SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

Index No. 05050-16

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE VERIFIED PETITION

Sam Kazman
Anna St. John
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(917) 327-2392
sam.kazman@cei.org
anna.stjohn@cei.org

BAKER & HOSTETLER LLP
Mark I. Bailen
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 861-1500
mbailen@bakerlaw.com

Elizabeth M. Schutte
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200
eschutte@bakerlaw.com

Counsel for Petitioner

INTRODUCTION

Respondent's motion to dismiss is premised on the faulty argument that this action is moot because "the public release"—*i.e.*, the release of a responsive document by the Office of the Attorney General for the District of Columbia to a third party that, in turn, posted that document on its public website—means that "Petitioner has received all the relief to which it could be entitled under FOIL." Mot. to Dismiss 4. But even if Respondent has now released the Climate Change Coalition Common Interest Agreement ("Climate CIA") from its own files (as it must), Respondent's response contains several indications that it has not met its obligations under the Freedom of Information Law ("FOIL").

Now contending that the Climate CIA is the single responsive document, Respondent fails to explain why it referenced multiple responsive "records" in its initial FOIL response and what additional documents it may have been referring to. Respondent also fails to state whether it searched for or located common interest agreements that "mention or otherwise include" the individuals and entities specified in Petitioner's request. Instead, in his discussion of his search of Respondent's records, Mr. Michael Jerry, the records access officer, notes only that the search "produced no documents responsive to that portion of the request seeking a Common Interest Agreement *with* the non-State individuals and entities listed in the Request." Affirmation of Michael Jerry ¶ 8 (emphasis added). Respondent must conduct a proper search for all of the records requested by Petitioner and explain the discrepancy between its initial response indicating that it had located multiple responsive records and its current position that the Climate CIA is the only responsive record.

Further, to the extent Respondent has not produced responsive common interest agreements *from its own files*, Respondent must do so, and Petitioner remains entitled to a judicial

determination—or at least a public acknowledgment from Respondent—that the records responsive to Petitioner's FOIL request are public records and, as such, subject to release under FOIL, as well as an award of attorneys' fees and costs incurred in this case. *See* Verified Petition. Without such a determination or an award of attorneys' fees, there is nothing deterring Respondent from repeating its wrongful assertion of exemption under FOIL of the Climate CIA and documents that fall within its terms in response to future requests by members of the public.

STATEMENT OF FACTS

Petitioner is a non-profit public policy institute based in Washington, DC. Verified Petition ("Pet.") ¶ 12. As stated in its FOIL request to Respondent, Petitioner has research, legal, investigative journalism, and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws. *Id.*

On May 5, 2016, Petitioner served a records request under FOIL to Respondent. Pet. ¶ 16. The request sought any common interest agreements entered into by the Office of the Attorney General of New York that are signed by, mention, or otherwise include three specified private individuals, four specified private entities, or the attorney general for any other U.S. state or territory during a specified period in 2016. *Id.* ¶ 17.

Petitioner's FOIL request followed Respondent's launch of the politically motivated "AGs United for Clean Power" campaign. Respondent announced the "Clean Power" campaign at a press conference on March 29, 2016. Affirmation of Elizabeth M. Schutte ("Schutte Aff.") ¶ 3. A coalition of Democratic state attorneys general, including Respondent and the attorneys general for the Commonwealth of Massachusetts ("Massachusetts AG") and the U.S. Virgin Islands ("Virgin

Islands AG"), is involved in this campaign. *Id.* All of these attorneys general are, according to Respondent's press release accompanying the announcement, "committed to aggressively protecting and building upon the recent progress the United States has made in combatting climate change." Schutte Aff. Ex 1. The coalition was formed due to the "'gridlock and dysfunction gripping Washington,'" leading its members to believe "'it is up to the states to lead on the generation-defining issue of climate change'" and vowing to "'stand ready to defend the next president's climate change agenda.'" *Id.* at 2 (quoting Respondent Attorney General Schneiderman). The media subsequently reported that coalition members had entered into a common interest agreement for the purpose of circumventing government transparency laws and thus ensuring confidentiality for their exchange of information as they pursued their climate-change policy initiative. *Id.* ¶ 4, Exh. 2.

In connection with the "Clean Power" campaign, the Virgin Islands AG issued a subpoena to Petitioner in April 2016, demanding a decade's worth of communications, emails, statements, drafts, and other documents, including private donor information, relating to Petitioner's work on climate change and energy policy. *Id.* ¶ 5. Petitioner objected to the subpoena as an unlawful attempt to intimidate and silence those who disagree with the policy objectives of the Clean Power campaign. In late June, in response to Petitioner's objections and motion to quash the subpoena, the Virgin Islands AG withdrew the subpoena. Petitioner's motion for sanctions against the Virgin Islands AG for issuing an abusive subpoena remains pending in the Superior Court for the District of Columbia. *Id.* ¶¶ 6-8.

The Virgin Islands AG also issued a subpoena to Exxon Mobil in connection with the climate probe, as did the Massachusetts AG, in April 2016. *Id.* ¶ 9. Earlier this month, in response to Exxon Mobil's motion to enjoin enforcement of the subpoena by the Massachusetts AG, the U.S. District Court for the Northern District of Texas ordered jurisdictional discovery due to its concern

that the Massachusetts AG may have "issued the CID in bad faith" or "with bias or prejudgment about what the investigation of Exxon would discover." Schutte Aff. ¶¶ 9-10, Exh. 3 at 3-4. The court cited, in particular, the Clean Power coalition's attending presentations from a global warming activist and an environmental attorney with a well-known global warming litigation practice and discussing ways to solve issues with legislation relating to climate change on the day before its press conference announcing the coalition. *Id.* Exh. 3 at 4-5.

Meanwhile, by letter dated June 15, 2016, Respondent denied Petitioner's FOIL Request in its entirety. Pet. ¶ 22. While the denial letter did not provide any details about the number or nature of the responsive records or the nature of the search that it had conducted, it repeatedly referenced "record***s***" that were responsive to Petitioner's request. Respondent cited four separate grounds for denial of Petitioner's FOIL request: (a) the attorney-client privilege, (b) the attorney work product doctrine; (c) interference with law-enforcement investigations or judicial proceedings; and (d) the inter-agency and intra-agency exemption. *Id.*

On June 21, 2016, Petitioner timely appealed the denial of its FOIL request. Pet. ¶ 36. By letter dated July 7, 2016, Respondent upheld the denial of Petitioner's FOIL request. *Id.* ¶ 38. The letter asserted that the requested records were properly withheld as attorney work product and because they were compiled with law enforcement in mind. Affidavit of Hans Bader, August 26, 2016 ("Bader Aff."), Exh. 4. The letter did not cite the attorney-client privilege or protection for inter-agency or intra-agency materials as a proper basis for withholding the records.

On August 31, 2016, Petitioner filed the Verified Petition under Article 78 of the Civil Law and Practice Rules to compel Respondent's compliance with FOIL and production of documents pursuant to Petitioner's records request. On September 30, 2016, Respondent responded to the Verified Petition by serving a motion to dismiss and an accompanying Affirmation of Michael Jerry.

Although Respondent refused to produce any documents in response to Petitioner's FOIL request prior to the filing of this action, attached to the Jerry Affirmation is a document titled "Climate Change Coalition Common Interest Agreement" (hereafter, "Climate CIA"). Neither Respondent nor Mr. Jerry identifies from where the attachment came, although Mr. Jerry states that the Energy & Environment Legal Institute posted a copy of the document on its website. Contrary to Respondent's assertions,[1] the Energy & Environment Legal Institute is not an "affiliate" of CEI.[2]

STANDARD OF REVIEW

In considering a motion to dismiss, the Court must "deem[] [a petitioner's] allegations to be true, construe[] them liberally, and grant[] [petitioner] the benefit of every favorable inference." *Rafferty Sand & Gravel, LLC v. Kalvaitis*, 984 N.Y.S.2d 462, 464 (N.Y. Sup. Ct. 2014).

ARGUMENT

I. Respondent's response is legally inadequate and this proceeding is not moot.

A. Respondent must produce responsive documents from its own files, even if those documents are publicly available.

For its mootness argument, Respondent relies on a third party's release of the Climate CIA and a second third party's posting of that document on its website. *See* Mot. to Dismiss 5. Respondent attaches the Climate CIA as Exhibit A to the Affirmation of Michael Jerry (the "Jerry Affirmation") that it filed concurrently with its motion to dismiss; however, Respondent has not authenticated the document or specified its source. It thus is unclear whether that document was produced from Respondent's own files or is simply a copy of the Climate CIA produced by the Office of the Attorney General for the District of Columbia and posted on the third-party website. *See id.* ("a full copy of the Climate Common Interest Agreement is attached as Exhibit A to the Jerry

[1] *See* Memorandum of Law in Support of Motion to Dismiss at 4.
[2] There is, however, one independent contractor who works for both groups.

Affirmation"). If the latter—and Petitioner is entitled to such favorable inference—Petitioner remains entitled to production of responsive documents that Respondent locates in its own files.

While from a practical standpoint, one might argue that since *a* copy of the Climate CIA is available to Petitioner, and Respondent asserts that this is the only document responsive to Petitioner's FOIL request that it has located, this request is moot. But that position is contrary to law and would undermine the public-access and open-government principles that undergird FOIL. FOIL requires Respondent to release public records regardless of whether those documents are available from other sources. The statute contains no exemption for publicly available materials. *See generally* N.Y. Pub. Off. Law § 87(2). If the legislature "had wished to codify an exemption for all publicly available materials, it knew perfectly well how to do so." *See U.S. Dep't. of Justice v. Tax Analysts*, 492 U.S. 136, 152-53 (1989). The Freedom of Information Act ("FOIA"), the federal analog on which FOIL was modeled, likewise does not "foreclose an individual from seeking the production of records already disclosed to him." *See Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 104-05 (D.D.C. 2013). Because FOIL was modeled after FOIA, such "Federal case law and legislative history … are instructive when interpreting such provisions." *Lesher v. Hynes*, 19 N.Y.3d 57, 64 (2012) ("FOIL's legislative history indicates that many of its provisions were patterned after the Federal analogue.") (internal quotations marks omitted).

Petitioner thus has not "receive[d] an adequate response to [its] FOIL request during the pendency of [its] CPLR article 78 proceeding," Mot. to Dismiss 4 (quoting *Matter of DeFreitas v. New York State Crime Lab*, 141 A.D.3d 1043, 1044 (3d Dep't 2016)), and the proceeding should not be dismissed as moot.

B. Respondent fails to explain the discrepancy between its initial determination that multiple records were responsive to Petitioner's request and its current position that only the Climate CIA is responsive.

The need for Respondent to provide a more robust response and to produce responsive documents from its own files, to the extent it has not, is evidenced by Respondent's initial response to Petitioner's FOIL request. Throughout Respondent's initial response, Mr. Jerry discussed "record***s*** responsive to [Petitioner's] request" that had been withheld. *See* Bader Aff., Ex. 2 (June 15, 2016 Jerry letter) at 3 (emphasis added). Respondent has not explained why it initially determined there were multiple documents responsive to Petitioner's request and now contends that release of the Climate CIA relieves it of any further obligation under FOIL. Respondent's conflicting assertion that there is only a single responsive record demands that Respondent produce its own responsive record(s) following a diligent search and explain where in the process an error was made.

C. Respondent's description of its search results indicates its initial search was inadequate.

Respondent's motion to dismiss raises further concern that its search for documents responsive to Petitioner's FOIL request may have been inadequate. Under Public Officers Law § 89(3), an agency must perform a "diligent search" for records. In his affirmation, Mr. Jerry states that his "search produced no documents responsive to that portion of the request seeking a Common Interest Agreement *with* the non-State individuals and entities listed in the Request," Jerry Aff. at ¶ 8 (emphasis added), when Petitioner's request more broadly seeks common interest agreements that "are signed by, mention or otherwise include" the listed non-State individuals and entities. Bader Aff. Ex. 1 at 1-2. Mr. Jerry's description of his search suggests it was not conducted diligently and did not hew to the actual request made by Petitioner. Rather, it appears to have been based on a rough (but inaccurate) approximation of Petitioner's request, which may have led Respondent to overlook responsive records.

Accordingly, the document and affirmation attached to Respondent's motion to dismiss are insufficient to moot this Article 78 proceeding.

II. Even if Respondent has satisfied its production obligations, Petitioner is entitled to a determination that the Climate CIA is a public record subject to production under FOIL and to an award of attorneys' fees.

The Article 78 proceeding initiated by Petitioner seeks not only Respondent's production of common interest agreements responsive to its FOIL request; it also seeks a declaration that the responsive common interest agreements are public records subject to disclosure and an award of attorneys' fees and costs reasonably incurred in this case, with the amount to be determined at the conclusion of the proceeding. Pet. at 9-10. Even assuming the Climate CIA attached to the Jerry Affirmation was produced from Respondent's files and that it is the only responsive record, that production fails to provide all of the relief to which petitioner is entitled.

First, Petitioner is entitled to a determination that the record responsive to Petitioner's FOIL request is a public record and, as such, is subject to release under FOIL. In its motion to dismiss, "Respondent stands by its response to [Petitioner]'s FOIL request," *i.e.*, its position that the Climate CIA is not a public record and is not subject to release under FOIL. *See* Mot. to Dismiss 1. Respondent thus implicitly argues that the Climate CIA is a valid common interest agreement; otherwise, there would be no investigatory or other reason to withhold it. But such validity is far from established. "Like all privileges, the common interest rule is narrowly construed," and "'[t]he party asserting the common interest rule bears the burden of showing'" that the privilege applies. *See AMP Servs. Ltd. v. Walanpatrias Foundation*, No. 106462/04, 2008 N.Y. Slip. Op. 33217(U), 2008 N.Y. Misc. LEXIS 8021, at *4 (N.Y. S.Ct. Dec. 1, 2008) (quoting *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415 (S.DN.Y. 2004)). Under the common interest rule, "[d]isclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become

colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interest are sufficiently aligned that the counsel of each is in effect the counsel of all." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 628 (2016) (internal quotation marks omitted). The privilege does not apply simply because parties "share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation." *Id.*

Here, while the signatory attorneys general may be investigating the possibility of fraudulent statements by certain target companies and entities, Respondent cannot show that litigation in which the signatories would be co-litigants was reasonably anticipated. In fact, the evidence shows that the Clean Power coalition was formed to advance political ends. In contravention of New York law, the Climate CIA did not relate to any existing litigation when it was entered and, in the time since, no litigation has been commenced, nor is there evidence that litigation is reasonably anticipated.

Further undermining the validity of the Climate CIA is the breadth of its coverage. Rather than being limited to any specific subject, it covers a wide-range of potential efforts in furtherance of the coalition's political goals. For example, the Climate CIA covers matters such as "potentially taking actions to compel or defend federal measures to limit greenhouse gas emissions," "potentially conducting investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change," and "potentially conducting investigations of possible illegal conduct to limit or delay the implementation and deployment of renewable energy technology." *See* Jerry Aff. Ex. A ¶ 1. Because Respondent cannot make this threshold showing of validity, it cannot assert any lawful basis for withholding the Climate CIA.

Even assuming the Climate CIA is a valid common interest agreement, the FOIL exceptions relied upon by Respondent do not protect it from disclosure. *See* Mot. to Dismiss 1. Nothing in the

document reveals non-routine "criminal investigative techniques or procedures" or "interfere[s] with law enforcement investigations," particularly now that it has been disclosed by one of the other signatories and given the Clean Power coalition's primarily political aims. *See* N.Y. Pub. Off. L. § 87(2)(e)(1). Moreover, the Climate CIA does not contain information specific to any potential targets of future investigations. *See N.Y. Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 490-91 (2005) (law enforcement exception inapplicable to tapes and transcripts to be used as evidence at trial of Zacarias Moussaoui because they contained nothing specifically relating to defendant and would not impair criminal case).

The Climate CIA both was shared among multiple non-New York State entities and constitutes a final agency policy or determination, such that the exemption for intra- and inter-agency communications is inapplicable. *See id.* § 87(2)(g). "The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." *N.Y. Times Co.*, 4 N.Y.3d at 488. Given this standard, it is no wonder that even Respondent declined to rely on this exemption in response to Petitioner's appeal of the initial FOIL response.

And given the broad dissemination of the Climate CIA and the political nature of its origination, it cannot be a confidential attorney-client communication or attorney work product protected from disclosure under § 87(2)(a). As an initial matter, a communication must be confidential to be protected by the attorney-client privilege or work product doctrine. The Climate CIA is no longer confidential, as it has been intentionally and publicly released by a member of the Clean Power coalition. The document itself shows that it is not "of a legal character" and is not "uniquely the product of a lawyer's learning," as required under New York law. *See Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991); *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st

Dept. 1980). Instead, it was drafted and entered by those seeking to further a particular *political* agenda relating to climate change.

Finally, if Respondent is able to moot this proceeding by producing the Climate CIA while maintaining its position that the document is exempt under FOIL, Respondent would avoid judicial oversight notwithstanding its improper acts, and would be permitted to engage in similar conduct with respect to future FOIL requests. Worse still, Respondent avoids a judicial determination that the Climate CIA is invalid and cannot be used to shield documents that fall within its terms. Respondent would remain free to improperly deny public access to materials relating to a highly controversial program. Respondent should not be able to evade proper judicial oversight and interpretation of FOIL in this manner.

A full dismissal on mootness grounds also may allow Respondent to avoid paying Petitioner the attorneys' fees and costs to which it is statutorily entitled. Petitioner has "substantially prevailed" through this action and should be awarded attorneys' fees and costs under Public Officers Law § 89(4)(c). Specifically, Petitioner has prevailed in two respects. First, Petitioner's complaint succeeded in eliciting from Respondent the information that the Climate CIA is the only record responsive to Petitioner's FOIL complaint—which, as discussed above, it seeks to confirm through further response from Respondent, following Respondent's repeated reference to responsive "records" in its initial denial of Petitioner's FOIL request. *See* Bader Aff. Ex. 2. Second, if the Climate CIA attached to the Jerry Affirmation was produced from Respondent's files, Respondent has, after lengthy delay, produced the requested information, which it withheld based on unsupported claims of exemption. Respondent may not "forestall an award of counsel fees simply by releasing the requested documents…." *In re New York State Defenders*, 87 A.D.3d 193, 195 (3d Dept. 2011) (ordering award of attorneys' fees). Otherwise, a respondent could "contravene the very purposes of

FOIL's fee-shifting provision" "simply by releasing the requested documents before asserting a defense." *Id.* at 195-96. Accordingly, Petitioner asks the Court to order Respondent to pay reasonable attorneys' fees and other litigation costs reasonably incurred by petitioner in this case or, at a minimum, allow Petitioner to file a motion requesting such fees and costs following a ruling on Respondent's motion.

With respect to the statutory factors for attorneys' fees, the Climate CIA is "of clearly significant interest to the general public." N.Y. Pub. Off. L. § 89(4)(c)(i). The media has devoted significant attention to the unprecedented climate probe launched by the attorneys general who signed the Climate CIA, and the public has a strong interest in the questionable use of public resources to pursue an investigation that has targeted First Amendment-protected speech by non-profit organizations and corporations. The Climate CIA is the founding document of that highly controversial inquiry. Respondent's decision to withhold the Climate CIA from Petitioner as well as the public at the peak of the controversy was a major disservice, lasting from the date of Petitioner's FOIL request in early May through early August, when another entity released the Climate CIA to a separate third-party that made the document publicly available. FOIL was enacted to combat this specific public harm. Its very purpose "is to shed light on governmental decisionmaking so that the electorate may make informed choices regarding governmental activities and to expose governmental waste, negligence, and abuse." *Tartan Oil Corp. v. State Dep't of Taxation & Finance*, 668 N.Y.S.2d 76, 78 (N.Y. Sup. Ct. 1998).

Leaving aside its self-serving protestations to the contrary, Respondent "lacked a reasonable basis in law for withholding the record." N.Y. Pub. Off. L. § 89(4)(c)(ii). The existence of the Climate CIA was public knowledge, and there is nothing contained in the document that, upon disclosure, interferes with law enforcement investigations or judicial proceedings or meets one of the

other exemptions under Public Officers Law § 87(2). The disclosure of the same Climate CIA by the Office of the Attorney General for the District of Columbia underscores this point. The DC Freedom of Information Act, like FOIL, exempts from disclosure (i) records compiled for law-enforcement purposes that would interfere with an investigation; (ii) inter-agency and intra-agency documents; (iii) the attorney-client privilege; and (iv) the attorney work product doctrine. *See* D.C. Code § 2-534 (specifying exemptions from right of access to public records). The disclosure of the Climate CIA by the Office of the Attorney General for the District of Columbia indicates that Office's position that these exemptions did not apply.

III. Conclusion

For the foregoing reasons, Respondent's motion to dismiss should be denied or, in the alternative, Petitioner should be awarded attorneys' fees and receive a declaration that the Climate CIA is invalid and is subject to disclosure under FOIL.

Dated: New York, New York
October 25, 2016

Respectfully submitted,

BAKER & HOSTETLER LLP

Mark I. Bailen
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 861-1500
mbailen@bakerlaw.com

Elizabeth M. Schutte
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200
eschutte@bakerlaw.com

Counsel for Petitioner

Sam Kazman
Anna St. John
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(917) 327-2392
sam.kazman@cei.org
anna.stjohn@cei.org

TO: Office of the New York Attorney General
The Capitol
ALBANY OFFICE
The Capitol Albany, New York, 12224-0341
Phone (518) 776-2000

AFFIDAVIT OF SERVICE

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

CHRISTINA I. BELANGER, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and am employed by the law firm of Baker & Hostetler LLP located at 45 Rockefeller Plaza, New York, New York 10111.

On October 25, 2016, I served the foregoing Memorandum of Law in Opposition to Respondent's Motion to Dismiss the Verified Petition via overnight courier service (Federal Express) upon the following:

Kelly L. Munkwitz, Esq.
Shannan C. Krasnokutski, Esq.
Office of the New York Attorney General
The Capitol
Albany, New York 12224-0341

CHRISTINA I. BELANGER

Sworn to before me this
25th day of October, 2016

NOTARY PUBLIC

BRIAN SIMPSON
Notary Public, State of New York
No. 01SI6151226
Qualified in New York County
Commission Expires Nov. 6, 2018