To Be Argued By:
ANNA ST. JOHN
Time Requested: 10 Minutes

Appellate Division — Third Department Case No. 525579

Supreme Court of the State of New York

APPELLATE DIVISION—THIRD DEPARTMENT

In The Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78
of The Civil Practice Laws and Rules

—against—

NYS OFFICE OF THE ATTORNEY GENERAL,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

In this appeal, respondent-appellant Office of the Attorney General of New York ("OAG") seeks to overturn the modest, sub-lodestar attorneys' fees awarded to petitioner-appellee Competitive Enterprise Institute ("CEI"). Supreme Court properly exercised its discretion to award CEI fees of $20,377.50—about 25% less than the amount it requested—after finding CEI substantially prevailed in the Article 78 proceeding seeking compliance with its Freedom of Information Law ("FOIL") request. Supreme Court issued the fee decision after finding, pursuant to Public Officers Law § 89(4)(c), that CEI substantially prevailed and OAG had no reasonable basis for denying access. OAG disputes these two findings.

OAG's appeal rests on a series of misinterpretations of the law and fact. OAG itself acknowledges it first disclosed the Climate Change Coalition Common Interest Agreement (the "Agreement") responsive to CEI's request in *this proceeding*, attaching the document to its motion to dismiss. (Brief for NYS Office of the Attorney General ("OAG Br.") at 11-12.) OAG is not relieved of its statutory duty under FOIL simply because another entity releases the same document. Even if it were, CEI obtained additional responses to its FOIL request, including useful information, as a result of this proceeding. In its brief, OAG skims over (i) its inconsistent and unexplained references to single and multiple responsive documents, and (ii) the inadequate records search described as underlying its FOIL response and appeal denial. In this proceeding, Supreme Court ordered OAG to provide a FOIL-compliant response. In that supplemental response, OAG ultimately confirmed that the Agreement was the only responsive record following a "*de novo*," "more extensive" search. (*See* Record on Appeal ("R.") 120-121.) By obtaining these responses, CEI substantially prevailed.

OAG had no reasonable basis to deny CEI access to the Agreement. Despite relying on four statutory exemptions in its initial denial and continuing to claim those

exemptions were valid in its supplemental response, even after the document was in the public domain, OAG now claims the Agreement is exempt from disclosure only as work product. New York case law does not support this position, nor does the document itself: no legal strategy, attorney analysis, theories, or conclusions are reflected in the Agreement, which is largely a form document that was shared broadly. Accordingly, it was not reasonable for OAG to rely on the work product doctrine when it received CEI's FOIL request. Supreme Court properly found the statutory requirements were met and exercised its discretion to award modest fees following a close analysis of the factors this Court has identified as relevant to fee awards. The judgment should be affirmed.

STATEMENT OF FACTS

A. CEI's FOIL Request and Relevant Background

CEI is a non-profit public policy institute based in Washington, DC. (R.24 ¶ 12.) CEI 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, CEI served a records request under FOIL on OAG. (R.25 ¶ 16.) The request sought any common interest agreements entered into by OAG 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; R.36.)

CEI's FOIL request followed OAG's launch of the politically motivated "AGs United for Clean Power" campaign. OAG announced the "Clean Power" campaign at a press conference on March 29, 2016. (R.93 ¶ 3.) A coalition of Democratic state

attorneys general, including OAG and the attorneys general for the U.S. Virgin Islands ("Virgin Islands AG") and the District of Columbia ("DC AG"), was involved in this campaign. (*Id.*) In connection with the "Clean Power" campaign, the Virgin Islands AG issued a subpoena to CEI in April 2016, demanding a decade's worth of communications, emails, statements, drafts, and other documents, including private donor information, relating to CEI's work on climate change and energy policy. (R.94 ¶ 5.) CEI objected to the subpoena on First Amendment grounds, viewing it as an unlawful attempt to intimidate and silence those who disagree with the policy objectives of the Clean Power campaign. (*Id.* ¶ 6.) In late June 2016, in response to CEI's objections and motion to quash the subpoena, the Virgin Islands AG withdrew the subpoena. CEI'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.)

Meanwhile, by letter dated June 15, 2016, OAG denied CEI's FOIL request in its entirety. (R.41.) While the records officer, Michael Jerry, did not provide any details about the number or nature of the responsive records or the nature of the search that OAG had conducted in the denial letter, he repeatedly referenced "record***s***" that were responsive to CEI's request. OAG cited four separate statutory exemptions as grounds for the denial: (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. (R.43-44.)

On June 21, 2016, CEI timely appealed the denial of its FOIL request. (R.46.) By letter dated July 7, 2016, OAG upheld the denial. (R.56.) Despite noting that the records officer who denied the FOIL request "explained that responsive record***s*** were being withheld," the appeal denial letter did not claim that this description was inaccurate because only one responsive record had been located. (*Id.* (emphasis added).) And while the letter noted that there were no agreements *signed* by the non-state entities

and individuals listed in CEI's FOIL request, the letter was totally silent as to the existence of agreements that *mentioned or otherwise included* those entities and individuals. (R.57 n.1.) The letter asserted that "the common interest agreement" was properly withheld as attorney work product and because it was compiled with law enforcement in mind. (R.57.) It claimed that the work product exception applied because the agreement was made to protect "the common legal interests shared by the signing parties . . . with respect to law enforcement and legal actions each may undertake" and "reflects the legal theories under which such actions are likely to proceed, and disclosure would reveal these strategies." (*Id.*) The letter also claimed that the law enforcement exception applied, noting that "[r]ecords compiled with law enforcement in mind can be withheld . . . even if they were not compiled for a specific law enforcement investigation," and claimed, "again, disclosure of the agreement would reveal the legal strategies that underpin or are likely to underpin both the current and future investigations." (*Id.*) The letter failed to identify any specific investigation or litigation anticipated by OAG or how they could be compromised by disclosure of the "legal theories" supposedly set forth in the agreement. Despite noting that the records officer had initially withheld responsive records based on the attorney-client privilege and protection for inter-agency or intra-agency materials, the appeal denial letter did not claim those as a proper basis for withholding the records. (R.56-57.)

B. Supreme Court Proceedings

On August 31, 2016, CEI filed the Verified Petition under Article 78 of the Civil Law and Practice Rules to compel OAG's compliance with FOIL. (R.22.) On September 30, 2016, OAG responded to the Verified Petition by serving a motion to dismiss and an accompanying Affirmation of Michael Jerry ("Jerry Affirmation"). (R.59.) Although OAG refused to produce any records in response to CEI's FOIL request prior to the filing of this action, attached to the Jerry Affirmation was a

document titled "Climate Change Coalition Common Interest Agreement"—the document referred to herein as the Agreement. (R.69.) OAG did not identify where the attachment came from, although the Jerry Affirmation stated that the Energy & Environment Legal Institute posted a copy of the document on its website upon its release by the DC AG on August 4, 2016. (R.66 ¶ 14.) Contrary to OAG's assertions, the Energy & Environment Legal Institute is not affiliated with and does not have "staff in common with" CEI, though there is a single independent contractor who works for both organizations. (*Id.*) Mr. Jerry further stated 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," (R.65 ¶ 8 (emphasis added)). However, he was totally silent on the question of whether there were any common interest agreements that "mention or otherwise include" those non-state individuals and entities. CEI opposed OAG's motion to dismiss. (*See* R.93.)

In a ruling by Judge Zwack, Supreme Court, Albany County refused to dismiss CEI's proceeding and ordered OAG to provide a response to CEI's FOIL request "that fully complies with the intent and purpose of this disclosure statute" and allowed CEI to submit an application for attorneys' fees and costs. (R.18.) Supreme Court discussed the "clear discrepancy" between OAG's initial response stating that it located multiple responsive records and its subsequent, unexplained production of just a single record. It also noted the discrepancy between CEI's request for common interest agreements that mention or otherwise include the specified individuals and entities, and OAG's unduly narrow focus, in its response, on agreements *with* those individuals and entities. (R.17.)

In its supplemental response, OAG persisted in claiming that the Agreement was "exempt from disclosure for one or more" of the four statutory exemptions it initially cited, and stated that it "decline[d]" to invoke—but did not waive the applicability of—those exemptions solely for the purpose of responding to CEI's request. (R.126-127.)

CEI subsequently filed a motion requesting attorneys' fees of $26,901.25 and costs of $466.72. (R.8.) In a detailed opinion, Supreme Court awarded attorneys' fees of $20,377.50 and costs of $466.72. (R.13.) Supreme Court noted that in OAG's supplemental FOIL response, OAG "again asserted that the subject document . . . was exempt from disclosure 'for one or more' of four different exemptions, without specifying which of the asserted exemptions applied or why" and provided CEI with the Agreement without waiving the applicability of the asserted exemptions even after the document was in the public domain. (R.7-8.) Supreme Court declined to implement the $250/hour rate cap advocated by OAG as "counterproductive and unreasonable under the circumstances." (R.12.) Supreme Court nevertheless reduced one attorney's billing rate from the requested $450/hour to $300/hour despite finding that her "education, training and professional experience could amply support" the requested rate, declined to award any fees for the billings by paralegals and paraprofessionals, and noted the other two attorneys' "already discounted hourly rate" in declining to reduce their rate further. (R.10-12.)

OAG subsequently filed this appeal.

ARGUMENT

I. Point I: Supreme Court properly determined the statutory prerequisites for an attorneys' fee award were met and exercised its discretion to award modest attorneys' fees and costs.

A court has discretion to award attorneys' fees and other litigation costs pursuant to FOIL in any case "in which such person has substantially prevailed, when," as relevant here, "the agency had no reasonable basis for denying access." Public Officers Law § 89(4)(c). "If the statutory requirements have been satisfied, the determination of whether to award fees rests within the court's discretion, subject to review only for an abuse of that discretion." *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 2017 N.Y. Slip Op. 07209 (2017). OAG argues Supreme Court erred by finding CEI

substantially prevailed and OAG had no reasonable basis for denying access. Neither argument has merit.

A. Supreme Court did not err in finding that CEI substantially prevailed.

OAG challenges Supreme Court's holding that CEI substantially prevailed by arguing: (1) the commencement of this litigation was not the reason that OAG released the Agreement; and (2) OAG had already "clarified" that OAG possessed no responsive records other than the Agreement and, thus, this litigation was unnecessary for CEI to confirm that fact. (R.11-12.) These arguments are not supported by the law or the facts of the case.

1. This lawsuit is the reason why OAG finally released the Agreement and provided a compliant response to CEI's FOIL request.

OAG acknowledges that a party substantially prevails "when the records are released 'because of the commencement of litigation.'" OAG Br. at 11 (quoting *Matter of Friedland v. Maloney*, 148 A.D.2d 814, 816 (3d Dept. 1989)). As elaborated in other cases, a party "substantially prevails" when it receives "all the information that it requested and to which it was entitled in response to the underlying FOIL litigation." *Legal Aid Society v. N.Y. State Dept. of Corrections & Community Supervision*, 105 A.D.3d 1120, 1121-22 (3d Dept. 2013). "Full compliance" thus may be achieved even where the petitioner receives only "a certification that the requested record could not be found after a diligent search, as opposed to the production of responsive documents," because "the petitioner received the full and only response available pursuant to the statute under the circumstances." *Id.* at 1122. "[T]he counsel fee provision does not distinguish between" these available responses; its purpose of deterring unreasonable delays and denials of access by state agencies and costly litigation for record-requesters remains applicable. *Id.* For similar reasons, a petitioner can "substantially prevail" even in the

absence of a consent decree or judgment of Supreme Court, such as when respondent attaches responsive materials to a pleading in an article 78 proceeding. *See, e.g.*, *Matter of New York State Defenders Ass'n v. New York State Police*, 87 A.D.3d 193, 195 (3d Dept. 2011). "[T]o allow a respondent to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purposes of FOIL's fee-shifting provision." *Id.* Such an approach would be "irrational," as it "would allow a respondent to moot any proceeding" and prevent a fee award by releasing the documents before asserting a defense. *Matter of Powhida v. City of Albany*, 147 A.D.2d 236, 239 (3d Dept. 1989). In such cases, a petitioner still "received all the information that it requested and to which it was entitled in response to the underlying FOIL litigation," and thus "it may be said to have substantially prevailed within the meaning of Public Officers Law § 89(4)(c)." *New York State Defenders Ass'n*, 87 A.D.3d at 196.

By OAG's own admission here, it was only upon the commencement of this proceeding that "OAG revisited the issue for the first time since its final FOIL determination," "learned that another attorney general had made the document public," and subsequently disclosed the Agreement from its files to CEI by attaching it to its motion to dismiss. (OAG Br. at 11-12.) In other words, *this proceeding* caused OAG to release the document requested by CEI. If CEI had not filed its complaint, OAG would not have reviewed and reconsidered its earlier wrongful denial. Unlike in *Maloney*, the case cited by OAG, OAG had not been searching for responsive documents in good faith beginning on the day it received CEI's FOIL request and simply needed more time to complete its search due to the complexity and extensive nature of the request. *Cf.* 148 A.D.2d at 815-16. OAG had already denied access to the responsive record and provided an incomplete response that suggested there could be additional responsive records. Even after releasing the Agreement in this litigation, OAG indicated it had failed to conduct a proper search, suggesting there could be additional responsive

documents. (R.65 ¶ 8.) Stated simply, it was the filing of this action that spurred OAG to action—both to release the Agreement and to provide a supplemental, compliant response pursuant to court order.

Supreme Court properly rejected OAG's further argument that CEI already had obtained the Agreement before filing this action because the DC AG had released its copy "into the public domain by giving a copy to an entity with staff in common with petitioner." (OAG Br. at 11.) OAG's position fundamentally misinterprets the law and would undermine the purpose of FOIL should the Court adopt it. FOIL requires OAG 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* Public Officers 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, 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 (D.D.C. 2013).

2. Supreme Court based its decision on the full record.

OAG incorrectly claims that Supreme Court "overlooked" that OAG's appeals decision "clarified" that the Agreement was the only responsive record. Therefore, according to OAG, CEI need not have filed its lawsuit. (OAG Br. at 12.) As an initial matter, when OAG attached the Agreement to its motion to dismiss, OAG did not authenticate the document or specify its source. It was unclear whether the document was produced from OAG's own files or was simply a copy of the document produced by the DC AG and posted on a third-party website.

More fundamentally, and as OAG conveniently fails to mention, Supreme Court found that OAG had provided an incomplete response. (R.17.) In fact, Supreme Court

focused on OAG's inconsistent responses in its initial FOIL determination and its appeals decision. Compounding the problem, OAG had failed to perform a complete and diligent search for records that responded to the actual request made by CEI. In particular, throughout OAG's initial response, the records officer discussed ***records*** that it had located and was choosing to withhold. OAG's subsequent response to CEI's appeal then indicated there was "the" only responsive common interest agreement; it failed to explain this conflicting assertion or where in the response process the error had occurred. (*Id.*; R.43; R.57.) In addition to OAG's unexplained backpedaling, OAG's records officer indicated that he had conducted an inadequate search for responsive records. He had failed to search for common interest agreements that "mention or otherwise include" the individuals and entities listed in the FOIL request. OAG indicated that it had searched only for common interest agreements entered into *with* the listed individuals and entities. (R.65 ¶ 8.)

As a remedy, Supreme Court ordered OAG to provide a response that "fully complies with the intent and purpose of this disclosure statute." (R.18.) In this subsequent response, OAG finally conducted a diligent search and CEI received confirmation that OAG had produced the only record responsive to its FOIL request. (*See* R.124.)

Had CEI not litigated this Article 78 proceeding, there still would be a question as to (i) which other "records" OAG may have located but failed to produce, (ii) the source of the Agreement, specifically, whether OAG had produced the Agreement from its own files, and (iii) whether OAG has any common interest agreements that "mention or otherwise include" the individuals and entities listed in CEI's FOIL request.

Rather than take responsibility for its failure to adhere to its statutory duty to provide transparent governance, OAG tries to shift the blame for its sloppy response to Supreme Court. (*See* OAG Br. at 12 (claiming Supreme Court "overlooked" elements

of OAG's appeals decision as an explanation for Supreme Court's detailed order ruling against OAG).) Supreme Court analyzed the record in detail, awarded CEI the relief it sought, and correctly found that CEI substantially prevailed. OAG provides no sound reason to disturb Supreme Court's findings.

B. OAG did not meet its burden of showing it had a reasonable basis to withhold the Agreement.

OAG claimed four grounds for withholding the Agreement in its denial letter. It whittled the four grounds down to two in its appeals decision. Now, OAG claims just a single ground—the work product doctrine—as its basis for withholding the Agreement. Like the other FOIL exemptions abandoned by OAG, this one also fails.

Importantly, OAG fails to argue that it had a reasonable basis for its response. The response failed to comply with FOIL in significant respects, such as its inadequate records search and inconsistent and unexplained assertion of multiple responsive records, and it required CEI to expend resources litigating this proceeding. Thus, even if this Court agrees that OAG meets its burden of showing it had a reasonable basis to withhold the Agreement, no such basis exists for its other failures and CEI still meets the statutory requirements to recover fees.

1. The Agreement is not protected work product.

The work product exemption, like all exemptions to FOIL must be "narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption." *Matter of N.Y. State Defenders Ass'n*, 87 A.D.3d at 196 (internal quotation marks omitted). The law places a heavy burden on OAG "[t]o ensure maximum access to government documents" and promote "FOIL's policy of open government." *Id.* (internal quotation marks omitted).

The inapplicability of the work product exemption is facially evident from the release of the Agreement by the DC AG, another member of the Clean Power

Coalition. As in New York, the open-government law for the District of Columbia exempts attorney work product from disclosure. *See* D.C. Code § 2-534. The disclosure of the Agreement by the DC AG shows its position that the record is not work product. Although OAG argues that it only released the Agreement because the DC AG released its copy and the record was no longer protected once it was in the public domain, that does not change the fact that OAG had no reasonable basis to believe the Agreement was protected work product *at any time*. Just as the DC AG released the Agreement in response to a request, OAG should have released its own copy in response to CEI's FOIL request. The Agreement never qualified as work product—not before or after the DC AG released it.

OAG claims that the work product exception applied because the Agreement was prepared "in anticipation of state investigations and legal actions" by the signatory attorneys general. (OAG Br. at 13-14.) OAG fails to identify a single litigation for which the Common Interest Agreement was prepared. The Common Interest Agreement does not contain information specific to any current litigation or even to any potential targets of future litigation. OAG only notes vaguely that its records access officer identified an "ongoing investigation by OAG" (OAG Br. at 14), *i.e.*, a "pending investigation of ExxonMobil" (R.65), without providing any additional information. Moreover, OAG's assertion that the mostly standard-form Agreement "reflects the legal theories under which such actions are likely to proceed" is flatly contradicted by the Agreement itself. (*See* R.57.)

The work product exemption is "limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dept. 1980). It is not enough that the materials are prepared by an attorney; the materials must "contain his or her legal analysis, conclusions, theory, or strategy" to be protected from disclosure. *Geffner v. Mercy Med.*

Ctr., 125 A.D.3d 802, 802 (2d Dept. 2015); *see also Graf v. Aldrich*, 94 A.D.2d 823, 824 (3d Dept. 1983) (allowing discovery of letters drafted by attorney because work product "is a very narrowly construed concept" that includes "only materials prepared by an attorney, acting as an attorney, which contain his analysis and trial strategy"). The Agreement fails this standard.

OAG does not (and cannot) identify any specialized "learning and professional skills" or "legal analysis, conclusions, theory, or strategy" contained in the Agreement. Despite its unprecedented scope, many of the agreement's provisions utilize "standard language" that almost certainly has been used in countless similar agreements that are not exempt from disclosure. *See Fewer v. GFI Group Inc.*, 78 A.D.3d 412, 413 (1st Dept. 2010) ("work-product doctrine would not preclude discovery" of common-interest agreement). Although OAG claims it was reasonable based on federal case law for it to rely on the work product exemption, OAG does not cite a single New York case holding that a common interest agreement is protected work product; the only New York case it cites allows discovery of one. OAG nevertheless fails to explain why it was reasonable for it not to follow New York law. (*See* OAG Br. at 14.)

2. The common interest rule did not prevent waiver of any otherwise applicable work product protection.

OAG inaccurately claims that the sharing of the Agreement among the offices of the signatory attorneys general did not waive the work product protection. OAG stakes this position on the common-interest protection. (OAG Br. at 14.) "Like all privileges, the common interest rule is narrowly construed," and the party asserting the privilege bears the burden of showing that it applies. *AMP Servs. Ltd. v. Walanpatrias Foundation*, No. 106462/04, 2008 N.Y. Slip. Op. 33217(U), 2008 WL 5150654 (Sup. Ct., N.Y. County Dec. 1, 2008). 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 interests 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.*

As such, the Agreement is not exempt from disclosure by the common interest rule and is not a valid common interest agreement as understood under New York law. This conclusion is bolstered by its wide-ranging coverage. Rather than being limited to any specific subject or potential litigation, it covers numerous potential efforts in furtherance of the Clean Power coalition's political goals. The Agreement does not set forth the "legal theories" the signatories intended to advance, contrary to OAG's claim used to support its denial of CEI's FOIL appeal. (*See* R.57.) While one or more of the signatory attorneys general might be investigating the possibility of fraudulent statements by certain target companies and entities, OAG's repeated failure to identify any reasonably anticipated litigation in which the signatories are co-litigants can only be construed as an admission that there was none. In fact, the evidence shows that the coalition was formed to advance *political* ends. Throughout this litigation, OAG has not denied that its reason for withholding the Agreement was to hide the Clean Power Coalition's primarily political aims from public scrutiny.

3. No other grounds justify reversing the fee award.

Separately, OAG includes an irrelevant and ultimately inaccurate discussion of the purported compliance of its FOIL responses with the statute and the lack of a privilege log requirement. (OAG Br. at 15.) Neither is remotely relevant to Supreme Court's determination that CEI is entitled to fees because it substantially prevailed and

OAG had no reasonable basis to deny its FOIL request. First, Supreme Court never suggested OAG erred by failing to provide a privilege log. *Cf. id.* Next, OAG takes aim at Supreme Court's allegedly erroneous application of the legal standard when the court noted that OAG's FOIL response was conclusory and "parroted" the statutory language. Even if correct (and it is not), Supreme Court awarded fees as allowed by statute: CEI substantially prevailed because it obtained the relief to which it was entitled following commencement of this proceeding, and OAG had no reasonable basis to deny it access. No matter how they were phrased, OAG's initial response and appeal denial did not provide CEI with the responsive records to which it was entitled under FOIL.

II. Point II: Supreme Court's fee award was appropriate and should not be reduced.

The record contradicts OAG's argument that Supreme Court abused its discretion by awarding excessive fees. The abuse of discretion standard reflects that the trial court "is obviously in a far superior position to judge those factors integral to the fixing of counsel fees such as the time, effort and skill required; the difficulty of the questions presented; the responsibility involved; counsel's experience, ability and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation." *Shrauger v. Shrauger*, 146 A.D.2d 955, 956 (3d Dept. 1989). "[T]he trial court is not required to precisely spell out how it weighed the various factors making up the fee allowed." *Id.*

Following CEI's motion for attorneys' fees, Supreme Court issued a decision meticulously analyzing the issue and ultimately reducing the requested fees by nearly 25%. (R.6.) OAG does not challenge the number of hours factored into Supreme Court's fee award. It challenges only the hourly rate to the extent it exceeds $250 and, specifically, argues Supreme Court abused its discretion with respect to its weighing of just two issues—the fee customarily charged in the locality and the impact of OAG's

own conduct on the litigation cost. (OAG Br. at 17.)

A. Supreme Court did not abuse its discretion in allowing below-market rates that were above $250/hour.

On the first issue, as a state agency required to pay attorneys' fees when it fails its FOIL and certain other duties, OAG has an obvious interest in obtaining precedent imposing a hard cap of $250/hour. This Court should reject such a self-interested effort to undermine the multi-factor test that guides trial court discretion in favor of an across-the-board $250/hour cap. Such a cap would eviscerate the latitude provided trial courts to award fees as appropriate to the litigation. As Supreme Court observed, "an hourly rate alone is not determinative of what is a reasonable fee . . . how well a party articulates the issues and makes use of judicial resources, more likely than not, can be the more compelling factors." (R.11 n.5.) If an attorney knows in advance that her maximum recovery is capped at $250/hour no matter how challenging and time-consuming the case is and no matter how much experience she has, the pool of attorneys willing to accept complex litigation under FOIL and other fee-shifting statutes—and thus access to the judicial system by low- and middle-income individuals and small businesses—will be greatly reduced.

OAG admits that numerous courts have awarded fees above $250/hour for cases litigated in the Capitol District. (OAG Br. at 18-19.) Supreme Court properly exercised its discretion to do so here—with a reasoned analysis explaining why. It discussed the purpose of the attorneys' fee provision in FOIL: "'to create a clear deterrent to unreasonable delays and denials of access[and thereby] encourage every unit in government to make a good faith effort to comply with the requirements of FOIL.'" (R.9 (quoting *Matter of South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 931 (2d Dept. 2016), quoting *New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dept. 2011)).) Supreme Court set forth and analyzed the factors this Court has

identified as relevant to determining an appropriate fee award. (R.10 (quoting *Shrauger*, 146 A.D.2d at 956).) It examined the number of hours expended on the litigation, the type of work performed during those hours, and the hourly rate requested. (*Id.*) And it ultimately determined that certain hours should not be included in the award and another hourly rate should be reduced, despite finding that attorney had the "education, training and professional experience" to "amply support" the higher rate. (R.10-11.)

The hourly rates awarded by Supreme Court are at or below the hourly rates that CEI's attorneys charge in the market and have been awarded by other courts, and they also are below the hourly rate set forth in the Department of Justice's Laffey Matrix. (*See* R.150-151.) As such, those rates constituted "compelling evidence of a reasonable market rate." *Navigators Ins. Co. v. Sterling Infosystems, Inc.*, No. 653024/2013, 2016 N.Y. Slip. Op. 30609(U) (Sup. Ct., N.Y. County 2016) (internal quotation marks omitted). It was appropriate for Supreme Court to "use that rate to calculate the presumptively reasonable fee," without strict reliance on "the forum rule." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 193 (2d Cir. 2007).

A rate cap of $250/hour would have been counter-productive in this proceeding. While CEI might have selected counsel from the Capital District who bill $250/hour, those attorneys would have had to bill additional hours to learn the relevant background of CEI and the context of its FOIL request. CEI's FOIL request followed a politically driven subpoena issued to it in connection with the "Clean Power" campaign launched by OAG, with the intended purpose of intimidating and silencing CEI and others who might voice competing viewpoints on climate policy. *See supra* at 2. The loss of efficiency may have resulted in higher total fees. CEI relied on its own in-house counsel and experienced outside counsel with whom, as part of a multi-matter representation, it negotiated attorney billing rates significantly less than the rates those attorneys routinely charge paying clients and who were familiar with its operations and policy positions. (*See* R.150.) Given the discretionary nature of attorneys' fees in FOIL actions and the

uncertainty that CEI would recoup any of its legal fees, it would have made little sense for the non-profit organization to rely primarily on outside counsel rather than its own attorneys already on staff and those with whom it has previously worked and negotiated sub-market rates.

B. **OAG may not re-litigate the propriety of its response to reduce the fee award.**

OAG re-litigates its substantive compliance with FOIL in an effort to reduce fees, effectively arguing that it did nothing wrong. (OAG Br. at 19-20.) OAG claims it "fully complied with the statute in all of its FOIL responses, and had a reasonable basis for invoking the work product exemption to withhold the common interest agreement" as justification for its fee-reduction argument. (*Id.* at 19.) As discussed above at length, OAG is wrong on both counts. Supreme Court gave a detailed explanation of its reasoning and cited precedent for considering "tactics taken by a party which unnecessarily delayed resolution of the issues" in a fee award. (R.11 n.6 (internal quotation marks omitted); R.11-12.) In fact, this is OAG's third attempt to argue these issues; Supreme Court bluntly rejected OAG's second attempt as "precluded." (R.9.)

OAG also continues to claim that it only had an obligation to release the Agreement once the DC AG released it and it became part of the public domain. (*See* OAG Br. at 19-20.) CEI is not advocating for a rule requiring state agencies to periodically review all of their FOIL decisions in order to avoid having to pay attorneys' fees should circumstances have changed. Any suggestion otherwise is a red herring. OAG's failure began when it refused to release the Agreement in response to CEI's initial request; it should have conducted an appropriate search and fully complied with its duties under FOIL. The Agreement was no more work product at the time of CEI's FOIL request than it was after the DC AG released its version of the document in response to another entity's records request—because the DC AG rightly recognized

that it was not protected work product.

Ultimately, CEI submitted a modest lodestar request for fees that excluded all hours billed by its General Counsel and all hours related to its work on the motion requesting attorneys' fees. Supreme Court appropriately balanced the relevant factors and awarded fees in a reduced amount. OAG provides no sound reason to disturb that ruling on appeal.

CONCLUSION

For the foregoing reasons, Supreme Court's judgment awarding attorneys' fees and costs should be affirmed and CEI should be awarded attorneys' fees and costs for this appeal.

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