



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

FILE COPY

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL  
LITIGATION BUREAU

Writer Direct: 518-776-2606

September 30, 2016

Charles E. Diamond, Chief Clerk  
Albany County Supreme Court  
16 Eagle Street  
Albany, NY 12207

Re: *Competitive Enterprise Institute v. The Attorney General of New York*  
Supreme Court, Albany County  
Index No. 5050-16

Dear Mr. Diamond:

Enclosed for filing with the Court is the 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 on behalf of Respondent in the above-referenced proceeding, together with proof of service.

Thank you for your attention to this matter.

Very truly yours,

Shannan C. Krasnokutski  
Assistant Attorney General

Enclosure

September 30, 2016

Page 2

cc: Mark I. Bailen, Esq.  
Washington Square, Suite 1100  
Baker & Hostetler LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036

Elizabeth M. Schutte, Esq.  
45 Rockefeller Plaza  
New York, New York 10111-0100

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](mailto: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](mailto: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](mailto:mbailen@bakerlaw.com)

Elizabeth M. Schutte, Esq.  
45 Rockefeller Plaza  
New York, New York 10111-0100  
(212) 589-4200  
[eschutte@bakerlaw.com](mailto: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

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.<sup>1</sup>

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

---

<sup>1</sup> 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.

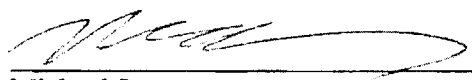
12. On June 21, 2016, Petitioner administratively appealed from the denial of its Request, via a letter to Kathryn Sheingold, Records Appeal Officer for the OAG Division of Appeals and Opinions. *See* Petition Exh. 3.

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

A handwritten signature in black ink, appearing to read "Michael Jerry", written over a horizontal line.

Michael Jerry

# Exhibit A

## 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.

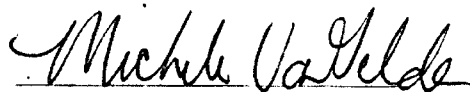
9. Related Litigation. The Parties continue to be bound by this Agreement in any litigation or other proceeding that arises out of the Matters of Common Interest.

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



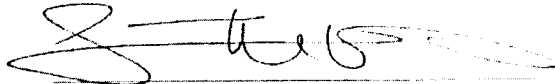
Michele Van Gelderen  
Supervising Deputy Attorney General  
Consumer Law Section  
Office of Attorney General Kamala D. Harris  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
Tel. (213) 897-2000

Dated: May 3, 2016

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



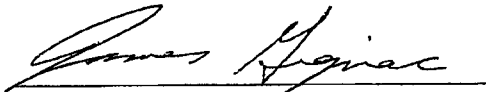
Dated: May 2, 2016



Elizabeth Wilkins  
Senior Counsel to the Attorney General\*  
Office of the Attorney General for the District of  
Columbia  
441 4th Street N.W. Suite 1100S  
Washington, D.C. 20001  
(202) 724-5568  
elizabeth.wilkins@dc.gov

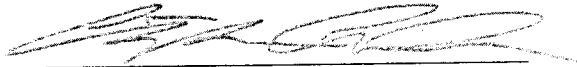
\*Admitted to practice only in Maryland. Practicing in the  
District of Columbia under the direct supervision of Natalie O.  
Ludaway, a member of the D.C. Bar pursuant to D.C. Court of  
Appeals Rule 49(c).

Dated: May 2, 2016




James P. Gignac  
Environmental and Energy Counsel  
Illinois Attorney General's Office  
69 W. Washington St., 18th Floor  
Chicago, IL 60602  
(312) 814-0660  
[igignac@atg.state.il.us](mailto:igignac@atg.state.il.us)

Dated: April 29, 2016



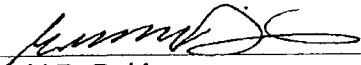
CHRISTOPHE COURCHESNE  
Assistant Attorney General  
Chief, Environmental Protection Division  
One Ashburton Place  
Boston, MA 02108  
christophe.courchesne@state.ma.us

Dated: Mar 10, 2016



Joshua N. Auerbach  
Assistant Attorney General  
200 Saint Paul Place  
Baltimore, Maryland 21202  
(410) 576-6311  
jauerbach@oag.state.md.us


Dated: May 5, 2016

  
Gerald D. Reid  
Assistant Attorney General  
Chief, Natural Resources Division  
Maine Office of the Attorney General  
(207) 626-8545  
jerry.reid@maine.gov

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

Karen D. Olson  
Deputy Attorney General  
Minnesota Attorney General's Office  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101  
(651) 757-1370  
karen.olson@ag.state.mn.us

Dated: April 29, 2016

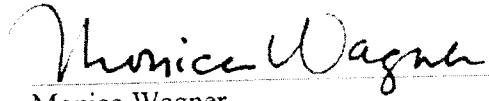
  
\_\_\_\_\_  
JOSEPH A. FOSTER, ATTORNEY GENERAL  
K. Allen Brooks, Senior Assistant Attorney General  
33 Capitol Street  
Concord, NH 03301  
(603) 271-3679  
allen.brooks@doj.nh.gov

Dated: May 6, 2016

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

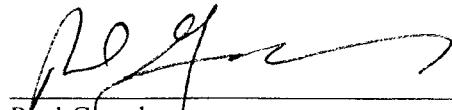


Dated: May 2, 2016



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

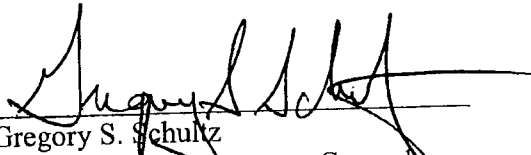
Dated: April 29, 2016



---

Paul Garrahan  
Attorney-in-Charge | Natural Resources Section |  
General Counsel Division  
Oregon Department of Justice  
1162 Court St. NE, Salem, OR 97301-4096  
971.673.1943 (Tue, Thu, Fri) (Portland)  
503.947.4593 (Mon, Wed) (Salem)  
503.929.7553 (Mobile)

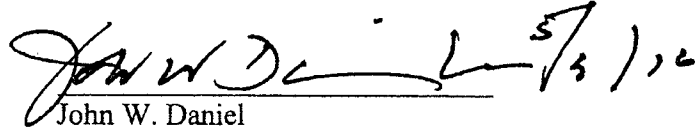
Dated: April 28, 2016

  
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

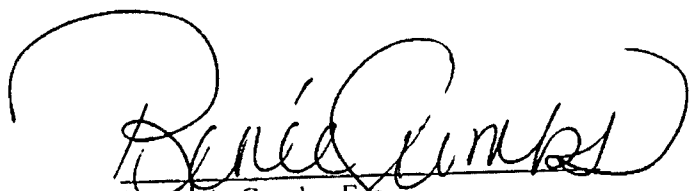
 5/9/16

Rhodes B. Ritenour  
Deputy Attorney General  
Civil Litigation Division  
Office of the Attorney General  
900 East Main Street  
Richmond, VA 23219  
Office: (804) 786-6731  
E-mail: RRitenour@oag.state.va.us

 5/9/16

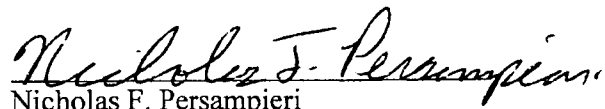
John W. Daniel  
Deputy Attorney General  
Commerce, Environmental, and Technology  
Division  
Office of the Attorney General  
900 East Main Street  
Richmond, VA 23219  
Office: (804) 786-6053  
E-mail: JDaniel@oag.state.va.us

Dated: May <sup>4th</sup> 10. 2016



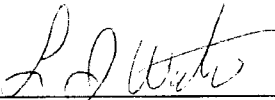
Renee A. Gumbs, Esq.  
Deputy Attorney General  
Department of Justice  
34-38 Kronprindsens Gade  
GERS Complex, 2nd flr.  
St. Thomas, VI 00802  
(340) 774-5666. ext. 101  
(340) 776-3494 (Fax)  
Renee.gumbs@doj.vi.gov

Dated: April 29, 2016



Nicholas F. Persampieri  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001  
(802)-828-6902  
nick.persampieri@vermont.gov

Dated: May 1, 2016



---

Laura J. Watson  
Senior Assistant Attorney General  
Washington State Office of the Attorney General  
(360)-586-6743  
Laura.watson@atg.wa.gov

# Exhibit B





- [Home](#)
- [About](#)
- [Strategic Litigation](#)
- [Policy](#)
- [Communications](#)
- [Blog](#)
- [Donate](#)
- [Contact](#)

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

### **Latest Posts**



### **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](mailto: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 Tattletale on the U.S. Senate Floor**

For Immediate Release: September 28, 2016 Contact: Craig Richardson [Richardson@eelegal.org](mailto: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](mailto: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

August 4, 2016

**Contact:**

Craig Richardson

[Richardson@eelegal.org](mailto: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.

FILE COPY

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

---

In the Matter of the Application of

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

Index No. 05050-16

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

---

**MEMORANDUM OF LAW IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS**

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

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](mailto: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](mailto:Shannan.Krasnokutski@ag.ny.gov)

**Table of Contents**

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 1

POINT I

    The Petition Should Be Dismissed as Moot, Since Petitioner Has Already  
    Received All the Relief to Which It Could Be Entitled. .... 4

CONCLUSION ..... 6

## **PRELIMINARY STATEMENT**

Petitioner Competitive Enterprise Institute (“CEI”) commenced this Article 78 proceeding against Respondent, New York State Attorney General, on August 31, 2016. This proceeding arises from Petitioner’s challenge to the agency’s July 7, 2016 final determination denying Petitioner’s May 5, 2016 request (the “Request”) for records pursuant to New York’s Freedom of Information Law, Public Officers Law §§ 84-89 (“FOIL”). Petitioner sought Common Interest Agreements entered into between Respondent, the Attorneys General of any other U.S. states or territories, and/or various individuals and entities in connection with climate policies or agendas. Respondent identified only one document—the Climate Change Coalition Common Interest Agreement (“Climate Common Interest Agreement”)—as responsive to the request. Respondent found no documents responsive to that portion of the request seeking Common Interest Agreements with the non-State individuals and entities listed in the Request. Because the one responsive document identified pertained to an open investigation, Respondent denied the Request.

Subsequent to Respondent’s final determination, the Climate Common Interest Agreement was released by the Attorney General for the District of Columbia to the Energy & Environment Legal Institute (“E&E”), an entity that has staff in common with CEI. On or about August 4, 2016, E&E posted a copy of the Climate Common Interest Agreement to its website. While Respondent stands by its response to CEI’s FOIL request, the document is now public, rendering this action moot. Accordingly, Respondent moves to dismiss.

## **STATEMENT OF FACTS**

This section provides a summary of the facts pertinent to this matter. For a full statement



of the relevant facts, Respondent respectfully refers the Court to the Affirmation of Michael Jerry dated September 30, 2016 (“Jerry Affirmation”), submitted herewith.

The Office of the Attorney General (“OAG”) is the chief law enforcement agency of the State of New York. *See* Exec. L. § 63. In particular, it has broad jurisdiction under New York’s General Business Law §§ 352-359-h (the “Martin Act”) and 349 to ensure that New York’s securities markets are free from fraud, and New York consumers are not deceived. Specifically, as pertains to this petition, OAG is currently conducting an investigation into whether Exxon’s statements and disclosures to New York investors and consumers regarding the impact of climate change on its business violated New York State investor, business and consumer laws. *See* Jerry Affirmation, ¶ 7.

On or about May 5, 2016, the Office of the Attorney General (“OAG”) received CEI’s Request seeking the production of records. *See id.* at ¶ 3. 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.

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.

Petition Exh. 1, at 1-2; Jerry Affirmation, at ¶ 5.

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 agenda.

Petition Exh. 1, at 2.

After receiving the Request, OAG’s Records Access Officer, Michael Jerry, conducted a diligent search for responsive records. *See* Jerry Affirmation, at ¶ 7. That search produced one responsive document, the Climate Common Interest Agreement. *See id.* at ¶ 8. Respondent found no documents responsive to that portion of the request seeking Common Interest Agreements with the non-State individuals and entities listed in the Request. *Id.*

As Mr. Jerry explains in his Affirmation, Common Interest Agreements for active matters generally 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 . . . .”

On June 15, 2016, Mr. Jerry denied Petitioner's Request. *See* Jerry Affirmation, ¶¶ 10-11 and Petition Exh. 2. Mr. Jerry's June 15, 2016 letter noted that the Climate Common Interest Agreement was exempt from disclosure pursuant to New York Public Officers Law §§ 87(2)(a), 87(2)(e)(1) and 87(2)(g).

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

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 E&E, an affiliate of CEI. *See* Jerry Affirmation, ¶ 14. E&E then posted a copy of the Climate Common Interest Agreement to its website on August 4, 2016. *See id.* Upon information and belief, the Climate Common Interest Agreement has been publicly available since on or about August 4, 2016.

Given the public release of the single document responsive to Petitioner's Request, Petitioner has received all the relief to which it could be entitled under FOIL. As such, the Petition now is moot and is subject to dismissal.

## POINT I

### **The Petition Should Be Dismissed as Moot, Since Petitioner Has Already Received All the Relief to Which It Could Be Entitled.**

"Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties . . . ." *Matter of DeFreitas v. New York State*

*Crime Lab*, 141 A.D.3d 1043, 1044 (3d Dep't 2016), citing *Matter of Ratley v. New York City Police Dept.*, 96 N.Y.2d 873, 875 (2001). "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries. Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences." *Coleman v Daines*, 19 N.Y.3d 1087, 1090 (2012) (internal citations omitted). The petition is moot and should be dismissed because a determination will not affect the rights of the parties.<sup>1</sup> *Matter of DeFreitas*, 141 A.D.3d at 1044.

The Jerry Affirmation, submitted herewith, explains that Mr. Jerry conducted a diligent search for records responsive to Petitioner's Request, and identified a single record (identified in the Jerry Affirmation as the "Climate Common Interest Agreement") responsive to that Request. See Jerry Affirmation, ¶¶ 7-8. Mr. Jerry further states that, on or about August 4, 2016, after the agency's final determination on Petitioner's Request, a third party (the Office of the Attorney General for the District of Columbia) released a full copy of the Climate Common Interest Agreement to E&E, an entity that has staff in common with CEI. See Jerry Affirmation, ¶ 14. E&E then posted a copy of the Climate Common Interest Agreement to its website on August 4, 2016. See *id.*

Upon information and belief, the Climate Common Interest Agreement has been publicly available since on or about August 4, 2016. See *id.* Further, a full copy of the Climate Common Interest Agreement is attached as Exhibit A to the Jerry Affirmation. Accordingly, Petitioner has been afforded all the relief to which it could be entitled, this proceeding is moot, and Respondent's Motion should be granted. See *Alvarez v. Vance*, 139 A.D.3d 459, 460 (1st Dep't

---

<sup>1</sup> The mootness doctrine has exceptions: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-715 (1980). There are no facts before the Court to suggest that any of the exceptions are applicable here.

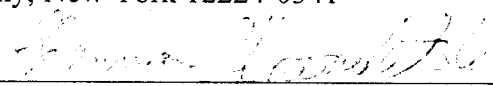
2016); *see also Matter of American Univ. of Antigua v. CGFNS Intl.*, 126 A.D.3d 1146, 1150 (3d Dep't 2015) (dismissing petition as moot where petitioners were already provided all the relief to which they were entitled).

### CONCLUSION

For the foregoing reasons, Respondent's Motion should be granted, and the Court should issue an Order (a) directing that the Petition be dismissed as moot; (b) in the event that the motion is denied, in whole or in part, granting Respondent 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 (c) granting such other and further 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 Respondents*  
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)  
[Kelly.Munkwitz@ag.ny.gov](mailto: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](mailto: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](mailto:mbailen@bakerlaw.com)

Elizabeth M. Schutte, Esq.  
45 Rockefeller Plaza  
New York, New York 10111-0100  
(212) 589-4200  
[Eschutte@bakerlaw.com](mailto:Eschutte@bakerlaw.com)