SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,
   Petitioner,

         against

THE ATTORNEY GENERAL OF NEW YORK,
   Respondent,

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

      ___________________________

Index No. __________________

AFFIDAVIT OF Hans Bader

      ___________________________

DISTRIBUT OF COLUMBIA) ss

Hans Bader, being duly sworn, deposed and says:

1. I am an attorney at the Competitive Enterprise Institute.

2. I submit this affidavit in support of Petitioner’s Verified Petition seeking legal and equitable relief under Article 78 of the New York Civil Practice Law and Rules.

3. Attached to the Petition as Exhibit 1 is a true and correct copy of a letter from Petitioner to the Records Access Officer, Office of the Attorney General, dated May 5, 2016, and sent via electronic mail to FOIL@ag.ny.gov, requesting specified records pursuant to the New York Freedom of Information Law (“FOIL Request”).

4. Attached to the Petition as Exhibit 2 is a true and correct copy of a letter from Michael Jerry, Records Access Officer, Assistant Attorney General, Office of the Attorney General, to Petitioner, dated June 15, 2016, denying the FOIL Request (“FOIL Denial”).
5. Attached to the Petition as Exhibit 3 is a true and correct copy of a letter from Petitioner to Kathryn Sheingold, Records Appeals Officer, Office of the Attorney General, dated June 21, 2016,上诉 the FOIL Denial ("FOIL Appeal").

6. Attached to the Petition as Exhibit 4 is a true and correct copy of a letter from Kathryn Sheingold, Appeals and Opinions Bureau, Office of the Attorney General, to Petitioner, dated July 7, 2016, denying the appeal regarding the FOIL Request ("Appeal Denial").

Dated: August 26, 2016
Washington, D.C.

[Signature]
Hans Bader

On the 26th day of August in the year 2016 before me, the undersigned, personally appeared Hans Bader, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity and that by his signature on the instrument executed the instrument.

[Signature]
Notary Public

Printed Name: Marcus Scribner
My Commission Expires: October 14, 2018
Exhibit 1
REQUEST UNDER THE NEW YORK FREEDOM OF INFORMATION LAW

May 5, 2016

Records Access Officer
Office of the Attorney General
The Capitol
Albany, NY 12224

By Electronic mail: FOIL@ag.ny.gov

Re: Certain Common Interest Agreements

To the Designated FOIL Records Access Officer,

On behalf of the Competitive Enterprise Institute (CEI), pursuant to New York’s Freedom of Information Law (FOIL) (Public Officers Law, Article 6, §84 et seq.), please provide us within five (5) business days copies of any and all records as described herein. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code with 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.

Please provide us copies of any Common Interest Agreement(s) entered into by the Office of Attorney General and which are signed by, mention or otherwise include any of
the following: John Passacantando, Kert Davies, the Eco-Accountability Project, Matt Pawa, the Pawa Law Group, the Center for International Environmental Law, the Climate Accountability Institute, or the attorney general for any other U.S. state or territory.

Redirected records will be dated over the approximately four-month period from January 1, 2016 through the date you process this request, inclusive.

We request responsive records in electronic format.

The already tightly narrowed nature of this request notwithstanding, if you have information to help further narrow this request please feel free to contact the undersigned.

We request a rolling production, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released.

We do not seek duplicates of responsive records.

While we request that the limited fees allowed by statute be waived, we nevertheless agree to pay legitimate expenses up to $150.00. If you estimate costs will exceed that please notify us and break down the expected costs.

We request records in electronic form if available. By the nature of this request most responsive records should be in electronic format, necessitating no photocopying expense.

We not seek the information for a commercial purpose. CEI is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. As such, we also have no commercial interest possible in these records.

CEI is also a media outlet for these purposes, as acknowledged by several federal agencies in applying the Freedom of Information Act: it not only serves as a regular source of public information and substantive editorial comment about this information to numerous
national (and/or local) media outlets but also applies substantive editorial input in its own publications disseminating public information.

In addition to coverage of its FOIAs in print publications, CEI regularly disseminates its findings on broadcast media.

CEI is also regularly cited in newspapers and trade publications for their open records efforts.¹

The requested information is of critical importance to the nonprofit policy advocacy
groups engaged on these relevant issues, news media covering the issues, and others concerned
with government activities on the critical subject of attorneys general and working with private
activists to initiate investigation under color of state law of political speech in opposition to the
“climate” policy agenda.

Given its non-profit transparency and journalism activities, we ask that any fees
permitted by FOIL be waived.

We will treat a failure to substantively respond within the statutory period a denial of our
request, consistent with FOIL.

We repeat our request for a rolling production of records, such that the State should
furnish records electronically to the undersigned as soon as they are identified, on a rolling basis
if necessary, and any hard copies to 1899 L Street #1200, Washington, DC 20036.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,

Hans Bader

Hans Bader
Senior Attorney
Competitive Enterprise Institute
1899 L Street, NW, #1200
Washington, DC 20036
hans.bader@cei.org
202-331-2278

______________________________________________________________

WITH THAT, Jan. 14, 2013; EPA Doubles Down on ‘Richard Windsor’ Stonewall, WAITS UP WITH
THAT, Jan. 15, 2013; Treasury evasions on carbon tax email mock Obama’s ‘most transparent

1899 L Street NW #1200, Washington, DC 20036 ~ www.cei.org ~
Exhibit 2
June 15, 2016

via e-mail: hans.bader@cei.org
Mr. Hans Bader
Competitive Enterprise Institute
1899 L Street, NW, #1200
Washington, DC 20036

RE: Freedom of Information Law (FOIL) Request #160290

Dear Mr. Bader:

This letter responds to your correspondence dated May 5, 2016, which, pursuant to the FOIL, requested the following:

"[O]n behalf of the Competitive Enterprise Institute (CEI), please provide us within five (5) business days copies of any and all records as described herein. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code with 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.

Please provide us copies of any Common Interest Agreement(s) entered into by the Office of Attorney General and which are signed by, mention or otherwise include any of the following: John Passacantando, Kert Davies, the Eco-Accountability Project, Matt Pawa, the Pawa Law Group, the Center for International Environmental Law, the Climate Accountability Institute, or the attorney general for any other U.S. state or territory.

Responsive records will be dated over the approximately four-month period from January 1, 2015 through the date you process this request, inclusive.

We request responsive records in electronic format."
The already tightly narrowed nature of this request notwithstanding, if you have information to help further narrow this request please feel free to contact the undersigned.

We request a rolling production, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released.

We do not seek duplicates of responsive records.

While we request that the limited fees allowed by statute be waived, we nevertheless agree to pay legitimate expenses up to $150.00. If you estimate costs will exceed that please notify us and break down the expected costs.

We request records in electronic form if available. By the nature of this request most responsive records should be in electronic format, necessitating no photocopying expense.

We not seek the information for a commercial purpose. CEI is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. As such, we also have no commercial interest possible in these records.

CEI is also a media outlet for these purposes, as acknowledged by several federal agencies in applying the Freedom of Information Act: it not only serves as a regular source of public information and substantive editorial comment about this information to numerous national (and/or local) media outlets but also applies substantive editorial input in its own publications disseminating public information.

In addition to coverage of its FOLAs in print publications, CEI regularly disseminates its findings on broadcast media.

CEI is also regularly cited in newspapers and trade publications for their open records efforts.

The requested information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with government activities on the critical subject of attorneys general and working with private activists to initiate investigation under color of state law of political speech in opposition to the ‘climate’ policy agenda.

Given its non-profit transparency and journalism activities, we ask that any fees permitted by FOIL be waived.
We will treat a failure to substantively respond within the statutory period a denial of our request, consistent with FOIL.

We repeat our request for a rolling production of records, such that the State should furnish records electronically to the undersigned as soon as they are identified, on a rolling basis if necessary, and any hard copies to 1899 L Street #1200, Washington, DC 20036.

If you have any questions please do not hesitate to contact me.”

On May 10, 2016, we received the following revision to your request:

“[T]here was a typo in our May 5 Freedom of Information Law (FOIL) request. The roughly four-month period specified in the public records request was intended to be in 2016, not 2015. The reference to 2015 in the following sentence was a typo (as the reference to ‘through the date you process this request’ shows):

Responsive records will be dated over the approximately four-month period from January 1, 2015 through the date you process this request, inclusive.

The words ‘January 1, 2015’ should read ‘January 1, 2016.’

The typo has been corrected in the attached PDF file containing the public records request.”

The Office of the Attorney General has conducted a diligent search for the records that you have requested.

Please be advised that the records responsive to your request are exempt from disclosure and have been withheld for one or more of the following reasons:

- pursuant to Public Officers Law § 87(2)(a), which provides that records that are exempted from disclosure by state or federal statute are exempt from disclosure under FOIL. Records responsive to your request constitute:
  - confidential communication made between attorney and client, which is exempt from disclosure under Civil Practice Law and Rules § 4503(a); or
  - attorney work product, which is exempt from disclosure under Civil Practice Law and Rules § 3101(c);

- pursuant to New York Public Officers Law § 87(2)(e), because the documents requested were compiled for law-enforcement purposes and would, if disclosed,
interfere with law-enforcement investigations or judicial proceedings; and

- pursuant to Public Officers Law § 87(2)(g), because the records are inter-agency or intra-agency materials.

You have a right to appeal the foregoing decision. If you should elect to file such an appeal, your written appeal must be submitted, within 30 days, to Kathryn Sheingold, Records Appeals Officer, State of New York, Office of the Attorney General, Division of Appeals and Opinions, The Capitol, Albany, New York 12224. You may reach the Records Appeals Officer at (518) 776-2009.

Very truly yours,

Michael Jerry
Assistant Attorney General
Exhibit 3
June 21, 2016

Kathryn Sheingold,
Records Appeals Officer, State of New York,
Office of the Attorney General
Division of Appeals and Opinions
The Capitol
Albany, New York 12224

Dear Ms. Sheingold:

Re: Freedom of Information Law (FOIL) Request #160290

I am appealing the denial of my FOIL request, which was contained in the attached letter, which rejected my request for certain “Common Interest Agreement(s) entered into by the Office of Attorney General.”

The letter withheld the responsive records “pursuant to Public Officers Law § 87(2)(g), because the records” allegedly “are inter-agency or intra-agency materials.” This basis for withholding is invalid for at least two reasons. First, the exemption does not cover communications with non-New York entities, yet here, the agreement in question was shared outside of New York State government, with entities that do not qualify as a New York State “agency,” and thus cannot qualify for this exemption. See Town of Waterford v. N.Y. State Dept. of Environmental Conservation, 18 N.Y.3d 652 (2012) (FOIL exemption for inter-agency materials did not apply to communications between Environmental Protection Agency (EPA) and state agencies concerning Hudson River dredging project, even though the state and federal agencies shared common goals); cf. People for the American Way v. U.S. Dept. of Education, 516 F.Supp.2d 28 (D.D.C. 2007) (communications between federal agency and DC municipal government in operating federal program not exempt, because municipal government was not an “agency” subject
to the Freedom of Information Act). Second, this withholding is also invalid because this exemption to FOIL excludes final agency policy or determinations and the signing of the agreement is clearly the final agency policy on the matter.¹

The letter also withheld the responsive records on the basis that the requested records were allegedly “compiled for law-enforcement purposes and would, if disclosed, interfere with law-enforcement investigations or judicial proceedings.” This conclusory invocation of the law-enforcement exception is insufficient to meet the burden of showing the records fall within this exemption. An agency wishing to deny a request for responsive records has the burden of “demonstrating that they fit within one of the statutory exemptions.” Washington Post Co. v. New York State Ins. Dep’t, 61 N.Y.2d 557, 566 (1984); see also Russo v. Nassau Cty. Cnty. Coll., 81 N.Y.2d 690, 700 (1993) (stating that governmental body has burden of proving that record falls “squarely within the ambit of one of the statutory exemptions”). “The entity resisting disclosure” must “articulate a ‘particularized and specific justification for denying access,’” and “conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.” Baez v. Brown, 124 A.D.3d 881, 883 (2d Dept. 2015). It “is well-settled that, in order to establish the existence of the law enforcement privilege, the party asserting the privilege must make ‘a substantial threshold showing[ ] that there are specific harms likely to accrue from disclosure of specific materials,’” not “[mere conclusory or ipse dixit assertions],” McNamara v. City of New York, 249 F.R.D. 70, 85 (S.D.N.Y. 2008). “Even if the requested material ‘constitutes records or information compiled for law enforcement purposes,’ it is not exempt unless disclosure would . . . cause the harm embodied in one or more of” the law enforcement exception’s “six types of “protected law enforcement interests.”² No such details about either the alleged interference or any specific harms have been provided.

Even if this were not so, since the agreement’s existence is already known, its release could hardly reveal the existence of, or interfere with, any investigation. Nor is there any indication or claim that it could deprive anyone of a fair trial or

¹ This conclusory basis for withholding also has not provided the necessary details needed to establish the “required elements of the deliberative-process privilege, including the dates the documents were created,” “the relative positions in the chain of command of the author and recipient” and “the nature of the author’s decisionmaking authority.” See CREW v. DOJ, 955 F. Supp. 2d 4, 14 (D.D.C. 2013).

impartial adjudication, disclose any investigative techniques or procedures (much
less non-routine ones that might implicate the exemption), or otherwise interfere
with law enforcement investigations or judicial proceedings.

Finally, the letter also withheld the responsive records on the following purported
basis: "confidential communication made between attorney and client, which is
exempt from disclosure under Civil Practice Law and Rules § 4503(a); or attorney
work product, which is exempt from disclosure under Civil Practice
Law and Rules § 3101(c)." But as its very name shows, the "Common Interest
Agreement(s)" sought by this FOIL request involves communications pursuant to
the common-interest privilege, not the more narrowly-defined attorney-client or
attorney work-product privileges recognized by statute as a basis for withholding
records under FOIL. Unlike those privileges, the common-interest doctrine is not
recognized by statute, and thus is insufficient, without more, to justify withholding.

The common-interest privilege is a common-law privilege that goes beyond the
statutory privileges recognized in these two statutory provisions. FOIL only
exempts those records that are specifically exempted from disclosure by state or
federal statute. See Public Officers Law § 87(2)(a). The statutes cited in the letter
only involve attorney-client privilege (CPLR § 4503(a)), and attorney work-
product (CPLR § 3101(c)), not the broader common-interest doctrine or
communications allegedly falling within it, such as the "Common Interest
Agreement(s)" at issue in this FOIL request.

The common-interest privilege goes well beyond the attorney-client privilege as
recognized by New York statute, since one of the purposes of the attorney-client
privilege is to "entice clients to divulge information to their own lawyers" while
the joint-defense privilege is meant to encourage communications with third
parties having a common interest. See Susan K. Rushing, Separating the Joint-
Defense Doctrine from the Attorney-Client Privilege, 68 Tex. L. Rev. 1273,
(stating that governmental body has burden of proving that record falls "squarely
within the ambit of one of the statutory exemptions").

Even if attorney-client privilege or attorney work-product could otherwise
encompass a common interest agreement of the sort at issue in this FOIL request,
the conclusory nature of the privilege claim contained in the June 15 letter fails to
meet the burden of proving that it was privileged. See, e.g., Coastal Oil Co. of New
York v. Peck, 184 A.D.2d 241 (1st Dept. 1992) ("the burden of satisfying each
element of the [attorney-client or work-product] privilege falls on the party
asserting it . . . and conclusory assertions will not suffice”); In re Omnicom, 233 F.R.D. 400, 404 (S.D.N.Y. 2006) (“The party invoking the privilege has the burden of proving the facts on which the privilege claim is based, and must do so by competent and specific evidence, rather than by conclusory or ipse dixit assertions.”); Aiossa v. Bank of America, No. CV 10–1275, 2011 U.S. Dist. LEXIS 102207, at *27, 2011 WL 4026902 (E.D.N.Y. Sept. 12, 2011) (“conclusory assertions will not suffice” to demonstrate a claim of privilege) (citing Von Bulow v. Von Bulow, 811 F.2d 136, 146 (2d Cir.1987)); Spread Enterprises, at **2-3 (“Conclusory assertions” that communication was “in legal capacity” and involved discussion of “legal implications” is insufficient to establish attorney-client privilege, since a privilege claim requires proof of the underlying “facts on which the privilege claim is based”). Not even the most cursory information about the withheld records is provided, such as “its date, its recipients and the nature of its general subject matter,” rendering it a “conclusory objection.” H.L. Haden Co. v. Siemens Medical Sys., 108 F.R.D. 686, 688-89 & n.2 (S.D.N.Y. 1985)

Similarly, communications related to public relations are not covered by the other privileges cited in denying our FOIL request.  

Sincerely,

Hans Bader

Hans Bader
Competitive Enterprise Institute
1899 L Street, NW, Floor 12
Washington, D.C. 20036
(202) 331-2278
hans.bader@cei.org

---

June 15, 2016

via e-mail: hans.bader@cei.org
Mr. Hans Bader
Competitive Enterprise Institute
1899 L Street, NW, #1200
Washington, DC 20036

RE: Freedom of Information Law (FOIL) Request #160290

Dear Mr. Bader:

This letter responds to your correspondence dated May 5, 2016, which, pursuant to the FOIL, requested the following:

"In behalf of the Competitive Enterprise Institute (CEI), please provide us within five (5) business days copies of any and all records as described herein. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code with 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.

Please provide us copies of any Common Interest Agreement(s) entered into by the Office of Attorney General and which are signed by, mention or otherwise include any of the following: John Passacantando, Kert Davies, the Eco-Accountability Project, Matt Pawa, the Pawa Law Group, the Center for International Environmental Law, the Climate Accountability Institute, or the attorney general for any other U.S. state or territory.

Responsive records will be dated over the approximately four-month period from January 1, 2015 through the date you process this request, inclusive.

We request responsive records in electronic format."
The already tightly narrowed nature of this request notwithstanding, if you have information to help further narrow this request please feel free to contact the undersigned.

We request a rolling production, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released.

We do not seek duplicates of responsive records.

While we request that the limited fees allowed by statute be waived, we nevertheless agree to pay legitimate expenses up to $150.00. If you estimate costs will exceed that please notify us and break down the expected costs.

We request records in electronic form if available. By the nature of this request most responsive records should be in electronic format, necessitating no photocopying expense.

We do not seek the information for a commercial purpose. CEI is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. As such, we also have no commercial interest possible in these records.

CEI is also a media outlet for these purposes, as acknowledged by several federal agencies in applying the Freedom of Information Act: it not only serves as a regular source of public information and substantive editorial comment about this information to numerous national (and/or local) media outlets but also applies substantive editorial input in its own publications disseminating public information.

In addition to coverage of its FOIA's in print publications, CEI regularly disseminates its findings on broadcast media.

CEI is also regularly cited in newspapers and trade publications for their open records efforts.

The requested information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with government activities on the critical subject of attorneys general and working with private activists to initiate investigation under color of state law of political speech in opposition to the ‘climate’ policy agenda.

Given its non-profit transparency and journalism activities, we ask that any fees permitted by FOIL be waived.
We will treat a failure to substantively respond within the statutory period a denial of our request, consistent with FOIL.

We repeat our request for a rolling production of records, such that the State should furnish records electronically to the undersigned as soon as they are identified, on a rolling basis if necessary, and any hard copies to 1899 L Street #1200, Washington, DC 20036.

If you have any questions please do not hesitate to contact me.”

On May 10, 2016, we received the following revision to your request:

“[T]here was a typo in our May 5 Freedom of Information Law (FOIL) request. The roughly four-month period specified in the public records request was intended to be in 2016, not 2015. The reference to 2015 in the following sentence was a typo (as the reference to ‘through the date you process this request’ shows):

Responsive records will be dated over the approximately four-month period from January 1, 2015 through the date you process this request, inclusive.

The words ‘January 1, 2015’ should read ‘January 1, 2016.’

The typo has been corrected in the attached PDF file containing the public records request.”

The Office of the Attorney General has conducted a diligent search for the records that you have requested.

Please be advised that the records responsive to your request are exempt from disclosure and have been withheld for one or more of the following reasons:

- pursuant to Public Officers Law § 87(2)(a), which provides that records that are exempted from disclosure by state or federal statute are exempt from disclosure under FOIL. Records responsive to your request constitute:
  - confidential communication made between attorney and client, which is exempt from disclosure under Civil Practice Law and Rules § 4503(a); or
  - attorney work product, which is exempt from disclosure under Civil Practice Law and Rules § 3101(c);

- pursuant to New York Public Officers Law § 87(2)(e), because the documents requested were compiled for law-enforcement purposes and would, if disclosed,
interfere with law-enforcement investigations or judicial proceedings; and

- pursuant to Public Officers Law § 87(2)(g), because the records are inter-agency or intra-agency materials.

You have a right to appeal the foregoing decision. If you should elect to file such an appeal, your written appeal must be submitted, within 30 days, to Kathryn Sheingold, Records Appeals Officer, State of New York, Office of the Attorney General, Division of Appeals and Opinions, The Capitol, Albany, New York 12224. You may reach the Records Appeals Officer at (518) 776-2009.

Very truly yours,

Michael Jerry
Assistant Attorney General
Exhibit 4
July 7, 2016

Mr. Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, #1200  
Washington, DC 20036  

VIA EMAIL: hans.bader@cei.org  

Re: Appeal re: Freedom of Information Law Request # 160290  

Dear Mr. Bader:  


By correspondence dated May 5, 2016, you, on behalf of the Competitive Enterprise Institute (CEI), requested “copies of any Common Interest Agreement(s) entered into by the Office of Attorney General and which are signed by, mention or otherwise include any of the following: John Passacantando, Kert Davies, the Eco-Accountability Project, Matt Pawa, the Pawa Law Group, the Center for International Environmental Law, the Climate Accountability Institute, or the attorney general for any other U.S. state or territory, from the period of January 1, 2016 through the date this request was processed.”  

The Records Access Officer responded to you by letter dated June 15, 2016. He explained that responsive records were being withheld under Public Officers Law § 87(2)(a) and CPLR 3101(e) as attorney work product and CPLR 4503(a) as confidential communications made between attorney and client; Public Officers Law § 87(2)(e), because the documents requested were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations or judicial proceedings; and under Public Officers Law § 87(2)(g), because the records are inter- or intra-agency materials.
You administratively appeal the denial.

The common interest agreement is properly excepted from disclosure under Public Officers Law § 87(2)(a) as attorney work product. See CPLR 3101(c); see also R.F.M.A.S., Inc. v. So, 2008 U.S. Dist. LEXIS 14969 (S.D.N.Y. 2008) ("As a general matter, a [common interest] agreement fits within the broad definition of work product, which embraces documents prepared because of the prospect of litigation."). The agreement was made to protect the common legal interests shared by the signing parties—the Attorneys General of various jurisdictions—with respect to law enforcement and legal actions each may undertake. Indeed, the New York Office of the Attorney General, a law enforcement agency, currently is engaged in such a law enforcement investigation. The common interest agreement reflects the legal theories under which such actions are likely to proceed, and disclosure would reveal these strategies.

Likewise, the agreement is properly excepted under Public Officers Law § 87(2)(e)(i). The agreement was compiled by the Office of the Attorney General, which has been granted enforcement powers under New York law. Records compiled with law enforcement in mind can be withheld under Public Officers Law § 87(2)(e)(i), even if they were not compiled for a specific law enforcement investigation. In re Madeiros v. New York State Education Dep't, 133 A.D.3d 962, 964-65 (3d Dep't 2015). And, again, disclosure of the agreement would reveal the legal strategies that underpin or are likely to underpin both the current and future investigations.

Finally, your assertion that the Records Access Officer needed to provide a “particularized and specific justification” with respect to the records he withheld is incorrect. The standard that you rely on applies only to “the agency’s burden of proof when its denial of disclosure to a FOIL applicant is challenged in an article 78 proceeding.” In re Capitol Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986); see also In re Baez v. Brown, 124 A.D.3d 881, 882-83 (2d Dep't 2015). The “particularized and specific justification” standard does not apply when an agency responds to a FOIL request in the first instance or on administrative appeal.

---

1 There are no agreements signed by the other entities and individuals listed in your request—i.e., John Passacantando, Kert Davies, the Eco-Accountability Project, Matt Pawa, the Pawa Law Group, the Center for International Environmental Law, or the Climate Accountability Institute.
This is a final agency determination. Please be advised that judicial review of this determination can be obtained under Article 78 of the Civil Practice Law & Rules.

Very truly yours,

KATHRYN SHEINGOLD
Records Appeals Officer

Cc: Committee on Open Government
OAG Records Access Officer