

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

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

Petitioner,

v.

LETITIA JAMES, as Attorney General of the State of  
New York,

Respondent.

**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 Letitia James (“Respondent James”) is the duly elected Attorney General of New York responsible for determining whether state officers are entitled to a defense paid for by the State pursuant to New York Public Officers Law § 17. Respondent James is also the Democratic candidate for New York State Attorney General in the general election to be held on November 8, 2022.

**NATURE OF THE ACTION**

3. Governor Cuomo brings this special proceeding to challenge Respondent James’s April 12, 2022 denial of his request for representation or, in the alternative, certification that he is entitled to representation by private counsel paid for by the State of New York in

connection with an action brought against him by Trooper 1 in the United States District Court for the Eastern District of New York entitled *Trooper 1 v. New York State Police, et al.*, 22-CV-893 (LDH) (TAM) (“Trooper 1 Action”). Respondent James, through her office (the Office of the Attorney General or “OAG”), had previously investigated and made factual findings about Governor Cuomo, which Trooper 1 expressly relies on in bringing her action. As explained below, Respondent James’s denial of Governor Cuomo’s request for counsel was arbitrary, capricious, contrary to the plain text of the statute, biased, personally and politically conflicted, and was in dereliction of Respondent James’s duties as the chief legal officer of the state under N.Y. Exec. L. § 63(1). It should be reversed.

4. Denial by the Attorney General of a state officer’s request for a defense under Section 17 permits the employee to challenge that determination in the New York Supreme Court by way of a special proceeding. N.Y. Public Officers L. § 17(2)(b).

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

6. Pursuant to CPLR 506(b), venue is proper in this Court as the decision to deny Governor Cuomo’s defense was made in New York County, per Respondent James’s April 12 letter, which was sent from the OAG at 28 Liberty Street, New York, New York 10005.

### **STATEMENT OF FACTS**

#### ***A. The Underlying Action and Its Reliance on a Report Commissioned and Publicly Announced by Respondent James***

7. On February 17, 2022, a civil action was commenced against Governor Cuomo, the New York State Police (“NYSP”), and Melissa DeRosa (“DeRosa”) in the United States District Court for the Eastern District of New York.

8. On February 18, 2022, Trooper 1 amended her Complaint to add Richard Azzopardi as an additional Defendant (“Amended Complaint”). The Amended Complaint is

currently the operative pleading. A true and correct copy of the Amended Complaint is attached hereto as Exhibit A.

9. The Amended Complaint asserts six causes of action against Governor Cuomo and others: unlawful discrimination and retaliation in violation of the Equal Protection Clause (First and Second Causes of Action), the New York State Human Rights Law (Third and Fourth Causes of Action), and the New York City Human Rights Law (Fifth and Sixth Causes of Action). Ex. A ¶¶ 160–189.

10. Trooper 1 alleges that, in her capacity as a New York State Trooper assigned to Governor Cuomo’s personal security detail, which he was afforded as Governor, “[b]etween 2013 and 2021, the Governor of the State of New York, Andrew Cuomo, sexually harassed” Trooper 1 and others. Ex. A ¶ 1. The entirety of Trooper 1’s claims regarding unlawful discrimination and sexual harassment by Governor Cuomo derive from Trooper 1’s proximity to and interactions with the Governor because of his position as the Governor and her job as a member of his assigned security detail.

11. Trooper 1 relies heavily and almost exclusively upon the August 3, 2021 report issued by Respondent James entitled: “Report of Investigation Into Allegations of Sexual Harassment by Governor Andrew M. Cuomo” (the “Report”). A true and correct copy of the Report is attached hereto as Exhibit B. That Report, which is incomplete, biased, flawed and misleading, discussed and made findings regarding Governor Cuomo’s interactions with numerous women while he was Governor, all of which factual allegations Trooper 1 incorporates into her Amended Complaint. The Report was the result of a supposedly “independent” investigation (the “Investigation”) carried out by attorneys selected and deputized by Respondent James to act as Special Deputy Attorneys General to Respondent James’s First Deputy Attorney General,

including an attorney whose professional life is largely devoted to representing plaintiffs in sexual harassment cases—despite Respondent James having told Governor Cuomo she would not select a plaintiff’s attorney for the investigation.

12. 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 governor in 2022. Notwithstanding obvious conflict of interest concerns relating to the Investigation and issuance of the Report, Respondent James refused to disavow any intention to run for governor in 2022.

13. Respondent James publicly announced the issuance of the Report during a televised and extraordinarily prejudicial press conference on August 3, 2021, in which 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.” 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 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.”

14. One week later, on August 10, 2021, Governor Cuomo announced his resignation effective August 24, 2021.

15. The Report was a one-sided, deeply flawed ambush of Governor Cuomo. In numerous instances, the Report accepted as true certain highly suspect allegations, even though the investigators had not fully probed those allegations and ignored material evidence that directly undermined the allegations and credibility of complainants. Respondent James refused in 2021—

and to this day—to make all the evidence underlying the Report available to Governor Cuomo or the public for scrutiny.

16. Mere weeks after issuing the Report and holding her prejudicial press conference, on October 29, 2021, Respondent James announced her campaign for New York State governor. Twelve days later, in the midst of her campaign for governor as media reports speculated that Governor Cuomo could also enter the Democratic primary, Respondent James began a slow-rolling, selective, and prejudicial public release of transcripts from the Investigation.

17. Although the OAG investigators interviewed 179 witnesses, the investigators took transcribed, sworn testimony from only 41 of them. Ex. B at 15. On November 10, 2022, Respondent James chose to publicly release on her office’s website only eleven witness transcripts, those of Governor Cuomo and ten female complainants.

18. Then, on November 29, 2021, Respondent James publicly released on her office’s website only sixteen additional transcripts, this time from Executive Chamber staff members who worked closely with Governor Cuomo, some outside advisors to Governor Cuomo, and his brother Christopher Cuomo.

19. Not only did Respondent James selectively release only certain transcripts, but she also redacted information that undermined the credibility of certain complainants.

20. 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 at the time ongoing investigations by district attorney offices based on the Report and a pending criminal charge (since dismissed on the merits) against Governor Cuomo.

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

22. 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 criminal complaint against Governor Cuomo—a misdemeanor forcible groping allegation brought by Albany County Sheriff Craig Apple without any consultation with the Albany County District Attorney—was dismissed on January 7, 2022, after the Albany County District Attorney concluded that after “review of all the available evidence we have concluded that we cannot meet our burden at trial.”<sup>1</sup>

23. On January 20, 2022, Respondent James released the remaining fourteen of the forty-one witness transcripts. Those transcripts contained material evidence favorable to Governor Cuomo, including information that undermined both the Report’s factual findings and the credibility of certain complainants.

24. On February 17, 2022, Trooper 1 filed her lawsuit, alleging that, during the relevant time period, Trooper 1 was employed by the New York State Police and served on the Protective Services Unit (“PSU”), as a member of Governor Cuomo’s personal security detail. *See* Ex. A ¶¶ 20, 29. Trooper 1 specifically alleges that the State aspect of the Governor’s role is a pivotal part of her claim, noting “The Governor . . . was enabled by the machinery of the State.” *See id.* ¶ 2.

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<sup>1</sup> Notably, on October 28, 2021, the very day that Albany County Sheriff Craig Apple unilaterally and without notice to the Albany County District Attorney filed the meritless criminal complaint against Governor Cuomo, Respondent James issued a public statement on OAG’s website claiming that the filing of that complaint “further validate[s] the findings in our report.” Respondent James was silent, however, when the Albany County District Attorney publicly dismissed the charge after having reviewed the evidence.

25. More particularly, Trooper 1 alleges the following facts that make clear that her claims are based on her work as a member of Governor Cuomo's security detail and are against Governor Cuomo in his capacity as Governor:

- a. "Trooper 1 was initially assigned to protect the Governor at his Mount Kisco residence," which was "a typical first posting for new PSU officers." *Id.* ¶ 32.
- b. Trooper 1 and the Governor conversed "while she was on duty." *Id.* ¶ 34.
- c. "Trooper 1, as part of her duties, escorted the Governor from his Mount Kisco residence to his New York City Office," and "was responsible for, among other things, accompanying the Governor up the elevator to his office." *Id.* ¶ 39.
- d. "On April 18, 2019, Trooper 1 secured a coveted transfer to the Governor's travel team," where she was responsible for "performing motorcade operations, preparing sites for events, coordinating protection at those events and accompanying the Governor and his family around the state and country." *Id.* ¶¶ 40, 41.
- e. "Trooper 1 was driving the Governor to an event with the Head of the PSU (Trooper 1's supervisor) also in the car." *Id.* ¶ 48.
- f. Around the same time, Trooper 1 alleges that she "was posted in the 'command center' in the lower level of the [Executive] Mansion." *Id.* ¶ 51.

- g. “On September 23, 2019, Trooper 1 accompanied the Governor to an event at Belmont racetrack” where she “was tasked with, among other things, escorting the Governor to and from the event stage.” *Id.* ¶ 53.
- h. “[I]n October 2019 . . . Trooper 1 was accompanying the Governor at an event at the Low Memorial Library.” *Id.* ¶ 58.
- i. “On March 5, 2020 . . . [Trooper 1] was greeting the Governor at the airstrip of Farmingdale Republic Airport.” *Id.* ¶ 61.
- j. On January 23, 2021, “Trooper 1 drove” Governor Cuomo in “the lead car of a motorcade,” “while departing an event at the William Reid New York City Housing Authority development in Brooklyn.” *Id.* ¶ 68.
- k. “On June 27, 2021, . . . [a]fter the Governor landed at Grabeski Airport for a private event, Trooper 1 received him on the tarmac as part of his security detail that day.” *Id.* ¶ 72.
- l. “In January 2021 . . . the Governor sought out Trooper 1 at an event at the new Moynihan Train Hall to wish her a Happy New Year.” *Id.* ¶ 73.

26. Each of the discrimination causes of action (Counts One, Three, and Five of the Amended Complaint, *id.* ¶¶ 160–164, 170–174, 180–184) relates to alleged conduct by Governor Cuomo that occurred during his tenure as Governor of New York and related to activities and events within the scope of his employment, as well as Trooper 1’s employment. With respect to the retaliation claims (Counts Two, Four, and Six of the Amended Complaint, *id.* ¶¶ 165–169, 175–179, 185–189), Trooper 1 refers to: (i) a February 10, 2022 statement about the OAG’s seriously flawed Investigation that took place while he was Governor, and OAG’s decision to ignore evidence of misconduct that arose during that Investigation; and (ii) a February 17, 2022



statement by Governor Cuomo’s spokesperson Richard Azzopardi that criticized the Trooper 1 Action and, among other things, noted that the action “relies on the AG’s proven fraud of a report.”

27. In her Amended Complaint, Trooper 1 also directly incorporates allegations about each of the other complainants from the Report, realleging the findings of the Report. *Id.* ¶¶ 1–5, 13, 75–149. Of the eleven complainants identified in the Report, nine were current or former state employees. *Id.* ¶ 1. As with Trooper 1, the allegations regarding the other women also stemmed from Governor Cuomo’s position and work as Governor. For example, in addition to allegations regarding Trooper 1, the Amended Complaint includes the following:

- a. Allegations concerning “an Executive Assistant who worked in the Governor’s Executive Chamber,” who was regularly engaged in “projects working with the Governor directly.” *Id.* ¶¶ 76, 78.
- b. Allegations concerning an individual who “began working in the Executive Chamber as a Briefer and, by May 2019, was assigned to work as Senior Briefer and an Executive Assistant for the Governor.” *Id.* ¶ 92.
- c. Allegations concerning “an event at Madison Square Garden” that Governor Cuomo attended in his official capacity. *Id.* ¶ 106.
- d. Allegations that “[i]n or around October 2017, [a complainant] flew with the Governor on his plane.” *Id.* ¶ 112.
- e. Allegations about “an Executive Assistant in the Executive Chamber since 2018” who “was working alone with the Governor,” and “[o]n one occasion in early 2019 . . . was in the Governor’s office, across from

him with her notepad and pen, slightly bent over, ready to take dictation.” *Id.* ¶¶ 117–18, 123.

- f. Allegations concerning “a former Director of the New York State Department of Health[] perform[ing] a live demonstration of a COVID-19 nasal swab test on the Governor” that was televised. *Id.* ¶ 141.

28. Governor Cuomo denies the allegations of sexual harassment contained in the one-sided Report and has publicly criticized the shoddy and biased Investigation and Report.

29. Respondent James and her office have not responded to multiple written and public requests by counsel to Governor Cuomo for access to all evidence underlying the Report.

30. On August 20, 2021, Respondent James’s Director of Communications issued a statement on behalf of OAG and posted on OAG’s website, publicly dismissing valid and significant criticism of the Investigation and Report as “continued attacks, lies, and conspiracy theories.”

31. On October 20, 2021, counsel to Governor Cuomo submitted to Respondent James a 153-page “Application to Amend, Correct and Supplement the AG Report,” which detailed the many material omissions and errors in the biased and one-sided Investigation and Report. A true and correct copy of this application is attached hereto as Exhibit C. Respondent James ignored Governor Cuomo’s request to amend, correct, or supplement the flawed and misleading Report.

32. On March 6, 2022, while in the midst of her campaign for re-election as Attorney General and after Governor Cuomo criticized the Report and condemned the cancel culture in a speech at a Brooklyn church, Respondent James responded by reportedly calling

Governor Cuomo a “serial sexual harasser” and a “sick, pathetic man” who “won’t even spare a house of worship from his lies.”

***B. Respondent James’s Arbitrary and Capricious Denial of Governor Cuomo’s Request for Certification of Private Counsel***

33. On March 7, 2022, counsel for Governor Cuomo accepted service of the Summons and Amended Complaint in the Trooper 1 Action.

34. On the same day, counsel for Governor Cuomo contacted the Office of the Attorney General, requesting that Respondent James provide counsel or approve the certification of private counsel for Governor Cuomo in the Trooper 1 Action. A true and correct copy of this correspondence is attached hereto as Exhibit D. Governor Cuomo’s counsel specifically noted her concern that, under all the circumstances, Respondent James and the OAG were conflicted from representing Governor Cuomo in the matter. Ex. D. This conflict was obvious, given that the Trooper 1 Action relies almost exclusively on the Report.

35. On March 8, 2022, Respondent James, through her office, acknowledged receipt of Governor Cuomo’s request. A true and correct copy of this correspondence is attached hereto as Exhibit E. OAG stated: “We will inform you shortly of the determination.” Ex. E.

36. On March 24, 2022, after having heard nothing from Respondent James, counsel for Governor Cuomo followed up on the March 7, 2022 request for counsel and was informed by OAG that the Governor’s “request for representation pursuant to Public Officers Law § 17 is under consideration.” A true and correct copy of this correspondence is attached hereto as Exhibit F.

37. On April 12, 2022, just five weeks after Respondent James reportedly called Governor Cuomo a “serial sexual harasser” and “sick pathetic man,” Respondent James, through her office, denied Governor Cuomo’s request for the State to provide him representation or to pay

for his private counsel in connection with the Trooper 1 Action. A true and correct copy of this correspondence is attached hereto as Exhibit G (“April 12 Denial”).

38. Respondent James, through her office, stated the following: “Based upon our review of the Amended Complaint and publicly available information, this Office has determined that the State is not authorized to provide for your legal representation or to pay for private counsel to represent you in the Lawsuit.” Ex. G at 3.

39. Respondent James provided no reasoning or support for her determination that the State is not authorized to provide Governor Cuomo, and simply attached copies of Public Officers Law §§ 17 and 17-a. Ex. G at 3, 4–10.

40. On April 19, 2022, counsel for Governor Cuomo spoke with the Deputy Attorney General for State Counsel and the Chief Deputy Attorney General for State Counsel regarding the April 12 Denial and requested that Respondent James (i) reconsider the denial given OAG’s approval of representation or private counsel in similar matters, and (ii) asked for more information concerning the basis for the denial.

41. On April 20, 2022, Respondent James’s office informed Governor Cuomo that Respondent James would not change her determination and provided no additional reason for the denial. A true and correct copy of this correspondence is attached hereto as Exhibit H.

42. On July 6, 2022, counsel for Governor Cuomo again requested that Respondent James reconsider her denial of Governor Cuomo’s request for representation or certification for private counsel, and also that she specify the bases for such denial, beyond the “factors” referenced by her office during the April 19, 2022 call. A true and correct copy of this correspondence is attached hereto as Exhibit I.

43. On July 7, 2022, Respondent James, through her office, responded by attaching the April 20, 2022 correspondence and referencing the same, but failed to provide any further explanation of the denial. A true and correct copy of this correspondence is attached hereto as Exhibit J.

***C. Respondent James's Office Has Been Subpoenaed in the Trooper 1 Action for All Records Underlying the Investigation and Report Because OAG Is a Third-Party Witness***

44. On June 6, 2022, the District Court in the Trooper 1 Action entered a scheduling order, pursuant to which discovery is to be completed by January 16, 2023. Because the Amended Complaint relies extensively on the Report and incorporates its findings, Governor Cuomo, among other discovery efforts, sent a third-party subpoena dated July 7, 2022 to OAG, demanding any and all materials and evidence underlying the Investigation and Report ("Subpoena"). The Subpoena specifically calls for production of interview memoranda and transcripts in the possession of the OAG that have not yet been released to the public, and any evidence the OAG received in the course of the Investigation.

45. The Subpoena's return date was July 28, 2022.

46. On July 25, 2022, Respondent James, through her office, sent a letter to Governor Cuomo categorically objecting to the Subpoena on the basis that such discovery was "premature," and declining to comply with or otherwise respond to the Subpoena at that time. A true and correct copy of this correspondence is attached hereto as Exhibit K.

47. On the same day, counsel for Governor Cuomo advised Respondent James that factual assertions in OAG's July 25, 2022 objection were inaccurate and referenced the court-ordered discovery schedule. A true and correct copy of this correspondence is attached hereto as Exhibit L.

48. On August 4, 2022, Respondent James's office and counsel for Governor Cuomo met and conferred regarding the Subpoena. Although Respondent James's office committed to providing more detailed responses and objections to the Subpoena by Friday, August 12, 2022, the office would not commit to a specific timeline for complying with the Subpoena, and certainly provided no assurance that her office would fully comply with the Subpoena prior to the general election on November 8, 2022.

49. In addition, the *Daily News* recently reported that, in response to a FOIL request, OAG had refused to disclose interview memos for the 179 people interviewed in the Investigation. Editorial Board, *Shine a Light: Release Documents from the Cuomo Sexual Harassment Investigation*, N.Y. DAILY NEWS (Aug. 3, 2022), <https://www.nydailynews.com/opinion/ny-edit-shine-a-light-james-cuomo-kim-clark-20220803-yepyy4vylzgexb5x4jeriamqg4-story.html>. The *Daily News* published OAG's FOIL response letter on its website. A true and correct copy of OAG's FOIL response as posted on the Daily News website is attached at Exhibit M.

50. Respondent James's refusal to comply fully with the *Daily News* FOIL request is based largely on unwarranted and baseless claims of attorney work product and attorney-client privilege. Respondent James's office makes the unfounded assertion, for example, that the investigators were *her and her office's* counsel and that *she and her office* were the investigators' clients. Ex. M at 2. The claim of a confidential attorney-client relationship is wholly inconsistent with the fact that Respondent James deputized the investigators as her agents for the purpose of making a public report. See Ex. B at 14, 14 n.72 ("For the avoidance of doubt, 'we' and 'us,' as used throughout this Report (unless otherwise specified) refers to the Special Deputies and Special Assistants to the First Deputy Attorney General, as appointed for the purposes of this Section 63(8)

investigation by the NYAG.”). Thus, rather than acting as Respondent James’s counsel, the deputized investigators were simply her and her office’s agents. Further, Respondent James’s office insists, again without basis, that the witness interview memos, which were not prepared in anticipation of litigation but were instead prepared in connection with a high-profile Investigation that was intended to and did result in a lengthy public Report, are protected as attorney work product.<sup>2</sup> Indeed, some witness interview memos over which Respondent James asserted a baseless privilege claim to the *Daily News* were provided to Governor Cuomo as part of discovery related to the Albany County Sheriff’s short-lived, flawed and meritless charge with no claim of privilege, or limitation of waiver of privilege associated therewith.

### **FIRST CAUSE OF ACTION**

51. Governor Cuomo repeats and realleges each and every allegation in paragraphs 1 through 50 as though fully set forth herein.

52. Under section 17 of the Public Officers Law, a state officer is entitled to a defense in any civil action “arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties, or which is brought to enforce a provision of section nineteen hundred, eighty-one or nineteen hundred, eighty-three of Title forty-two of the United States Code.” N.Y. Pub. Officers L. § 17(2)(a).

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<sup>2</sup> Notably, the two cases cited by Respondent James in her denial of the *Daily News* FOIL Request do not remotely support her assertion that “[i]n the FOIL context, attorney work product need not be prepared in anticipation of litigation to be excepted from disclosure.” *See generally Matter of Shooters Comm. on Political Educ., Inc. v. Cuomo*, 147 A.D.3d 1244 (3d Dep’t 2017) (discussing “inter-agency materials,” and making no mention of the work product standard); *Matter of Morgan v. N.Y. State Dep’t of Env’tl. Conservation*, 9 A.D.3d 586 (3d Dep’t 2004) (finding privileged documents exempt from disclosure, but not discussing work product standard).

53. The Amended Complaint alleges misconduct on part of Governor Cuomo during his tenure as Governor of New York and while he was acting within the scope of his public employment and duties.

54. The Amended Complaint likewise is brought to enforce Trooper 1's rights under 42 U.S.C. § 1983, among others. Ex. A ¶ 8.

55. Respondent James declined to provide Governor Cuomo with a defense in the Trooper 1 Action. Ex. G.

56. Respondent James has provided Governor Cuomo with no legal authority or factual basis supporting such denial, and there is no legal or factual basis upon which to conclude that the Attorney General may decline to provide Governor Cuomo with a defense in the Trooper 1 Action. *Id.*

57. In carrying out her duty under Section 17, the Attorney General acts as an insurance company deciding whether coverage is owed under its policy. *Frontier Ins. Co. v. State of New York*, 87 N.Y.2d 864, 867 (1995). If the complaint alleges that a state employee “committed a wrongful act within the scope of his public employment . . . a defense must be provided, irrespective of the actual facts or ultimate factual determination.” *Spitz v. Abrams*, 123 Misc. 2d 446, 449 (Sup. Ct., Albany Cty. 1984), *aff'd*, 105 A.D.2d 904 (3d Dep’t 1984); *see also Hassan v. Fraccola*, 851 F.2d 602, 605 (2d Cir. 1988) (citing *Colon v. Aetna Life & Cas. Ins. Co.*, 66 N.Y.2d 6, 8 (1985)) (under the near-identical N.Y. Pub. Officers Law § 18, “the ultimate responsibility of the [employee] is not a consideration”); N.Y. STATE COMPTROLLER, Op. 90-47 (1990), available at <https://www.osc.state.ny.us/legal-opinions/opinion-90-47>.

58. To the extent Respondent James relies upon Public Officers Law § 17-a to support the April 12 Denial, that statute is inapplicable. Section 17-a covers *indemnification* of an



individual who has been found liable for specified intentional wrongdoing. The obligation to indemnify an officer who has already been found to be liable is fundamentally different from the statutory duty to provide state officers with a defense as set forth in Section 17. *See, e.g., Messinger v. Yap*, 203 A.D.2d 870, 872 (3d Dep’t 1994) (“The duty to defend arises from a statutory obligation whereas the liability to indemnify depends upon the facts of the case as to be determined at the conclusion of the matter”); *Hassan*, 851 F.2d at 605.

59. As detailed in the accompanying Memorandum of Law, Respondent James’s determination is inconsistent with the Attorney General’s prior precedent, and with treatment of Ms. DeRosa, also a state employee acting within the course of her employment in the allegations made in the Trooper 1 Action. Mem. at 14–18.

60. Ms. DeRosa served as Secretary to Governor Cuomo from 2017 to August 24, 2021 and was the highest appointed official in New York State. While Trooper 1 herself testified that she had almost no interaction with Ms. DeRosa beyond “hello” and “goodbye,” the Trooper 1 Action includes Ms. DeRosa in its allegations based on her purported involvement in the underlying claims asserted against the Governor as a result of the OAG Report. Ex. A ¶¶ 66, 148–49, 154.

61. On information and belief, on March 7, 2022, Ms. DeRosa requested that OAG provide her with representation in the Trooper 1 Action pursuant to Public Officers Law Section 17.

62. On information and belief, just four days later, on March 11, 2022, OAG determined that it would certify to the State Comptroller that, in accordance with provisions of § 17, it would be inappropriate for OAG to represent Ms. DeRosa in the Trooper 1 Action but that she was entitled to be represented by private counsel.

63. Respondent James's determination that Ms. DeRosa is entitled to representation, but that Governor Cuomo is not entitled to a defense pursuant to the Public Officers Law is thus arbitrary and capricious, and without a basis in fact.

64. Respondent James's determination as to Governor Cuomo is rife with conflict, given: (i) Respondent James's role in the one-sided and materially flawed Report upon which the Trooper 1 Action is based, and vested interest in defending that flawed Report; (ii) the fact that her office has been subpoenaed in the Trooper 1 Action for all evidence underlying the Report; (iii) her long-standing refusal to provide Governor Cuomo with all evidence underlying the Report for careful scrutiny; (iv) her refusal to correct, amend or supplement the Report despite being made aware of its material omissions and errors; (v) her political ambitions and ongoing re-election campaign for New York State Attorney General; (vi) her obvious personal dislike of Governor Cuomo, and her reported prejudicial and personally disparaging public statements about the Governor since August 3, 2021.

65. Respondent James is in dereliction of her duties under the Public Officers Law and the Executive Law. *See, e.g.*, N.Y. Exec. L. § 63(1) ("The attorney-general shall . . . prosecute and defend all actions in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state"). Here, not only has Respondent James failed to carry out her obligation under Section 17, but she has also failed in her role as state counsel by leaving a claim against a state officer to be undefended.

#### **PRAYER FOR RELIEF**

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

- A. Enforcing his rights under Public Officers Law § 17;
- B. Vacating the Attorney General's April 12 Denial of Governor Cuomo's request for a defense paid for by the state;
- C. Declaring that Respondent James has a conflict of interest and that Governor Cuomo is therefore entitled under Section 17 to be represented by private counsel of his choice paid for by the state in connection with his defense of the Trooper 1 Action; and
- D. Granting such other relief as this Court may deem just and proper to effect the purpose of Public Officers Law § 17.

Dated: New York, New York  
August 10, 2022



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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 Massachusetts, making this Verification proper pursuant to CPLR 3020(d)(3).



\_\_\_\_\_  
Rita M. Glavin

Dated:     August 10, 2022  
           New York, New York