

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.

RECORD ON APPEAL

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**NEW YORK SUPREME COURT
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 Law and Rules

-against-

NYS OFFICE OF THE ATTORNEY GENERAL,

Respondent-Appellant.

STATEMENT UNDER RULE 5531

1. The above captioned CPLR Article 78 proceeding is identified as Index Number 05050-16 in the Supreme Court, County of Albany.
2. The names of the parties are stated in full in the above caption, and there have been no changes therein. (The title as shown above is correct).
3. This proceeding was commenced in Supreme Court, Albany County, by the filing of a notice of petition and verified petition on August 31, 2016, with a supporting affidavit and exhibits.
4. The verified petition requests an order: (a) declaring that the records requested in petitioner's Freedom of Information Law request are public records and, as such are subject to release under New York's Freedom of Information Law; (b) directing respondent to produce the requested records to petitioner within 5 business days of the date of the order; (c) awarding petitioner attorney's fees and costs reasonably incurred in this case in an amount to be

determined at the conclusion of this proceeding; and (d) granting petitioner such other and further relief as the Court may deem just and proper.

5. On or about September 30, 2016, respondent filed and served a notice of motion to dismiss.
6. On or about October 25, 2016, petitioner filed and served an affidavit in opposition with exhibits.
7. By decision and order dated November 21, 2016, Supreme Court, Albany County (Zwack, J.), ordered respondent to issue a new response to petitioner's Freedom of Information Law request, within 30 days, and stated that petitioner may within 60 days submit their application for attorney fees and costs.
8. On or about December 21, 2016, respondent filed and served an affirmation with a supplemental response to petitioner's Freedom of Information Law request.
9. On or about January 19, 2017, petitioner filed and served a notice of motion for attorney's fees and litigation costs.
10. On or about March 3, 2017, respondent filed and served an affirmation in opposition to attorney fees with exhibits.
11. By decision and order dated April 19, 2017, and entered in the office of the Albany County Clerk on April 27, 2017, Supreme Court issued a final judgment in the proceeding, ordering respondent to pay petitioner the sum of \$20,377.50 as counsel fees, with \$466.72 in litigation costs.
12. The notice of appeal is from Supreme Court's final judgment.
13. This appeal is on a full printed record.

Notice of Appeal, dated May 19, 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,
Petitioner,

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

-against-

NYS OFFICE OF THE ATTORNEY GENERAL,

Respondent.

NOTICE OF APPEAL

Index No. 5050-16
RJI 01-16-ST8116

Zwack, J.


PLEASE TAKE NOTICE that Respondent NYS Office of the Attorney General hereby appeals to the Appellate Division of the Supreme Court for the Third Judicial Department from the April 19, 2017 Decision/Order of the Hon. Henry Zwack, A.J.S.C., entered in the office of the Albany County Clerk, Albany, New York on April 27, 2017.

This appeal is taken from each and every part of said April 19, 2017 Decision/Order of Hon. Henry Zwack, A.J.S.C. as well as the whole thereof.

Dated: Albany, New York
May 19, 2017

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
*Attorney for Respondent NYS Office of the
Attorney General*

The Capitol
Albany, New York 12224-0341

By: 
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,
Petitioner,

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

AFFIDAVIT OF SERVICE

-against-

Index No. 5050-16

NYS OFFICE OF THE ATTORNEY GENERAL,
Respondent.

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

BETH VANDEREHEYDEN, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for Respondents NYS Office of the Attorney General, herein.

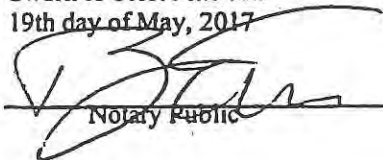
On May 19, 2017, I served the annexed Notice of Appeal upon the following individual, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a U.S. Mail box in the City of Albany, a depository under the exclusive care and custody of the United States Postal Service, directed to the said counsel for petitioner at the address designated by them for that purpose, as follows:

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Peter B. Shapiro, Esq.
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Beth Vandereheyden
BETH VANDEREHEYDEN

Sworn to before me this
19th day of May, 2017


Notary Public

BRITTANY ERICSEN
Notary Public, State of New York
Reg No. 01ER6308680
Qualified in Saratoga County
Commission Expires July 28, 20 18

Decision and Order, dated April 19, 2017

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

All Purpose Term

Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 01-16-ST8116 Index No. 5050-16

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ORIGINAL

DECISION/ORDER

Zwack, J.:

In this CPLR Article 78 proceeding involving a request pursuant to the Freedom of Information Law (Public Officers Law Article 6 - "FOIL") by petitioner Competitive Enterprise Institute ("CEI") for the production of documents by respondent Attorney General, by a decision and order dated November 21, 2016 the Court determined that the petitioner had substantially prevailed and that respondent had failed to fully explain the reason for denial of access and also failed to detail its search for the requested information (Common Interest Agreement - "CIA"). The Court rejected the respondent's conclusory assertions that the subject records fell within a statutory exemption, directed the respondent to provide within 30 days a response "that fully complies with the intent and purpose" of FOIL, and permitted the petitioner to make an application for fees and costs within 60 days — with a response by respondent within 30 days following — with the Court to schedule a hearing on the issue upon the request of either party.¹

On December 21, 2016, respondent provided a supplemental response to petitioner's FOIL request,² stating that after conducting a diligent search it found only one record responsive to the request. Respondent again asserted that the subject document (CIA) was exempt from disclosure "for one or more" of four different exemptions, without specifying

¹Neither party requested a hearing on the issue of fees.

²Affirmation by Michael Jerry, Esq., dated December 21, 2016.

which of the asserted exemptions applied or why, and, after determining that the document was in the public domain since August 2016, it provided the document (without waiving the applicability of the asserted exemptions) to the petitioner.

Now, petitioner moves for an order awarding attorney fees of \$26,901.25 and costs of \$466.72, and in support offers an affirmation by CEI attorney Anna St. John, together with supporting documentation including her time entries; and billing statements from Baker & Hostetler, together with copies of biographies of its primary attorneys working on the matter (Mark Bailen and Elizabeth Schutte). In support of the requested award, petitioner argues that if it had not litigated this FOIL request, there would still be questions as to whether other records in response to its request. It also asserts that respondent never identified the actual exemption it was claiming privilege under, and only turned over the CIA document following the Court's decision and then only because it was by then in the public domain.

Respondent opposes the petitioner's application for an award of fees, in sum arguing that petitioner did not substantially prevail in this Article 78 proceeding, that it articulated a reasonable basis for denying access to the requested information, and that petitioner's fee request is excessive and unreasonable. Respondent argues that petitioner failed to support the qualifications of its non-attorneys working on matter, that the hourly rates for the attorneys are overstated/excessive and not consistent with fees customarily charged in the locality, and includes billings for "excessive, duplicative or unnecessary to the conduct of

this litigation.”³

Here, absent a request to reargue or renew (CPLR 2221) — which is not before the Court — there is no purpose served by respondent’s instant attempt to argue that petitioner failed to substantially prevail or that petitioner has not met the statutory requirements to be entitled to an award of fees and costs under FOIL. The Court determined both issues in the November-21, 2016 decision and order — including rejecting respondent’s “conclusory assertions that certain records fall within a statutory exemption” and also its argument that it had substantially complied with petitioner’s FOIL request — and thus law of the case now precludes any further examination of either argument (*Martin v City of Cohoes*, 37 NY2d 162, 165 1975)).

In determining an award of fees and costs in a FOIL proceeding, the Court is mindful “that the decision whether to award such fees is discretionary even when the statutory prerequisites have been established” (*Matter of Carnevale v City of Albany*, 68 AD3d 1290, 1293 [3d Dept 2009]), that an “award of attorney’s fees is intended to ‘create a clear deterrent to unreasonable delays and denials of access[and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL’ ” (*Matter of South Shore Press, Inc. v Havemeyer*, 136 AD3d 929, 931 [2d Dept 2016], quoting *New York Civil Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338 [3d Dept 2011]); and that the award should be should be reasonable and take into consideration

³For example, it argues that petitioners’s use of both in house and outside counsel resulted in duplicative and unnecessary work in responding to respondent’s essentially straightforward motion to dismiss, pointing to St. John expending 25 hours, plus Baker & Hostetler expending additional hours in opposition to a six page motion.

appropriate factors including “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 AD2d 955, 956 [3d Dept 1989]).

From attorney St. John’s affidavit, it appears that petitioner CEI’s attorneys expended 58.75 hours, supported by 17.25 hours of paralegal and paraprofessional, and now seeks legal fees of \$16,425 for only the 36.5 hours expended by St. John, with an requested hourly rate of \$450. St. John tells the Court that she is paid on a salary basis by CEI (without stating her salary), and that when she was employed in 2014 at another firm her billing rate exceeded \$450 per hour. Although St. John’s education, training and professional experience⁴ could amply support a billing rate of \$450, the Court notes that she was supervised by CEI’s general counsel, that Baker & Hostetler also represented CEI, and accordingly reduces her hourly rate to \$300 and more in line with an hourly rate for an associate. On the issue of the number of hours expended by St. John, in the Court’s view the hours are reasonable and to the extent that some of her work paralleled the work performed by Baker & Hostetler, it was not neither excessive or inappropriate.

Turning to the billings submitted by Baker & Hostetler, the Court declines to award fees for the hours expended by its paralegals and paraprofessionals. Petitioner offered no supporting documentation for the Court, beyond speculation, to make any determination on

⁴The same hourly rate was also approved by another court (*In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. C 07-05634 CRB, 2015 U.S. Dist. LEXIS 106943 (N.D. Cal. Aug 13, 2015)).

their training and experience and thus determine an appropriate hourly rate. Turning to the rates charged for the principal attorneys, Bailen and Schutte, each is well supported by their respective education, training and extensive professional experience. A review of the time charged by the attorneys (22.5 hours for Bailen, 6.25 hours for Schutte) shows it to be reasonable and reflective of the nature and quality of the work performed.⁵ Albeit respondent proposes that the Court cap the attorney's hourly rate at no more than \$250 — arguing that “local courts have recognized, prevailing rates even for experienced attorneys in the Capital District are far lower than rates charged Petitioner by its New York City - and D.C. - based counsel” — the Court is not so inclined. Here, respondent was well aware that petitioner was represented by “New York City - and D.C.- based counsel” and also that the CIA document was in the public domain as early as August 2016. Thus, throughout, it was entirely within respondent's ability to control or limit everyone's costs — including the use of the Court's limited resources — by simply providing the CIA document before petitioner was compelled to commence the Article 78 proceeding, and certainly provide confirmation that there were no other responsive documents before being directed by the Court to provide a response that fully complied with FOIL.⁶ On this record, and particularly towards

⁵This Court, depending on the matter, has approved hourly rates for partners and associates in the range of \$275 to \$450, including the higher rates in more complex matters including matrimonials, and lower rates in more straightforward real property and foreclosure actions. In any event, 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...

⁶Factors integral to an award of fees can include tactics taken by a party “which unnecessarily delayed resolution of the issues” (*Siegal Law Offs., LLC v Tulin*, 32 AD3d596, 597 [3d Dept 2006]).

encouraging respondent to make a good faith effort in complying with FOIL, the Court declines respondent's request to reduce an already discounted hourly rate. Any less would be counterproductive and unreasonable under the circumstances.⁷

However viewed, petitioner was entitled to a straightforward response by respondent — whether “to disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search” (*Matter of Legal Aid Socy. v New York State Dept. Of Corr. & Community Supervision*, 105 AD3d 1120, 1124 [3d Dept 2013], internal quotations and citations omitted). Instead, in the Court's view, respondent stonewalled, and as noted in the November 2016 Decision and Order baldly “asserted that the records fell within ‘one or more’ of five possible exemptions...(and completely failed) its obligation to ‘fully explain in writing...the reason for the denial of access’” (citing *Matter of West Harlem Bus. Group v Empire state Dev. Corp.*, 13 NY3d 882, 884 [2009]). Thus, on account of respondent's failure to either turn over the requested documents, or identify the applicable exemption and that the material requested fell squarely within that exemption (*Matter of Carnevale* 68 AD3d at 1292), petitioner was required to commence this Article 78 petition. It substantially prevailed, and it was only through the use of judicial process that it was able to obtain the required disclosure. Further, given respondent's continued failure “to proffer

⁷Petitioner is seeking an award of fees for a total of 59 hours expended by both St. John ad Baker & Hostetler, hardly an excessive request in the matter and not disproportionate to the 40.82 hours approved a matter respondent cites in opposition (*Matter of Chiaroscuro Foundation v New York State Department of Health*, Albany County Index No. 3252-13 [Decision and Order dated June 30, 2016, Hartman, J.]).

more than conclusory assertions” as a basis for withholding the subject record (*Matter of Jaronczyk v Mangano*, 121 AD3d 995, 996 [2d Dept 2014]) — and then only producing it after it was in the public domain — the Court’s award of substantial attorney fees is particularly appropriate “in order to promote the purpose and policy behind FOIL” (*Matter of South Shore Press, Inc.* 136 AD3d at 931).


For all of the above, the Court approves an hourly rate for St. John of \$300, and for the 36.5 hours expended awards the sum of \$10,990. For Baker & Hostetler, the Court approves an hourly rate of \$450 for Bailen and hourly rate of \$350 for Schutte, and awards fees of \$9,387.50 (\$12,476.25 less \$3,088.75 for paralegals and paraprofessionals).

Accordingly, it is

ORDERED and ADJUDGED, that respondent shall pay to the petitioner the sum of \$20,377.50 as counsel fees, with \$466.72 in litigation costs, all within 30 days from the notice and entry of this decision and order.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the petitioners for filing and entry. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: April 19, 2017
Troy, New York


Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Amended Notice of Motion dated January 25, 2017; Affirmation of Anna St. John, Esq., dated January 17, 2017, together with Exhibits "1" through "4". Memorandum of Law by Mark I. Bailen, Esq., dated January 19, 2017;
2. Affirmation of Shannan C. Krasnokutski, Esq., dated March 3, 2017, together with Exhibits "A" through "E"; Memorandum of Law by Shannan C. Krasnokutski, Esq. dated March 3, 2017;
3. Reply Memorandum of Law by Mark I. Bailen, Esq., dated March 9, 2017.

Decision and Order, dated November 21, 2016

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

ORIGINAL

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJ: 01-16-ST8116 Index No. 5050-16

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Albany, New York 12224-0341

DECISION/ORDER

Zwack, J.:

Petitioner Competitive Enterprise Institute (CEI) brings this Article 78 seeking an order compelling Respondent New York State Attorney General to comply with its request under the Freedom of Information Law (FOIL). In addition to seeking compliance, petitioner also seeks an award of attorneys fees and costs. Respondent has moved to dismiss the petition as moot, arguing that the publication of the one document it deems responsive to petitioner's FOIL request — the Climate Change Coalition Common Interest Agreement ("CIA") — and also that it found "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," renders the petition moot, as petitioner's have received all the relief they are entitled to.

When a FOIL request is made, an agency is "duty-bound to conduct a 'diligent search' of the records in its possession responsive to the request and to state, in writing the reason for the denial of access" (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882,884 [2009], internal quotations and citations omitted). The response "must not 'merely parrot' the statutory language of the FOIL exemptions, but must 'adequately describe the documents withheld and set forth the reasons for withholding them.'" (*Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.*,

141 AD3d 997, 999 [3d Dept 2016]), internal quotations and citations omitted). When faced with an Article 78 challenge such as this, “the agency bears the burden of ‘articulating a particularized and specific justification for denying access’” (*Matter of Rose v Albany County Dist. Attorney’s Off.*, 111 AD3d 1123, 1125 [3d Dept 2013]), quoting *Matter of Kaufman v New York State Dept. Of Envtl. Conservation*, 289 AD2d 826, 827 [2001]). Petitioner asserts that respondent failed to give the required detail of its search, as its original denial letter made reference to the existence of records. Petitioner also points out — although the respondent now relies on the release by a third party of the CIA report — respondent remains obligated to produce the document for petitioners. Petitioners also request a finding by the Court that the CIA is a public document and respondents lacked a reasonable basis in the law for withholding it, which would entitle them to attorneys fees and costs on this Article 78.

There is a clear discrepancy between respondent’s initial FOIL request determination and the answer it submits in this Article 78. Initially, respondent indicated it had “records responsive to your request” — withheld without any description of the documents — and now identifies only “one document potentially responsive to the Request.” The Court agrees with petitioner that respondent must provide more detail regarding its search for common interest agreements “that mention or otherwise include” the individuals and entities specified in petitioner’s request. Further, in denying the request, respondent has the burden of demonstrating the records fall within one of the statutory exemptions (*Matter of*


Washington Post Co. v New York State Ins. Dept., 61 NY2d 557[1984]). In its initial denial of petitioner's request, petitioner asserted that the records fell within 'one or more' of five possible exemptions. However viewed, the denial was nothing more than a parroting of statutory language, and thus a complete failure of its obligation "to fully explain in writing...the reason for the denial of access" (*Matter of West Harlem Bus. Group*, 885).

Turning to the application by petitioner for attorneys fees and costs (Public Officers Law 89[4][c]), although respondent argues that it should not be subject to attorney fees and costs because it substantially complied with the petitioner's request, on this record the Court finds that this was simply not the case. Here, petitioner has substantially prevailed and respondent's "conclusory assertions that certain records fall within a statutory exemption are not sufficient" (*Matter of Acme Bus Corp. v County of Suffolk*, 136 AD3d 896, 898 [2d Dept 2016]) to deny access.

Accordingly, the subject FOIL request is referred back to the Attorney General for a response, within 30 days, that fully complies with the intent and purpose of this disclosure statute. Petitioners may within 60 days submit their application for attorney fees and costs on notice to respondent, who shall have the ability to submit a written response within 30 days following, with the Court to schedule a hearing, on request of either party, on the issue.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the Petitioner (Elizabeth Schutte, Esq., of counsel) for filing and entry. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: November 21, 2016
Troy, New York


Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated August 31, 2016; Verified Petition sworn to August 26, 2016; Affidavit of Hans Bader sworn to August 26, 2016 together with Exhibits "1" through "4";
2. Notice of Motion dated September 30, 2016; Affirmation of Michael Jerry, Esq., dated September 30, 2016, together with Exhibits "A" and "B"; Memorandum of Law dated September 30, 2016.
3. Affirmation of Elizabeth M. Schutte, Esq., dated October 25, 2016; Memorandum of Law, dated October 25, 2016..

Notice of Petition, dated August 31, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

Index No. 05050-16

COMPETITIVE ENTERPRISE INSTITUTE,
Petitioner,

-against-

NOTICE OF PETITION

THE ATTORNEY GENERAL OF NEW YORK,
Respondent,

ORAL ARGUMENT REQUESTED

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

RECEIVED
AUG 31 11 51 AM '16

PLEASE TAKE NOTICE that upon the accompanying Verified Petition and the Affidavit of Hans Bader, Esq., dated August 26, 2016, and the exhibits annexed thereto, Petitioner Competitive Enterprise Institute will move this Court at the Supreme Court of New York, Albany County, New York, located at 16 Eagle Street, Albany, New York, on October 7, 2016, at 9:30 a.m., or as soon thereafter as counsel may be heard, for a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules to compel compliance by the respondent Attorney General of New York with the New York Freedom of Information, Public Officers Law §§ 84-90 ("FOIL"), and to compel production under a records request made by Petitioner, and granting such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 7804(c), answering papers, if any, are to be served upon the undersigned at least five (5) days prior to the return date and any reply papers shall be served at least one (1) day prior to the return date.

NYS DEPARTMENT OF LAW
RECEIVED BY PERSONAL SERVICE
AT 11:10 O'CLOCK A.M. 8/31/2016

SIGNED: H. Collins
OFFICE OF LEGAL RECORDS

PLEASE TAKE FURTHER NOTICE that Petitioner requests oral argument.

Dated: New York, New York
August 31, 2016

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Respectfully submitted,

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Counsel for Petitioner

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Verified Petition, dated August 31, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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.

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

Sam Kazman
Anna St. John
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, DC 20005
Telephone: (917) 327-2392
Email: Sam.kazman@cei.org
Email: Anna.stjohn@cei.org

Respectfully submitted,

BAKER & HOSTETLER LLP


Mark I. Bailen

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Counsel for Petitioner

VERIFICATION

DISTRICT OF COLUMBIA) ss

Sam Kazman, being duly sworn, deposes and says-

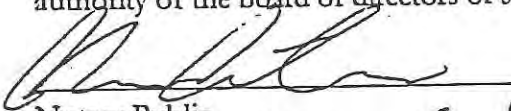
I am the General Counsel of the Competitive Enterprise Institute, Petitioner in the above-captioned action. I have reviewed the foregoing Petition and know the contents thereof to be true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those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



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.

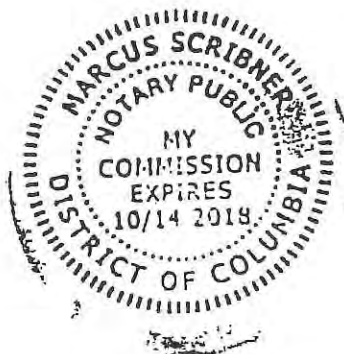


Notary Public

Printed Name: Marcus Scribner

My Commission Expires:

October 14, 2018



Supporting Affidavit of Hans Bader, dated August 26, 2016

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. 05050-16

AFFIDAVIT OF Hans Bader

DISTRICT 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").

10-16-16 10:30:00

NEW YORK DEPARTMENT OF LAW
 REGISTRY OF PERSONAL SERVICE
 AT 11:30 O'CLOCK A.M. 8/31 2016
 SIGNED: [Signature]
 OFFICE OF LEGAL RECORDS

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, appealing 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.

Hans Bader
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.

Marcus Scribner

Notary Public

Printed Name: Marcus Scribner

My Commission Expires: October 14, 2018

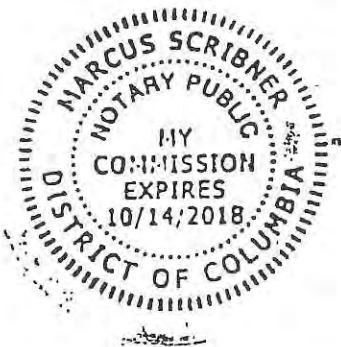


Exhibit 1 – FOIL Request, dated May 5, 2016



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.

Responsive 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

¹ Print examples include e.g., Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, WASHINGTON TIMES, Apr. 30, 2011, at A1; Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, NEW YORK POST, Jan. 6, 2013, at 23; Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, WASHINGTON TIMES, Apr. 9, 2013, at A4; Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, WASHINGTON TIMES, Apr. 2, 2013, at A1; Dinan, "Researcher: NASA hiding climate data", WASHINGTON TIMES, Dec. 3, 2009, at A1; Dawn Reeves, *EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013; Dinan, *EPA's use of secret email addresses was widespread: report*, WASHINGTON TIMES, Feb. 13, 2014. See also, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.UL0aPYf7L9U>; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013; *The FOIA coping response in climate scientists*, WATTS UP WITH THAT, Jan. 21, 2014; *Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science*, WATTS UP WITH THAT, Feb. 17, 2014; *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012; *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks*, WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled*, WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013; *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP

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*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013.

Exhibit 2 – FOIL Denial, dated June 15, 2016



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.

Mr. Hans Bader
June 15, 2016
Page 2

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,

Mr. Hans Bader
June 15, 2016
Page 4

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 – FOIL Appeal, dated June 21, 2016



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

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.

Mr. Hans Bader
June 15, 2016
Page 3

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,

Mr. Hans Bader
June 15, 2016
Page 4

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 – FOIL Appeal Determination,
dated July 7, 2016



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

APPEALS AND OPINIONS BUREAU

Telephone (518) 776-2009

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:

I write in response to your June 21, 2016 administrative appeal letter in the above-referenced Freedom of Information Law (FOIL) matter.

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.

Mr. Bader
Appeal of FOIL # 160290
Page 2

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.¹ 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.

Mr. Bader
Appeal of FOIL # 160290
Page 3

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,

A handwritten signature in cursive script, appearing to read "Kathryn Sheingold", is written over a dashed horizontal line.

KATHRYN SHEINGOLD
Records Appeals Officer

Cc: Committee on Open Government
OAG Records Access Officer

Notice of Motion to Dismiss, dated September 30, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

NOTICE OF MOTION

Index No. 05050-16

PLEASE TAKE NOTICE that Respondent Attorney General of the State of New York, by its attorney, Eric T. Schneiderman (Kelly L. Munkwitz and Shannan C. Krasnokutski, Assistant Attorneys General, of counsel), interposes the following objections in point of law to the Petition:


Petitioner's claims are moot. CPLR 3211(a)(7); CPLR 7804(f).

PLEASE TAKE FURTHER NOTICE that upon the annexed Affirmation of Michael Jerry, Assistant Attorney General, Records Officer, dated September 30, 2016, with all accompanying Exhibits, and the annexed Memorandum of Law, Respondent Attorney General of the State of New York will move at a Special Term of the Supreme Court, held in and for the County of Albany, at the Albany County Courthouse, Albany, New York on October 7, 2016 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order dismissing the Petition pursuant to CPLR §§ 3211(a)(7), and alternatively, in the event that the motion is denied, in

whole or in part, for leave pursuant to CPLR 7804(f) to serve an answer, within thirty days after service of a copy of the Court's Decision and Order with Notice of Entry, and for such other relief as may be just and proper.

Dated: Albany, New York
September 30 2016

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224-0341

By: 
Kelly L. Munkwitz
Assistant Attorney General, of counsel
Telephone: (518) 776-2626
Fax: (518) 915-7738 (Not for service of papers)
Email: Kelly.Munkwitz@ag.ny.gov

Shannan C. Krasnokutski
Assistant Attorney General, of counsel
Telephone: (518) 776-2606
Fax: (518) 915-7738 (Not for service of papers)
Email: Shannan.Krasnokutski@ag.ny.gov

TO: BAKER & HOSTETLER LLP
Counsel for Petitioner
Mark I. Bailen, Esq.
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 861-1500
mbailen@bakerlaw.com

Elizabeth M. Schutte, Esq.
45 Rockefeller Plaza
New York, New York 10111-0100
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eschutte@bakerlaw.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,
Petitioner,

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

-against-

NYS OFFICE OF THE ATTORNEY GENERAL,
Respondent.

**AFFIRMATION OF
SERVICE**

Index No. 5050-16

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

Shannan C. Krasnokutski, an attorney admitted to practice in the State of New York and an Assistant Attorney General, of counsel in this matter to Eric T. Schneiderman, Attorney General of the State of New York, attorney for Respondent NYS Office of the Attorney General, affirms the following under penalty of perjury pursuant to CPLR 2106:

On September 30, 2016, I served the annexed Notice of Motion, Affirmation of Michael Jerry with Exhibits A and B, and a Memorandum of Law in Support of Respondent's Motion to Dismiss upon the following individuals, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a post office box in the City of Colonie, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said party at the address theretofore designated for that purpose, as follows:

Mark I. Bailen, Esq.
BAKER & HOSTETLER, LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036

Elizabeth M. Schutte, Esq.
BAKER & HOSTETLER, LLP
45 Rockefeller Plaza
New York, New York 10111-0100

Dated: Albany, New York
October 3, 2016


Shannan C. Krasnokutski

Affirmation of Michael Jerry, dated September 30, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

AFFIRMATION

Index No. 05050-16

Michael Jerry, an attorney admitted to practice in the State of New York, affirms the following to be true under penalty of perjury pursuant to CPLR 2106:

1. I am Assistant Counsel and the Records Access Officer in the Office of Eric T. Schneiderman, Attorney General of the State of New York ("OAG"). In my capacity as Records Access Officer, I am responsible for (a) the review of requests received by the OAG for documents or information pursuant to New York's Freedom of Information Law, Public Officers Law §§ 84-89 ("FOIL"); (b) the initial determination of the OAG's legal obligations with respect to such requests; (c) the coordination of the collection and preparation for production of documents responsive to such requests; and (d) production of required responses. I am fully familiar with the facts and documents described in this Affirmation, and I make this Affirmation in support of Respondent's Motion to Dismiss the Petition.

2. This proceeding arises from Petitioner's challenge to Respondent's denial of a request for records pursuant to FOIL.

3. On or about May 5, 2016, a request bearing that date from Petitioner, Competitive

Enterprise Institute ("CEI") (Exhibit 1 to the Petition, the "Request") was referred to me for review. I promptly reviewed the Request, which was assigned the identifying number of "FOIL 160290".

4. The Request described CEI's purpose and function, stating as follows:

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 policy makers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Petition Exh. 1, at 1.

5. The Request further described the records sought from the OAG as follows:

... 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, 2016 through the date you process this request, inclusive.¹

Petition Exh. 1, at 1-2.

6. Finally, the Request described the purposes for which CEI sought the requested records:

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

¹ The original Request indicated that the commencement date for the specified period was "January 1, 2015." On May 10, 2016, the OAG received a revised Request, which corrected that typographical error.

agenda.

Petition Exh. 1, at 2.

7. Based on the content and subject matter of the Request, I determined that responsive records, if any, would reside with attorneys involved in the OAG's pending investigation of ExxonMobil Corporation (Exxon).

8. The search produced one document potentially responsive to the Request. That document was titled "Climate Change Coalition Common Interest Agreement." A copy of that document, hereafter referred to as the "Climate Common Interest Agreement" is attached hereto as Exhibit A. The search produced no documents responsive to that portion of the request seeking a Common Interest Agreement with the non-State individuals and entities listed in the Request.

9. Generally speaking, Common Interest Agreements for active matters are exempt from FOIL for each of the following reasons:

- a. Pursuant to New York Public Officers Law § 87(2)(a), which provides a FOIL exemption for records "specifically exempted from disclosure by state or federal statute" Under that provision, Common Interest Agreements are exempt both as confidential communications between attorney and client pursuant to C.P.L.R. § 4503(a), and as attorney work product under C.P.L.R. § 3101(c);
- b. Pursuant to New York Public Officers Law § 87(2)(e)(1), because generally speaking, Common Interest Agreements are "compiled for law enforcement purposes and . . . if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings . . . "; and
- c. Pursuant to New York Public Officers Law § 87(2)(g), as "inter-agency or intra-agency materials"

10. I reviewed the Climate Common Interest Agreement and determined that it was exempt from disclosure pursuant to FOIL because the agreement pertained to an active investigation. As noted above, it was exempt pursuant to Public Officers Law §§ 87(2)(a),

87(2)(e)(1) and 87(2)(g).

11. Based upon my analysis and review of applicable exemptions, on June 15, 2016, I denied Petitioner's Request. *See* Petition Exh. 2. My June 15, 2016 letter summarized all of the exemptions applicable to the Climate Common Interest Agreement.

12. On June 21, 2016, Petitioner administratively appealed from the denial of its Request, via a letter to Kathryn Sheingold, Records Appeal Officer for the OAG Division of Appeals and Opinions. *See* Petition Exh. 3.

13. On July 7, 2016, Ms. Sheingold issued a letter to Petitioner upholding the denial of Petitioner's Request. *See* Petition Exh. 4.

14. Upon information and belief, on or about August 4, 2016, the Office of the Attorney General for the District of Columbia released a full copy of the Climate Common Interest Agreement to the Energy & Environment Legal Institute ("E&E"), an entity that has staff in common with CEI. E&E then posted a copy of the Climate Common Interest Agreement to its website on August 4, 2016. A copy of the accompanying press release posted to E&E's website on August 4, 2016 is attached hereto as Exhibit B. Upon further information and belief, the Climate Common Interest Agreement has been publicly available since on or about August 4, 2016.

15. Insofar as (a) the Climate Common Interest Agreement was the only document identified as responsive to Petitioner's May 5, 2016 Request; and (b) the Climate Common Interest Agreement is now publicly available, Petitioner now has received all the relief to which it could be entitled under FOIL, New York Public Officers Law §§ 84-90. *See* accompanying Memorandum of Law. As such, this proceeding is moot, and Respondent respectfully requests the Petition be dismissed.

Dated: Albany, New York
September 30, 2016



Michael Jerry

Exhibit A – Climate Change Coalition Common Interest
Agreement

CLIMATE CHANGE COALITION COMMON INTEREST AGREEMENT

This Common Interest Agreement (“Agreement”) is entered into by the undersigned Attorneys General of the States, Commonwealths, and Territories (the “Parties”) who are interested in advancing their common legal interests in limiting climate change and ensuring the dissemination of accurate information about climate change. The Parties mutually agree:

1. Common Legal Interests. The Parties share common legal interests with respect to the following topics: (i) potentially taking legal actions to compel or defend federal measures to limit greenhouse gas emissions, (ii) potentially conducting investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change, (iii) potentially conducting investigations of possible illegal conduct to limit or delay the implementation and deployment of renewable energy technology, (iv) potentially taking legal action to obtain compliance with federal and state laws governing the construction and operation of fossil fuel and renewable energy infrastructure, or (v) contemplating undertaking one or more of these legal actions, including litigation (“Matters of Common Interest”).
2. Shared Information. It is in the Parties’ individual and common interests to share documents, mental impressions, strategies, and other information regarding the Matters of Common Interest and any related investigations and litigation (“Shared Information”). Shared Information shall include (1) information shared in organizing a meeting of the Parties on March 29, 2016, (2) information shared at and after the March 29 meeting, pursuant to an oral common interest agreement into which the Parties entered at the meeting and renewed on April 12, 2016, and (3) information shared after the execution of this Agreement.
3. Legends on Documents. To avoid misunderstandings or inadvertent disclosure, all documents exchanged pursuant to this Agreement should bear the legend “Confidential – Protected by Common Interest Privilege” or words to that effect. However, the inadvertent failure to include such a legend shall not waive any privilege or protection available under this Agreement or otherwise. In addition, any Party may, where appropriate, also label documents exchanged pursuant to this Agreement with other appropriate legends, such as, for example, “Attorney-Client Privileged” or “Attorney Work Product.” Oral communications among the Parties shall be deemed confidential and protected under this Agreement when discussing Matters of Common Interest.
4. Non-Waiver of Privileges. The exchange of Shared Information among Parties—including among Parties’ staff and outside advisors—does not diminish in any way the privileged and confidential nature of such information. The Parties retain all applicable privileges and claims to confidentiality, including the attorney client privilege, work product privilege, common interest privilege, law enforcement privilege, deliberative process privilege and exemptions from disclosure under any public records laws that may be asserted to protect against disclosure of Shared Information to non-Parties (hereinafter collectively referred to as “Privileges”).

5. Nondisclosure. Shared Information shall only be disclosed to: (i) Parties; (ii) employees or agents of the Parties, including experts or expert witnesses; (iii) government officials involved with the enforcement of antitrust, environmental, consumer protection, or securities laws who have agreed in writing to abide by the confidentiality restrictions of this Agreement; (iv) criminal enforcement authorities; (v) other persons, provided that all Parties consent in advance; and (vi) other persons as provided in paragraph 6. A Party who provides Shared Information may also impose additional conditions on the disclosure of that Shared Information. Nothing in this Agreement prevents a Party from using the Shared Information for law enforcement purposes, criminal or civil, including presentation at pre-trial and trial-related proceedings, to the extent that such presentation does not (i) conflict with other agreements that the Party has entered into, (ii) interfere with the preservation of the Privileges, or (iii) conflict with court orders and applicable law.

6. Notice of Potential Disclosure. The Parties agree and acknowledge that each Party is subject to applicable freedom of information or public records laws, and nothing in this Agreement is intended to alter or limit the disclosure requirements of such laws. If any Shared Information is demanded under a freedom of information or public records law or is subject to any form of compulsory process in any proceeding ("Request"), the Party receiving the Request shall: (i) immediately notify all other Parties (or their designees) in writing; (ii) cooperate with any Party in the course of responding to the Request; and (iii) refuse to disclose any Shared Information unless required by law.

7. Inadvertent Disclosure. If a Party discloses Shared Information to a person not entitled to receive such information under this Agreement, the disclosure shall be deemed to be inadvertent and unintentional and shall not be construed as a waiver of any Party's right under law or this Agreement. Any Party may seek additional relief as may be authorized by law.

8. Independently Obtained Information. Provided that no disclosure is made of Shared Information obtained pursuant to this Agreement, nothing in this Agreement shall preclude a Party from (a) pursuing independently any subject matter, including subjects reflected in Shared Information obtained by or subject to this Agreement or (b) using or disclosing any information, documents, investigations, or any other materials independently obtained or developed by such Party.

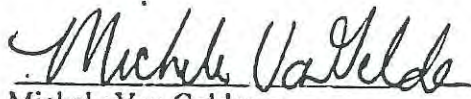
9. Related Litigation. The Parties continue to be bound by this Agreement in any litigation or other proceeding that arises out of the Matters of Common Interest.

10. Parties to the Agreement. This Agreement may be executed in counterparts. All potential Parties must sign for their participation to become effective.

11. Withdrawal. A Party may withdraw from this Agreement upon thirty days written notice to all other Parties. Withdrawal shall not terminate, or relieve the withdrawing Party of any obligation under this Agreement regarding Shared Information received by the withdrawing Party before the effective date of the withdrawal.

12. Modification. This writing is the complete Agreement between the Parties, and any modifications must be approved in writing by all Parties.

Dated: May 18, 2016

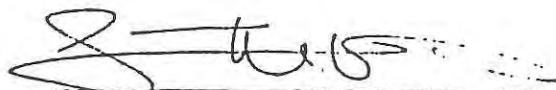


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Dated: July 3, 2016

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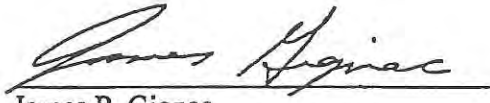
Dated: May 2, 2016



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Ludaway, a member of the D.C. Bar pursuant to D.C. Court of
Appeals Rule 49(c).

Dated: May 2, 2016



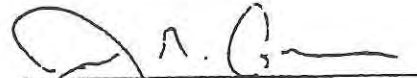
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Dated: April 29, 2016




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Dated: March 10, 2016



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Dated: May 5, 2016


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Signature: Karen D. Olson Date: 5/16/16

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Dated: April 29, 2016



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Dated: May 6, 2016

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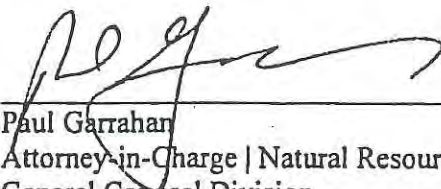
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Dated: May 2, 2016

Monica Wagner

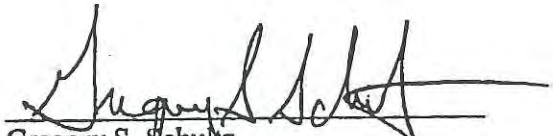
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Dated: April 29, 2016



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Dated: April 28, 2016




Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Department of Attorney General
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Tel.: (401) 274-4400, Ext. 2400

Dated: May 9, 2016

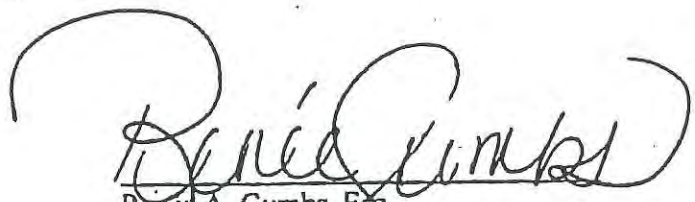
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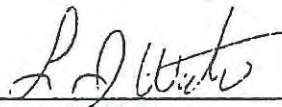
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Dated: May ^{4th} 10, 2016



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Dated: May 1, 2016



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Exhibit B – Press Release



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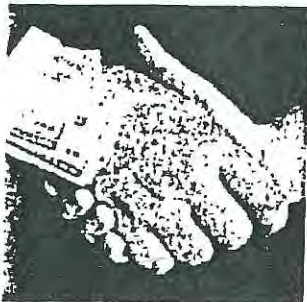
Press Release: State AG 'Secrecy Pact' Aimed at Thwarting Transparency Laws Released

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[Press Release: E&E Legal Sues EPA to Force Release of Documents Related to its Work with Controversial Institute](#)

For Immediate Release: September 29, 2016 Contact: Craig Richardson Richardson@eelegal.org
703-981-5553 Washington, D.C. –



[E&E Legal Responds to Senator Sheldon Whitehouse's Tantrum on the U.S. Senate Floor](#)

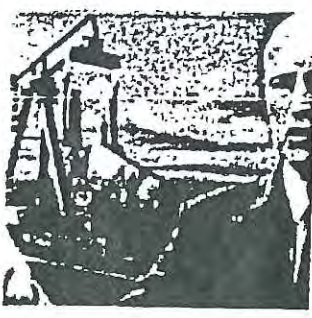
E&E Legal Responds to Senator Sheldon Whitehouse's Rant on the U.S. Senate Floor

For Immediate Release: September 28, 2016 Contact: Craig Richardson Richardson@eelegal.org
703-981-5553 Washington, D.C. — Yesterday



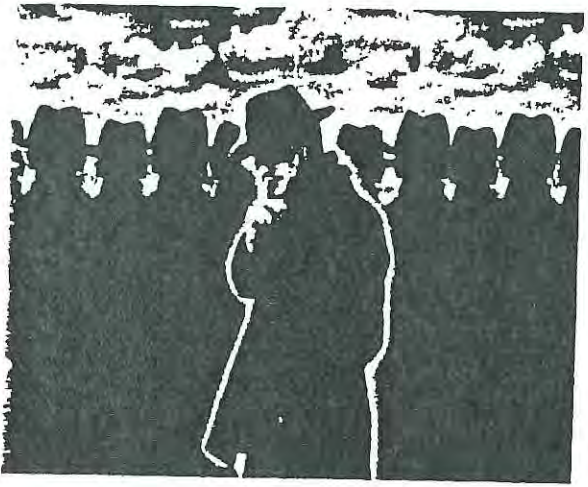
Press Release: E&E Legal Releases Video Highlighting Hillary Clinton's Approach For Suffering Coal Regions: "We're going to put a lot of coal miners and coal companies out of business"

For Immediate Release: September 26, 2016 Contact: Craig Richardson Richardson@eelegal.org
703-981-5553 Washington, D.C. — Today,



Grimes: Hypocrisy, Thy Name is Jerry Brown

by Katy Grimes, E&E Legal Senior Media Fellow As Appearing in Canada Free



For Immediate Release:
August 4, 2016

Contact:

August 4, 2016

Contact:

Craig Richardson

Richardson@eelegal.org

703-981-5553

**State AG 'Secrecy Pact' Aimed at Thwarting Transparency Laws Released;
*E&E Legal Obtains Document From DC Following Litigation***

Washington D.C. -The Energy & Environment Legal Institute (E&E Legal) has obtained a copy of the purported "Common Interest Agreement" led by New York's Attorney General Eric Schneiderman and signed back in late April/early May by 17 state and territorial attorneys general. The agreement, however, runs counter to what a traditional Common Interest Agreement may cover. It was clearly drafted to obstruct open-records requests, while these AGs carried out a political campaign against their critics. Worse, the AGs have been working hard to keep the agreement itself a secret.

"It's baffling that these AGs feel they can trample on their own states' public records laws," said David W. Schnare, E&E Legal General Counsel. "If they truly believe that they are engaged in anything other than a purely political campaign, they should have no problem explaining to the public what they are doing and subjecting their activities to the scrutiny their legislatures demanded."

E&E Legal obtained the purported Common Interest Agreement after months of making Freedom of Information Act requests. The Competitive Enterprise Institute, which was targeted by the AGs' campaign, also made direct requests. Finally, during E&E Legal's litigation with the District of Columbia, the document was handed over. The time and effort it took to obtain the document; the arguments made to defeat efforts to obtain it; and the AGs' reluctance even to acknowledge the existence of such an agreement, all raise more questions about what these AGs are hiding.

Signers of the Common Interest Agreement include: California, Connecticut, District of Columbia, Washington State, Massachusetts, Illinois, Maryland, Maine, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, US Virgin Islands, and Vermont.

Key Information about the Common Interest Agreement.

A Common Interest Agreement requires that there be 1) litigation, or the reasonable anticipation of litigation, 2) that the parties share a similar interest, and that 3) there be a clearly defined scope to the agreement. Here the AGs from many different states, apparently working with outside interest groups, came together to claim privilege for documents without the required shared reasonable anticipation of litigation, but in anticipation of open records requests.

While an AG may undertake an investigation, there is no evidence that most of these AGs have done so. In fact, the majority of the signatory AGs have disclaimed any investigation. Moreover, outside groups like the Union of Concerned Scientists and green-group lawyers with whom E&E Legal revealed are consulting with the AGs have no official role in a state-led investigation and therefore don't share what would be considered a similar interest with the states. In other words, these are activists groups with a single focus and no interest in the collateral damage they do. The states are supposed to care very much about that. Yet it seems the AGs are seeking to keep their communications with such parties hidden from the public through the purported Common Interest Agreement.

communications with such parties hidden from the public through the purported Common Interest Agreement.

Noted E&E Senior Legal Fellow Chris Horner, "This is far less a proper common interest agreement than a sweeping cloak of secrecy, one this 'informal coalition' is trying to cast over all discussions of their use of law enforcement to impose the 'climate' agenda. Including with outside activists and even donors."

He added, "It was drafted not in anticipation of any particular litigation but in obvious anticipation of open records requests. We have already revealed they've colluded on this use of their law enforcement powers to wage a political campaign with political activist groups and activist lawyers. This is wrong and in the end will be fully exposed. Perhaps that is why so many of the AGs have already walked away from this abusive campaign. It's certainly why they are trying to keep it all secret."

Common Interest Agreement is Overly Broad.

Common interest agreements must be tailored to specific legal actions, which the AGs' agreement doesn't do. It is overly broad and covers discussions related to numerous topics, including defending federal programs to "limit greenhouse gases," or actions to prevent any delays to the implementation of renewable energy technologies, among other sweeping subject areas. This goes against common interest doctrine, as well as open records laws, which state legislators passed to keep AGs accountable.

The AGs' agreement appears to be more of an effort to obtain a "Get Out of FOIA Free card," rather than a suit or any discrete or formal project.

AGs Claim Privilege for Sharing Investigation Information with Select Outside Parties.

The agreement allows the AGs to share information with any outside party if agreed upon in advance by all signers. Given the extent that environmental activist organizations have helped orchestrate this campaign, E&E Legal has filed numerous public records requests seeking all records from the AGs' offices suggesting, consenting, or objecting to the inclusion of any outside party in this cabal of abusive law enforcement offices. It is also seeking any information relating to the investigations that was shared with outside groups.

From the Beginning, AGs Were Concerned About Schneiderman Rhetoric; Months Later, the AGs No Longer Appear Interested.

Even from the beginning, particularly during the press conference in March with Al Gore, many AG offices raised concerns about investigations, as revealed in several open records productions obtained by E&E Legal. Now, months later, most of the AGs appear to have backed away from any interest in using racketeering laws against political opponents of their climate agenda. As a result, E&E Legal is seeking all withdrawals from the pact as provided for in the agreement. If an AG's office has not withdrawn, it should explain why.

AGs' Reasons for Keeping the Common Interest Agreement Away From The Public.

Prior to obtaining this document through litigation with the District of Columbia's Attorney General, E&E Legal encountered a series of seemingly panicked and even unlawful excuses from the AGs' offices to keep the public from seeing a purported deal.

offices to keep the public from seeing a purported deal.

For example, the Rhode Island Office of Attorney General claimed that attachments aren't part of an email chain and therefore they didn't have to disclose the agreement.

Perhaps the most absurd excuse came from Iowa's Attorney General, who claimed that despite declining to become a party to the agreement, it was still covered by the common interest privilege. They also claimed that despite neither writing nor editing the agreement, that it was their attorney work product, so they didn't have to hand it over.

"Attorneys general are supposed to be the ultimate guardians of the law in their states," said Craig Richardson, E&E Legal Executive Director. "Instead, these particular AG's have abandoned this critical role and are actually secretly colluding to prosecute those who dare disagree with a political 'climate change' agenda pushed by their benefactors, making this action particularly egregious."

The Energy & Environment Legal Institute (E&E Legal) is a 501(c)(3) organization engaged in strategic litigation, policy research, and public education on important energy and environmental issues. Primarily through its petition litigation and transparency practice areas, E&E Legal seeks to correct onerous federal and state policies that hinder the economy, increase the cost of energy, eliminate jobs, and do little or nothing to improve the environment.

Affirmation of Elizabeth M. Schutte, dated October 25, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Index No. 05050-16

Petitioner,

**AFFIRMATION OF
ELIZABETH M. SCHUTTE**

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

Elizabeth M. Schutte, an attorney duly admitted to the State of New York, hereby affirms under penalty of perjury:

1. I am an attorney with Baker and Hostetler LLP, counsel to Petitioner the Competitive Enterprise Institute in the above-captioned matter.

2. I submit this affirmation in support of Petitioner's Opposition to Respondent's Motion to Dismiss the Verified Petition.

3. On March 29, 2016, Respondent issued a press release titled "A.G. Schneiderman, Former Vice President Al Gore And A Coalition of Attorneys General From Across The Country Announce Historic State-Based Effort to Combat Climate Change." The press release described the announcement of "an unprecedented coalition of top law enforcement officials," referred to as the "AGs United For Clean Power," "committed to aggressively protecting and building upon the recent progress the United States has made in combatting climate change." The press release included quotes by certain members of the coalition, including the Attorney General for the U.S. Virgin Islands ("Virgin Islands AG") and the Attorney General for the Commonwealth of

Massachusetts (“Massachusetts AG”). Attached hereto as Exhibit 1 is a true and correct copy of the press release issued by Respondent on March 29, 2016, printed to Adobe PDF on October 24, 2016 from <http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across>.

4. The media subsequently reported that members of the “Clean Power” coalition had entered into a common interest agreement “to keep documents about their investigations into global warming skeptics from going public.” Attached as Exhibit 2 is a true and correct copy of an article titled “Dem AGs Using Secret Pact to Keep Global Warming Investigation Docs From Going Public,” printed to Adobe PDF on October 24, 2016, from <http://dailycaller.com/2016/07/06/dem-ags-using-secret-pact-to-keep-global-warming-investigation-docs-from-going-public/>.

5. In connection with the “Clean Power” campaign, the Virgin Islands AG issued a subpoena to Petitioner out of the Superior Court for the District of Columbia in April 2016. The subpoena demanded a decade’s worth of communications, emails, statements, drafts, and other documents, including private donor information, relating to Petitioner’s work on climate change and energy policy.

6. On April 20, 2016, Petitioner filed an objection to the subpoena, *inter alia*, as an unlawful attempt to silence and intimidate speech by those who disagree with the policy objectives of the Clean Power campaign. On May 16, 2016, Petitioner filed a motion to dismiss to invalidate the subpoena and motion for sanctions against the Virgin Islands AG and his counsel.

7. In late June, in response to Petitioner’s objections and motion to dismiss, the Virgin Islands AG withdrew the subpoena.

8. Petitioner’s motion for sanctions remains pending in the Superior Court for the District of Columbia.

9. Also in connection with the Clean Power campaign, the Virgin Islands AG and the Massachusetts AG issued subpoenas to Exxon Mobil. The Virgin Islands AG withdrew its subpoena

to Exxon at around the same time that it withdrew its subpoena to Petitioner. Exxon moved in federal court in Texas to enjoin enforcement of the subpoena issued by the Massachusetts AG.

10. In an order issued on October 13, 2016, the U.S. District Court for the Northern District of Texas ordered jurisdictional discovery to "aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds," due to its concern that the Massachusetts AG may have "issued the CID in bad faith" or "with bias or prejudice about what the investigation of Exxon would discover." A true and correct copy of the October 13, 2016, order is attached hereto as Exhibit 3.

Dated: New York, New York
October 25, 2016



Elizabeth M. Schutte

Exhibit 1 – Press Release dated March 29, 2016

A.G. Schneiderman, Former Vice President Al Gore And A Coalition Of Attorneys General From Across The Country Announce Historic State-Based Effort To Combat Climate Change

Unprecedented Coalition Vows To Defend Climate Change Progress Made Under President Obama And To Push The Next President For Even More Aggressive Action

Attorneys General From California, Connecticut, District Of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, Washington State And The US Virgin Islands Agree To Coordinate Efforts

Schneiderman: Climate Change Is The Most Consequential Issue Of Our Time. This Unprecedented State-To-State Coordination Will Use All The Tools At Our Disposal To Fight For Climate Progress

A.G. Schneiderman, Al Gore And Coalition Of ...



NEW YORK – Attorney General Eric T. Schneiderman today joined Attorneys General from across the nation to announce an unprecedented coalition of top law enforcement officials committed to aggressively protecting and building upon the recent progress the United States has made in combatting climate change.

Attorneys General Schneiderman, William Sorrell of Vermont, George Jepsen of Connecticut, Brian E. Frosh of Maryland, Maura Healey of Massachusetts, Mark Herring of Virginia, and Claude Walker of the US Virgin Islands were joined by former Vice President Al Gore for the announcement in New York City. Today's announcement took place during a one-day Attorneys General climate change conference, co-sponsored by Schneiderman and Sorrell.

The participating states are exploring working together on key climate change-related initiatives, such as ongoing and potential investigations into whether fossil fuel companies misled investors and the public on the impact of climate change on their businesses. In 2015, New York State reached a historic settlement with Peabody Energy – the world's largest publicly

traded coal company – concerning the company’s misleading financial statements and disclosures. New York is also investigating ExxonMobil for similar alleged conduct.

Many of the states in the coalition have worked together on previous multi-state environmental efforts, including pressing the EPA to limit climate change pollution from fossil-fueled electric power plants, defending federal rules controlling climate change emissions from large industrial facilities, and pushing for federal controls on emissions of the potent greenhouse gas methane emissions from the oil and natural gas industry.

All of the members of the new coalition are part a coalition of 25 states, cities and counties led by Attorney General Schneiderman that intervened to defend the federal Environmental Protection Agency’s “Clean Power Plan” against legal challenge. Today, the interveners filed a brief with the DC Circuit Court defending President Obama’s Clean Power Plan rule, which establishes a nationwide framework to achieve meaningful and cost effective reductions of carbon-dioxide emissions from power plants—the largest single source of greenhouse gas emissions in the nation—and provides states and power plants flexibility to decide how best to achieve these reductions.

“With gridlock and dysfunction gripping Washington, it is up to the states to lead on the generation-defining issue of climate change. We stand ready to defend the next president’s climate change agenda, and vow to fight any efforts to roll-back the meaningful progress we’ve made over the past eight years,” said **Attorney General Schneiderman**. “Our offices are seriously examining the potential of working together on high-impact, state-level initiatives, such as investigations into whether fossil fuel companies have misled investors about how climate change impacts their investments and business decisions.”

“We cannot continue to allow the fossil fuel industry or any industry to treat our atmosphere like an open sewer or mislead the public about the impact they have on the health of our people and the health of our planet. Attorneys General and law enforcement officials around the country have long held a vital role in ensuring that the progress we have made to solve the climate crisis is not only protected, but advanced. The first-of-its-kind coalition announced today is another key step on the path to a sustainable, clean-energy future,” said **Vice President Al Gore**.

Vermont Attorney General William Sorrell said, “We are happy to have worked closely with New York to organize this meeting. As we all know, global warming, if not reversed, will be catastrophic for our planet. We, the states, have a role to play in this endeavor and intend to do our part.”

“The states represented here today have long been working to sound the alarm, to put smart policies in place to speed our transition to a clean energy future, and to stop power plants from emitting millions of tons of dangerous global warming pollution into our air,” said **Massachusetts Attorney General Maura Healey**. “In Massachusetts, we’re a leader in clean energy and together we’re taking a thoughtful, aggressive approach to ensuring our planet’s health for generations to come.”

Connecticut Attorney General George Jepsen, said “I am delighted to meet with so many thoughtful leaders to strategize on ways we can protect our citizens from the greatest threat we collectively face, climate change. I am proud to have worked with them and others in defending the Obama Administration’s action to combat global warming, and look forward to discussing how we can best further that important work. I also appreciate the opportunity to discuss potential future efforts, including the merits of possible joint investigations in this important area.”

U.S. Virgin Islands Attorney General Claude Earl Walker said, “The Virgin Islands, which is especially vulnerable to environmental threats, has a particular interest in making sure that companies are honest about what they know about climate change. We are committed to ensuring a fair and transparent market where consumers can make informed choices about what they buy and from whom. If ExxonMobil has tried to cloud their judgment, we are determined to hold the company accountable.”

that progress is made on climate change and that the public is fully aware of the effects on the health and well-being of New Mexico families,” said **New Mexico Attorney General Hector Balderas**.

Español

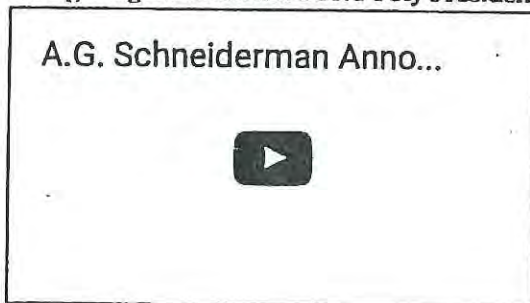
New York City Press Office: (212) 416-8060

Albany Press Office: (518) 776-2427

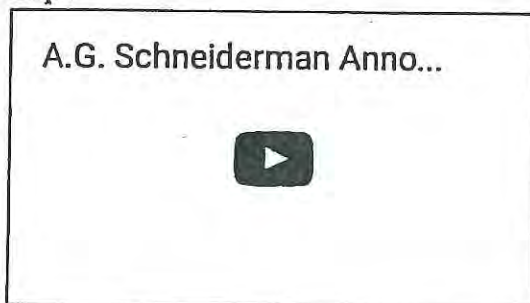
nyag.pressoffice@ag.ny.gov

The People of the State of New York v. Maurice R. Greenberg & Howard I. Smith

A.G. Schneiderman Announces Criminal Charges Against Former SUNY Poly President



A.G. Schneiderman Announce Takedown Of Nationwide Drug Ring In "Operation Dirty Dope"



A.G. Schneiderman Announces Criminal Charges Against Officer Wayne Isaacs

Maryland Attorney General Brian E. Frosh said, "Climate change poses an existential threat to Maryland and to the nation. I am proud to join with my colleagues across the country in this important collaboration, and am willing to use every tool at our collective disposal to protect our air, our water and our natural resources. The pledge we are making today can help insure a cleaner and safer future."

Virginia Attorney General Mark Herring said, "As a Commonwealth and as a nation, we can't just put our heads in the sand because we are already confronting the realities of climate change. Hampton Roads is our Commonwealth's second most populated region, it's our second biggest economy, and it is the second most vulnerable area in the entire country as climate change drives continued sea-level rise. State government, local governments, and the military are spending millions to prepare for this challenge, and even more significant investment and resiliency measures will be required. I'm proud to have Virginia included in this first-of-its-kind coalition, which recognizes the reality and the pressing threat of manmade climate change and sea level rise. I'm looking forward to working with my colleagues to explore opportunities to address climate change, encourage the growth of our clean energy sectors, and build a cleaner, more sustainable future."

"Taking additional steps to reduce carbon pollution will keep us moving toward cleaner air, a healthier environment, and more affordable energy," said **Illinois Attorney General Lisa Madigan**. "I look forward to continuing to work with other states to advance the Clean Power Plan, as well as to advocate for a comprehensive portfolio of renewable energy sources and enhancements to energy efficiency programs."

"Climate change has real and lasting impacts on our environment, public health, and the economy," said **California Attorney General Kamala D. Harris**. "California has been a national leader in fighting to reduce greenhouse gas emissions, and I am proud to join this effort to preserve and protect our natural resources for future generations to come."

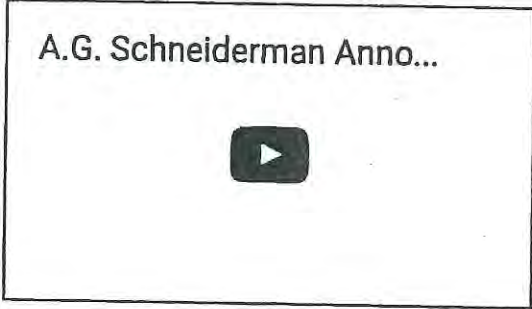
Maine Attorney General Janet Mills said, "Our natural resources are the lifeblood of our state's economy and our quality of life. Global climate change demands immediate action and I am committed to using the authority of my office to address the problem in a meaningful way by defending important EPA regulations against attacks led by the coal industry and exploring litigation options that will hold the worst polluters accountable for their actions."

"Washington is mired by political gridlock. We cannot sit back and watch the dysfunction while nothing gets done, or worse, Washington rolls back the progress we have made in the recent past to address the issue of climate change. If Washington is not going to step up and recognize the crisis and find meaningful solutions, then it will be up to the states to do so," said **Rhode Island Attorney General Peter F. Kilmartin**. "As a state that will incur significant negative impacts from global climate change, including sea-level rise and increased flooding, Rhode Island is committed to continuing the fight for common-sense regulation of greenhouse gas emissions from power plants and other large emitters."

"Washington State has long made protecting our environment a top priority," **Washington State Attorney General Bob Ferguson** said. "A problem like climate change is bigger than any one state. I look forward to working with the coalition on innovative solutions to combat and reverse the harmful effects of climate change."

"Our office has a mandate to protect the public interest, and this includes ensuring that our community is not negatively affected by preventable climate change. We welcome this crucial state-to-state cooperation to ensure that we do everything we can to fight the causes of climate change regardless of whether the federal government continues to partner with us in these efforts or not," said **District of Columbia Attorney General Karl Racine**.

"We have been impacted by climate change, and we see its drastic effects in New Mexico---extreme drought, increased risk of severe forest fires, and the ruin of our wildlife and natural habitats," **Attorney General Balderas** said. "Our efforts will ensure



A.G. Schneiderman Announces Results Of "Operation Child Tracker," Ending Illegal Online Tracking Of Children At Some Of Nation's Most Popular Kids' Websites



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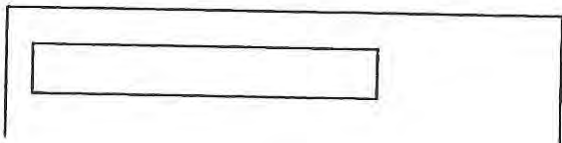






Exhibit 2 – News Article, dated July 6, 2016

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Dem AGs Using Secret Pact To Keep Global Warming Investigation Docs From Going Public

 **MICHAEL BASTASCH**
(<http://dailycaller.com/author/michael>)

12:05 PM 07/06/2016

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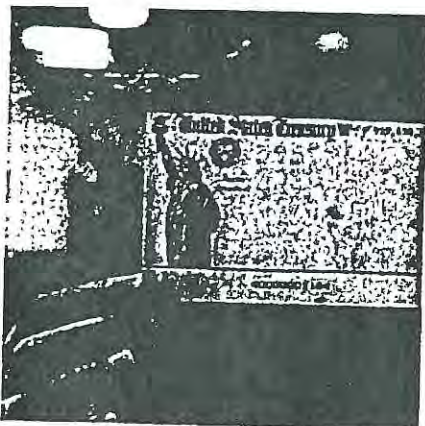
New documents unearthed by a free market legal Institute suggest a coalition of Democratic state attorneys general are using a "common interest agreement" to keep documents about their investigations into global warming skeptics from going public.

"We have confirmed that the Democratic AGs are citing a Common Interest Agreement to avoid releasing crucial information to the public, as they continue their abuse of power," David Schnare, general counsel for the Energy & Environment Legal Institute (EELI), said in a statement.

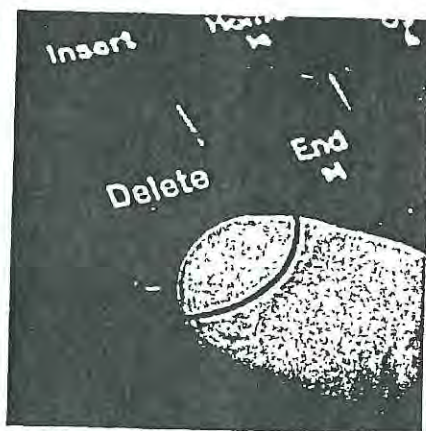
For weeks, EELI has been working to find out if Democratic prosecutors, led by New York AG Eric Schneiderman, had signed onto a common interest agreement that was revealed through a previous Freedom of Information Act (FOIA) request. EELI now says it has evidence AGs and activists have entered into an agreement to block FOIA requests regarding investigations into ExxonMobil's alleged campaign to mislead the public on global warming. Those investigations have ensnared conservative think tanks, policy experts and scientists (<http://dailycaller.com/2016/05/03/ags-use-exxon-probe-to-target-dozens-of-conservative-groups-and-scientists/>) with alleged ties to Exxon.

"In short, these activist AGs are trying to write themselves out from freedom of information laws their legislatures have written them into," said Chris Horner, an EELI senior fellow.

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"They are hiding behavior that seems to be precisely the sort of abuse lawmakers sought to expose to sunlight when deciding to cover their state's chief law enforcement officers under FOIA laws, particularly their use of nearly limitless powers to chill opposition and damage political opponents," Horner said.

So far, four AGs — three Democrats and one Independent — have launched investigations into Exxon's disclosure of global warming risks to investors and funding of skeptic groups. Schneiderman was the first AG to launch an Exxon probe, citing reporting by InsideClimate News and Columbia University.

Schneiderman held an event in March where other AGs announced they would be going after Exxon. The 20 AG offices involved in the event, dubbed the "Green 20," used the conference to condemn fossil fuel companies allegedly trying to cover-up global warming. The AGs also promised to protect federal climate rules from legal attacks.

Emails EELI's action have uncovered showed environmental activists working behind the scenes at the event, briefing state AGs on global warming litigation strategies. Schneiderman's office even tried to cover up (<http://dailycaller.com/2016/04/18/new-york-ag-tried-to-cover-up-activist-involvement-in-exxon-probe/>) activist involvement by telling them not to admit they attended the event.



EELI's email review also showed AGs were working on a "common interest agreement" to, among other things, withhold certain records regarding their probes.

EELI says it's now found evidence AGs have signed the agreement and are using it to block FOIA requests. Illinois' AG recently sent a FOIA letter to EELI (<http://eelegal.org/wp-content/uploads/2016/07/IL-OAG-response-to-appeal-closing-out-RICO-FOIA.pdf>) citing "a common interest agreement (Agreement) was entered into by the Office of the Illinois Attorney General and the other affected stakeholders related to a number of the withheld records."

EELI also recovered an April 12th email from Rhode Island Special Assistant Attorney General Gregory Schultz (<http://eelegal.org/wp-content/uploads/2016/07/RI-signed-on-to-CIA.pdf>) saying he would sign onto the agreement.

Common interest agreements are commonly used to keep certain records secret for a time, but EELI argues the agreement between AGs and green groups is unusual because it shows "these AGs and their green-group colleagues with inherently disparate interests have entered not a legitimate [Common Interest Agreement], but a pact of secrecy, covering broad topics, not specific matters, simply to avoid scrutiny of otherwise public records," according to the group's release.

EELI's release comes amid news that three of the four investigations into Exxon have stalled or fallen apart (<http://dailycaller.com/2016/06/29/liberal-ag-global-warming-investigations-into-exxon-are-falling-apart/>). Exxon has won legal victories against AGs of Massachusetts and the U.S. Virgin islands, both of which subpoenaed the company and supposedly-affiliated groups.

California AG Kamala Harris's office opened an investigation into Exxon (<http://dailycaller.com/2016/01/20/now-calif-is-investigating-exxons-global-warming-stance/>), but the company has yet to receive a subpoena from Harris. She's not likely to push the investigation much further since she's running for U.S. Senate.

Follow Michael on Facebook (<https://www.facebook.com/MichaelBastaschDCNF>) and Twitter (<https://twitter.com/MikeBastasch>)

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Exhibit 3 – Order dated October 13, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,

Plaintiff,

v.

MAURA TRACY HEALEY, Attorney
General of Massachusetts in her official
capacity,

Defendant.

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Civil Action No. 4:16-CV-469-K

ORDER

Plaintiff Exxon Mobil Corporation's Motion for a Preliminary Injunction (Doc. No. 8) and Defendant Attorney General Healey's Motion to Dismiss (Doc. No. 41) are under advisement with the Court. Plaintiff Exxon Mobil Corporation ("Exxon") moves to enjoin Defendant Attorney General Maura Tracy Healey of Massachusetts from enforcing the civil investigative demand ("CID") the Commonwealth of Massachusetts issued to Exxon on April 19, 2016. The Attorney General claims that the CID was issued to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts. Exxon contends that the Attorney General issued the CID in an attempt to satisfy a political agenda. Compliance with the CID would require Exxon to disclose documents dating back to January 1, 1976 that relate to what Exxon possibly knew about climate change and global warming.

Additionally, Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint for (1) lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), (2) lack of subject matter jurisdiction under Rule 12(b)(1) under *Younger v. Harris*, 401 U.S. 37 (1971), (3) lack of subject matter jurisdiction under Rule 12(b)(1) because the dispute is not yet ripe, and (4) improper venue under Rule 12(b)(3). Before reaching a decision on either Plaintiff Exxon's Motion for a Preliminary Injunction or Defendant Attorney General Healey's Motion to Dismiss, the Court **ORDERS** that jurisdictional discovery be conducted.

I. Applicable Law

The Court has an obligation to examine its subject matter jurisdiction *sua sponte* at any time. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.”). A district court has broad discretion in all discovery matters, including whether to permit jurisdictional discovery. *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982). “When subject matter jurisdiction is challenged, a court has authority to resolve factual disputes, and may devise a method to . . . make a determination as to jurisdiction, ‘which may include considering affidavits, allowing further discovery, hearing oral testimony, or conducting an evidentiary hearing.’” *Hunter v. Branch Banking and Trust Co.*, No. 3:12-cv-2437-D, 2012 WL 5845426, at *1 (N.D. Tex. Nov. 19, 2012) (quoting *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir.

1994)). If subject matter jurisdiction turns on a disputed fact, parties can conduct jurisdictional discovery so that they can present their arguments and evidence to the Court. *In re Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 319 (5th Cir. 2012).

II. The Reason for Jurisdictional Discovery

One of the reasons Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint is for lack of subject matter jurisdiction under Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). The Court particularly wants to conduct jurisdictional discovery to determine if Plaintiff Exxon's Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because of the application of *Younger* abstention. See *Younger*, 401 U.S. at 43-45; *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008) (stating that although *Younger* abstention originally applied only to criminal prosecution, it also applies when certain civil proceedings are pending if important state interests are involved in the proceeding). The Supreme Court in *Younger* "espouse[d] a strong federal policy against federal court interference with pending state judicial proceedings." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

Jurisdictional discovery needs to be conducted to consider whether the current proceeding filed by Exxon in Massachusetts Superior Court challenging the CID warrants *Younger* abstention by this Court. If Defendant Attorney General Healey issued the CID in bad faith, then her bad faith precludes *Younger* abstention. See *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984). Attorney General Healey's

actions leading up to the issuance of the CID causes the Court concern and presents the Court with the question of whether Attorney General Healey issued the CID with bias or prejudice about what the investigation of Exxon would discover.

Prior to the issuance of the CID, Attorney General Healey and several other attorneys general participated in the AGs United for Clean Power Press Conference on March 29, 2016 in New York, New York. Notably, the morning before the AGs United for Clean Power Press Conference, Attorney General Healey and other attorneys general allegedly attended a closed door meeting. At the meeting, Attorney General Healey and the other attorneys general listened to presentations from a global warming activist and an environmental attorney that has a well-known global warming litigation practice. Both presenters allegedly discussed the importance of taking action in the fight against climate change and engaging in global warming litigation.

One of the presenters, Matthew Pawa of Pawa Law Group, P.C., has allegedly previously sued Exxon for being a cause of global warming. After the closed door meeting, Pawa emailed the New York Attorney General's office to ask how he should respond if asked by a Wall Street Journal reporter whether he attended the meeting with the attorneys general. The New York Attorney General's office responded by instructing Pawa "to not confirm that [he] attended or otherwise discuss" the meeting he had with the attorneys general the morning before the press conference.

During the hour long AGs United for Clean Power Press Conference, the attorneys general discussed ways to solve issues with legislation pertaining to climate

change. Attorney General Eric Schneiderman of New York and Attorney General Claude Walker of the United States Virgin Islands announced at the press conference that their offices were investigating Exxon for consumer and securities fraud relating to climate change as a way to solve the problem.

Defendant Attorney General Healey also spoke at the AGs United for Clean Power Press Conference. During Attorney General Healey's speech, she stated that "[f]ossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable." Attorney General Healey then went on to state that, "[t]hat's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public." The speech ended with Attorney General Healey reiterating the Commonwealth of Massachusetts's commitment to combating climate change and that the fight against climate change needs to be taken "[b]y quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long." Subsequently, on April 19, 2016, Attorney General Healey issued the CID to Exxon to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts.

The Court finds the allegations about Attorney General Healey and the anticipatory nature of Attorney General Healey's remarks about the outcome of the Exxon investigation to be concerning to this Court. The foregoing allegations about

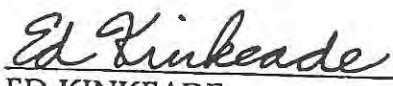
Attorney General Healey, if true, may constitute bad faith in issuing the CID which would preclude *Younger* abstention. Attorney General Healey's comments and actions before she issued the CID require the Court to request further information so that it can make a more thoughtful determination about whether this lawsuit should be dismissed for lack of jurisdiction.

III. Conclusion

Accordingly, the Court ORDERS that jurisdictional discovery by both parties be permitted to aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds.

SO ORDERED.

Signed October 13th, 2016.


ED KINKEADE
UNITED STATES DISTRICT JUDGE

Affirmation of Michael Jerry, dated December 21, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

AFFIRMATION

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

Index No. 05050-16

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

Michael Jerry, an attorney admitted to practice in the State of New York, affirms the following to be true under penalty of perjury pursuant to CPLR 2106:

1. I am Assistant Counsel and the Records Access Officer in the Office of Eric T. Schneiderman, Attorney General of the State of New York ("OAG"). In my capacity as Records Access Officer, I am responsible for (a) the review of requests received by the OAG for documents or information pursuant to New York's Freedom of Information Law, Public Officers Law §§ 84-89 ("FOIL"); (b) the initial determination of the OAG's legal obligations with respect to such requests; (c) the coordination of the collection and preparation for production of documents responsive to such requests; and (d) production of required responses. I am fully familiar with the facts and documents described in this Affirmation.

2. On or about May 5, 2016, a request bearing that date from Petitioner, Competitive Enterprise Institute ("CEI") (Exhibit 1 to the Petition, the "Request") was referred to me for review. I promptly reviewed the Request, which was assigned the identifying number of "FOIL 160290".

3. Immediately thereafter, I arranged for a diligent search to be conducted for the

requested records. Based on the content and subject matter of the Request, I focused the search for responsive records on those attorneys and bureaus involved in OAG's pending investigation of ExxonMobil Corporation.

4. This search located one record responsive to Petitioner's Request, titled "Climate Change Coalition Common Interest Agreement." The search located no documents responsive to that portion of the Request seeking Common Interest Agreements "signed by, mention[ing] or otherwise includ[ing]" the non-State individuals and entities listed in the Request. As set forth in my prior Affirmation dated September 30, 2016, based on my analysis and review of applicable exemptions, I determined that the responsive record was exempt from disclosure pursuant to FOIL. *See* Jerry Affirmation dated September 30, 2016, at ¶¶ 9-11.

5. On June 15, 2016, I denied Petitioner's Request. *See* Petition Exh. 2. My June 15, 2016 letter stated, in part:

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

Petition, Exh. 2, at 3 (emphasis added).

6. The reference in my June 15, 2016 letter to "records" was a typographical error resulting from my use of a form FOIL letter. I was aware, at the time I denied Petitioner's Request, that only a single record existed within OAG's possession, custody or control responsive to Petitioner's Request.

7. After an unsuccessful administrative appeal, Petitioner commenced this Article 78 proceeding on August 31, 2016. On November 21, 2016, Supreme Court (Hon. Henry F. Zwack, A.J.S.C.) issued a Decision/Order in this matter.

8. Following the issuance of Judge Zwack's Decision/Order, OAG undertook a *de*

novo diligent search for records responsive to Petitioner's Request, which included canvassing all Bureau Chiefs within the OAG for common interest agreements within their bureaus. As a result of this second, more extensive search, OAG confirmed that the only responsive record is titled, "Climate Change Coalition Common Interest Agreement."

9. OAG's expanded search also confirmed that no documents existed within OAG's possession, custody or control responsive to that portion of the Request seeking Common Interest Agreements "signed by, mention[ing] or otherwise includ[ing]" the non-State individuals and entities listed in the Request.

10. On December 21, 2016, consistent with Judge Zwack's Decision/Order, I provided a further response on behalf of OAG to the May 5, 2016 Request (the "Supplemental Response"). A copy of the Supplemental Response (with enclosures) is attached hereto as Exhibit A.

11. In the Supplemental Response, I described the statutory exemptions applicable to the single record responsive to Petitioner's Request. I then stated:

The OAG has determined that, despite diligent efforts by the OAG to maintain its confidentiality, the record responsive to your request has been in the public domain since on or about August 4, 2016. Accordingly, for purposes of responding to this request only, and without waiving the applicability of the foregoing statutory exemptions to this record or type of record, OAG declines to invoke any exemptions from disclosure, and a copy of the referenced record is enclosed herewith.

Exh. A, at 4.

12. I respectfully submit that OAG's June 15, 2016 response to Petitioner's Request, together with the Supplemental Response, amply satisfies the express statutory provisions of FOIL, Public Officers Law §§ 84-89, as well as the intent and purpose of that statute.

Dated: Albany, New York
December 21, 2016



Michael Jerry

Exhibit A – Respondent’s Supplemental Response,
dated December 21, 2016



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

MICHAEL JERRY
ASSISTANT ATTORNEY GENERAL
RECORDS ACCESS OFFICER

December 21, 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:

Consistent with the Order of the Honorable Henry Zwack, A.J.S.C., dated November 21, 2016, the Office of the Attorney General ("OAG") provides this letter in further response to your correspondence dated May 5, 2016 which, pursuant to 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.

Mr. Hans Bader
December 21, 2016
Page 2

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.

Mr. Hans Bader
December 21, 2016
Page 3

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."

OAG has conducted a diligent search for the records that you have requested, which included canvassing all Bureau Chiefs within the OAG for common interest agreements within their bureaus. That search located one record responsive to your request, titled "Climate Change Coalition Common Interest Agreement." OAG's search located no documents responsive to that portion of the request seeking Common Interest Agreements "signed by, mention[ing] or otherwise includ[ing]" the non-State individuals and entities listed in the request.

Please be advised that the record responsive to your request is exempt from disclosure 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. The record responsive to your request constitutes:
 - a 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

Mr. Hans Bader
December 21, 2016
Page 4

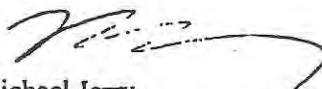
Law and Rules § 3101(c);

- pursuant to New York Public Officers Law § 87(2)(e), because the document requested was 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 record constitutes inter-agency or intra-agency material.

The OAG has determined that, despite diligent efforts by the OAG to maintain its confidentiality, the record responsive to your request has been in the public domain since on or about August 4, 2016. Accordingly, for purposes of responding to this request only, and without waiving the applicability of the foregoing statutory exemptions to this record or type of record, OAG declines to invoke any exemption from disclosure, and a copy of the referenced record is enclosed herewith.

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

CLIMATE CHANGE COALITION COMMON INTEREST AGREEMENT

This Common Interest Agreement ("Agreement") is entered into by the undersigned Attorneys General of the States, Commonwealths, and Territories (the "Parties") who are interested in advancing their common legal interests in limiting climate change and ensuring the dissemination of accurate information about climate change. The Parties mutually agree:

1. Common Legal Interests. The Parties share common legal interests with respect to the following topics: (i) potentially taking legal actions to compel or defend federal measures to limit greenhouse gas emissions, (ii) potentially conducting investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change, (iii) potentially conducting investigations of possible illegal conduct to limit or delay the implementation and deployment of renewable energy technology, (iv) potentially taking legal action to obtain compliance with federal and state laws governing the construction and operation of fossil fuel and renewable energy infrastructure, or (v) contemplating undertaking one or more of these legal actions, including litigation ("Matters of Common Interest").

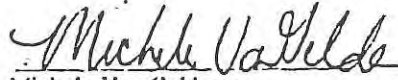
2. Shared Information. It is in the Parties' individual and common interests to share documents, mental impressions, strategies, and other information regarding the Matters of Common Interest and any related investigations and litigation ("Shared Information"). Shared Information shall include (1) information shared in organizing a meeting of the Parties on March 29, 2016, (2) information shared at and after the March 29 meeting, pursuant to an oral common interest agreement into which the Parties entered at the meeting and renewed on April 12, 2016, and (3) information shared after the execution of this Agreement.

3. Legends on Documents. To avoid misunderstandings or inadvertent disclosure, all documents exchanged pursuant to this Agreement should bear the legend "Confidential – Protected by Common Interest Privilege" or words to that effect. However, the inadvertent failure to include such a legend shall not waive any privilege or protection available under this Agreement or otherwise. In addition, any Party may, where appropriate, also label documents exchanged pursuant to this Agreement with other appropriate legends, such as, for example, "Attorney-Client Privileged" or "Attorney Work Product." Oral communications among the Parties shall be deemed confidential and protected under this Agreement when discussing Matters of Common Interest.

4. Non-Waiver of Privileges. The exchange of Shared Information among Parties—including among Parties' staff and outside advisors—does not diminish in any way the privileged and confidential nature of such information. The Parties retain all applicable privileges and claims to confidentiality, including the attorney client privilege, work product privilege, common interest privilege, law enforcement privilege, deliberative process privilege and exemptions from disclosure under any public records laws that may be asserted to protect against disclosure of Shared Information to non-Parties (hereinafter collectively referred to as "Privileges").

5. Nondisclosure. Shared Information shall only be disclosed to: (i) Parties; (ii) employees or agents of the Parties, including experts or expert witnesses; (iii) government officials involved with the enforcement of antitrust, environmental, consumer protection, or securities laws who have agreed in writing to abide by the confidentiality restrictions of this Agreement; (iv) criminal enforcement authorities; (v) other persons, provided that all Parties consent in advance; and (vi) other persons as provided in paragraph 6. A Party who provides Shared Information may also impose additional conditions on the disclosure of that Shared Information. Nothing in this Agreement prevents a Party from using the Shared Information for law enforcement purposes, criminal or civil, including presentation at pre-trial and trial-related proceedings, to the extent that such presentation does not (i) conflict with other agreements that the Party has entered into, (ii) interfere with the preservation of the Privileges, or (iii) conflict with court orders and applicable law.
6. Notice of Potential Disclosure. The Parties agree and acknowledge that each Party is subject to applicable freedom of information or public records laws, and nothing in this Agreement is intended to alter or limit the disclosure requirements of such laws. If any Shared Information is demanded under a freedom of information or public records law or is subject to any form of compulsory process in any proceeding ("Request"), the Party receiving the Request shall: (i) immediately notify all other Parties (or their designees) in writing; (ii) cooperate with any Party in the course of responding to the Request; and (iii) refuse to disclose any Shared Information unless required by law.
7. Inadvertent Disclosure. If a Party discloses Shared Information to a person not entitled to receive such information under this Agreement, the disclosure shall be deemed to be inadvertent and unintentional and shall not be construed as a waiver of any Party's right under law or this Agreement. Any Party may seek additional relief as may be authorized by law.
8. Independently Obtained Information. Provided that no disclosure is made of Shared Information obtained pursuant to this Agreement, nothing in this Agreement shall preclude a Party from (a) pursuing independently any subject matter, including subjects reflected in Shared Information obtained by or subject to this Agreement or (b) using or disclosing any information, documents, investigations, or any other materials independently obtained or developed by such Party.
9. Related Litigation. The Parties continue to be bound by this Agreement in any litigation or other proceeding that arises out of the Matters of Common Interest.
10. Parties to the Agreement. This Agreement may be executed in counterparts. All potential Parties must sign for their participation to become effective.
11. Withdrawal. A Party may withdraw from this Agreement upon thirty days written notice to all other Parties. Withdrawal shall not terminate, or relieve the withdrawing Party of any obligation under this Agreement regarding Shared Information received by the withdrawing Party before the effective date of the withdrawal.
12. Modification. This writing is the complete Agreement between the Parties, and any modifications must be approved in writing by all Parties.

Dated: May 18, 2016

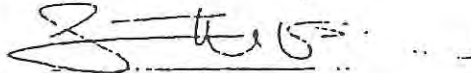


Michele Van Gelderen
Supervising Deputy Attorney General
Consumer Law Section
Office of Attorney General Kamala D. Harris
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel. (213) 897-2000

Dated: _____, 2016

Matthew I. Levine
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06106

Dated: May 2, 2016



Elizabeth Wilkins
Senior Counsel to the Attorney General*
Office of the Attorney General for the District of
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(202) 724-5568
elizabeth.wilkins@dc.gov

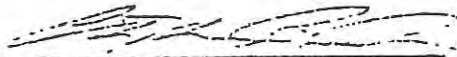
*Admitted to practice only in Maryland. Practicing in the
District of Columbia under the direct supervision of Natalie O.
Ludaway, a member of the D.C. Bar pursuant to D.C. Court of
Appeals Rule 49(c).

Dated: May 2, 2016



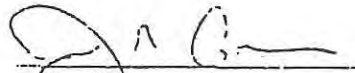
James P. Gignac
Environmental and Energy Counsel
Illinois Attorney General's Office
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igignac@atg.state.il.us

Dated: April 29, 2016



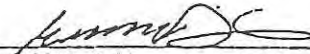
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection Division
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christophe.courchesne@state.ma.us

Dated: 6.1.17, 2016



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Dated: May 5, 2016


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Maine Office of the Attorney General
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Signature: Karen D. Olson Date: 5/16/16

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Minnesota Attorney General's Office
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Dated: April 29, 2016

Joseph A. Foster

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K. Allen Brooks, Senior Assistant Attorney General
33 Capitol Street
Concord, NH 03301
(603) 271-3679
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Dated: August 6, 2016

Dania

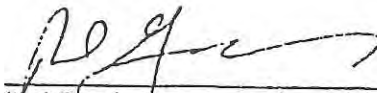
Tania Maestas
Deputy Attorney General Civil Affairs
Office of the New Mexico Attorney General
PO Drawer 1508
Santa Fe, NM 87504

Dated: *May 2*.....2016

Monica Wagner

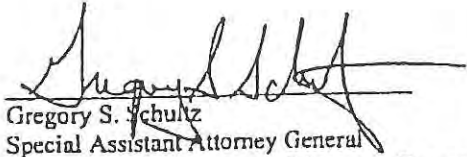
Monica Wagner
Deputy Chief
Environmental Protection Bureau
Office of the Attorney General of New York
120 Broadway, 26th floor
New York, NY 10271
212-416-6351

Dated: April 29, 2016



Paul Garrahan
Attorney-in-Charge | Natural Resources Section :
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Oregon Department of Justice
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971.673.1943 (Tue, Thu, Fri) (Portland)
503.947.4593 (Mon, Wed) (Salem)
503.929.7553 (Mobile)

Dated: April 28, 2016


Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street Providence, RI 02903
Tel.: (401) 274-4400, Ext. 2400

Dated: May 9, 2016

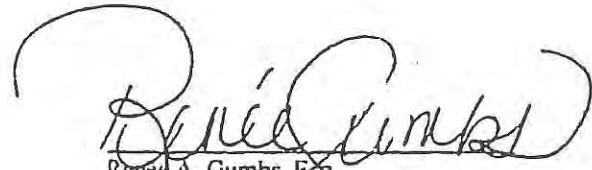
Rhodes B. Ritenour 5/9/16

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John W. Daniel 5/9/16

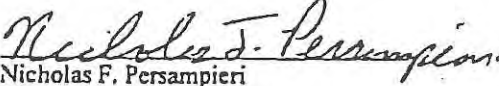
John W. Daniel
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Dated: May ^{4th} 10, 2016



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Renee.gumbs@doj.vi.gov

Dated: April 29, 2016


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Assistant Attorney General
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(802)-828-6902
nick.persampieri@vermont.gov

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

AFFIDAVIT OF SERVICE

Index No. 5050-16

-against-

NYS OFFICE OF THE ATTORNEY GENERAL,

Respondent.

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

BETH VANDEREHEYDEN, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for Respondents NYS Office of the Attorney General, herein.

On December 22, 2016, I served the annexed Affirmation of Michael Jerry with Exhibit A upon the following individual, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a U.S. Mail box in the City of Albany, a depository under the exclusive care and custody of the United States Postal Service, directed to the said counsel for petitioner at the address designated by them for that purpose, as follows:

Mark I. Bailen, Esq.
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Elizabeth M. Schutte, Esq.
Baker & Hostetler LLP
45 Rockefeller Plaza
11th floor
New York, NY 10111-0100

Beth Vandereheyden
BETH VANDEREHEYDEN

Sworn to before me this
22nd day of December, 2016

Patrick Lawlor
Notary Public

Printed [Reproduced] on Recycled Paper
PATRICK LAWLOR
Notary Public State of New York
Reg. No. 31269-16003
Qual. Exp. 4/30/17 County
Commission Expires Nov. 4, 2017

Notice of Motion for Attorney's Fees and Litigation Costs, dated January 19, 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,

Index No. 05050-16

Petitioner,

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

NOTICE OF
MOTION FOR ATTORNEYS'
FEES AND LITIGATION COSTS

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

PLEASE TAKE NOTICE that, upon the Affirmation of Anna St. John, dated January 17, 2017, and the Memorandum of Law accompanying this Notice of Motion, Petitioner Competitive Enterprise Institute ("CEI") will move this Court at the Supreme Court of New York, Albany County, New York, located at 16 Eagle Street, Albany, New York, 12207 on February 17, 2017, at 9:30 a.m., or as soon thereafter as may be heard, for an order granting CEI's motion for reasonable attorneys' fees and litigation costs, together with such further relief as this Court may deem just and proper, pursuant to N.Y. Pub. Officers Law § 89(4)(c).

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR Section 2214(b) and 2215 answering papers and cross-motions, if any, are required to be served no less than seven (7) days

before the return date of this motion.

Dated: January 19, 2017

Sam Katzman
Anna St. John
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, DC 20005
Telephone: (917) 327-2392
Email: Sam.katzman@cei.org
Email: Anna.stjohn@cei.org

Respectfully submitted,
BAKER & HOSTETLER LLP



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

Peter B. Shapiro
45 Rockefeller Plaza
New York, NY 10111-0100
(212) 589-4200
pshapiro@bakerlaw.com

Counsel for Petitioner

Affirmation of Anna St. John, dated January 17, 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETTIVE ENTERPRISE INSTITUTE,

Index No. 05050-16

Petitioner,

AFFIRMATION OF
ANNA ST. JOHN

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

Anna St. John, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under the penalties of perjury:

1. I submit this affirmation in support of Petitioner's Motion for Attorneys' Fees and Litigation Costs.
2. I am an attorney with the non-profit Competitive Enterprise Institute ("CEI") based out of Washington, DC. I have worked with CEI since October 1, 2015, when my then-employer, the non-profit Center for Class Action Fairness, merged with CEI.
3. CEI 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. CEI 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.

4. CEI attorneys, including myself, are paid on a salary basis that does not vary with the result in any case. We do not receive a contingent bonus based on success in any case, a structure that would be contrary to I.R.S. restrictions on non-profit organizations.

5. I was the primary attorney on this case, with supervision from CEI's General Counsel, Sam Kazman. CEI does not seek any fees for the work performed by Mr. Kazman. The law firm Baker & Hostetler LLP also represented CEI in this matter. With significant experience in Freedom of Information Law matters and litigation in New York State courts, Baker & Hostetler provided strategic direction, edited draft filings, and managed all court filings.

6. With respect to counsel's skill and experience, I am a 2006 graduate of Columbia Law School, where I was a James Kent Scholar. After law school, I served as a law clerk for the Honorable Rhesa H. Barksdale on the U.S. Court of Appeals for the Fifth Circuit, and I worked as an associate for the Washington, DC, office of Covington & Burling LLP. While at Covington, I managed complex insurance litigation on behalf of policyholders and white collar investigations, in connection with which I engaged in nearly all forms of written and document discovery, deposed and defended witnesses, and authored various motions and briefs in state and federal courts. When I left Covington in May 2014, my billing rate exceeded the \$450 rate I am seeking in this case.

7. The Baker & Hostetler attorneys with primary responsibility for this case were partner Mark Bailen and associate Elizabeth Schutte. With respect to the experience of Mr. Bailen and Ms. Schutte, attached as Exhibits 1 and 2 are true and correct copies of their respective biographies downloaded from the Baker & Hostetler website, www.bakerlaw.com, on January 17, 2017. It is my understanding and belief that both Mr. Bailen and Ms. Schutte ordinarily charge clients a higher billing rate than they charged CEI in this litigation.

8. CEI seeks fees of \$16,425 for my work on this case. This amount represents 36.5 hours at a billing rate of \$450 per hour. The request does not include any time spent preparing for a

potential court hearing on Respondent's motion to dismiss Petitioner's complaint or preparing this fee motion. It is my understanding and belief that the \$450 billing rate I am seeking for lodestar in this case is less than the billing rate for attorneys with comparable skill and experience in Washington, DC. In *In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. C 07-05634 CRB, 2015 U.S. Dist. LEXIS 106943 (N.D. Cal. Aug. 13, 2015), the U.S. District Court for the Northern District of California approved this billing rate for my work.

9. Attached as Exhibit 3 is a true and correct copy of the time entries I contemporaneously kept in this matter.

10. CEI seeks fees of \$12,476.25 for Baker & Hostetler's work on this case. This amount represents 16 hours of work by Mr. Bailen at a rate of \$450 per hour, significantly reduced from his usual market billing rate, and 6.25 hours of work by Ms. Schutte at \$350 per hour, also a reduced billing rate, as well as hours billed by paralegals and other litigation support staff at the firm. This time does not include any time spent on the motion for attorneys' fees or in preparation for a potential hearing on Respondent's motion to dismiss Petitioner's complaint. Any time entries that appeared duplicative or were non-essential were not included in the lodestar calculation.

11. Attached as Exhibit 4 is a true and correct copy of the invoices sent to CEI by Baker & Hostetler for its work in this matter.

12. CEI's lodestar is:

Name	Hours	Billing Rate	Total
Attorneys			
St. John	36.5	\$450	\$16,425
Bailen	16	\$450	\$7,200
Schutte	6.25	\$350	\$2,187.50
Paralegals and Paraprofessionals			

Belanger	0.5	\$315	\$157.50
Blaber	9.25	\$175	\$1,618.75
Cabrera	2	\$175	\$350
Paremond	5.50	\$175	\$962.50
Total	76		\$28,901.25

13. In terms of efficiency, CEI litigated this case efficiently with 58.75 hours of attorney time and 17.25 hours of litigation support staff time in its lodestar. I believe this is a reasonable amount of time spent in this case, which involved researching and drafting a verified petitioner and researching and drafting an opposition to Respondent's motion to dismiss.

14. CEI also seeks \$466.72 in litigation costs. This amount represents filing fees, delivery and postage charges, and fees associated with service of process that Petitioner incurred to litigate this case.

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Dated: January 17, 2017
New Orleans, LA

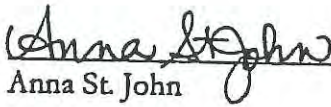

Anna St. John

Exhibit 1 – Mark Bailen Biography

BakerHostetler

Mark I. Bailen

Partner

Washington, D.C.

T +1 202.861.1715 | F +1 202.861.1783

mbailen@bakerlaw.com



Services

- Complex Commercial Litigation
- Media Mergers and Acquisitions
- Media Law and Digital Content
- International Arbitration and Litigation

Industries

- Communications Industry

Prior Positions

- Nationally Syndicated Political Talk Show: Producer

Admissions

- U.S. Court of Appeals, Fourth Circuit, 2015
- U.S. Court of Appeals, Second Circuit, 2012
- U.S. Court of Appeals, District of Columbia Circuit, 2005
- U.S. District Court, Southern District of New York, 2012
- U.S. District Court, District of Massachusetts, 2010
- U.S. District Court, District of Columbia, 2001
- U.S. District Court, District of Maryland, 1998
- District of Columbia, 1998
- Massachusetts, 1997
- Maryland, 1997
- New York, 2011

Education

- J.D., New York University School of Law, 1997
- B.A., Cornell University, 1992

Mark Bailen focuses his practice on media and publishing matters, including libel and privacy, copyright, and trademark, while also performing complex commercial litigation and International arbitration. As media and technology have evolved, Mark has transitioned from representing not only traditional media outlets, but also clients in the growing fields of Internet and digital media. He represents websites, bloggers, and others who publish and disseminate news, information, opinions, and Ideas. His involvement with all mediums of publication leaves Mark with a full understanding of the rights and obligations of content publishers. He advises clients on the potential legal issues related to their content and is proactive in developing the appropriate solutions to protect clients in their publishing endeavors.

Mark also litigates complex commercial disputes in federal and state courts across the country, including international litigation matters involving foreign sovereigns.

Experience

Media

- Represented non-profit firm, major national newspaper, and others in libel suit in New York arising out of content of an advertisement published in newspaper and on the Internet.
- Represented publisher in copyright infringement actions in New York and California involving claimed rights in photographs and manuscripts.
- Represents bloggers in various defamation actions in Washington, D.C., arising from commentary on blogs and use of video on the website.
- Litigated issue of first impression concerning identities of anonymous online posters and established standard for disclosure of their identities under Maryland law.
- Represented defendants operating a website in a defamation action filed by a publicist who sued over statements made about her on the website stemming from postings on her personal social media page, raising issues of first impression under the First Amendment where one seeks attention and publicity through social media.
- Defended publishers in various actions brought by authors disputing royalties in Washington, D.C., and New York.

- Represented newspaper in civil rights action against governor and state agencies for denying newspapers' First Amendment rights to comment freely on governor's actions.
- Vetted numerous manuscripts, including best-selling biography of former U.S. president.

International Litigation

- Managed team of attorneys through six-week jury trial in New York in multimillion-dollar breach of fiduciary duty and fraud action involving foreign government official.
- Represented foreign government in sovereign debt litigations.
- Represented foreign bank in breach of contract action in New York federal court.
- Litigated dispute over royalties from sales through foreign distribution outlets on behalf of major publishing firm.

Memberships

- Barristers: Washington, D.C.
- International Bar Association

Community

- International Center for Journalists: Board of Directors
- Boys and Girls Clubs of Greater Washington: Board Member and Former Chair of D.C. Region

Exhibit 2 – Elizabeth Schutte Biography

BakerHostetler

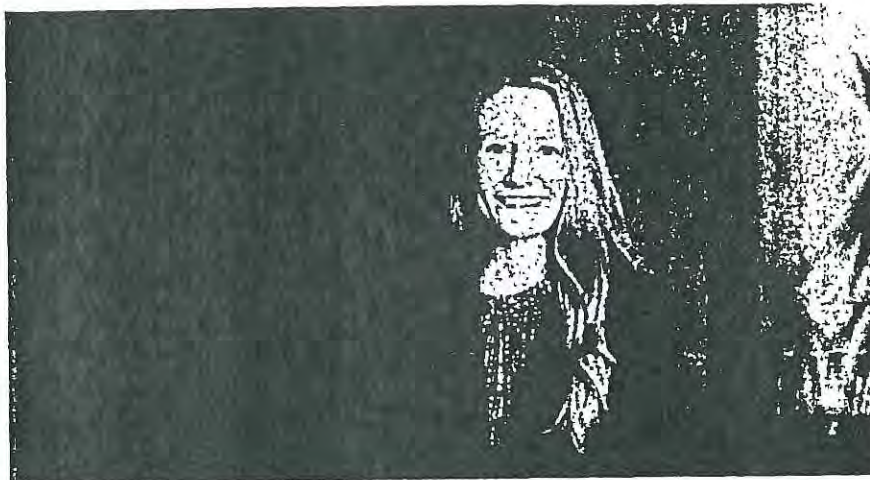
Elizabeth M. Schutte

Associate

New York

T +1 212.271.2030 | F +1 212.589.4201

eschutte@bakerlaw.com



Services

- Complex Commercial Litigation

Admissions

- U.S. Court of Appeals, Second Circuit, 2013
- U.S. Court of Appeals, Seventh Circuit, 2010
- U.S. District Court, Southern District of New York, 2013
- U.S. District Court, Eastern District of New York, 2013
- U.S. District Court, Northern District of Illinois, 2009
- New York, 2010
- Illinois, 2008

Education

- J.D., John Marshall Law School, 2008, Student Publications Editor, *The John Marshall Law Review*
- B.S., Indiana University, Bloomington, 2004

Elizabeth Schutte is a committed litigator who approaches cases from alternative angles in order to craft creative solutions that obtain the most effective results for her clients.

Experience

- Currently working on a variety of investigatory and litigation matters in connection with BakerHostetler's role as court-appointed counsel to the Securities Investor Protection Act Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC.
- Representing client against allegations of securities violations in a class action lawsuit.
- Member of team that represents a former London-based JPM managing director whose cooperation was sought in the investigation related to a multibillion-dollar trading loss for the bank. Team secured a rare non-prosecution agreement with the Justice Department and agreements with other regulatory authorities, which enabled the client to cooperate with federal prosecutors in the continuing investigations.

Recognitions

- New York Metro Super Lawyers "Rising Star" (2013 to 2016)

Memberships

- American Bar Association
- New York State Bar Association
- New York City Bar Association

Exhibit 3 – Bill Time Entries

***In the Matter of the Application of Competitive Enterprise Institute v. Attorney
General of New York , Index No. 0505-16
Time Entries for Anna St. John***

Date	Description of Services	Hours
7/17/2016	Review relevant materials and begin drafting notice of petition and verified petition.	2.5
7/19/2016	Draft verified petition to enforce FOIL request to NY Attorney General.	1.2
7/20/2016	Draft verified petition to enforce FOIL request to NY Attorney General.	4.2
7/21/2016	Legal research regarding potential defenses to petition.	0.9
8/26/2016	Conference with Mr. Kazman regarding petition; final review of petition before filing.	0.5
9/22/2016	Legal research regarding legal deadlines in Article 78 proceeding.	2.1
9/29/2016	Strategy updates from Mr. Kazman.	0.1
10/4/2016	Draft opposition to motion to dismiss and legal research in support.	4
10/5/2016	Draft opposition to motion to dismiss and legal research in support.	3.9
10/6/2016	Review comments on opposition brief from Mr. Kazman and respond to email regarding strategy for same.	0.5
10/7/2016	Research and draft standard of review and statement of facts section of opposition to motion to dismiss; legal research to support argument section.	4.6
10/9/2016	Revise opposition to motion to dismiss; legal research in support of same.	1.4
10/11/2016	Edit opposition to motion to dismiss.	0.9
10/12/2016	Edit opposition to motion to dismiss.	2.3

10/19/2016	Conference with Mr. Kazman regarding strategy for opposition to motion to dismiss.	0.1
10/20/2016	Edit opposition to motion to dismiss.	3.7
10/21/2016	Edit opposition to motion to dismiss.	1
10/24/2016	Cite check opposition to motion to dismiss (1.0); conference with Mr. Bailen (0.2); review Mr. Bailen's edits to opposition (0.1); draft affirmation in support of opposition (0.5).	1.8
10/25/2016	Draft affirmation in support of opposition to motion to dismiss (0.6); finalize opposition and correspond with Mr. Bailen and Mr. Kazman re same (0.2).	0.8

Exhibit 4 – CEI Invoices to Baker & Hostetler

BakerHostetler

Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 09/09/16
Invoice Number: 50285717
B&H File Number: 08214/046796/000003
Taxpayer ID Number: [REDACTED]

Page 1

Regarding: NY Freedom of Information Appeal

For professional services rendered through August 31, 2016

BALANCE FOR THIS INVOICE DUE BY 10/09/16 \$ 4,713.75

Remittance Copy

Please include this page with payment

Invoice No: 50285717

Firm Contact Information

Gary Pyne
(202) 861-1755
gpyne@bakerlaw.com

Please Remit To:
Baker & Hostetler LLP
P.O. Box 70189
Cleveland, OH 44190-0189

FOR WIRE REMITTANCES:
Baker & Hostetler LLP
KeyBank, N.A., Cleveland, OH
Account No: 1001516552 / ABA 041001039
SWIFT Code: KEYBUS33

Reference Invoice No:
50285717

Email the "Remittance Copy" to
bakerlockbox@bakerlaw.com

Regarding: NY Freedom of Information Appeal

Matter Number: 046796.000003

Name	Title	Hours	Rate	Amount
Bailen Mark I	Partner	4.00	\$ 450.00	\$ 1,800.00
Schutte Elizabeth M.	Associate	1.00	350.00	350.00
Blaber Theresa A	Paralegal	6.25	175.00	1,093.75
Paremoud Jana	Paralegal	5.50	175.00	962.50
Belanger Christina I.	Paraprofessional	0.50	315.00	157.50
Total		17.25		\$ 4,363.75

Date	Name	Description	Hours
08/26/16	Bailen Mark I	[NY FOIL issue] Review and analyze petition and accompanying documents to be filed in Supreme Court in Albany; advise and New York office paralegals regarding preparation of documents and filing; telephone calls with client regarding revisions to documents and filing.	2.75
08/26/16	Belanger Christina I.	Review of Notice of Petition, Affirmation, RJI and Petition for format prior to filing.	0.50
08/26/16	Blaber Theresa A	Work on creating and revising multiple documents to start new FOIL Action in Albany, New York- including Notice of Petition; Affirmation of attorney, Mark Bailen; confer with Bailen regarding questions related to starting new action in Albany, New York; work with Managing Clerk's office regarding matters of service and filing.	6.25
08/26/16	Paremoud Jana	Assist Ms. Blaber with preparing the NY FOIL Verified Petition and supporting documents for filing.	1.00
08/26/16	Schutte Elizabeth M.	Review Albany filing requirements and emails with Ms. Blaber and Ms. Belanger regarding the same.	0.25
08/26/16	Schutte Elizabeth M.	Review petition and other materials relating to FOIL filing in Albany.	0.75
08/29/16	Bailen Mark I	[NY FOIL issue] Review and signoff on final drafts of the documents; confer with client regarding same; advise regarding filing and service issues.	1.00

Baker & Hostetler LLP

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver
 Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

Date	Name	Description	Hours
08/29/16	Paremoud Jana	Prepare for filing, page-check, finalize, and put together 5 sets of the RJI, Petition, Verification, Affidavit, and Exhibits in the NY FOIL suit.	4.50
08/31/16	Bailen Mark I	[NY FOIL issue] Correspondence with client regarding filing and service issues.	0.25
		Total	17.25

Baker-Hostetler

Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 10/20/16
Invoice Number: 50302280
B&H File Number: 08214/046796/000003
Taxpayer ID Number: [REDACTED]

Page 1

Regarding: NY Freedom of Information Appeal

For professional services rendered through September 30, 2016

BALANCE FOR THIS INVOICE DUE BY 11/19/16 \$ 1,306.25

2016 OCT 20 10 10 AM EST

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Invoice No: 50302280

Firm Contact Information

Gary Pyne
(202) 861-1755
gpyne@bakerlaw.com

Please Remit To:
Baker & Hostetler LLP
P.O. Box 70189
Cleveland, OH 44190-0189

Reference Invoice No:
50302280

FOR WIRE REMITTANCES:
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KeyBank, N.A., Cleveland, OH
Account No: 1001516552 / ABA 041001039
SWIFT Code: KEYBUS33

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Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 10/20/16
Invoice Number: 50302280
B&H File Number: 08214/046796/000003
Taxpayer ID Number: XXXXXXXXXX
Page 2

Regarding: NY Freedom of Information Appeal

For professional services rendered through September 30, 2016

Fees \$ 1,306.25

BALANCE FOR THIS INVOICE DUE BY 11/19/16 \$ 1,306.25

Baker & Hostetler LLP

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Houston

Chicago
Los Angeles

Cincinnati
New York

Cleveland
Orlando

Columbus
Philadelphia

Costa Mesa
Seattle

Denver
Washington, DC

Regarding: NY Freedom of Information Appeal

Matter Number: 046796.000003

Name	Title	Hours	Rate	Amount
Bailen Mark I	Partner	1.25	\$ 450.00	\$ 562.50
Schutte Elizabeth M.	Associate	1.75	350.00	612.50
Blaber Theresa A	Paralegal	0.75	175.00	131.25
Total		3.75		\$ 1,306.25

Date	Name	Description	Hours
09/06/16	Blaber Theresa A	Save final electronic forms of documents for attorneys review and use.	0.50
09/22/16	Bailen Mark I	Telephone message from NY Attorney General's office regarding motion to dismiss petition; call with Mr. Kazman regarding same.	0.25
09/22/16	Schutte Elizabeth M.	Telephone call with Mr. Bailen to discuss strategy regarding the Attorney General's anticipated motion to dismiss and request for extension.	0.25
09/22/16	Schutte Elizabeth M.	Draft email to Mr. Bailen summarizing research on timing of Competitive Enterprises' petition, the Attorney General's motion, and other matters.	0.50
09/22/16	Schutte Elizabeth M.	Review court rules and applicable state statutes regarding the timing of the Attorney General's motion to dismiss, Competitive Enterprises' response, any hearing and return dates, and the Attorney General's request for an extension.	0.75
09/22/16	Schutte Elizabeth M.	Returned telephone call to the New York Attorney General regarding their response to Competitive Enterprise's petition and oral argument.	0.25
09/26/16	Bailen Mark I	Telephone calls with NY Attorney General's office and client regarding response to petition.	0.50
09/29/16	Blaber Theresa A	Follow-up with attorneys, regarding upcoming filing of Reply Brief in Albany County Court.	0.25

Competitive Enterprise Institute

Invoice Date: 10/20/16
Invoice Number: 50302280
Matter Number: 046796.000003
Page 4

Date	Name	Description	Hours
09/30/16	Ballen Mark I	Review and analyze NY Attorney General's office answer and memorandum of law in Energy & Environment Legal Institute matter.	0.50
		Total	3.75

Baker & Hostetler LLP

Allanta
Houston

Chicago
Los Angeles

Cincinnati
New York

Cleveland
Orlando

Columbus
Philadelphia

Costa Mesa
Seattle

Denver
Washington, DC

BakerHostetler

Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 11/17/16
Invoice Number: 50314035
B&H File Number: 08214/046796/000003
Taxpayer ID Number: [REDACTED]

Page 1

Regarding: NY Freedom of Information Appeal

For professional services rendered through October 31, 2016

BALANCE FOR THIS INVOICE DUE BY 12/17/16 \$ 6,272.97

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Firm Contact Information

Gary Pyne
(202) 861-1755
gpyne@bakerlaw.com

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P.O. Box 70189
Cleveland, OH 44190-0189

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KeyBank, N.A., Cleveland, OH
Account No: 1001516552 / ABA 041001039
SWIFT Code: KEYBUS33

Reference Invoice No:
170314035

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Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 11/17/16
Invoice Number: 50314035
B&H File Number: 08214/046796/000003
Taxpayer ID Number: XXXXXXXXXX

Page 2

Regarding: NY Freedom of Information Appeal

For professional services rendered through October 31, 2016

Fees \$ ~~6,456.25~~ 6,043.75

Expenses and Other Charges

Delivery Services (E107)	51.49
Postage (E108)	2.83
Miscellaneous (E124)	2.40
Service of Process Fees/Subpoena Fees (E113)	105.00
Filing Fees (E112)	(45.00)

Total Expenses \$ 116.72

BALANCE FOR THIS INVOICE DUE BY 12/17/16 \$ 6,272.97

Baker&Hostetler LLP

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver
Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

Regarding: NY Freedom of Information Appeal

Matter Number: 046796.000003

Name	Title	Hours	Rate	Amount
Bailen Mark I	Partner	9.50	\$ 450.00	\$ 4,275.00
Schutte Elizabeth M.	Associate	3.25	350.00	1,137.50
Blaber Theresa A	Paralegal	2.25	175.00	393.75
Cabrera Ramon C	Paralegal	2.00	175.00	350.00
Total		17.00		\$ 6,156.25

Date	Name	Description	Hours
08/29/16	Schutte Elizabeth M.	Review and finalize documents for filing.	2.00
10/03/16	Bailen Mark I	Correspondence with client regarding filing of NY AG's answer to Petition.	0.25
10/03/16	Schutte Elizabeth M.	Emails with Mr. Bailen, Ms. Blaber and Ms. Belanger regarding the Attorney General's motion to dismiss.	0.25
10/04/16	Bailen Mark I	Telephone calls with NY AG's office and client regarding AG's motion to dismiss CEI's Petition; review and analyze motion to dismiss papers.	1.50
10/04/16	Schutte Elizabeth M.	Review the New York Attorney General's motion to dismiss Competitive Enterprise Institute's petition.	0.25
10/05/16	Bailen Mark I	Analyze return date issues and possible extension; telephone calls with client regarding analysis of motion to dismiss, issues to raise in reply, and adjournment of return date; correspondence with NY AG's office and court clerk regarding adjournment.	1.75
10/06/16	Bailen Mark I	Draft and send letter to Chief Clerk regarding adjournment.	0.25
10/07/16	Bailen Mark I	Draft and send letter to Chief Clerk regarding adjournment of return date.	0.25
10/19/16	Bailen Mark I	Confer with Mr. Kazman regarding opposition to NY AG's motion to dismiss.	0.25
10/24/16	Bailen Mark I	Review and revise opposition to motion to dismiss; correspondence with client regarding supporting affirmation and changes to brief.	2.25
10/25/16	Bailen Mark I	Revise affirmation and draft of opposition to motion to	2.75

Duplicate Entry - Not included in Total being sought

Baker & Hostetler LLP

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver
 Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

Date	Name	Description	Hours
		dismiss; correspondence with client regarding revised drafts; supervise finalizing documents for filing and service.	
10/25/16	Blaber Theresa A	Work on preparing and getting served and sent to NYS Court in Albany County- Memo of Law in Opposition to Motion to Dismiss and Affirmation of Ms. E. Schutte with multiple exhibits.	2.25
10/25/16	Cabrera Ramon C	Assist Mr. Bailen, Ms. Schutte, and Ms. Blaber with getting the opposition to the motion to dismiss papers ready for filing.	2.00
10/25/16	Schutte Elizabeth M.	Review draft affirmation and finalize documents for filing.	0.25
10/25/16	Schutte Elizabeth M.	Review draft opposition brief.	0.50
10/26/16	Bailen Mark I	Correspondence with client and New York office regarding confirmation of filing and service.	0.25
	Total		17.00

BakerHostetler

Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 12/19/16
Invoice Number: 50326754
B&H File Number: 08214/046796/000003
Taxpayer ID Number: XXXXXXXXXX

Page 1

Regarding: NY Freedom of Information Appeal

For professional services rendered through November 30, 2016

BALANCE FOR THIS INVOICE DUE BY 01/18/17 \$ 762.50

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Invoice No: 50326754

Firm Contact Information

Gary Pyne
(202) 861-1755
gpyne@bakerlaw.com

Please Remit To:
Baker & Hostetler LLP
P.O. Box 70189
Cleveland, OH 44190-0189

FOR WIRE REMITTANCES:
Baker & Hostetler LLP
KeyBank, N.A., Cleveland, OH
Account No: 1001516552 / ABA 041001039
SWIFT Code: KEYBUS33

Reference Invoice No:
174)326754

Email the "Remittance Copy" to
bakerlockbox@bakerlaw.com

BakerHostetler

Competitive Enterprise Institute
Sam Kazman
1310 L Street, N.W.
7th Floor

Invoice Date: 12/19/16
Invoice Number: 50326754
B&H File Number: 08214/046796/000003
Taxpayer ID Number: XXXXXXXXXX
Page 2

Regarding: NY Freedom of Information Appeal

For professional services rendered through November 30, 2016

Fees	\$	762.50
BALANCE FOR THIS INVOICE DUE BY 01/18/17	\$	762.50

Competitive Enterprise Institute

Invoice Date: 12/19/16
Invoice Number: 50326754
Matter Number: 046796.000003
Page 3

Regarding: NY Freedom of Information Appeal

Matter Number: 046796.000003

Name	Title	Hours	Rate	Amount
Bailen Mark I	Partner	1.50	\$ 450.00	\$ 675.00
Schutte Elizabeth M.	Associate	0.25	350.00	87.50
Total		1.75		\$ 762.50

Date	Name	Description	Hours
11/01/16	Bailen Mark I	Correspondence with client regarding case status and assignment to Justice Zwack; analyze Justice Zwack's background.	0.50
11/27/16	Bailen Mark I	Review and analyze the court's order granting petition; correspondence with clients regarding same.	0.50
11/29/16	Schutte Elizabeth M.	Review decision and order, coordinate with Ms. Belanger to enter order with the clerk of court.	0.25
11/30/16	Bailen Mark I	Advise regarding Notice of Entry issue and analyze legal fee petition under New York procedures.	0.50
	Total		1.75

Affirmation in Opposition to Attorney Fees, by Shannan C. Krasnokutski,
dated March 3, 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

AFFIRMATION

Index No. 05050-16

Shannan C. Krasnokutski, an attorney admitted to practice in the State of New York, affirms the following to be true under penalty of perjury pursuant to CPLR 2106:

1. I am an Assistant Attorney General, of counsel to Eric T. Schneiderman, Attorney General of the State of New York. I am fully familiar with the facts and documents described in this Affirmation, and I make this Affirmation in opposition to Petitioner's Motion for Attorney Fees and Litigation Costs (the "Attorney Fee Motion").

2. On or about May 5, 2016, the Office of the Attorney General ("OAG") received a request bearing that date from Petitioner, Competitive Enterprise Institute ("CEI") (Exhibit 1 to the Petition, the "Request").

3. Petitioner's Request was reviewed by OAG Records Access Officer Michael Jerry. Attached hereto as Exhibit A is the September 30, 2016 Affirmation of Mr. Jerry, which summarizes Mr. Jerry's review and analysis of the Request, as well as the search conducted by Mr. Jerry to locate documents responsive to the Request.

4. As Mr. Jerry explains, the search produced one document responsive to the

Request. That document was titled "Climate Change Coalition Common Interest Agreement" (hereafter referred to as the "Climate Common Interest Agreement").

5. On June 15, 2016, Mr. Jerry denied Petitioner's Request, based on his determination that the Climate Common Interest Agreement was exempt from disclosure under Public Officers Law §§ 87(2)(a), 87(2)(e), and/or 87(2)(g). A copy of Mr. Jerry's June 15, 2016 letter is attached hereto as **Exhibit B**.

6. On June 21, 2016, Petitioner administratively appealed from the denial of its Request, via a letter to Kathryn Sheingold, Records Appeal Officer for the OAG Division of Appeals and Opinions. *See* Petition Exh. 3.

7. On July 7, 2016, Ms. Sheingold issued a letter to Petitioner upholding the denial of Petitioner's Request. A copy of Ms. Sheingold's July 7, 2016 letter is attached hereto as **Exhibit C**. That letter made clear that the only document responsive to Petitioner's FOIL request was a single "common interest agreement," which was exempted from disclosure under Public Officers Law §§ 87(2)(a) and 87(2)(e)(i). *See* Exh. C, at 2.

8. On information and belief, on or about August 4, 2016, the Office of the Attorney General for the District of Columbia released a full copy of the Climate Common Interest Agreement to the Energy & Environment Legal Institute ("E&E"), an entity that has staff in common with CEI. On further information and belief, E&E then posted a copy of the Climate Common Interest Agreement to its website on August 4, 2016.

9. Petitioner filed this proceeding, seeking production of the Climate Common Interest Agreement, on August 31, 2016.

10. On September 30, 2016, Respondent moved to dismiss this proceeding on the ground of mootness. Petitioner opposed that motion.

11. On November 21, 2016, this Court (Henry F. Zwack, A.J.S.C.) issued a Decision/Order denying Respondent's motion to dismiss, and referring the Request "back to the Attorney General for a response, within 30 days, that fully complies with the intent and purpose of this disclosure statute."

12. Pursuant to Judge Zwack's November 21, 2016 Order, on December 21, 2016, Mr. Jerry issued a further response to the Request (the "Supplemental Response"). A copy of the Supplemental Response is attached hereto as Exhibit D.

13. Also on December 21, 2016, Mr. Jerry executed a second Affirmation describing the actions taken by Respondent following the issuance of Judge Zwack's Decision/Order. A copy of Mr. Jerry's December 21, 2016 Affirmation is attached hereto as Exhibit E.

14. As Mr. Jerry explains in his December 21, 2016 Affirmation, OAG undertook a *de novo* diligent search for records responsive to Petitioner's Request, which included canvassing all Bureau Chiefs within the OAG for common interest agreements within their bureaus. *See* Exh. E, ¶ 8. As a result of this second, more extensive search, OAG confirmed that the only responsive record is the Climate Common Interest Agreement. *See id.*

15. In the Supplemental Response, Mr. Jerry described the statutory exemptions applicable to the Climate Common Interest Agreement. Mr. Jerry then stated:

The OAG has determined that, despite diligent efforts by the OAG to maintain its confidentiality, the record responsive to your request has been in the public domain since on or about August 4, 2016. Accordingly, for purposes of responding to this request only, and without waiving the applicability of the foregoing statutory exemptions to this record or type of record, OAG declines to invoke any exemptions from disclosure, and a copy of the referenced record is enclosed herewith.

Exh. D, at 4.

16. On January 19, 2017, Petitioner filed the instant Attorney Fee Motion.

Dated: Albany, New York
March 3, 2017



Shannan C. Krasnokutski


STIPULATION

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing are correct and complete copies of all pertinent papers on this appeal, except such exhibits, if any, as have been omitted by consent but shall be filed with the Appellate Division when the briefs are filed; and that settlement of the transcript and certification of the record are hereby waived.

DATED: 6/29/2017

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Respondent-Appellant

BY:




Jeffrey Lang, Esq.
Assistant Solicitor General

DATED: 6-23-17

BAKER & HOSTETLER LLP
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BY:



Mark I. Bailen, Esq. or
Peter B. Shapiro, Esq.