

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

In the matter of:

**FREE MARKET ENVIRONMENTAL
LAW CLINIC,**

ADVOCATES FOR PRATTSBURGH,

CITIZEN POWER ALLIANCE,

COHOCTON WIND WATCH,

**COALITION FOR THE PRESERVATION
OF THE GOLDEN CRESCENT AND
1000 ISLANDS REGION,**

GREAT LAKES WIND TRUTH,

CLEAR SKIES OVER ORANGEVILLE,

and

ROGER CAIAZZA

Petitioners,

v.

THE ATTORNEY GENERAL OF NEW YORK

Respondent,

**For a judgment pursuant to Article 78
of the Civil Practice Law and Rules.**

Index No.: 101759 / 16

**AMENDED
VERIFIED PETITION
PER CPLR § R3025**

INTRODUCTION

Petitioners FREE MARKET ENVIRONMENTAL LAW CLINIC (“FME Law”), and others, for their AMENDED petition against Respondent ATTORNEY GENERAL FOR THE STATE OF NEW YORK (“the AG” or “OAG”), pursuant to CPLR § R3025, 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 two records requests made by the petitioners.

Parties

2. Petitioner Free Market Environmental Law Clinic (“FME Law”) is a nonprofit research, public policy 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 and energy policy, as well as 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.
3. Petitioner Advocates for Prattsburgh is a New York not-for-profit corporation organized by volunteers in the area of Prattsburgh, New York, whose members are concerned with the noise, negative health effects, ice throws and overwhelming visual dominance of wind turbines. One of its members, John Servo, is a citizen of New York and interested in the underlying information.

4. Petitioner Citizen Power Alliance is a coalition of independent groups organized to promote sound energy and environmental policy. It is based in the Finger Lakes Region of New York State. One of its members, Mary Kay Barton, is a citizen of New York and interested in the underlying information.
5. Petitioner Cohocton Wind Watch is a citizens' organization dedicated to preserve the public safety, property values, economic viability, environmental integrity and quality of life in Cohocton, New York and in surrounding townships. One of its members, Judi Hall, is a citizen of New York and interested in the underlying information.
6. Petitioner Coalition for the Preservation of the Golden Crescent and 1000 Islands Region is an unincorporated citizens group operating in upstate New York. One of its members, Robert Alliaso, Jr., is a citizen of New York and interested in the underlying information.
7. Petitioner Great Lakes Wind Truth is a collection of persons and groups around the Lakes, sharing a mutual mission of increasing knowledge of the fragility of the Lakes and Basin systems, committed in opposition to any single or multiple industrial wind projects that threaten those ecosystems, threaten to compromise water supplies, and negatively affect fishing, boating, migration routes, and the complex underwater life and lake bottom already compromised over time. Member-petitioner Alan Isselhard is a citizen of New York and interested in the underlying information.
8. Petitioner Clear Skies Over Orangeville is an unincorporated association of citizens in the vicinity of Orangeville, New York, concerned about New York's energy policy choices. Member-Petitioner Linda Makson is a citizen of New York and interested in the underlying information.

9. Petitioner Roger Caiazza is a resident of Liverpool, New York.
10. 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 custodian, in his official capacity as Attorney General, of the records petitioners seek. He is sued in his official capacity only.

The Freedom of Information Request — FOIL Request # 160286

11. 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 records reflecting efforts to “arrange, schedule, discuss, or in any way mention[ing]” October and November 2015 meetings of OAG and representatives of Fahr LLC, including, but not limited to, Tom Steyer and Ted White. *See Exhibit A.*
12. The request also sought records reflecting efforts to “arrange, schedule, discuss, or in any way mention[ing]” a February 2015 meeting of Attorney General Schneiderman and representatives of “Eco-Accountability”, including, but not limited to, John Passacantando and Kert Davies.
13. The Attorney General's Office assigned the May 5, 2016 request tracking # 160286.
14. Approximately four months later, the Attorney General's Office denied the petitioners' 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 B.**

15. The Attorney General's Office's denial of some unstated number of requested records in full provided no details about the quantity or nature of the responsive records or the nature of any search that the Attorney General's Office had conducted, or why the records cannot be redacted to exclude any properly exempt information.
16. With respect to those records withheld in full, the Attorney General stated that any potentially responsive records are "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.
17. Given the nature and specifics of petitioners' search parameters it seems likely that records responsive to petitioners' 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. Records likely reflect correspondence between New York employees and employees of private organizations such as Fahr LLC or "Eco-Accountability."

18. On September 9, 2016, petitioners 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 C.**
19. By letter dated September 26, 2016, the appeals officer upheld the categorical denial in full of the indeterminate number of records responsive to the petitioners' 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 D.**
20. That denial of petitioners' appeal asserted that, because the Attorney General's Office is involved in a purported law enforcement investigation of whether the corporation 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 similarly re-iterated the prior reasons for denying access to the remaining records.
21. While this has no apparent bearing on its face to the records petitioners requested involving private, politically active parties, other records in the public domain and produced by attorneys general of other states indicate that rather than conducting any such investigation relevant to petitioners' request for law enforcement purposes the related 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.

22. 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.
23. Petitioners therefore 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 with respect to the May 5, 2016 request.

Jurisdiction and Venue

24. This matter is brought pursuant to CPLR Article 78.
25. 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**

26. Petitioners re-allege paragraphs 1-25 as if fully set out herein.
27. 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 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 therefor that are not properly exempt under the law.
28. 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

29. Petitioners re-allege paragraphs 1-28 as if fully set out herein.
30. Petitioners are entitled to injunctive relief compelling respondent to produce all records in its possession responsive to petitioners' New York Freedom of Information Law requests, without fees, subject to legitimate withholdings.
31. 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' requests, and any attachments thereto, subject to legitimate withholdings.
32. 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

33. Petitioners re-allege paragraphs 1-32 as if fully set out herein.
34. 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.
35. Petitioners are 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.
36. 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: _____

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Attorney for Petitioners

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 Petitioners in the within proceeding. I make this Verification pursuant to CPLR 3020(d)(3) because none of the petitioners have an office in New York County.
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: _____