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. Cmty. 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).

[2] Harry A. Hammitt, et al., *Litigation Under the Federal Open Government Laws* (25th ed. 2010) at pg. 224.

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, 1279–1280 (1990); *Russo v. Nassau Cty. Cmty. 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").

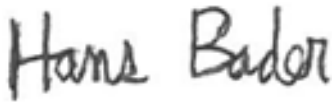
Even if attorney-client privilege or attorney work-product could otherwise encompass a common interest agreement of the sort at issue in this FOIL request, the conclusory nature of the privilege claim contained in the June 15 letter fails to meet the burden of proving that it was privileged. *See, e.g., 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)

The assertion of privilege is also overbroad in its application to common interest agreements or provisions dealing with public relations (such as those related to the March 29 multistate attorney general press conference held by New York Attorney General Eric Schneiderman and others, in relation to a common interest agreement). Neither attorney-client privilege, nor attorney work product, nor any "common-interest" privilege, would cover records related to public relations -- even during litigation, or as part of an investigation. *See, e.g., Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. 2013) (rejecting application of the privilege to protect against discovery of emails sent or received from a public relations firm the plaintiff had hired, among other things, to assist his counsel with the case, to develop and implement a global media strategy, and to manage crisis communications); *Haugh v. Schroder Investment Management*, 2001 U.S. Dist. LEXIS 14586 (S.D.N.Y. 2003) (rejecting attorney client privilege for communications with public relations expert); *Ebin v Kangadis Food, Inc.*, No. 13-cv-2311, 2013 WL 6085443 (S.D.N.Y. Nov. 12, 2013); *Scott v. Chipolte Mexican Grill Inc*., 2015 WL 1424009, *3 (S.D.N.Y.2015); *Calvin Klein Trademark Trust v. Wachner,* 198 F.R.D. 53, 54–55 (S .D.N.Y.2000); *Fine v. ESPN, Inc.,* 2015 WL 3447690, *11 (N.D.N.Y.2015); and *McNamee v. Clemens,* 2013 WL 6572899, *1, 6 (E.D.N.Y.2013).

Similarly, communications related to public relations are not covered by the other privileges cited in denying our FOIL request.[3]

Sincerely,



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

[3] *See, e.g., Fox News Network v. Dept. of Treasury*, 911 F.Supp.2d 261, 279 (S.D.N.Y. 2012) (holding agency's draft response to press inquiry unprotected by deliberative process privilege subsumed in the "inter-agency" memorandum exception); *National Day Laborer Organizing Network v. U.S. Immigration and Customs*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011).

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

MICHAEL JERRY
ASSISTANT ATTORNEY GENERAL
RECORDS ACCESS OFFICER

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 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.

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