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May 20, 2019

By NYSCEF and Hand Delivery

The Hon. Barry R. Ostrager
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: ***People of the State of New York*** **v.** ***Exxon Mobil Corporation*****, No. 452044/2018**

Dear Justice Ostrager:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil" or "the Company") to advise the Court that the parties have reached an impasse on a discovery dispute. The Office of the Attorney General ("OAG") has refused to collect and search the contents of former Attorney General Eric Schneiderman's personal email account (the "Personal Account") even though Mr. Schneiderman used the Personal Account to conduct official business relevant to ExxonMobil's defenses in this matter. Because the Personal Account likely contains relevant discovery and OAG has an obligation to preserve and collect official records located within that account, the Court should direct OAG to comply with ExxonMobil's discovery requests.

Mr. Schneiderman Used His Personal Account For Official Business

During fact discovery, OAG produced ten email chains that Mr. Schneiderman forwarded from the Personal Account ("[redacted]") to his work account ("[redacted]" or the "Work Account"). Contrary to OAG's assertions, the Personal Account contains far more than innocuous emails from third parties sending articles and newsletters. *See* **NYSCEF Dkt. 211, Pl.'s Reply Br. in Supp. of Mot. for Protective Order at 10. In fact, the Personal Account contains direct evidence that OAG colluded with special interests engaged in a scored-earth campaign against ExxonMobil. Matthew Pawa, an avid ExxonMobil detractor intent on suppressing the Company's speech on climate policy, used the Personal Account to communicate with Mr. Schneiderman.[1] In a February 5, 2016 email sent to Mr. Schneiderman, Mr. Pawa [redacted]**

[1] **Pawa's hostility toward ExxonMobil is well documented in the Findings of Fact and Conclusions of Law issued by the Honorable R.H. Wallace, Jr., District Judge for the 96th District Court in Tarrant County, Texas.** *See* **Ex. A.**

[redacted].[2] This exchange highlights the influence of private interests on OAG's investigation of ExxonMobil. Another email sent to the Personal Account on June 22, 2016 shows Mark Cuban, a prominent investor, [redacted][3] [redacted][4] Mr. Schneiderman's interview with the *New York Times* announcing his investigation into ExxonMobil's reserves took place less than two months later.[5] This exchange bears directly on the claims at issue in this litigation, and strongly suggests that the Personal Account is reasonably likely to contain discoverable information.

These emails show that Mr. Schneiderman used his Personal Account to communicate with special interests urging the use of government power to coerce ExxonMobil into changing its position on climate policy. These communications are not only relevant to ExxonMobil's defenses of selective enforcement and official misconduct, they also reach the merits of OAG's claims against ExxonMobil. And they are likely just the tip of the iceberg. Additional documents doubtless exist in the Personal Account that Mr. Schneiderman never bothered to forward to his Work Account. OAG has provided no sound basis, and ExxonMobil is aware of none, that would excuse OAG from acquiring and searching official government records located within the Personal Account.

Despite ExxonMobil's Repeated Requests, OAG Declined to Request Access to Mr. Schneiderman's Personal Email Account

Concerned about the substance of communications sent to the Personal Account, on April 29, 2019, ExxonMobil sought confirmation from OAG that it had placed a litigation hold on the Personal Account.[6] During a meet-and-confer the following day, OAG stated that it would confirm whether emails from the Personal Account were appropriately preserved and collected.

At a follow-up meet-and-confer held on May 2, 2019, OAG confirmed that, in or around April 2016, then-Attorney General Schneiderman received a litigation hold notice that covered both the Work Account and the Personal Account. OAG admitted, however, that the Personal Account had not been searched or collected in connection with this action. When asked whether it would collect and search the Personal Account, OAG took the position that it does not have access to the account because Mr. Schneiderman is no longer an OAG employee. ExxonMobil thus asked OAG whether it planned to **(i)** request access to the Personal Account, and **(ii)** conduct a search of that account for responsive documents. OAG responded that it would need some time to formulate an official position before responding to ExxonMobil's inquiry. ExxonMobil revisited the issue with OAG the following day. OAG noted that it was not yet prepared to respond and would reach out the week of May 6, 2019 with a status update. When OAG did not respond, ExxonMobil followed up on May 13, again to no avail.

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2 *See* Ex. B.
3 Ex. C.
4 *Id.*
5 *See* Ex. D.
6 *See* Ex. E at 3.

On May 15, 2019, OAG filed its reply brief in support of its motion for a protective order. Among other things, OAG argued that ExxonMobil has not demonstrated a need to depose OAG because Mr. Schneiderman purportedly preserved his personal emails by forwarding them to his Work Account. *See* Pl.'s Reply Br. at 11. In support of OAG's motion, Mr. Schneiderman affirmed that he did not use his Personal Account "to engage in any substantive communications" regarding OAG's investigation of ExxonMobil. NYSCEF Dkt. 213, Second Montgomery Aff., Ex. A. Later that same day, OAG rejected its discovery obligations with respect to the Personal Account and told ExxonMobil that it would not produce any documents from that account.

Contrary to OAG's claims, the record establishes that Mr. Schneiderman used his Personal Account to conduct official government business. That fact alone warrants search and collection of the Personal Account.

Because Mr. Schneiderman Used Personal Email To Conduct Official Business, OAG is Obligated to Search the Contents of the Personal Account and Produce Responsive Information

It is undisputed that Mr. Schneiderman used his Personal Account alongside his Work Account to conduct official business as Attorney General and regularly exchanged official emails between the two accounts. This practice carries the dangerous incentive of "shunt[ing] critical and sensitive communication away from official channels and out of public scrutiny." *Brennan Ctr. for Justice at New York Univ. Sch. of Law* v. *U.S. Dep't of Justice*, 2019 WL 1932757, at *5 (S.D.N.Y. Apr. 30, 2019). But emails in the Personal Account are no less subject to disclosure than emails in the Work Account. Mr. Schneiderman had no right to "deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain." *Competitive Enter. Inst.* v. *Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016). By routinely corresponding about this litigation through the Personal Account, Mr. Schneiderman subjected that account to disclosure. Indeed, the New York State Committee on Open Government has made clear that "email kept, transmitted or received" by a government official in relation to his or her official duties is subject to the Freedom of Information Law "even if the official 'uses his private email address' and his own computer." N.Y. Dep't of State, Comm. on Open Gov't, Advisory Op., FOIL-AO-15893 (Apr. 6, 2006). ExxonMobil is therefore entitled to receive responsive documents in the Personal Account, regardless of whether they were forwarded to the Work Account.

Contrary to OAG's assertions, Mr. Schneiderman is not entitled to any presumption of compliance with document preservation policies. *See* Pl.'s Reply Br. at 11. "Evidence of a record on a personal account is sufficient to raise a question of compliance with recordkeeping obligations, rendering the presumption of compliance inapplicable." *Brennan Ctr.*, 2019 WL at *5; *see also Landmark Legal Found.* v. *E.P.A.*, 959 F. Supp. 2d 175, 181–82 (D.D.C. 2013). Here, ExxonMobil has submitted direct evidence that Mr. Schneiderman kept official records on his Personal Account, rendering the presumption inapplicable. And Mr. Schneiderman's bare assertions of compliance in his affirmation do not immunize his Personal Account from discovery. In *Competitive Enterprise Institute* v. *Office of Science & Technology Policy*, a case cited by OAG, the district court held only that the presumption of compliance applied after the custodian submitted a declaration showing 4,500 instances of compliance with the email forwarding rule. 241 F. Supp. 3d 14, 22 (D.D.C. 2017). Similarly, in *Matter of Smith* v. *New York State Office of the Attorney General*, another case cited by OAG, the court relied on former Attorney General

Eliot Spitzer's affidavit because he attested that he retained a digital forensic firm to search his personal email account for responsive records—but such records were not found *after* a diligent search. 159 A.D.3d 1090, 1091 (3d Dep't 2018). OAG has made no such showing here, raising substantial questions as to the adequacy of its efforts to collect and search the Personal Account. Indeed, neither OAG nor Mr. Schneiderman claim to have searched the Personal Account at all.

OAG's argument that the Personal Account is not in its possession is entirely beside the point. A party need only have the legal right to obtain the documents at issue, not actual possession of them, for discovery obligations to attach. *See In re Folding Carton Antitrust Litig.*, 76 F.R.D. 420, 423 (N.D. Ill. 1977). Because Mr. Schneiderman used the Personal Account in his official capacity, the emails constitute official government records that OAG has the legal right to obtain. It is of no moment that Mr. Schneiderman is no longer employed by OAG. Beyond OAG's legal right to obtain the emails, OAG has the "practical ability to obtain the documents." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 530 (S.D.N.Y. 1996) (citation omitted). In the case of a former employee, it is incumbent on the party in receipt of the production request to "exhaust the practical means at its disposal to obtain the documents from [the former employee]." *Export-Import Bank of U.S.* v. *Asia Pulp & Paper Co., Ltd.*, 233 F.R.D. 338, 342 (S.D.N.Y. 2005). Here, not only has OAG failed to "exhaust the practical means" of obtaining Mr. Schneiderman's personal emails, it has also failed to perform the bare minimum required by law—requesting that Mr. Schneiderman make the Personal Account available. *See id.* at 341 (noting that employers must, "at the very least, ask their former employees to cooperate before asserting that they have no control over documents in the former employees' possession").

Ultimately, ExxonMobil seeks only to hold OAG to the standard set during its investigation of the Company. During the investigation, OAG took issue with the fact that ExxonMobil did not disclose the existence of secondary email accounts—even though the Company produced documents that made the existence of those accounts clear. Specifically, OAG asked the Court to require ExxonMobil to "search for and produce" documents from any "secondary email accounts" used by ExxonMobil custodians.[7] It then followed up the next week, demanding that ExxonMobil identify whether custodians "utilized secondary email accounts, and if so, whether documents relating to those accounts have been preserved, collected, and/or reviewed for production."[8] Here, OAG presumably knew that Mr. Schneiderman used his Personal Account for official business, but never advised ExxonMobil of that fact and apparently made no effort to collect and search that account for responsive records. ExxonMobil merely asks this Court to hold OAG to the same standard now.

Accordingly, ExxonMobil respectfully requests that this Court order OAG to **(i)** confirm that the Personal Account has been properly preserved; **(ii)** undertake to obtain immediate access to the Personal Account; and **(iii)** review and produce responsive documents from the Personal Account as quickly as possible, and in no event later than by May 31, 2019. ExxonMobil is available to address this issue at the upcoming May 22, 2019 hearing.

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7 *See* Ex. F at 4.

8 *See* Ex. G at 4.

Respectfully submitted,

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.

cc: All counsel of Record (by NYSCEF)