

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

In the matter of:)	
)	
ENERGY & ENVIRONMENT)	Index No.: <u>101678/16</u>
LEGAL INSTITUTE)	
)	
)	VERIFIED PETITION
)	
Petitioner,)	
)	
v.)	
)	
THE ATTORNEY GENERAL OF NEW YORK)	
)	
Respondent,)	
)	
For a judgment pursuant to Article 78)	
of the Civil Practice Law and Rules.)	

INTRODUCTION

Petitioner ENERGY & ENVIRONMENT LEGAL INSTITUTE (“E&E Legal”) for its petition against Respondent ATTORNEY GENERAL FOR THE STATE OF NEW YORK (“the AG” or “OAG”), alleges 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 two records requests made by the petitioner.

Parties

2. 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.
3. 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 petitioner seeks. He is sued in his official capacity only.

The March 30, 2016 Request — FOIL Request # 160197

4. The petitioner’s first New York Freedom of Information Law request at issue in this case was sent via electronic mail on March 30, 2016, and sought correspondence of the Attorney General and two named employees of the Attorney General, which correspondence was to or from or included any of fifteen identified addresses, names or search terms, during a certain period of time. Responsive records related to the Attorney General’s decision announced in the past year to investigate those who disagree with him on climate change and climate change policies. *See Exhibit 1.*
5. The majority of these keywords were email addresses of private citizens who, public reports suggest, did or may have had a role in encouraging the Attorney General to

investigate the above-described opponents of a political agenda and/or claims regarding the state of certain scientific knowledge. Another six keywords or terms were names of private parties or institutions which, public reports suggest, did or may have had a role in encouraging the Attorney General to investigate the above-described opponents.

6. The Attorney General's Office assigned the March 30, 2016 request tracking # 160197.
7. Approximately five months later, the Attorney General's Office denied the petitioner's FOIL Request in part and complied in part by letter dated September 2, 2016. The relevant letter was signed by Assistant Attorney General Michael Jerry, who works in the Attorney General's Manhattan Office. **Exhibit 2.**
8. The production amounted to 128 pages over 100 pages of which were press stories or releases, with two activist complaints, nineteen electronically submitted citizen complaints sent via "NYSAG EMAIL FOR INTRANET", and one email from an environmental lobbyist passing along a blog post.
9. The Attorney General's Office's denial of the rest of the requested records provided no details about the number or nature of the responsive records or the nature of any search that the Attorney General's Office had conducted.
10. With respect to those records withheld in full, the Attorney General stated 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, or exempt from disclosure as attorney work product.

b) The requested records were exempt from disclosure because disclosure would interfere with a law enforcement investigation.

c) The requested records were exempt from disclosure because they were inter- or intra-agency memoranda.

11. Given the nature of petitioner's search parameters it seems likely that records responsive to petitioner's request would have been shared between the Attorney General's Office and outside parties, to which none of these three grounds for denying the request would legitimately apply under New York law. Eight of the fifteen search terms contained in the March 30, 2016 request were non-governmental email addresses, while several of the other search terms were the names of private parties who, public reports suggest, did or may have had a role in encouraging the Attorney General to investigate the above-described opponents.

12. On September 8, 2016, petitioner appealed this categorical and insufficient denial of its request as required by §89 (4) (a) of the New York Freedom of Information Law, again requesting the Office provide a proper response under the statute. **Exhibit 3.**

13. By letter dated September 22, 2016, the appeals officer upheld the categorical denial in full of the indeterminate number of records responsive to the petitioner's request again without providing any information regarding how many if any responsive records existed or were located, or how any exemption found in the New York Freedom of Information Law applied to any discrete record including but not limited to possible correspondence with outside private parties. **Exhibit 4.**

14. That denial of petitioner's appeal asserted that, because the Attorney General's Office is involved in a purported law enforcement investigation of whether ExxonMobil "made false, deceptive, or misleading statements about climate change and its impact on ExxonMobil's business," disclosure of the requested records would interfere with the Attorney General's law enforcement powers. The administrative appeals officer further purported to uphold the determination to withhold certain records consisting of communications between an attorney, apparently outside of the Office of the Attorney General, and the Attorney General, on the grounds that the Attorney General was a "potential client."
15. Records in the public domain and produced by attorneys general of other states indicate that rather than conducting any such investigation relevant to petitioner's request for law enforcement purposes, these efforts are those of what even their own correspondence describes as a political coalition pursuing political dissent and free speech by both corporations and individuals. Accordingly, disclosure of the requested records cannot impede any actual, legitimate law enforcement investigation. Moreover, some or even many of the requested records cannot be legitimately protected by attorney-client privilege insofar as no attorney-client relationship exists between the Attorney General and outside parties, or because sharing of material outside of any attorney-client relationship would waive the privilege.
16. Accordingly, petitioner files 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 with respect to the March 30, 2016 request.

The May 5, 2016 Request — FOIL Request # 160288

17. The petitioner's second 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 four named employees of the Attorney General during a certain period of time, which correspondence included any of five identified search terms all of which were names or email addresses of outside activists with whom, records prove, the Attorney General has consulted with on decision to investigate those who disagree with him on climate change and climate change policies. *See Exhibit 5.*¹
18. These keywords were email addresses of private citizens who, public reports suggest, did or may have had a role in encouraging the Attorney General to investigate the above-described opponents of a political agenda and/or claims regarding the state of certain scientific knowledge. The Attorney General's Office assigned the May 5, 2016 request tracking # 160288.
19. Approximately three months later, the Attorney General's Office denied the petitioner's FOIL Request in part and complied in part by letter dated September 2, 2016. The relevant letter was signed by Assistant Attorney General Michael Jerry, who works in the Attorney General's Manhattan Office. **Exhibit 6.**
20. The production amounted to 58 pages, 51 of which were a Nuclear Regulatory Commission filing, with several pages of email correspondence with two of the three activists named in the request discussing this same campaign by the Attorney General undertaken with the activists' encouragement and participation.

¹ Due to a typographical error petitioner corrected this request with an amended request on May 19, 2016.

21. Notably, two of those latter pages involve the controversial suggestion by the New York Office of Attorney General that one of the activists mislead a reporter about whether the activist had in fact briefed several attorneys general and other activists on March 29, 2016 about investigating opponents of the climate agenda (as records show he did);² they reveal the activist expressing his opinion that that made good sense, and that the Vermont Office of Attorney General — co-organizer with New York of the above-described campaign, as other records obtained elsewhere show — expressed its gratitude for the activist’s agreement.
22. Records produced by other state attorneys general but withheld by New York in this matter further demonstrate the impropriety of the Attorney General’s response. For example, the Attorney General withholds other correspondence with two of the three activists, for example about inclusion of the third activist in their meetings, which records meet no privilege under New York’s FOIL.³
23. Specifically, the Attorney General’s Office’s denial of the rest of the requested records provided no details about the number or nature of the responsive records or the nature of any search that the Attorney General’s Office had conducted.
24. With respect to those records withheld in full, the Attorney General stated that any potentially responsive record is “exempt from disclosure and have been withheld for one

² Other records show that the reporter referenced in the exchange, Amy Harder of the *Wall Street Journal*, was calling about a different if related meeting that the activist attended, among only private parties. See Amy Harder, “Exxon Fires Back at Climate-Change Probe”, *Wall Street Journal*, April 13, 2016, <http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535>.

³ Certain such records can be found at <http://eelegal.org/wp-content/uploads/2016/04/VT-NY-OAGs-fine-w-Sharon-Eubanks-joining-Pawa-for-AGs-briefing.pdf> and <http://eelegal.org/wp-content/uploads/2016/04/Calls-w-Pawa-and-Frumhoff.pdf>.

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, or exempt from disclosure as attorney work product.

b) The requested records were exempt from disclosure because disclosure would interfere with a law enforcement investigation.

c) The requested records were exempt from disclosure because they were inter- or intra-agency memoranda.

25. Other records produced by other states’ attorneys general prove that records described in petitioner’s request were shared between the Attorney General’s Office and outside parties, and suggest that numerous others also were, to which records none of these three grounds for denying the request would legitimately apply under New York law. In fact, two of the five search terms in the May 5, 2016 request were email “domain” addresses belonging to private parties outside of the Attorney General’s Office and, as noted above, petitioner already possesses proof that the Attorney General’s Office corresponded with those addresses yet is improperly withholding those records.

26. On September 8, 2016, petitioner appealed this categorical and insufficient denial of its request as required by §89 (4) (a) of the New York Freedom of Information Law, again requesting the Office provide a proper response under the statute. **Exhibit 7.**

27. By letter dated September 22, 2016, the appeals officer upheld the categorical denial of all records responsive to the petitioner's request, which were initially withheld. The appeals officer further refused to give any account of how many responsive records

existed or were located, or how any exemption found in the New York Freedom of Information Law applied to any discrete record. **Exhibit 8.**

28. That denial of petitioner's appeal asserted that, because the Attorney General's Office is involved in a purported law enforcement investigation of whether ExxonMobil "made false, deceptive, or misleading statements about climate change and its impact on ExxonMobil's business," disclosure of the requested records would interfere with the Attorney General's law enforcement powers. The administrative appeals officer further upheld the determination to withhold certain records consisting of communications between an attorney, including apparently with parties outside of the Office of the Attorney General, on the grounds that the Attorney General was a "potential client."
29. Records in the public domain and produced by attorneys general of other states indicate that rather than conducting any such investigation relevant to petitioner's request for law enforcement purposes, these efforts are those of what even their own correspondence describes as a political coalition pursuing political dissent and free speech by both corporations and individuals. Accordingly, disclosure of the requested records cannot impede any actual, legitimate law enforcement investigation.
30. Moreover, some or even many of the requested records cannot be legitimately protected by attorney client privilege insofar as no attorney-client relationship exists between the Attorney General and outside parties, or because sharing of material outside of any attorney-client relationship would waive the privilege.

31. Accordingly, petitioner files 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 with respect to the May 5, 2016 request.

Jurisdiction and Venue

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

33. Venue is proper in this Court pursuant to NY CPLR 506 (b) because the Attorney General's September 2, 2016 letters were signed by an Assistant Attorney General working from the Attorney General's Manhattan office.

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

34. Petitioner re-alleges paragraphs 1-33 as if fully set out herein.

35. Petitioner has 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 requests 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 thereof that are not properly exempt under the law.

36. Petitioner asks this Court to enter a judgment declaring that:

- a. The records as specifically described in petitioner's 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

37. Petitioner re-alleges paragraphs 1-36 as if fully set out herein.
38. Petitioner is entitled to injunctive relief compelling respondent to produce all records in its possession responsive to petitioner's New York Freedom of Information Law requests, without fees, subject to legitimate withholdings.
39. Petitioner asks the Court to order the respondent to produce to petitioner, within 5 business days of the date of the order, the requested records described in petitioner's requests, and any attachments thereto, subject to legitimate withholdings.
40. Petitioner asks the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 10 days after petitioner 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 petitioner's challenges to respondent's withholdings and any other remaining issues.

THIRD CLAIM FOR RELIEF
Seeking Costs and Fees

41. Petitioner re-alleges paragraphs 1-40 as if fully set out herein.

42. 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.

43. Petitioner is statutorily entitled to recover fees and costs incurred as a result of respondent's refusal to fulfill the open records requests at issue in this case.

44. Petitioner asks the Court to order the respondent to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Petitioner 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 6th day of October, 2016.

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By: _____

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