

Congress of the United States

House of Representatives

SELECT SUBCOMMITTEE ON THE CORONAVIRUS PANDEMIC

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (202) 225-5074
Minority (202) 225-5051

September 10, 2024

The Honorable Kathy Hochul
C/O Stephen Juris, Esq.
Partner
Fried, Frank, Harris, Shriver, and Jacobson LLP
One New York Plaza
New York, NY 10004

Dear Governor Hochul:

On November 6, 2023, the Select Subcommittee on the Coronavirus Pandemic (Select Subcommittee) requested pertinent documents and information from the New York Executive Chamber (Executive Chamber) related to our investigation into the decision to send COVID-19-positive patients into nursing homes.¹ Although you promised to be “fully transparent” regarding COVID-19 in nursing homes,² the Executive Chamber’s decision to withhold responsive documents—without notice to the Select Subcommittee—is anything but transparent, has unjustifiably delayed our investigation, and falls squarely on your shoulders.

The Select Subcommittee’s November 6 requests came after the Executive Chamber had ignored two previous letters from the Select Subcommittee requesting similar information.³ Rather than responding to the Select Subcommittee’s initial letters, the Executive Chamber deflected responsibility to the New York State Department of Health (NYDOH). The Executive Chamber failed to produce any documents until February 2024—more than eight months after our original request. While the Select Subcommittee has since received three separate productions amounting to 373,999 documents, it is apparent that the Executive Chamber has not been fully cooperative with our requests and not produced pertinent documents for potentially erroneous reasons.

As outlined below, the documents produced by the Executive Chamber are incomplete and substantially redacted—often, inconsistently and without apparent legal basis. Further, there are responsive documents the Select Subcommittee knows exist—through public reporting and witness testimony—that were not included in the productions. This is unacceptable.

¹ Letter from Brad Wenstrup, D.P.M., Chairman, H. Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Kathy Hochul, Governor of New York (Nov. 6, 2023).

² Matt Sedensky, *Cuomo Exit Isn’t Stopping Push For Answers on Nursing Homes*, NBC NEW YORK (Aug. 13, 2021).

³ Letter from Brad Wenstrup, D.P.M., Chairman, H. Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Kathy Hochul, Governor of New York (May 19, 2023); Letter from Brad Wenstrup, D.P.M., Chairman, H. Select Subcomm. on the Coronavirus Pandemic & Nicole Malliotakis, Member of Congress, to Kathy Hochul, Governor of New York (Oct. 10, 2023).

Additionally, the Executive Chamber only informed the Select Subcommittee that certain responsive documents were intentionally withheld after all other documents were produced. It is not clear whether the Executive Chamber would have ever disclosed its decision to withhold these documents had we not requested a privilege log based on concerns about the adequacy of the production and its excessive redactions.

The Select Subcommittee is charged with conducting oversight to inform legislative solutions to address deficiencies and ingrain proficiencies within the federal government. The Select Subcommittee may use this investigation to recommend legislative solutions regarding state implementation of federal public health guidance, the use of federal funds to respond to a public health emergency, and the appropriateness of current federal statutes protecting nursing home residents, including the Civil Rights of Institutionalized Persons Act (CRIPA). Documents currently in possession of the Executive Chamber but wrongly withheld from the Select Subcommittee are necessary to inform these possible legislative solutions.

To further our investigation, the Select Subcommittee requires the production of all responsive documents in the custody of the Executive Chamber. Accordingly, please find attached a subpoena compelling production of the requested documents.

I. The Executive Chamber's productions do not include certain responsive mobile communications.

Testimony received by the Select Subcommittee indicates that the Executive Chamber has failed to produce certain types of communications. For example, in a transcribed interview, Linda Lacewell, the former Superintendent of New York's Department of Financial Services (DFS), testified that Executive Chamber employees communicated through various means, including text messages and BlackBerry PIN messaging.⁴

Ms. Linda Lacewell (May 31, 2024)

Q. First, how did the governor's team typically communicate with each other?

A. Are you talking about during COVID?

Q. Yes, specifically during COVID.

A. Well, in the beginning we all congregated in the executive chamber in Albany on the second floor of the capital. We had a lot of phone calls, group calls, daily calls, things of that nature, and e-mails and to some degree, pin-to-pin messages, probably text messages. That probably captures most of it.

⁴ Transcribed Interview of Linda Lacewell, by H. Select Subcomm. on the Coronavirus Pandemic Staff (May. 31, 2024) [hereinafter Lacewell TI].

Similarly, former Governor Andrew Cuomo testified to using BlackBerry PIN messaging to communicate with staff and conduct official business.⁵

Governor Andrew Cuomo (June 11, 2024)

Q. Did you ever use PIN messaging through BlackBerry to conduct official business?

A. Yes.

In fact, Melissa DeRosa, the former Secretary to the Governor, testified that the former Governor didn't have an official email account and that BlackBerry PIN messaging was typically how she communicated with him.⁶

Ms. Mellisa DeRosa (June 21, 2024)

Q. To be clear, did the governor use pin messaging as well?

A. Yes.

Q. And as far as non-verbal communication, was that typically how you would communicate with the governor?

A. In non-verbal, yes.

Q. He didn't have an email or –

A. He did not have an email. He didn't text with us, either.

Nonetheless, the Executive Chamber has not produced any BlackBerry PIN messages or text messages responsive to the Select Subcommittee's request. It's inconceivable that there were no communications other than emails responsive to our requests.

II. The Executive Chamber's claims of privilege are excessive, overly vague, and inconsistently applied.

The Select Subcommittee has endeavored to work in good faith with the Executive Chamber during our investigation. To that end, the Select Subcommittee has clearly identified the categories of documents relevant to our investigation and the names of priority custodians.⁷

⁵ Transcribed Interview of Andrew Cuomo, former Governor, New York, by H. Select Subcomm. on the Coronavirus Pandemic Staff (June 10, 2024) [hereinafter Cuomo TI].

⁶ Transcribed Interview of Melissa DeRosa, by H. Select Subcomm. on the Coronavirus Pandemic Staff (June 21, 2024).

⁷ *Supra*, n.1.

Additionally, we provided the Executive Chamber with specific priority documents and freely granted extensions of time to allow for the production of responsive documents.

A. *The Select Subcommittee cannot assess the adequacy of many of the Executive Chamber's privilege claims because the privilege log is overly vague.*

The privilege log provides insufficient—and in some areas, incomplete—information for the Select Subcommittee to be able to adequately identify and assess the documents or information that the Executive Chamber redacted or withheld. In particular, the privilege log includes numerous email entries that entirely redact the subject of the email, and others that do not disclose the names of the individuals sending or receiving the emails.⁸ There is even a communication that the Executive Chamber withheld that did not include the subject of the email or the names of the individuals that sent and received the email.⁹ The only information disclosed for this particular email—besides the claim that it was subject to the deliberative process privilege—was the timestamp.¹⁰

Moreover, the communication descriptions within the privilege log are entirely too vague to adequately inform the Select Subcommittee of the documents at issue. For example, the description is limited in numerous entries to an “[e]mail thread reflecting governmental deliberations regarding NYS information.”¹¹

B. *The privilege log suggests that the Executive Chamber inappropriately redacted and withheld responsive documents.*

The privilege log raises serious questions about the propriety of the documents withheld and redacted by the Executive Chamber.

i. *Claims of Deliberative Process*

For example, according to the privilege log, the Executive Chamber claims that the deliberative process privilege—assuming it is recognized—applies to communications from individuals apparently not employed by New York state government. Among other things, the Executive Chamber withheld documents and communications related to the July 6, 2020 NYDOH report, titled, “Factors Associated with Nursing Home Infections and Fatalities in New York During the COVID-19 Global health Crisis [hereinafter, “NYDOH Report”]—which was explicitly requested by the Select Subcommittee’s November 6 Letter—that were sent by

⁸ See NYSEC_SUBCOMM_00374006; NYSEC_SUBCOMM_00374007; NYSEC_SUBCOMM_00374047; NYSEC_SUBCOMM_00374053.

⁹ NYSEC_SUBCOMM_00374007.

¹⁰ *Id.*

¹¹ NYSEC_SUBCOMM_00374006-07; NYSEC_SUBCOMM_00374007; NYSEC_SUBCOMM_00374030; NYSEC_SUBCOMM_00374032; NYSEC_SUBCOMM_00374042-43; NYSEC_SUBCOMM_00374046-47. NYSEC_SUBCOMM_00374052-53.

Michael Dowling of Northwell Health,¹² David Grabowski of Harvard University,¹³ and individuals from McKinsey & Company.¹⁴ Your administration even claimed that deliberative process applied to an email from Rich Azzopardi to a member of the media.¹⁵

Although the Select Subcommittee does not recognize the deliberative process privilege, even if it did, the Executive Chamber's assertions are incorrect and overly broad. The deliberative process privilege serves to protect government personnel's internal, predecisional communications—not external communications with non-governmental personnel that are purely factual in nature or that are not deliberative in nature.¹⁶ The Executive Chamber has not explained why communications from, to, or among individuals who were not employed the Executive Chamber, and in many instances, were not even employed by the State of New York, are protected by the deliberative process privilege, even if it were to be recognized here. Nor has the Executive Chamber explained why any potential privilege claim was not waived by the inclusion of these third parties.

If recognized, the deliberative process privilege may apply to records prepared by consultants retained by the government.¹⁷ However, the Executive Chamber has failed to provide a reasonable explanation for claims of deliberative process privilege for communications involving third parties. Namely, whether the third-party individuals were retained as a consultant and the communication withheld involved a record produced in furtherance of their retention.

Nonetheless, as outlined by the numerous letters we have sent to you, the Select Subcommittee is specifically investigating the deliberations of the Executive Chamber surrounding this issue. Courts have found that the deliberative process privilege cannot restrict discovery “when the decision-making process itself is the subject of the litigation.”¹⁸ The Executive Chamber should produce responsive documents and communications.

ii. Claims of Attorney-Client Privilege

The Executive Chamber also appears to have unduly extended the attorney-client privilege in order to withhold responsive documents and communications. For instance, the

¹² NYSEC_SUBCOMM_00374009 (Email from Michael Dowling, Northwell Health, to Melissa DeRosa, Secretary to the Governor, New York State (June 30, 2020)).

¹³ NYSEC_SUBCOMM_00374009 (Email from David Grabowski, Professor, Harvard, to Melissa DeRosa, Secretary to the Governor, New York State (July 5, 2020)).

¹⁴ NYSEC_SUBCOMM_00374030; NYSEC_SUBCOMM_00374037; NYSEC_SUBCOMM_00374039-40.

¹⁵ NYSEC_SUBCOMM_00374078 (Email from Rich Azzopardi, Communications Director to the Governor, New York State, to Bernadette Hogan, N.Y. Post (June 16, 2020)).

¹⁶ The deliberative process privilege serves to “protect the deliberative process of the government by ensuring that person[s] in an advisory role would be able to express their opinions freely to agency decision makers.” *Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.*, 35 N.Y.S.3d 785, 790 (N.Y. App. Div. 2016) (internal quotation marks, brackets and citations omitted). It applies to records that are “deliberative,” meaning “communications exchanged for discussion purposes not constituting final policy decisions.” *Id.* at 1001 (internal quotation marks and citations omitted).

¹⁷ *Matter of Xerox Corp. v. Town of Webster*, 490 N.Y.S.2d 488 (N.Y. 1985).

¹⁸ *Hampshire Recreation, LLC v. Vill. Of Mamaroneck*, 204 N.Y.S.3d 893, 900 (N.Y. Sup. Ct. 2023).

Executive Chamber claimed that the privilege applied to communications from non-attorneys, including but not limited to communications from Melissa DeRosa, Jim Malatras, Rich Azzopardi, Peter Ajemian, Eleanor Adams, and Stephanie Benton. In one example, the Executive Chamber withheld four consecutive emails from an administrative assistant.¹⁹ While the Executive Chamber claims that many of these communications are requests for legal advice, the excessive use of this description throughout the productions, without sufficient context, raises serious questions.

In addition, the Executive Chamber has seemingly extended the attorney-client privilege to shield communications from individuals who do not have an attorney-client relationship with the Executive Chamber. For instance, Linda Lacewell testified to the Select Committee that she was acting as Superintendent of DFS during the pandemic—a position that did not require the provision of legal advice to the Governor or the Executive Chamber—yet the Executive Chamber has asserted that communications with her are somehow protected by the attorney-client privilege.²⁰

Ms. Linda Lacewell (May 31, 2024)

Q. During your applicable time period of January 2020 through your resignation in August of 2021, what was your job title?

A. Superintendent of DFS and, I guess, I was announced as a COVID Task force member.

Q. Do you recall or know if the superintendent of financial services is statutorily required to hold a Juris Doctor degree?

A. I don't think so.

Q. The qualifications section is actually pretty small because it's a state-confirmed position. New York State law Chapter 18 A, Section 2, Subsection 202, the requirements of the position are "The head of the department shall be the superintendent of financial services who shall be appointed by the governor by and with advice and consent of the senate, and who shall hold the office at the pleasure of the governor." Just for clarity, does that section list Juris Doctor as a requirement?

A. No.

Q. Do you recall your statutory duties as superintendent of financial services?

¹⁹ NYSEC_SUBCOMM_00374033.

²⁰ Lacewell TI.

A. Well, there are many.

Q. There are seven. I'll read them. According to New York State law Chapter 18 A, Section 2, the statutory duties of the superintendent of financial services are:

Number 1: Foster the growth of the financial industry in New York and spur state economic development through judicious regulation and digital supervision.

Number 2: To ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial services.

Number 3: Ensure fair, timely and equitable fulfillment of the financial obligations of such providers.

Number 4: Protect users of financial products and services from financially impaired or insolvent providers of such services.

Number 5: Encourage high standards of honesty, transparency, fair business practice and public responsibility.

Number 6: Eliminate financial fraud, other criminal use and unethical conduct in the industry.

Number 7: Educate and protect users of financial products and services and ensure that users are provided with timely and understandable information to make responsible decisions about financial products and services.

Does this statute list provide legal advice to the governor or executive chamber as a statutory duty of your position as superintendent?

A. No.

Q. Putting aside your position as superintendent, did you hold any other voluntary position with official state government positions where your duties were to provide legal advice to the governor?

A. I mean, I had other positions, but they did not require advice to the governor. I was on various boards and so forth.

Q. Did you have a personal attorney-client relationship with the governor?

A. I'm not sure what personal means.

Q. Did you have a retainer with him outside of your position as Superintendent of Financial Services?

A. No.

Q. Did you have any agreement with the governor to provide legal advice to him or the executive chamber?

A. Not a written agreement, but my role as counsel to the governor, the staff, the agencies, was historically derived from when I was in the chamber and I had such titles and it was factually based in that the client treated me as their lawyer and believed that they were having privileged conversations with me and relied on that. So there were discussions about giving me a second title.

Q. Were you ever given a second title?

A. No. It was really not deemed to be necessary, but factually, I was counsel.

Q. This is a little redundant because factually you were counsel, did you ever have any official position where your responsibilities were to provide legal advice to the governor?

A. Prior to being a DFS. Otherwise, no.

Despite this, the Executive Chamber has asserted that certain responsive communications involving Ms. Laceywell and no other individuals serving as counsel should be withheld or redacted on the basis of attorney-client privilege.²¹ The Select Subcommittee is especially concerned with the Executive Chamber's claim of attorney-client privilege over communications directly with Ms. Laceywell because she testified to having purported "privileged" conversations with Larry Schwartz, who is not an attorney, related to the March 25, 2020 NYDOH order [hereinafter "Order"] prior to its issuance.²² Although the attorney-client privilege does not shield documents from the Select Subcommittee's inquiries, the Executive Chamber has incorrectly asserted it in instances in which Ms. Laceywell and other individuals not serving as counsel are involved in communications with other State of New York employees who are not counsel. Additionally, the Executive Chamber has apparently asserted the privilege over communications in which legal advice is not sought, provided, or received from individuals serving in designated counsel roles.

²¹ See, e.g., NYSEC_SUBCOMM_00374002; NYSEC_SUBCOMM_003740004-07; NYSEC_SUBCOMM_00374010-22; NYSEC_SUBCOMM_00374024-32.

²² Laceywell TI.

III. The Executive Chamber withheld responsive documents critical to the Select Subcommittee’s investigation.

Furthermore, the Executive Chamber has completely withheld certain responsive documents necessary to informing legislative action.

A. The March 25th Order

For example, the Select Subcommittee is keenly interested to understand the decisions that led to the issuance of the Order—including documents supporting claims the Order followed applicable federal guidance. This starts with understanding who was involved in developing, drafting, and issuing the Order. Accordingly, the November 6 Letter requested that the Executive Chamber produce “[a]ll documents and communications regarding or relating to the March 25, 2020 NYSDOH Advisory entitled, “Advisory: Hospital Discharges and Admission to Nursing Homes.”²³

In a transcribed interview, Dr. Howard Zucker, the former Commissioner of NYDOH, testified that he did not know who was involved in drafting the Order.²⁴

Dr. Howard Zucker (December 18, 2023)

- Q. So I guess if we were looking for the original draft of this guidance, where would you suggest we find it?
- A. I don’t know because when this was an issue, and I was still commissioner, I asked that question, and I could not get it, of looking for where this came from. So I didn’t push it, but I just sort of said, “does someone have the original draft?” and I never got that.

Dr. Zucker also testified that the Greater New York Hospital Association (GNYHA) was involved and had spoken to the former Governor about the Order.²⁵ Nonetheless, the documents and communications produced by the Executive Chamber do not include any drafts of the Order, nor do they show any involvement by GNYHA.

Indeed, the documents and communications produced by the Executive Chamber did not include anything related to the development of the Order. Further, there were no emails, meeting notes, or memoranda reviewing its applicability to federal guidance contemporaneous to the issuance of the Order.

In fact, the Executive Chamber completely withheld the few communications contemporaneous with the issuance of the Order, including three emails between Kyle Kotary,

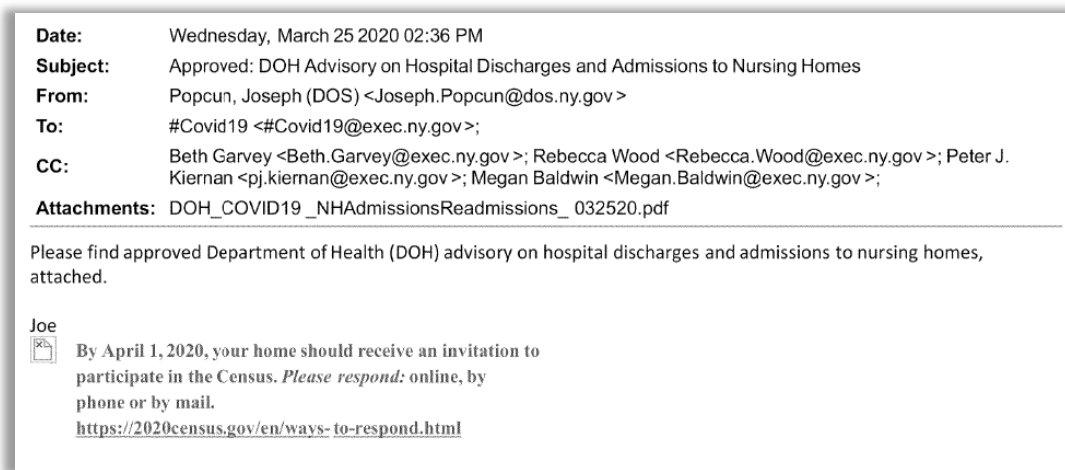
²³ *Supra*, n.1.

²⁴ Transcribed Interview of Dr. Howard Zucker, by H. Select Subcomm. on the Coronavirus Pandemic Staff (Dec. 18, 2023).

²⁵ *Id.*

Jason Conwall, and Rich Azzopardi.²⁶ While the Executive Chamber redacted the email subject, these emails appear to be related to the Order since the Executive Chamber produced emails from the reporters inquiring into the Order on March 25, 2020.²⁷ The communication descriptions of the emails between Kotary, Conwall, and Azzopardi are limited to an “[e]mail thread reflecting governmental deliberations regarding draft response to inquiry concerning NYS information.”²⁸ However, this description only raises questions as to what communications the Executive Chamber withheld, given it freely provided thousands of other draft responses—including from Kotary and Azzopardi—to media inquiries throughout its productions.

The only other email from March 25, 2020, produced by the Executive Chamber is the issuance of the Order.²⁹ The email—which attached the Order—is limited to the following:



However, the privilege log produced by the Executive Chamber asserts that it was withholding this exact communication elsewhere in the production because it was protected by the deliberative process privilege, noting that it was an “[e]mail reflecting governmental deliberations regarding draft March 25, 2020 Advisory, attaching draft advisory reflecting governmental deliberations.”³⁰ It’s clear that this is not deliberative at all, but another example of an inconsistency that leads to questions about how seriously the Executive Chamber took the Select Subcommittee’s request.

The Executive Chamber withheld numerous other critically important documents related to the Order, including an email thread occurring between April and May 2020, entitled “Draft Nursing Home Plan.”³¹ Interestingly, the Executive Chamber also withheld documents and

²⁶ NYSEC_SUBCOMM_00374078.

²⁷ NYSEC_SUBCOMM_00014078.

²⁸ *Id.*

²⁹ NYSEC_SUBCOMM_00063814 (Email from Joseph Popcun, Department of State, New York State, to Beth Garvey, Special Counsel to the Governor, New York State, *et al.* (Mar. 25, 2020)).

³⁰ NYSEC_SUBCOMM_00374049.

³¹ NYSEC_SUBCOMM_00374005; NYSEC_SUBCOMM_00374033; NYSEC_SUBCOMM_00374043-45; NYSEC_SUBCOMM_00374054; NYSEC_SUBCOMM_00374069-73.

communications related to the former Governor’s decision on May 11, 2020, to require readmitted and admitted residents to have proof of a negative COVID-19 test prior to being discharged to nursing homes, despite the former administration’s insistence that the May 11th Directive—as you refer to it in the privilege log—did not supersede the Order. Accordingly, these documents are clearly responsive to the November 6 Letter and must be produced in their entirety.

Similarly, the Select Subcommittee specifically requested all documents and communications regarding or relating to the NYSDOH Report.³² However, the documents provided by the Executive Chamber are insufficient.

In addition to public reporting,³³ the New York State Assembly Judiciary Committee’s impeachment report highlighted Governor Cuomo and his staff’s role in drafting the NYDOH Report, which conveniently concluded that the Order was not responsible for the resulting deaths occurring to nursing home residents.³⁴

Evidence obtained during our investigation demonstrates that while the DOH Report was released under the auspices of DOH, it was substantially revised by the Executive Chamber and largely intended to combat criticisms regarding former Governor Cuomo’s directive that nursing homes should readmit residents that had been diagnosed with COVID-19.

In a transcribed interview before the Select Subcommittee, Dr. Eleanor Adams, formerly employed by the NYDOH, testified that the NYDOH Report was not authored by her nor the NYDOH, and that it was not in fact a “peer reviewed”³⁵ publication as claimed by the former Governor and his staff.³⁶

Dr. Eleanor Adams (April 8, 2024)

Q. Would you consider yourself an author of this report?

³² New York State Department of Health, *Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis*, (July 6, 2020), available at https://health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf.

³³ See J. David Goodman & Danny Hakim, *Cuomo Aides Rewrote Nursing Home Report to Hide Higher Death Toll*, THE N.Y. TIMES (Mar. 4, 2021); Jesse McKinley, *et al.*, *As Cuomo Sought \$4 Million Book Deal, Aides Hid Damaging Death Toll*, THE N.Y. TIMES (Mar. 31, 2021); J. David Goodman, *et al.*, *Cuomo Aides Spent Months Hiding Nursing Home Death Toll*, THE N.Y. TIMES (Apr. 28, 2021).

³⁴ Davis Polk & Wardwell LLP, *Impeachment Investigation Report to Judiciary Committee Chair Charles Lavine and the New York State Assembly Judiciary Committee*, (Nov. 22, 2021), available at https://nyassembly.gov/write/upload/postings/2021/pdfs/20211122_99809a.pdf.

³⁵ Carl Campanile, *Gov. Cuomo’s coronavirus nursing home edict not to blame for deaths, report claims*, N.Y. POST (July 6, 2020), available at <https://nypost.com/2020/07/06/cuomos-nursing-home-edict-not-to-blame-for-deaths-report/>.

³⁶ Transcribed Interview of Dr. Eleanor Adams, by H. Select Subcomm. on the Coronavirus Pandemic Staff (Apr. 8, 2024)=.

- A. No.
- Q. Would you consider the department of health an author of this report?
- A. I would not. It was the dataset that we worked on and I consistently voiced that I didn't think this should be a DOH report. I provided edits as directed and asked, but they were not all accepted. And I told Dr. Zucker that I did not think this should be labeled as a department of health report as presented.
- ...
- Q. ...[T]he governor deemed this a peer reviewed paper at one point. Would you consider this a peer reviewed paper?
- A. For the science point of view for the peer review process, the reviewers are picked by the journal, so they are independently picked, and that process was not gone through here. So it wouldn't meet the usual criteria for a peer reviewed paper.
- Q. Have you sat on peer review committees before?
- A. I have.
- Q. Would you approve this paper?
- A. So as a journal article, this doesn't meet the criteria for an academic journal article. You know, this was issued as a report, and as I said before, I am not familiar with general report structures in different worlds. I just have not personally worked on them. So I was approaching this and continued to push for the method I was familiar with, which was a transparent process, where methods are explained, where all the analysis methods are explained, what kind of tests are run, full limitation sections, and I think for every draft of this that we saw, the group I was working with at the DOH made edits to that effect, um, and not all were accepted in the final project.

Despite its importance to our investigation, the Executive Chamber withheld all documents and communications related to the NYDOH Report between June 6, 2020 and July 6, 2020, the publication date of the report.³⁷ These documents and communications included

³⁷ NYSEC_SUBCOMM_00374008-14; NYSEC_SUBCOMM_00374030; NYSEC_SUBCOMM_00374032; NYSEC_SUBCOMM_00374033; NYSEC_SUBCOMM_00374035-40; NYSEC_SUBCOMM_00374049; NYSEC_SUBCOMM_00374057-62; NYSEC_SUBCOMM_00374068; NYSEC_SUBCOMM_00374070-71; NYSEC_SUBCOMM_00374076; NYSEC_SUBCOMM_00374078.

numerous priority custodians that we specifically requested, including Melissa DeRosa, Jim Malatras, Linda Lacewell, Beth Garvey, Gareth Rhodes, Rich Azzopardi, Jill DesRosiers, Howard Zucker, and Eleanor Adams.³⁸ As noted previously, the Executive Chamber also withheld emails from McKinsey & Company³⁹ and Michael Dowling, of Northwell Health, another individual identified as a priority custodian.⁴⁰

The Executive Chamber is also withholding documents and communications involving nursing home data. For example, the Executive Chamber withheld an email thread between Melissa DeRosa, Linda Lacewell, and Megan Baldwin related to presumed nursing home fatalities.⁴¹ The privilege log claims these emails are an “[e]mail thread reflecting governmental deliberations regarding NYS information, attaching draft spreadsheet reflecting deliberations.”⁴² It is highly concerning that the Executive Chamber would allege that nursing home death data could be interpreted as deliberative.

B. Documents needed to corroborate witness testimony

The Executive Chamber is also improperly withholding documents needed to evaluate the veracity of witness testimony already received by the Select Subcommittee. For example, former Governor Andrew Cuomo testified to Select Subcommittee staff that he did not have any role in the drafting of the NYDOH Report.⁴³

Governor Andrew Cuomo (June 11, 2024)

Q. Do you know if people outside of DOH were involved with drafting or editing this report?

A. No.

Q. Do you know if anyone on your staff, either the executive chamber staff or the COVID task force, was involved in this report?

A. No.

Q. Were you involved in the drafting of this report in any capacity?

A. No.

³⁸ *Id.*

³⁹ *Supra*, n. 11.

⁴⁰ *Supra*, n. 9.

⁴¹ NYSEC_SUBCOMM_00374014.

⁴² *Id.*

⁴³ Cuomo TI.

However, Dr. Jim Malatras testified to Select Subcommittee staff that the former Governor was involved, and that his edits were communicated through Executive Chamber staff.⁴⁴

Dr. Jim Malatras (May 20, 2024)

Q. [The Judiciary Committee’s impeachment report] says that the governor reviewed and edited the draft on multiple occasions. I believe you testified to this in the previous hour, but is that true?

A. Yes.

Q. How were the edits communicated?

A. The edits were communicated in a number of ways. Sometimes people received handwritten notes back on the printed-out piece of paper. Other times, like through messages from Ms. Benton or Ms. Walsh, who were the main, primary conduits for sending those comments back. Sometimes from Ms. DeRosa herself.

The privilege log indicates that there are numerous communications between Executive Chamber staff that would likely corroborate this testimony, including the below-referenced email from Stephanie Benton to Melissa DeRosa in which she apparently asks that a copy of the report be dropped off at the mansion for “him.”⁴⁵

6/22/2020	1:46:04 PM	Stephanie Benton	#briefingteam;	Melissa DeRosa;		Linda Lacerwell; Beth Garvey	can we drop at mansion for him pls FW: Nursing Home Report
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To take one more example, Ms. DeRosa emailed Ms. Benton a week later, asking via the email subject that “someone pls print to copies and drop at mansion.”⁴⁶

6/29/2020	5:43:14 PM	Melissa DeRosa	#briefingteam;	Stephanie Benton;			can someone pls print two copies and drop at mansion?
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In sum, the Executive Chamber has withheld responsive documents entirely and redacted some excessively without any proper legal basis. While the Select Subcommittee does not recognize attorney-client and deliberative process privileges, even if it did, the Executive Chamber’s privilege log includes numerous privilege assertions that are ill-founded, inconsistent,

⁴⁴ Transcribed Interview of Dr. Jim Malatras, by H. Select Subcomm. on the Coronavirus Pandemic Staff (May 20, 2024).

⁴⁵ NYSEC_SUBCOMM_00374013.

⁴⁶ NYSEC_SUBCOMM_00374010; NYSEC_SUBCOMM_00374013.

or overly vague, all of which has impeded the Select Subcommittee's ability to challenge the asserted privileges. Further, the Select Committee knows from public reporting and witness testimony that responsive documents have not been produced or included on the privilege log. And the Executive Chamber even withheld certain responsive documents without disclosing its decision to the Select Subcommittee until the Select Subcommittee requested a privilege log. Based on the aforementioned, the Select Subcommittee believes the Executive Chamber is acting in bad faith and will not tolerate any further unjustified delay to its investigation.

The Select Subcommittee on the Coronavirus Pandemic is authorized to investigate "the implementation or effectiveness of any Federal law or regulation applied, enacted, or under consideration to address the coronavirus pandemic and prepare for future pandemics," "executive branch policies, deliberations, decisions, activities, and internal and external communications related to the coronavirus pandemic," and "cooperation by the executive branch and others with Congress, the Inspectors General, the Government Accountability Office, and others in connection with oversight of the preparedness for an response to the coronavirus pandemic" under H. Res. 5. House Resolution 5 also expressly authorizes the Committee on Oversight and Accountability to issue subpoenas returnable to the Select Subcommittee.⁴⁷

Further, House Rule XI clause 2(m)(1)(B) grants Committees of the House of Representatives with the authority "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.

Thank you for your attention to this very important matter.

Sincerely,



Brad Wenstrup, D.P.M.
Chairman

cc: The Honorable Raul Ruiz, M.D., Ranking Member
Select Subcommittee on the Coronavirus Pandemic

⁴⁷ H. Res. 5, § 4(a)(3)(A)(ii).