



North Carolina General Assembly
Senate Chamber
State Legislative Building
Raleigh, NC 27601-2808
November 23, 2022

VIA EMAIL

Rachel Baron
American Oversight
records@americanoversight.org

Re: Public Records Request

Dear Ms. Baron:

This is in response to your letter dated September 28, 2022, requesting copies of “[a]ll email communications” between Senator Berger and “anyone” containing a list of “key terms.” Not all communications covered by your request are “public records” as that term is defined in state law because they may not constitute documents made or received pursuant to law and in the transaction of public business. In addition, communications covered by your request may also be subject to statutory legislative confidentiality and legislative privilege, in addition to attorney-client and any other applicable common law privileges.

Our office has conducted a thorough review of our records in response to your request. We are unable to produce any documents in response to your request because the few responsive records in our possession (that are not news clips or mass distributions excluded by your request) are subject to statutory legislative confidentiality and legislative privilege, in addition to attorney-client privilege, and are therefore not subject to disclosure.

Do not hesitate to contact our office if you have any questions related to your request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joshua A. Yost".

Joshua A. Yost
General Counsel
Office of the President Pro Tempore



September 28, 2022

VIA EMAIL

Senator Phil Berger
North Carolina General Assembly
Legislative Building, Room 2007 LB
16 West Jones Street
Raleigh, NC 27601
Phil.Berger@ncleg.gov

Re: Public Records Act Request

Dear Senator Berger:

Pursuant to the North Carolina Public Records Act, as codified at North Carolina General Statutes ch. 132, American Oversight makes the following request for records.

Requested Records

American Oversight requests that your office produce the following records as promptly as possible:

All email communications (including emails, email attachments, calendar invitations, and calendar invitation attachments) between (a) Senator Phil Berger, and (b) anyone communicating from an email address ending in .com, .net, .org, .mail, .me, .edu, or .law, containing any of the key terms listed below.

Key Terms:

- | | |
|---------------------------------------|-------------------------|
| i. "Independent State
Legislature" | vii. "Election Clause" |
| ii. "Legislature Doctrine" | viii. "Electors Clause" |
| iii. "Legislature Theory" | ix. "Elector Clause" |
| iv. ISLT | x. "Moore v. Harper" |
| v. ISLD | xi. "Moore v Harper" |
| vi. "Elections Clause" | xii. Harper |

Please note that American Oversight does not seek, and that this request specifically excludes, the initial mailing of news clips or other mass-distribution emails. However, subsequent communications forwarding such emails are responsive to this request. In other words, for example, Senator Berger received a mass-distribution news clip email referencing "Legislature Doctrine," that initial email would not be responsive to this request. However, if Senator Berger



forwarded that email to another individual with his own commentary, that subsequent message would be responsive to this request and should be produced.

Please provide all responsive records from September 1, 2021, through the date the search is conducted.

Please notify American Oversight of any anticipated fees or costs in excess of \$100 prior to incurring such costs or fee.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Public Records Act.¹
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled

¹ See Atty. Gen. Josh Stein, *North Carolina Open Government Guide* at 22 (2019), <https://ncdoj.gov/download/141/files/17891/2019-open-government-guide> (“Emails about official business are public records even if they are sent using the personal email account of an employee or official.”).

basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Conclusion

American Oversight is a 501(c)(3) nonprofit with the mission to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.²

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Rachel Baron at records@americanoversight.org or (202)897-2465.

Sincerely,

/s/Rachel Baron
Rachel Baron
on behalf of
American Oversight

² American Oversight currently has approximately 16,000 followers on Facebook and 119,100 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sept. 22, 2022); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 22, 2022).