



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(c) 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.

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.

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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 blue ink, enclosed in a thin black rectangular border. The signature is cursive and appears to read "Kathryn Sheingold".

KATHRYN SHEINGOLD
Records Appeals Officer

Cc: Committee on Open Government
OAG Records Access Officer