



COURT OF CLAIMS  
SUPREME COURT CHAMBERS

RENSELAER COUNTY COURTHOUSE  
80 SECOND STREET - THIRD FLOOR  
TROY, NEW YORK 12180  
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HENRY F. ZWACK  
Acting Supreme Court Justice

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November 22, 2016

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Albany, New York 12224-0341

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

Dear Counselors:

The Original Decision and Order is provided to Ms. Schutte for filing and entry. A copy is provided to Mr. Bailen and Ms. Krasnokutski, for filing.

All other papers are returned to the Court Clerk for filing.

Sincerely,

A handwritten signature in blue ink, appearing to read "Henry F. Zwack".

Henry F. Zwack  
Acting Supreme Court Justice

HFZ:jmv  
enc.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

COMPETITIVE ENTERPRISE INSTITUTE,

Petitioner,

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

-against-

THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

ORIGINAL

All Purpose Term

Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding

RJI: 01-16-ST8116

Index No. 5050-16

Appearances:

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## DECISION/ORDER

Zwack, J.:

Petitioner Competitive Enterprise Institute (CEI) brings this Article 78 seeking an order compelling Respondent New York State Attorney General to comply with its request under the Freedom of Information Law (FOIL). In addition to seeking compliance, petitioner also seeks an award of attorneys fees and costs. Respondent has moved to dismiss the petition as moot, arguing that the publication of the one document it deems responsive to petitioner's FOIL request — the Climate Change Coalition Common Interest Agreement ("CIA") — and also that it found "no documents responsive to that portion of the request seeking a Common Interest Agreement with the non-State individuals and entities listed in the request," renders the petition moot, as petitioner's have received all the relief they are entitled to.

When a FOIL request is made, an agency is "duty-bound to conduct a 'diligent search' of the records in its possession responsive to the request and to state, in writing the reason for the denial of access" (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882,884 [2009], internal quotations and citations omitted). The response "must not 'merely parrot' the statutory language of the FOIL exemptions, but must 'adequately describe the documents withheld and set forth the reasons for withholding them.'" (*Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.*,



141 AD3d 997, 999 [3d Dept 2016]), internal quotations and citations omitted). When faced with an Article 78 challenge such as this, “the agency bears the burden of ‘articulating a particularized and specific justification for denying access’” (*Matter of Rose v Albany County Dist. Attorney’s Off.*, 111 AD3d 1123, 1125 [3d Dept 2013]), quoting *Matter of Kaufman v New York State Dept. Of Env’tl. Conservation*, 289 AD2d 826, 827 [2001]).

Petitioner asserts that respondent failed to give the required detail of its search, as its original denial letter made reference to the existence of records. Petitioner also points out — although the respondent now relies on the release by a third party of the CIA report — respondent remains obligated to produce the document for petitioners. Petitioners also request a finding by the Court that the CIA is a public document and respondents lacked a reasonable basis in the law for withholding it, which would entitle them to attorneys fees and costs on this Article 78.

There is a clear discrepancy between respondent’s initial FOIL request determination and the answer it submits in this Article 78. Initially, respondent indicated it had “records responsive to your request” — withheld without any description of the documents — and now identifies only “one document potentially responsive to the Request.” The Court agrees with petitioner that respondent must provide more detail regarding its search for common interest agreements “that mention or otherwise include” the individuals and entities specified in petitioner’s request. Further, in denying the request, respondent has the burden of demonstrating the records fall within one of the statutory exemptions (*Matter of*

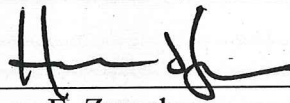
*Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557[1984]). In its initial denial of petitioner's request, petitioner asserted that the records fell within 'one or more' of five possible exemptions. However viewed, the denial was nothing more than a parroting of statutory language, and thus a complete failure of its obligation "to fully explain in writing...the reason for the denial of access" (*Matter of West Harlem Bus. Group*, 885).

Turning to the application by petitioner for attorneys fees and costs (Public Officers Law 89[4][c]), although respondent argues that it should not be subject to attorney fees and costs because it substantially complied with the petitioner's request, on this record the Court finds that this was simply not the case. Here, petitioner has substantially prevailed and respondent's "conclusory assertions that certain records fall within a statutory exemption are not sufficient" (*Matter of Acme Bus Corp. v County of Suffolk*, 136 AD3d 896, 898 [2d Dept 2016]) to deny access.

Accordingly, the subject FOIL request is referred back to the Attorney General for a response, within 30 days, that fully complies with the intent and purpose of this disclosure statute. Petitioners may within 60 days submit their application for attorney fees and costs on notice to respondent, who shall have the ability to submit a written response within 30 days following, with the Court to schedule a hearing, on request of either party, on the issue.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the Petitioner (Elizabeth Schutte, Esq., of counsel) for filing and entry. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: November 21, 2016  
Troy, New York



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Henry F. Zwack  
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated August 31, 2016; Verified Petition sworn to August 26, 2016; Affidavit of Hans Bader sworn to August 26, 2016 together with Exhibits "1" through "4";
2. Notice of Motion dated September 30, 2016; Affirmation of Michael Jerry, Esq., dated September 30, 2016, together with Exhibits "A" and "B"; Memorandum of Law dated September 30, 2016.
3. Affirmation of Elizabeth M. Schutte, Esq., dated October 25, 2016; Memorandum of Law, dated October 25, 2016..