

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.

VERIFIED PETITION

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

Respectfully submitted,

BAKER & HOSTETLER LLP



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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.

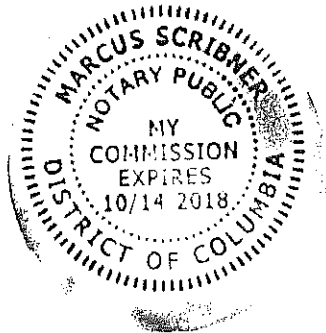


Notary Public

Printed Name: Marcus Scribner

My Commission Expires:

October 14, 2018



SUPREME COURT OF THE STATE OF NEW YORK
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In the Matter of the Application of

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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").

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").

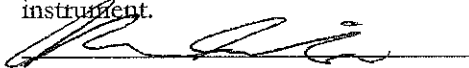
6. Attached to the Petition as Exhibit 4 is a true and correct copy of a letter from Kathryn Sheingold, Appeals and Opinions Bureau, Office of the Attorney General, to Petitioner, dated July 7, 2016, denying the appeal regarding the FOIL Request ("Appeal Denial").

Dated: August 26, 2016
Washington, D.C.



Hans Bader

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.



Notary Public

Printed Name: Marcus Scribner

My Commission Expires:

October 14, 2018



Exhibit 1



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#.ULOaPYf7L9U>; *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



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.

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,

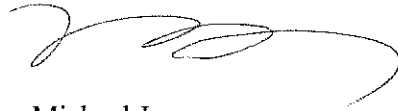
Mr. Hans Bader
June 15, 2016
Page 4

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,

A handwritten signature in black ink, appearing to read "Michael Jerry", with a long, sweeping flourish extending to the right.

Michael Jerry
Assistant Attorney General

Exhibit 3



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,

A handwritten signature in black ink that reads "Hans Bader". The letters are cursive and somewhat slanted to the right.

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.

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,

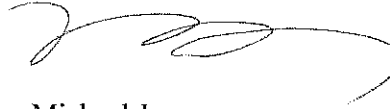
Mr. Hans Bader
June 15, 2016
Page 4

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,

A handwritten signature in black ink, appearing to read "Michael Jerry", with a long, sweeping flourish extending to the right.

Michael Jerry
Assistant Attorney General

Exhibit 4



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.

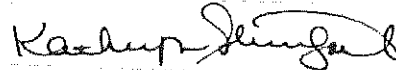
Finally, your assertion that the Records Access Officer needed to provide a “particularized and specific justification” with respect to the records he withheld is incorrect. The standard that you rely on applies only to “the agency’s burden of proof when its denial of disclosure to a FOIL applicant is 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.

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", written over a horizontal line.

KATHRYN SHEINGOLD
Records Appeals Officer

Cc: Committee on Open Government
OAG Records Access Officer