

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of the Application of

Index No.

COMPETITIVE ENTERPRISE INSTITUTE,  
Petitioner,

-against-

**VERIFIED PETITION**

THE ATTORNEY GENERAL OF NEW YORK,  
Respondent,

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

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**INTRODUCTION**

Petitioner COMPETITIVE ENTERPRISE INSTITUTE for its complaint against Respondent ATTORNEY GENERAL OF NEW YORK alleges as follows:

1. This is an action under Article 78 of the Civil Law and Practice Rules to compel compliance with the New York Freedom of Information Law, Public Officers Law §§ 84-90 (“FOIL”), and to compel production under a records request made by petitioner.

2. Petitioner’s FOIL request at issue in this case was sent to respondent via electronic mail to FOIL@ag.ny.gov on May 5, 2016, and 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 (“FOIL Request”). *See* Exhibit 1.

3. The common interest agreements requested by petitioner are between the Attorney General’s Office and individuals or entities that are not New York State government

employees or agencies and/or were shared with individuals and entities that are not New York State government employees or agencies.

4. The Attorney General's Office denied petitioner's FOIL Request in its entirety by letter dated June 15, 2016. *See* Exhibit 2.

5. The Attorney General's Office denied the request without providing any details about the number or nature of the responsive records or the nature of the search that it had conducted. The Attorney General's Office denied petitioner's request categorically, denying release of every record its search returned as potentially responsive.

6. The Attorney General's Office cited four separate grounds for denial of the FOIL Request, stating that "the records responsive to [petitioner's] request are exempt from disclosure and have been withheld for one or more of the following reasons:"

- The requested records are exempt from disclosure because they are privileged communications between an attorney and client;
- The requested records are exempt from disclosure because they are attorney work product;
- The requested records are exempt from disclosure because such disclosure would interfere with law-enforcement investigations or judicial proceedings; and
- The records are exempt from disclosure because they are inter-agency or intra-agency materials.

7. None of these four grounds for denying the request is legitimate under New York law.

8. On June 21, 2016, petitioner timely appealed the denial of its FOIL Request as required by § 89(4)(a) of FOIL. *See* Exhibit 3.

9. By letter dated July 7, 2016, the appeals officer upheld the denial of petitioner's FOIL Request. *See* Exhibit 4.

10. The denial of petitioner's appeal asserted that the requested records were properly withheld as attorney work product and because they were compiled with "law enforcement in mind." The denial did not cite the attorney-client privilege or protection for inter-agency or intra-agency materials as a proper basis for withholding the records. The denial rejected petitioner's request for a "particularized and specific justification" for withholding the records.

11. Accordingly, petitioner files this lawsuit to compel the Attorney General of New York to comply with the law and produce the public records requested by petitioner and/or that otherwise satisfy its statutory obligations under FOIL.

### **PARTIES**

12. Petitioner is a non-profit public policy institute based in Washington, DC, and organized under 26 U.S.C. § 501(c)(3), with research, legal, investigative journalism, and publication functions. As relevant to the present action, petitioner also has 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.

13. Respondent is the Attorney General of New York, a Constitutional Officer of the State of New York. N.Y. Const. art. V, § 4. In this capacity, he possesses or is otherwise the proper owner of the records petitioner seeks. He is sued in his official capacity only.

### **JURISDICTION AND VENUE**

14. This Court has jurisdiction pursuant to CPLR 7804(b) and 506(b) because all actions at issue in this case took place within Albany County.

15. Jurisdiction and venue are proper under CPLR 7804(b) and 506(b) because respondent has offices within Albany County.

### STATEMENT OF FACTS

16. On May 5, 2016, petitioner filed with the offices of respondent, *via* electronic mail to FOIL@ag.ny.gov, a request for access to certain records under FOIL. On May 10, 2016, petitioner filed with the offices of respondent, *via* electronic mail to FOIL@ag.ny.gov, a clarification to the request stating that the relevant period specified in the request should be in 2016 rather than 2015. A true and correct copy of this request is attached hereto as Exhibit 1.

17. Petitioner's request, herein referred to as the "FOIL Request", sought access to and a copy of "any Common Interest Agreement(s) entered into by the Office of the 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," dated from January 1, 2016 through the date the Office of the Attorney General processed the request. *See* Exhibit 1.

18. Petitioner asserts on information and belief that none of the individuals or entities named in its FOIL Request was a New York state agency or an employee of the Attorney General's Office or the State of New York at relevant times.

19. Petitioner asserts on information and belief that the requested common interest agreements were transmitted or otherwise shared with individuals or entities who were not New York state agencies or employees of the Attorney General's Office or the State of New York at relevant times.

20. Petitioner's FOIL Request sought information "of critical importance to the nonprofit policy advocacy groups engaged on [relevant transparency and educational] issues, news media covering the issues, and others concerned with government activities on the critical subject of attorneys general ... working with private activists to initiate investigation under color of state law of political speech in opposition to the 'climate' policy agenda." See Exhibit 1.

21. Petitioner asserts on information and belief that the Attorney General's Office shared information, consulted, or otherwise communicated with the named private individuals and entities and attorneys general for other states and territories regarding climate change policies and possible investigation under color of state law of certain private entities that vocalize opposition to such policies.

22. On June 15, 2016, the Attorney General's Office denied petitioner's FOIL Request in full. The denial claimed that the records responsive to the request are exempt from disclosure and had been withheld "for one or more of the following reasons:

- pursuant to Public Office 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.” See Exhibit 2.

23. The Attorney General’s Office did not provide an estimate of the number or nature of responsive records or provide any details regarding how it searched for potentially responsive records.

24. The FOIL exception for records protected by the attorney-client privilege does not apply to the requested common interest agreements, as such records were shared by the Attorney General with non-New York state agencies or employees.

25. The FOIL exception for records that constitute attorney work product does not apply to the requested common interest agreements.

26. Petitioner asserts on information and belief that the requested records were not prepared for or in anticipation of litigation.

27. Petitioner has a substantial need for the requested records and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

28. The FOIL exception for inter-agency or intra-agency materials does not apply to the requested common interest agreements, as such records were shared by the Attorney General with the individuals and entities listed in petitioner’s FOIL Request or other non-New York state government employees or entities.

29. Final agency policies or determinations, such as a signed common interest agreement, are not protected from disclosure by the exception for intra-agency or inter-agency materials.

30. Disclosure of the requested common interest agreements would not interfere with a law enforcement investigation or judicial proceeding.

31. The existence of the requested common interest agreements between the Attorney General's Office and attorneys general of other states and territories and the related involvement of the private individuals and entities listed in the FOIL Request have been publicly reported.

32. Disclosure of the requested common interest agreements would not deprive a person of a right to a fair trial or impartial adjudication.

33. Disclosure of the requested common interest agreements would not identify a confidential source or disclose confidential information relating to a criminal investigation.

34. Disclosure of the requested common interest agreements would not reveal criminal investigative techniques or procedures that are not routine.

35. No other exception to disclosure of the requested materials under FOIL applies.

36. On June 21, 2016, petitioner appealed the Attorney General's denial of access to all requested records to the designated record appeals officer, Kathryn Sheingold. *See* Exhibit 3.

37. Ms. Sheingold denied the petitioner's appeal by letter dated July 7, 2016 ("Appeal Denial"). *See* Exhibit 4.

38. In the Appeal Denial, Ms. Sheingold referenced an agreement signed by the attorneys general of various jurisdictions as a record responsive to petitioner's FOIL Request. She also referred to "responsive records" that "were being withheld" pursuant to the June 15, 2016 denial of petitioner's FOIL Request but did not identify which additional responsive records the Attorney General's Office had located. Ms. Sheingold stated that there are no agreements signed by the seven private entities and individuals listed in the FOIL Request. She did not state whether the Attorney General's Office searched for or located common interest agreements that "mention or otherwise include" any of those seven individuals or entities as

requested by petitioner. The Appeal Denial did not provide any further details about the search that the Attorney General's Office conducted or the number and nature of responsive records.

39. Ms. Sheingold stated that the common interest agreement is properly excepted from disclosure as attorney work product under Public Officers Law § 87(2)(a) because the agreement was made to protect the common legal interests shared by the signing parties and reflects the legal theories under which law enforcement investigations are likely to proceed.

40. Ms. Sheingold further stated that the common interest agreement is properly excepted from disclosure under Public Officers Law § 87(2)(e)(i) because the agreement was compiled "by the Office of the Attorney General, which has been granted enforcement powers under New York Law." She stated that disclosure of the agreement would reveal legal strategies that underpin or are likely to underpin current and future investigations.

41. Ms. Sheingold did not provide any detail how, or basis to conclude, that disclosure of the common interest agreement would reveal any legal strategies or theories in any current or future investigation.

42. Ms. Sheingold did not cite the attorney-client privilege or exception for inter-agency or intra-agency materials as a proper basis for not disclosing the requested records.

### **CAUSE OF ACTION: ARTICLE 78**

#### **REVIEW OF WRONGFUL DENIAL OF FOIL REQUEST**

43. Petitioner repeats and realleges each and every allegation contained in paragraphs 1 through 42 as if fully set forth herein.

44. Article 78 is the appropriate method of review of agency determinations concerning FOIL requests.



45. Petitioner has a right under the New York Freedom of Information Law, Public Officers Law §§ 84 *et seq.* to the records requested.

46. Petitioner has sought and been denied production of responsive records reflecting the conduct of official business. Respondent has failed to provide a proper explanation for its failure to produce records or portions thereof that are not properly exempt under the law.

47. Respondent has not produced the records sought by petitioner and has failed to properly invoke any legitimate exemptions under FOIL.

48. Respondent did not meet its burden to provide specific and particularized justification for withholding the requested records from disclosure under FOIL.

49. In accordance with Public Officers Law § 89(4)(b), petitioner has exhausted its administrative remedies and has no other remedy at law.

50. Public Officers Law § 89(4)(c) provides that in a proceeding brought pursuant to CPLR article 78 a court “may assess, against [an] agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by [a petitioner] in a case in which [a petitioner] has substantially prevailed, when: (i) the agency had no reasonable basis for denying access; or (ii) the agency failed to respond to a request or appeal within the statutory time.”

51. Petitioner is statutorily entitled to recover fees and costs incurred as a result of respondent’s refusal to fulfill petitioner’s FOIL Request.

#### **PRIOR APPLICATION**

52. A prior application has not been made for the relief now requested.

#### **RELIEF REQUESTED**

WHEREFORE, petitioner respectfully requests that this Court:

(1) Issue an order:

- a. declaring that (i) the records requested in petitioner's FOIL Request are public records and, as such, are subject to release under the New York Freedom of Information Law; and (ii) respondent must release those requested records;
- b. directing respondent to produce to petitioner within 5 business days of the date of the order, the records requested in petitioner's FOIL Request; and
- c. awarding attorneys' fees and costs reasonably incurred in this case in favor of petitioner and against respondent in an amount to be determined at the conclusion of this proceeding; and

(2) Grant petitioner such other and further relief as this Court may deem just and proper.

Dated: New York, New York  
August 31, 2016

Respectfully submitted,

BAKER & HOSTETLER LLP



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VERIFICATION

DISTRICT OF COLUMBIA ) ss

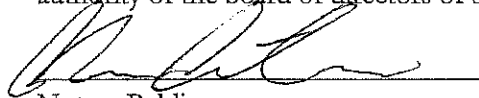
Sam Kazman, being duly sworn, deposes and says-

I am the General Counsel of the Competitive Enterprise Institute, Petitioner in the above-captioned action. I have reviewed the foregoing Petition and know the contents thereof to be true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

  
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Sam Kazman, General Counsel  
COMPETITIVE ENTERPRISE INSTITUTE

DISTRICT OF COLUMBIA

On the 26th day of August in the year 2016 before me personally came Sam Kazman, to me known, who, being by me duly sworn, did depose and say that he resides at 314 Shadow Walk, Falls Church, Virginia 22046 and is the General Counsel of the Competitive Enterprise Institute, the corporation described in and which executed the above instrument; and that he has signed his name thereto by authority of the board of directors of said corporation.

  
\_\_\_\_\_  
Notary Public  
Printed Name: Marcus Scribner  
My Commission Expires:  
October 14, 2018

