

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of:)
)
)
ENERGY & ENVIRONMENT) **Index No.:** _____
LEGAL INSTITUTE)
)
and)
)
FREE MARKET ENVIRONMENTAL) **VERIFIED PETITION**
LAW CLINIC,)
)
Petitioners,)
)
v.)
)
THE ATTORNEY GENERAL OF NEW YORK)
)
Respondent,)
)
For a judgment pursuant to Article 78)
of the Civil Practice Law and Rules.)

INTRODUCTION

Petitioners ENERGY & ENVIRONMENT LEGAL INSTITUTE (“E&E Legal”) and FREE MARKET ENVIRONMENTAL LAW CLINIC (“FME Law”) for their petition against Respondent ATTORNEY GENERAL FOR THE STATE OF NEW YORK (“the AG” or “OAG”), allege as follows:

Nature of Action

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, and to compel production under a records request made jointly by both petitioners.
2. The petitioners' New York Freedom of Information Law request at issue in this case was sent via electronic mail on May 5, 2016, and sought correspondence of the Attorney General which included any of eight individuals as correspondents, including six private parties, one employee of the Office of Attorney General, and one other state Attorney General, during a certain period of time and which correspondence contained certain keywords relating to the Attorney General's recent decision to investigate those who disagree with him on climate change and climate change policies. *See Exhibit 1.*
3. The Attorney General's Office denied the petitioners' FOIL Request in full by letter dated June 10, 2016, which letter was signed by Assistant Attorney General Michael Jerry, who works in the Attorney General's Manhattan Office. **Exhibit 2.**
4. 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 any search that the Attorney General's Office had conducted. The Attorney General's Office denied petitioners' request categorically, denying release of every record any such search did return, or would have returned, as potentially responsive.
5. The Attorney General cited three separate grounds for denial of the petitioners' request, stating that any potentially responsive record is "exempt from disclosure and have been withheld for one or more of the following reasons:"
 - a) The requested records were exempt from disclosure because they were privileged communications between an attorney and a client.

- b) The requested records were exempt from disclosure because they were attorney work product.
- c) The requested records were exempt from disclosure because they were inter- or intra-agency memoranda.
6. Most records described in petitioners' request were between Attorney General Schneiderman and outside parties, or correspondence shared outside the New York Attorney General's Office, to which none of these three grounds for denying the request would legitimately apply under New York law.
7. Tellingly, the Attorney General's initial denial letter asserted nothing more than *categorical* denials, of every word in every requested record — including to outside, major donors and activists — with no suggestion that the Office actually looked for records. As E&E Legal detailed in its June 13, 2016 appeal, the categorical justifications offered are unlikely to apply to correspondence between the AG and outside, private individuals no matter their importance to the AG's party, or political agenda. We also note that NY OAG offered no argument that any responsive records on Schneiderman's non-official text or email accounts were not official records
8. On June 13, 2016, petitioners appealed this blanket and insufficient denial of their request as required by §89 (4) (a) of the New York Freedom of Information Law, also requesting the Office provide a proper response under the statute. **Exhibit 3.**
9. By letter dated June 27, 2016, the appeals officer upheld the blanket denial of all records responsive to the petitioners' request. **Exhibit 4.**
10. That denial of petitioners' appeal asserted that, because one of the individuals named in petitioners' May 5, 2016 request, Christina Harvey, was a member of the Attorney Gen-

eral's "Executive Staff," the exemptions the office originally claimed protected all records from disclosure. Ms. Sheingold did not certify that no requested/withheld records were shared outside of the Attorney General's Office, including with any of the 7 other correspondents named in petitioners' May 5 request, nor did Ms. Sheingold explain how records shared outside of the New York Attorney General's Office (indeed, outside of the New York State government entirely) could be exempted from the law as attorney-client privileged communications, as attorney work product, or as intra-agency memoranda.

11. Accordingly, petitioners file this lawsuit to compel OAG to comply with the law and produce properly described public records and/or otherwise satisfy its statutory obligations under FOIL.

Parties

12. Petitioner Energy & Environment Legal Institute ("E&E Legal") is a nonprofit research, public policy and public interest litigation center incorporated in Virginia, with offices in Washington, DC. E&E Legal is dedicated to advancing responsible regulation and, in particular, economically sustainable environmental and energy policy. E&E Legal's programs include analysis, publication, and a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.
13. Petitioner Free Market Environmental Law Clinic ("FME Law") is a nonprofit public policy-based research, and public interest litigation center incorporated in Virginia, with offices in Washington, DC. FME Law is dedicated to providing counsel in support of responsible regulation and in particular economically sustainable environmental policy, and training law students and young lawyers in advocacy. FME Law's programs include publication and litigation relating to environmental and energy policy and how policymakers use public resources.

14. Respondent the Attorney General of New York is a Constitutional Officer of the State of New York, and is in possession of, or otherwise the proper owner, in his official capacity as Attorney General, of the records petitioners seek. He is sued in his official capacity only.

Jurisdiction and Venue

15. This matter is brought pursuant to CPLR Article 78.

16. Venue is proper in this Court pursuant to NY CPLR 506 (b) because the Attorney General's June 10, 2016 letter was signed by an Assistant Attorney General working from the Attorney General's Manhattan office.

Factual Background

17. In their May 5, 2016 FOIL request, the petitioners sought correspondence of the Attorney General between February 1, 2015 and the date the Office processed petitioners' request, which included any of eight individuals as correspondents, among whom were six private parties, one employee of the Office of Attorney General, and one other state Attorney General, which correspondence contained certain keywords relating to the Attorney General's recent decision to investigate those who disagree with him on climate change and climate change policies.

18. Specifically, petitioners requested:

“[C]opies of all correspondence, including attachments, which was sent to or from (including also as cc: or bcc:) New York Attorney General Eric Schneiderman, and one or more of the following eight individuals, using either his official or his non-official email and text messaging accounts (e.g., Gmail, private cell phone as well as State-provided accounts):

- a) Tom Steyer
- b) Ted White
- c) Matt Pawa
- d) Kamala Harris
- e) John Passacantando
- f) Kurt Davies [*sic*]¹
- g) Steve Coll
- h) Christina Harvey

Which correspondence contained any of these keywords or terms anywhere including in the body or the Subject field(s):

- i) energy
- j) fossil
- k) climate
- l) RICO
- m) Martin Act
- n) fraud
- o) accountability

19. Petitioners assert on information and belief that the Attorney General and his Office worked with the named individuals in preparing his campaign. Of them only one, Christina Harvey, was an employee of the New York Attorney General's Office at relevant times. None of the other individuals who were listed as potential correspondents of the

¹ Properly spelled, Kert Davies.

Attorney General are in any way employed by the Attorney General, or even by the State of New York.

20. On June 10, 2016 the New York Attorney General's Office denied the petitioners' May 5, 2016 request in full, claiming that all potentially responsive records and all potentially responsive information therein were attorney-client privileged communications, attorney work product, and/or intra-agency memoranda.
21. The Attorney General did not estimate a number or nature of responsive records or give any details at all regarding any process it used to search for and identify potentially responsive records.
22. Correspondence shared by the Attorney General with anyone outside the government of the State of New York, with six and arguably seven of the eight correspondents listed in the petitioners' May 5, 2016 request cannot possibly constitute any attorney-client communication, any attorney work product, or intra-agency memoranda.
23. To the extent any information that would otherwise be protected by any of the exemptions claimed by the Attorney General's Office was shared outside of that Office, any privilege or work-product claims would have been waived as soon as that information was divulged.
24. Petitioners appealed the Attorney General's blanket denial of access to any and all records, without explanation, to Kathryn Sheingold, the Attorney General's designated administrative appeals officer, by letter dated June 13, 2016.
25. Ms. Sheingold replied by letter dated June 27, 2016, pointing out that Christina Harvey is an employee of the New York Attorney General's Office. However, Ms. Sheingold did not claim that no responsive records existed for correspondence between the New York

Attorney General and any of the other seven identified individuals in the May 5, 2016 request, or explain how any exemptions found within the New York Freedom of Information Law might apply to those other seven individuals.

26. Ms. Sheingold also failed to articulate in any way any search that took place, what it located as potentially responsive records such as the number and nature of any responsive records that were located, or provide any reasonable response or other basis to conclude that the Office of Attorney General did anything but merely categorically deny petitioners' request.
27. While the Attorney General's Office has never explicitly claimed it is withholding records responsive to the petitioners' May 5, 2015 request pursuant to any common interest or joint defense agreement signed by the New York Attorney General and any outside parties or actors, it is nevertheless public knowledge that the Attorney General of New York has signed what purports to be such an agreement. That agreement has never been disclosed to the public, and is likely of no legal effect in light of the New York Court of Appeals' June 9, 2016 decision in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, in which that court held that common legal interests outside the context of litigation are not sufficient to justify the secrecy of a common interest agreement (citation not yet available).
28. Tellingly, the New York Court of Appeals held that "we do not perceive a need to extend the common interest doctrine to communications made in the absence of pending or anticipated litigation, and any benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse." If the Attorney General is claiming an ability to evade New York's Freedom of

Information Law through a broad, sweeping common interest agreement signed with actors outside of New York, the Court of Appeals' concern about the "potential for abuse" of common interest agreements is no longer hypothetical, but a very real danger to the public's right to know what its government is up to.

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

29. Petitioners re-allege paragraphs 1-28 as if fully set out herein.
30. Petitioners have sought and been denied production of responsive records reflecting the conduct of official business, because respondent has failed to provide a substantive response to the FOIL request at issue in this case, or to provide any reasonable basis to conclude that it properly searched for such records, or to produce records or portions therefor that are not properly exempt under the law.
31. Petitioners ask this Court to enter a judgment declaring that:
 - a. The records as specifically described in petitioners' FOIL request, and any attachments thereto, are public records, and as such, are subject to release under the New York Freedom of Information Law;
 - b. The respondent must release those requested records or segregable portions thereof subject to legitimate exemptions;
 - c. The respondent is estopped from seeking seek costs and fees for the request at issue in this case, due to the balance of the equities and the incorporation of common law principles by §89 (6) of the New York Freedom of Information Law.

SECOND CLAIM FOR RELIEF
Seeking Injunctive Relief

32. Petitioners re-allege paragraphs 1-31 as if fully set out herein.
33. Petitioners are entitled to injunctive relief compelling respondent to produce all records in its possession responsive to petitioners' New York Freedom of Information Law request, without fees, subject to legitimate withholdings.
34. Petitioners ask the Court to order the respondent to produce to petitioners, within 5 business days of the date of the order, the requested records described in petitioners' request, and any attachments thereto, subject to legitimate withholdings.
35. Petitioners ask the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 10 days after petitioners receive the last of the produced documents, addressing respondent's preparation of a withholdings log and a briefing schedule for resolution of remaining issues associated with petitioners' challenges to respondent's withholdings and any other remaining issues.

THIRD CLAIM FOR RELIEF

Seeking Costs and Fees

36. Petitioners re-allege paragraphs 1-35 as if fully set out herein.
37. Pursuant to §89 (4) (c), in most cases, the Court shall award reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
38. Petitioners are statutorily entitled to recover fees and costs incurred as a result of respondent's refusal to fulfill the open records request at issue in this case.
39. Petitioners ask the Court to order the respondent to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Petitioners request the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this the ____ day of _____, 2016.

Law Office of Francis Menton

By: _____

Francis Menton

85 Broad Street, 18th floor

New York, New York 10004

(212) 627-1796

fmenton@manhattancontrarian.com

Attorney for Petitioners

Energy & Environment Legal Institute and

Free Market Environmental Law Clinic

VERIFICATION

State of New York)
County of New York)

Francis Menton, an attorney admitted to practice in the State of New York, affirms pursuant to CPLR 2106 under the penalties of perjury:

1. I am an attorney for the Petitioner in the within proceeding. I make this Verification pursuant to CPLR 3020(d)(3) because both petitioners are foreign corporations.
2. I have read the attached Verified Petition and know its contents.
3. The allegations of the Verified Petition are all true to my personal knowledge, except for those alleged upon information and belief, and as to those I believe them to be true.



Francis Menton

Dated: July 22, 2016