the 41 transcribed interviews, the OAG specifically argued that complying with the subpoena would be an undue burden on both the OAG and New York State taxpayers, for “any production would require a time-consuming review and redaction process.” *Id.* at 3.

42. After months of briefing, during a February 7, 2023 oral argument regarding the Trooper 1 OAG Subpoena, the OAG argued that the Trooper 1 OAG Subpoena was an improper method of obtaining the Requested Materials, and *directed Governor Cuomo to go through the FOIL process*. *See* Glavin Aff., Ex. 21 at 73:7–14 (“So there is a procedure under FOIL for any member of the public to seek agency documents. . . That's the procedure that a party

needs to follow if they want to get documents from a nonparty state agency. . .”). The OAG asserted that “if the person who submits the FOIL request gets a determination that they don’t like, then they can take that to the state court under an Article 78 proceeding.” *Id.* at 77:16-23.

43. Following oral argument, on February 24, 2023, Governor Cuomo filed a letter limiting the scope of the Trooper 1 OAG Subpoena to address Respondent James’s undue burden argument. *Cuomo v. Office of the New York State Attorney General*, 22 mc. 3044 (LDH) (TAM) (E.D.N.Y.), ECF No. 28. The narrowed scope included only the Requested Materials.

44. On July 21, 2023, the Honorable Taryn A. Merkl, denied Governor Cuomo’s motion to compel, finding that the OAG Subpoena was overbroad in calling for all the material underlying the Investigation, Governor Cuomo had not established the relevancy of the materials sought to the Trooper 1 Action, and the OAG Subpoena would subject the OAG to an undue burden including redaction of materials such as witness interview memos. *See Id.*, ECF No. 37. Judge Merkl did not grant the OAG’s motion to quash the Trooper 1 OAG Subpoena.

45. On July 31, 2023, Governor Cuomo moved for reconsideration of the July 21, 2023 ruling and proposed narrowing the requests in the Trooper 1 OAG Subpoena. *Id.*, ECF Nos. 40-42. That motion remains pending.

46. While Trooper 1 OAG Subpoena litigation was ongoing, on September 8, 2023, Governor Cuomo received Comptroller records reflecting that, *in July 2022*, the OAG entered into a contract extension with Clearly Gottlieb *with the express purpose to review and redact documents in anticipation of disclosure*. Glavin Aff., Ex. 13 at 118. These records show that, long after the OAG disclosed a small amount of investigative materials to the public in 2021 and again on January 20, 2022, New York State paid approximately \$1.3 million to Cleary Gottlieb in 2023 to review and redact documents for disclosure under that June 2022 extension. *See Cuomo*

v. Office of the New York State Attorney General, 22 mc. 3044, ECF No. 47 at 1–2. This contract extension occurred: *four months* after Trooper 1 filed her lawsuit; *six months* after the various district attorneys had closed investigations of Governor Cuomo; and *ten months after* the Report was issued. Glavin Aff., Ex. 13.

47. On September 26, 2023, a status conference was held in the Trooper 1 OAG subpoena litigation, during which the OAG admitted that the witness interview memos, a subset of the Requested Materials, *had already been reviewed and redacted* for privilege by Cleary Gottlieb. Glavin Aff., Ex. 14 at 36. In an effort to explain why the OAG’s argument about “undue burden” was not disingenuous because the memos had already been redacted for privilege, the OAG claimed the witness interview memos had been redacted to comply with criminal discovery standards rather than civil discovery standards—without explaining the purported difference between those “standards”. *Id.* at 36:7–8 (“[T]hey were redacted under the criminal standards for production to fellow law enforcement.”). The OAG’s justification also failed to explain why the OAG sought a contract extension with Cleary Gottlieb in June 2022—*six months after the criminal investigations had been closed*—for the express purpose of having Cleary Gottlieb review and redact documents for disclosure.

48. The OAG also asserted that the witness interview memos were protected from disclosure by attorney-client privilege, attorney work-product protection, as well as law enforcement privilege. Glavin Aff., Ex. 14 at 35:10, 36:10 (referring to attorney-client privilege and work product); *see also Cuomo v. Office of the New York State Attorney General*, 22 mc. 3044, ECF No. 51. Given the OAG’s obstinance in refusing to produce the memos, Judge Merkl commented to Governor Cuomo’s lawyers at the conference that the OAG is “**never going to give you the interview memos. They’ve made that super clear.** That’s going to have to come to me

on some sort of privilege review and I may need to reach the sovereign immunity question.” Glavin Aff., Ex. 14 at 22:2-4 (emphasis added). Lastly, the OAG stated they possessed between 150-200 witness interview memoranda from the Investigation, ranging between two and ten pages each. Glavin Aff., Ex. 14 at 36:13-23.

49. During an October 5, 2023 meet and confer, the OAG argued that the memos were protected from disclosure by attorney-client and attorney work-product privileges, as well as law enforcement privilege. While the OAG acknowledged that *Cleary Gottlieb had already redacted those memos for attorney-client and attorney work-product privilege*, the OAG maintained that attorney work-product privilege for criminal discovery somehow differed from the attorney work-product privilege in civil discovery. Glavin Aff., ¶¶ 25-26.

50. Governor Cuomo has repeatedly argued that the witness interview memos are not protected by attorney-client privilege, and that the interview memos could not be protected by the attorney work-product privilege. *See Cuomo v. Office of the New York State Attorney General*, 22 mc. 3044, ECF No. 2 at 12–21; ECF No. 21 at 13–22.

D. The Bennett OAG Subpoena and Respondents’ Refusal to Comply

51. While the Trooper 1 OAG Subpoena litigation was ongoing, on August 22, 2023 Governor Cuomo served the Bennett OAG Subpoena for the Requested Materials, i.e., interview memos and unredacted transcripts for witnesses relevant to the Bennett Action. Glavin Aff., Ex. 18. Like the Trooper 1 complaint, the Bennett complaint cites to and relies upon the OAG Report. Glavin Aff., Ex. 19 ¶¶ 135-138 (relying upon the Report’s findings, including that Governor Cuomo “sexually harassed a number of current and former New York State employees”). The Bennett OAG Subpoena sought witness statements for a limited number of witnesses from the Investigation relevant to the Bennett Action. Glavin Aff., Ex. 18. Just as in

Trooper 1, the OAG has refused to produce any witness interview memos or unredacted transcripts in response to the Bennett OAG Subpoena, citing sovereign immunity and various privileges, including attorney-client, work-product, public interest, law enforcement, and deliberative process. Glavin Aff., Ex. 17. In a December 19, 2023 letter, the OAG objected to producing the Requested Materials in the Bennett Action on the grounds that, among other things, the Bennett OAG Subpoena “seeks purely privileged material.” Glavin Aff., Ex. 16. At a January 4, 2024 conference addressing the subpoena, the OAG doubled-down, arguing that the “entirety of the interview memos” are privileged. Transcript of Status Conference held before the Hon. Sarah L. Cave on Jan. 4, 2024, *Bennett v. Cuomo*, 22 cv. 7846 (VSB)(SLC), ECF No. 166 at 55:18-23. That dispute remains pending.

F. Respondent James Constructively Denies Governor Cuomo’s FOIL Request for the Witness Interview Memos and Unredacted Transcripts

52. Having been stymied by Respondents’ refusal to comply with a federal subpoena for the Requested Materials, on July 25, 2023, Governor Cuomo, through counsel, submitted a FOIL Request to the OAG requesting, (i) “[n]otes and interview memoranda reflecting statements made by the 179 witnesses who the OAG interviewed during the course of the investigation” and (ii) “[f]or the [41] witnesses whose testimony the OAG as part of the investigation was publicly released by the OAG in redacted form, copies of the unredacted transcripts and/or unredacted video testimony for those individuals.” Glavin Aff., Ex. 1. In other words, Governor Cuomo requested the OAG witness interview memos and unredacted transcripts.

53. On August 2, 2023, the OAG notified Governor Cuomo via email that he would receive an update on his FOIL request on August 30, 2023. Glavin Aff., Ex. 15. On August 30, 2023, the OAG FOIL Records Access Officer responded via email to Governor Cuomo’s counsel that: (1) “we are diligently engaged in the process of completing our response to your

request;” (2) “[w]e estimate that, by March 1, 2024, we will be able to begin producing to [Governor Cuomo] the records that respond to [his] request;” and (3) the delay in producing the records is due to “limited resources available at the agency; the volume of records that must be reviewed in order to respond to [Governor Cuomo’s] request; and the detailed nature of review required to respond to [Governor Cuomo’s] request.” *Id.* Glavin Aff., Ex. 2. The August 30, 2023 OAG email did not refer to the attorney-client privilege or attorney-work product privilege (or any other privilege) exempting the Requested Materials from production under FOIL.

54. On September 6, 2023, Governor Cuomo administratively appealed Respondent James’s determination on the grounds that the seven-month delay to purportedly *begin* producing documents was unreasonable and amounted to constructive denial. Glavin Aff., Ex. 3.

55. On September 20, 2023, the OAG, through its FOIL Appeals Officer, emailed Governor Cuomo’s counsel the denial of Governor Cuomo’s administrative appeal in part because the estimated ed March 1, 2024 date to begin production was a “date certain when the request would be granted in part” and reasonable under the circumstances. Glavin Aff., Ex. 4. The OAG based the reasonableness of that date on the Record Access Officer needing review the 41 transcripts as a whole, 22 videos of taped testimony from those same interviews, and “notes and interview memoranda of all 179 witnesses the OAG interviewed.” *Id.* Like the August 30, 2023 communication, this denial did not refer to attorney-client privilege, attorney-work product privilege, or any other privilege (or any other privilege) exempting the Requested Materials from production under FOIL, which are the arguments the OAG has repeatedly made and continues to make to avoid producing the witness interview memos and unredacted transcripts in response to federal subpoenas. Further, the FOIL Appeals Officer argued that the *New York Daily News* FOIL request differed from Governor Cuomo’s because the *Daily News* only requested witness interview

memos and was denied outright, whereas Governor Cuomo's request was broader and the OAG's August 30, 2023 FOIL Response was purportedly a "partial granting of the request." *Id.*

56. The September 20, 2023 appeal determination concluded by stating it was a final agency determination and judicial review can be "obtained under Article 78 of the Civil Practice Law & Rules." *Id.*

57. Despite the OAG's representation in the August 30, 2023 FOIL response that it estimated it will be able to begin producing the Requested Materials by March 1, 2024, the OAG has made repeatedly clear to courts and to Governor Cuomo it has no intention of producing the witness interview memos or unredacted interview transcripts—which are precisely what Governor Cuomo requested in his FOIL Request. Indeed, the OAG's December 19, 2023 letter in the Bennett Action made clear that the OAG views the Requested Materials as "purely privileged material." Glavin Aff., Ex. 16. Thus, the OAG has no intention of producing the Requested Materials and the OAG's August 30 and September 20, 2023 responses to Governor Cuomo's FOIL Request are actual and constructive denials.

G. The Witness Interview Memos and Unredacted Transcripts Are Not Protected By Privilege and Must Be Produced

58. The witness interview memos have already been redacted for attorney-client and work-product privilege by Cleary Gottlieb, to the extent such privileges could exist. Further, Governor Cuomo already received approximately 30 of the OAG witness interview memos. Thus, there has been a waiver.

59. To the extent that some attorney-client relationship could even exist between Respondents and the deputized investigators from Cleary Gottlieb and Vladeck, and

Governor Cuomo disputes this, the Requested Materials should be produced because they contain factual information not subject to privilege protection from disclosure.

60. Moreover, the Requested Materials were compiled and created for the express purpose of generating a public report, not providing legal advice. Indeed, in announcing the deputized investigators, the OAG stated: “Upon the conclusion of the investigation, the team will produce a written report which will include its findings. The report will be made available to the general public.” Glavin Aff., Ex. 20.

61. The work product doctrine also does not exempt the Requested Materials from disclosure because those materials were not prepared in connection with any pending or anticipated litigation. Rather, the Requested Materials were created in connection with an Investigation under N.Y. Exec. L. Section 63(8), where the entire purpose was to release a public report about the Investigation.

62. Even if work product protection could apply, the OAG waived such protection through the public release of the 165-page Report, which directly quoted from and cited to documents and communications the OAG received during the Investigation and relayed the contents of informal witness interviews.

63. No law enforcement privilege or exception applies because: (a) this was not a law enforcement investigation, but a Section 63(8) investigation where only a public report was to be produced; and (b) that Investigation has been closed for more than two years.

64. No “intra-agency” or “deliberative process” privilege or exception applies because the Requested Materials consist of purely factual information—witness statements.

No public interest privilege or exception applies given the public nature of this investigation and public release of the Report. To the contrary, the public interest weighs strongly in favor of disclosure of the Requested Materials to Governor Cuomo.

FIRST CAUSE OF ACTION

ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL REQUEST

65. Governor Cuomo repeats and realleges each and every allegation in paragraphs 1 through 57 as though fully set forth herein.

66. By refusing to produce responsive records to Governor Cuomo’s targeted FOIL Request in a reasonable time, refusing to even promise to produce records by March 2024, and by repeatedly informing Governor Cuomo throughout parallel litigation that the OAG will not produce the Requested Materials on privilege grounds, Respondents have violated Article 78 of the New York Civil Practice Law and Rules and N.Y. Pub. Officers L. § 87. Pursuant to N.Y. Pub. Officers L. § 89(4)(b), the denial of an appeal made pertaining to FOIL can be reviewed pursuant to a petition under Article 78 of the Civil Practice Law and Rules.

67. Respondents have repeatedly stated in subpoena litigation, and continue to state, that they will not produce the witness interview memos or unredacted witness transcripts that are the subject of the FOIL Request. In a December 19, 2023 filing in the Bennett Action, the OAG affirmatively asserted that the Requested Materials are “purely privileged material.” Glavin Aff., Ex. 16. The Requested Materials—interview memos and unredacted transcripts—are not privileged and should be produced.

68. Accordingly, the Court should rule in favor of Governor Cuomo and enter a judgment (1) enforcing his rights under Pub. Officers L. § 84 *et seq.*, (2) vacating Respondents’ August 30, 2023 and September 20, 2023 Denials of Governor Cuomo’s FOIL Request, (3)

declaring that Respondents acted unlawfully in failing to produce records responsive to Governor Cuomo's FOIL Request, and (4) compelling Respondents to disclose all records responsive to Governor Cuomo's FOIL Request within five days of the date of the order.

PRAYER FOR RELIEF

WHEREAS, Governor Cuomo respectfully requests that the Court enter an order and judgment:

- A. Enforcing his rights under Pub. Officers L. § 84 *et seq.*;
- B. Vacating Respondents' August 30, 2023 and September 20, 2023 Denials of Governor Cuomo's FOIL Request;
- C. Declaring that Respondents acted unlawfully in failing to produce records responsive to Governor Cuomo's FOIL Request;
- D. Compelling Respondents to disclose all records responsive to Governor Cuomo's FOIL Request within five days of the date of the order;
- E. Awarding Governor Cuomo attorney's fees and costs incurred in enforcing his right to records responsive to his FOIL Request pursuant to N.Y. Pub. Officers Law § 89(4)(c); and
- F. Granting such other relief as this Court may deem just and proper to effectuate the purpose of Public Officers Law § 89(4)(c).

Dated: New York, New York
January 18, 2024

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VERIFICATION

STATE OF NEW YORK:
COUNTY OF NEW YORK: ss.

Rita M. Glavin, an attorney duly admitted to practice in the State of New York,
hereby affirms the truth of the following under penalty of perjury pursuant to CPLR § 2106(a):

1. I am counsel for Petitioner in this action, and have knowledge of the circumstances alleged in the within action;
2. I have read the foregoing petition and know the contents thereof;
3. The same is true to my own knowledge except as to the matters therein stated to be on information and belief, and as to those matters, I believe them to be true; and
4. My office is located in New York County, and Petitioner is currently located in Westchester County, making this Verification proper pursuant to CPLR 3020(d)(3).

Rita M. Glavin

Rita M. Glavin

Dated: January 18, 2024
New York, New York