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To be argued by: Jeffrey W. Lang
Time requested: 10 minutes

Supreme Court, Albany County, Index No. 05050-16

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of
COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner-Respondent,

-against-

NYS OFFICE OF THE ATTORNEY GENERAL,

Respondent-Appellant.

REPLY BRIEF FOR NYS OFFICE OF THE ATTORNEY GENERAL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES PAGE

STATE STATUTES

PRELIMARY STATEMENT

This Court should reverse Supreme Court's award of attorney's fees and costs because petitioner was not entitled to fees as a matter of law. As established in our opening brief, petitioner did not substantially prevail in this proceeding, the only result of which was to provide it with a duplicate copy of a record—the "Climate Change Coalition Common Interest Agreement"—which it already possessed at the time it brought the proceeding.

Indeed, petitioner obtained the common interest agreement when another attorney general released its copy of the agreement to an entity with staff in common with petitioner, which entity posted the agreement to its website. (R. 66.) Although petitioner protests that only a "single independent contractor" works for both organizations (Br. at 5), petitioner does not deny that it possessed a copy of the common interest agreement before it brought this proceeding. Nor does petitioner claim that its copy differed in any way from the copy that OAG later produced to it. And as established below, petitioner did not obtain any other result by virtue of bringing this proceeding which would support its position that it substantially prevailed. Moreover, OAG had a reasonable basis to withhold the common interest agreement at the time of its final decision. Accordingly, a fee award was not

permitted by law. Alternatively, this Court should reduce the amount of the fee award as indicated in our opening brief.

ARGUMENT

POINT I

PETITIONER DID NOT SUBSTANTIALLY PREVAIL IN THIS PROCEEDING

Petitioner argues that this proceeding produced three results, any one of which should count as substantially prevailing. Petitioner is mistaken as to each of the three.

First, petitioner points out (Br. at 8) that this proceeding prompted OAG to revisit whether the agreement was subject to FOIL disclosure for the first time since it rendered its final decision, which then led OAG to release the record on its motion to dismiss. This sequence of events ignores the real reason for the record's release: after litigation was commenced, OAG learned that the common interest agreement had already been made public by another attorney general. Based on that development, OAG reasonably concluded that no further purpose could be served by continuing to withhold its own identical copy of the record, and OAG accordingly released it. Although petitioner cites cases for the proposition that a FOIL petitioner may substantially prevail where an agency releases records to forestall a court order and moot a proceeding, *see Matter of Powhida v. City of Albany*, 147 A.D.2d 236, 239 (3d Dep't 1989), that is not what occurred here. Apart

from the court below, no New York court has ever endorsed the notion that a FOIL petitioner substantially prevails where a *third party* independently discloses a record, thus rendering relief against the agency as to the very same record "academic," *see Matter of Madeiros v. N.Y.S. Educ. Dept.*, 30 N.Y.3d 67, 72 ftnt. 1 (2017), 2017 N.Y. Slip. Op. 07209 (citing *Matter of Fappiano v. New York City Police Dept.*, 95 N.Y.2d 738, 749 (2001)).[1] Such a result is neither logical nor fair to the responding agencies. In short, petitioner cannot be deemed to have substantially prevailed for the purposes of a FOIL fee award where its lawsuit did not produce any additional disclosure apart from what petitioner already possessed.

Second, petitioner argues (Br. at 8) that this proceeding was required to remedy what petitioner erroneously claims was OAG's initially deficient search for records. FOIL obligates a responding agency to conduct a "diligent search." Public Officers Law § 89(3); *see Matter of Rattley v. New York City Police Dept.*, 96 N.Y.2d 873, 875 (2001). "Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required." *Id.* at 875.

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[1] Although petitioner asserts that OAG was obligated to disclose to petitioner a record identical to what it already possessed (Br. at 9), this case does not present that issue; OAG withheld the common interest agreement at the time of its final decision based on asserted exemptions, not because it was in the public domain (its release by another attorney general had not yet occurred).

OAG's search complied with the statutory requirement of reasonable diligence. As OAG's Records Access Officer Michael Jerry explained, based on his familiarity with the content and subject matter of the request, he determined that "responsive records, if any, would reside with attorneys involved in OAG's pending investigation of ExxonMobil Corporation." (R. 65.) Jerry's search located a single responsive record, the "Climate Change Coalition Common Interest Agreement." (R. 65.) Petitioner's mistaken assertion (Br. at 10) that OAG originally failed to search for records that "mention or otherwise include" the individuals and entities listed in the request is based on a tortured reading of Jerry's affidavit submitted in support of OAG's motion to dismiss. Simply because Jerry did not repeat verbatim the precise terms of petitioner's request in summarizing the results of his search does not mean that the search excluded any portion of the request. Indeed, earlier in his affidavit Jerry had quoted the request in full, and had stated unequivocally that his search "produced one document potentially responsive to the Request." (R. 64-65.) Read in full, the affidavit clearly conveyed that OAG's search encompassed the full scope of the request.

Nor, as petitioner claims (Br. at 10), can OAG's decision to conduct a more extensive search for records in response to Supreme Court's order to provide a more detailed FOIL response (R. 120-121) be deemed an admission

that its initial search was somehow defective. As discussed in our opening brief (at 12, 15), Supreme Court's conclusion as to OAG's initial FOIL response reflected its failure to consider OAG's appeals decision (thus leading it to perceive a discrepancy between OAG's position at the administrative level and in litigation where none existed)[2] and its application of the wrong legal standard to initial FOIL responses. In short, petitioner's claim that this litigation was required to remedy a faulty search for records is without merit.

Petitioner's third argument in support of its claim that it substantially prevailed fares no better. Specifically, petitioner contends (Br. at 3-4, 10) that this proceeding was required to confirm that OAG had located no other records responsive to petitioner's request apart from the common interest agreement. Petitioner believes that it was necessary to confirm this fact because OAG's initial response referred to responsive "records," however, OAG's appeals decision, which referred to "the common interest agreement" (R. 57) in the singular, dispelled any possible confusion created by the typographical error in OAG's use of the plural "records" in its initial response (R. 120).

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[2] Petitioner claims (Br. at 10) that Supreme Court focused on "OAG's inconsistent responses in its initial FOIL determination and its appeals decision." Not so: the court identified an inconsistency between OAG's initial FOIL response and Jerry's affidavit submitted in support of OAG's motion to dismiss, *see* R. 17; it overlooked entirely OAG's appeals decision.

Attempting to manufacture an ambiguity that would justify its lawsuit, petitioner nonetheless claims that the confusion persisted because the appeals decision stated that OAG had located no other agreements "signed" by the other entities and individuals listed in the request, leaving open the possibility that it had found other records that "mention or otherwise include" these entities and individuals. (R. 57.) Petitioner simply overlooks that the decision repeatedly referred to "the" common interest agreement or "the" agreement in discussing the applicability of the asserted exemptions. (R. 57.) Read together with the statement that no other agreements signed by the relevant entities and individuals were found, this language in the appeals decision established that OAG had located no other responsive records. To the extent that petitioner continued to entertain any doubts on this score, a simple follow-up call or letter to the appeals officer could have settled the issue. Under these circumstances, a party should not be rewarded with substantial attorney's fees for its decision to sue.

POINT II

OAG HAD A REASONABLE BASIS TO WITHHOLD THE COMMON INTEREST AGREEMENT AT THE TIME OF ITS FINAL DECISION

Petitioner was not entitled to an award of attorney's fees as a matter of law for the additional reason that OAG had a reasonable basis to withhold the Climate Change Coalition Common Interest Agreement at the time of its

final decision, before it was released by a third party. As demonstrated in our opening brief (at 13-16), OAG reasonably withheld the agreement based on its status as attorney work product, and the privilege was not waived by sharing the agreement among other attorneys general.

As the U.S. Supreme Court explained in the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 511 (1948), attorney work product "is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways[.]" *See Morgan v. N.Y.S. Dept. Envtl. Conservation*, 9 A.D.3d 586, 587 (3d Dep't 2004) (title reports, handwritten notes and diagrams prepared by Attorney General's office are exempt from FOIL disclosure as attorney work product). As further shown below, the common interest agreement fits within this definition of attorney work product.

Petitioner argues (Br. at 11-12) that the release of the common interest agreement by another attorney general's office demonstrates that the work product privilege is "facially" inapplicable to the common interest agreement. But the mere fact that another party to the agreement decided, for its own reasons, to release a copy of the agreement does not demonstrate that OAG lacked any reasonable basis for its different conclusion.

Petitioner also claims (Br. at 12-13) the doctrine does not apply because the agreement does not reflect any legal analyses, conclusions, theories or

strategies, and because OAG has not identified any single litigation for which the agreement was prepared. In describing the common interests shared by the signatories, however, the agreement refers to "potential legal actions" as to federal measures dealing with greenhouse gas emissions and identifies joint concerns about (i) possible misrepresentations by companies regarding fossil fuels, renewable energy and climate change; (ii) illegal conduct in relation to limiting or delaying the implementation and deployment of renewable energy technology; and (iii) compliance with federal and state laws governing the construction and operation of fossil fuel and renewable energy infrastructure. The agreement also details the signatories' mutual legal obligations with respect to the confidentiality of shared information. (*See* R. 69-70.) Such concerns and confidentiality provisions draw upon legal skills and reflect attorney analyses, conclusions, theories and strategies, and therefore qualify as work product. That the common interest agreement may—like many legal agreements prepared by attorneys—incorporate form legal language (Br. at 13) and be "wide-ranging" in coverage (Br. at 14) does not defeat its status as attorney work product.

Nor have courts limited the application of the doctrine to records prepared in the context of any specific ongoing litigation. *See Matter of Morgan,* 9 A.D.3d at 587. Here, litigation was plainly anticipated, as the common interest agreement expressly refers to "potential legal actions."

Finally, petitioner disputes (Br. at 14) the application to this case of the common interest rule whereby disclosure to a party with whom one shares a common legal interest and where the parties reasonably anticipate litigation does not waive an otherwise applicable privilege. According to petitioner, the common interest agreement is not limited to "potential litigation" but covers "numerous potential efforts in furtherance of the Clean Power coalition's political goals." The claim that the signatories to the Climate Change Coalition Common Interest Agreement did not anticipate litigation is refuted by the content of the agreement itself, and whether the concerns about illegality and compliance expressed in the agreement may be characterized as "political" in nature is irrelevant to the analysis.

At a minimum, the fact that ample federal precedent supports the application of the work product privilege to the very type of agreement at issue here—a common interest agreement, *see R.F.M.A.S., Inc. v. So*, No. 06-Civ-13114(VM)(MHD), 2008 WL 465113 (Feb. 15, 2008) (collecting cases)—shows that OAG had a reasonable basis for its assertion of work product, even if it ultimately may not have prevailed had the issue been adjudicated. Although one Appellate Division case ordered the disclosure of such an agreement, *see Fewer v. GFI Group, Inc.*, 78 A.D.3d 412, 413 (1st Dep't 2010), that case did not discuss in detail the content of the subject agreement. Thus, OAG would have been free to argue to this Court that the case was either

inapplicable or not persuasive authority. Accordingly, this Court may reverse Supreme Court's fee award on the alternative ground that OAG had a reasonable basis for its decision to withhold the common interest agreement.

POINT III

ALTERNATIVELY, THIS COURT SHOULD REDUCE THE FEE AWARD

Even if this Court concludes that the statutory prerequisites for an award of attorney's fees were met, it should reduce the amount of the award to $16,312.50. As explained in our opening brief (at 16-17), our proposed amount does not challenge the number of attorney hours allowed by Supreme Court, but caps the hourly rates of the attorneys at $250, rather than the higher rates approved by the court.

In awarding hourly rates above $250, the lower court abused its discretion by using hourly rates in excess of the prevailing rate in the Capital District. Petitioner's arguments to the contrary are without merit. Although petitioner advances various special circumstances that might justify a departure from the prevailing rate (Br. at 16-17), none apply here. Thus, this proceeding to obtain FOIL disclosure did not call upon specialized legal skills, nor does petitioner's preference for outside counsel "familiar with its operations and policy positions" (Br. at 17) warrant an above-market rate. Nor does it matter that the hourly rates of $450 (Bailen), $350 (Schutte), and

$300 (St. John) are below what petitioner's attorney's typically charge "in the market" and are below the hourly rates set by the "Department of Justice's Laffey Matrix" (Br. at 17); these rates nonetheless greatly exceed the prevailing rate for attorneys in the Capital District, as shown in OAG's opening brief (at 18).

Likewise, petitioner references OAG's statement (at 18-19) that courts have awarded attorney fees in excess of $250 per hour in the Capital District, but fails to acknowledge that, as we said, those cases are readily distinguishable, as they involved federal class action settlements or social security contingency fee arrangements where the fees sought were uncontested. *See* OAG Br. at 18-19. Petitioner similarly cites (Br. at 17) another inapposite case, *Arbor Hill Concerned Citizens Neighborhood Assn. v. County of Albany & Albany County Bd. of Elections*, 522 F.3d 182, 192 (2d Cir. 2008), which articulated a rule "occasionally permitting a deviation from forum rates" in federal voting and civil rights actions, such as the Voting Rights Act lawsuit involved in that case.

Supreme Court ultimately decided to use above-market rates based on its view that OAG "stonewalled" and unnecessarily multiplied litigation costs, but the record simply does not support this conclusion. OAG promptly and appropriately responded to petitioner's FOIL request, and petitioner has

not shown otherwise. Thus, if this Court finds that petitioner was entitled to attorney's fees, it should reduce the award as indicated.

CONCLUSION

Supreme Court's decision and order should be reversed and the petition dismissed.

Dated: December 12, 2017
Albany, New York

Respectfully submitted,

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