



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

June 11, 2018

VIA U.S. MAIL & ELECTRONIC MAIL

Christopher Horner
1489 Kinross Lane
Keswick, VA 22947
chris.horner@cei.org

Re: Freedom of Information Act request – received May 23, 2018

Dear Mr. Horner:

The Office of the Attorney General for the Commonwealth of Virginia (hereinafter, "Office") acknowledges receipt of the above-referenced correspondence in which you seek certain records pursuant to the Virginia Freedom of Information Act, Virginia Code Section 2.2-3700, *et seq.* (hereinafter, "FOIA"). Specifically, your request states:

"Please provide me certain records as described, below, pertaining to the "Common Interest Agreement" signed by Rhodes Ritenour and John Daniel of your Office on May 9, 2016, relating to an 'informal coalition' of OAGs, according to the recruiting letter signed by former New York Attorney General Eric Schneiderman and Vermont's William Sorrell (I can provide the signature page if you require it):
any instruments and all related correspondence, including attachments, by which your Office rescinded, reversed, withdrew or otherwise altered this May 9, 2016 commitment."

To the extent that your request requires this Office to determine whether a specific record constitutes a legal rescission, reversal, withdrawal, or alteration of an agreement, please be advised that it constitutes a request for legal advice. As such, your request is outside of the scope of FOIA and is not a proper FOIA request. The Office is not authorized to give legal advice to private citizens or other entities outside of those named in Virginia Code Section 2.2-505(A), which states:

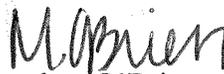
The Attorney General shall give his advice and render official advisory opinions in writing only when requested in writing so to do by one of the following: the

Governor; a member of the General Assembly; a judge of a court of record or a judge of a court not of record; the State Corporation Commission; an attorney for the Commonwealth; a county, city or town attorney in those localities in which such office has been created; a clerk of a court of record; a city or county sheriff; a city or county treasurer or similar officer; a commissioner of the revenue or similar officer; a chairman or secretary of an electoral board; or the head of a state department, division, bureau, institution or board.

However, in the interest of transparency please find enclosed documents relating to the conditions under which this Office entered into the common interest agreement.

Thank you for your attention.

Very truly yours,

A handwritten signature in black ink, appearing to read "Meaghan O'Brien". The signature is written in a cursive, flowing style.

Meaghan O'Brien
FOIA Administrator

Enclosures

Smith, Ruth Ann.

From: Monica Wagner <Monica.Wagner@ag.ny.gov>
Sent: Tuesday, May 03, 2016 11:18 PM
To: Ritenour, Rhodes B.
Cc: Daniel, John W.
Subject: Re: Common interest agreement

Thanks for explaining that, Rhodes. I'll talk to my office and be in touch.

Monica

On May 3, 2016, at 5:16 PM, Ritenour, Rhodes B. <RRitenour@oag.state.va.us> wrote:

Monica:

I hope this finds all well.

Thank you for your patience with our signing on to the Common Interest Agreement.

Before signing on to the Agreement, I wanted to make certain we were clear on our Office's understanding of the CIA and how it impacts (or doesn't) our duty to comply with Virginia's Freedom Of Information Act.

Virginia's public records law is interpreted with an eye toward transparency and its 144 exemptions are rarely applied broadly. Unlike the federal FOIA scheme, Virginia's FOIA law reflects years of specific modifications and carve-outs unique to Commonwealth agencies, not broad based categories of information which are applicable over various state and local public entities. While there are general discretionary exemptions for attorney-client privileged material and work product (which may be applicable under common interest once an agreement is signed and litigation is contemplated or reasonably anticipated), it is our view that such exemptions may not cover the full scope of cooperative material exchanged in furtherance of the investigation objectives expressed in the CIA.

Additionally, while our FOIA law has a "catch-all" provision requiring disclosure except as "otherwise prohibited by law," many of the discretionary provisions for investigative action assume that Virginia is actively participating in or conducting the investigation. While Virginia may possess a specific exemption for prosecutorial privilege related to a criminal investigation or in furtherance of a civil investigative demand under the antitrust provisions, the ability to assert a joint investigative privilege would hinge on Virginia's substantive involvement in the investigation and a clear nexus to an express statutory exemption.

Accordingly, we believe if there is information shared with Virginia under the common interest agreement which has no legitimate exception to disclosure expressed in Virginia law, we would have no choice but to produce it when requested. We would certainly work with the state participants to notify them of the disclosure, and be receptive to their comments and concerns regarding the production, but we would still be obligated by law to produce it. It is our view that the common interest agreement does not inoculate us from production of information or documents not clearly exempted from mandatory disclosure by our public records statute.

We wanted to be clear at the outset that our office is taking this position, before signing on to the CIA and asserting this position after the fact. Please let me know if this is a problem for you or the group, and we can proceed accordingly.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [<mailto:Monica.Wagner@ag.ny.gov>]
Sent: Thursday, April 28, 2016 6:20 PM
To: Ritenour, Rhodes B.
Subject: RE: Common interest agreement

I asked my paralegal to go ahead and send you the final agreement and your signature page, and then you can sign it when you get approval. Thanks.

From: Monica Wagner
Sent: Wednesday, April 27, 2016 5:37 PM
To: Rhodes Ritenour
Subject: FW: Common interest agreement

Rhodes -- checking in on whether VA has made a decision on the common interest agreement yet?

Thanks,

Monica

From: Monica Wagner
Sent: Wednesday, April 20, 2016 7:25 PM
To: 'Allen Brooks'; 'Amy Winn'; 'Christopher Courchesne'; 'Dennis Ragen'; 'Elizabeth Wilkins'; 'Greg Schultz'; 'Heather Leslie'; 'James Gignac'; 'Jerry Reid'; 'John Daniel'; John Oleske; 'Josh Auerbach'; 'Karen Olson'; 'Laura Watson'; Lemuel Srolovic; 'Leslie Seffern'; Mandy DeRoche; 'Matthew Levine'; 'Melissa Hoffer'; Michael J. Myers; 'Michele Van Gelderen'; 'Nick Persampieri'; 'Patrick Flanagan'; 'Paul Garrahan'; Peter Washburn; 'Ralph Durstein'; 'Renee Gumbs'; 'Rhodes Ritenour'; 'Robert Snook'; 'Sally Magnani'; 'Scot Kline'; 'Tania Maestas'; 'Tannis Fox'; 'Tim Nord'; 'Wendy Morgan'; 'William Grantham'
Subject: RE: Common interest agreement

Here's another draft incorporating California's change to the opening paragraph. If you've already reviewed the draft I sent around 3:30, the only change since then is to the opening paragraph.

Thanks,

Monica << File: Climate Change Common Interest Agreement 042016 redlined #2.docx >>

From: Monica Wagner

Sent: Wednesday, April 20, 2016 4:07 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: RE: Common interest agreement

That draft didn't incorporate some of California's changes so please hold off on reviewing it (and apologies if you already reviewed). I'll send a new draft by the end of the day.

From: Monica Wagner

Sent: Wednesday, April 20, 2016 3:33 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: Common interest agreement

I'm sending out a revised draft of the common interest agreement that shows changes made since the draft I sent last Tuesday. Please let me know if the changes work for you.

We're working on the signature pages and will send those separately. If you haven't had a chance to send me a signature block for your state, I'd appreciate it if you would.

Thanks,

Monica

Monica Wagner
Deputy Chief
Environmental Protection Bureau
Office of the Attorney General of New York
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-6351

<< File: Climate Change Common Interest Agreement 042016 redlined.docx >>

IMPORTANT NOTICE: This e-mail, including any attachments, may be confidential, privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.

Kibe, Jennifer S.

From: Monica Wagner <Monica.Wagner@ag.ny.gov>
Sent: Friday, May 06, 2016 2:03 PM
To: Ritenour, Rhodes B.
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement

Rhodes,

Thanks for letting us know your office's understanding of your obligations under VA's FOI Act. That does not present a problem for NY and we're comfortable with VA signing the common interests agreement. If you'd like to raise it with the other states, do you want to do that on next Tuesday's call?

Would you have time to talk to John Oleske and me about the coalition more generally before next Tuesday's call?

Thanks,

Monica

From: Ritenour, Rhodes B. [mailto:RRitenour@oag.state.va.us]
Sent: Tuesday, May 03, 2016 5:18 PM
To: Monica Wagner
Cc: Daniel, John W.
Subject: RE: Common interest agreement

Monica:

I hope this finds all well.

Thank you for your patience with our signing on to the Common Interest Agreement.

Before signing on to the Agreement, I wanted to make certain we were clear on our Office's understanding of the CIA and how it impacts (or doesn't) our duty to comply with Virginia's Freedom Of Information Act.

Virginia's public records law is interpreted with an eye toward transparency and its 144 exemptions are rarely applied broadly. Unlike the federal FOIA scheme, Virginia's FOIA law reflects years of specific modifications and carve-outs unique to Commonwealth agencies, not broad based categories of information which are applicable over various state and local public entities. While there are general discretionary exemptions for attorney-client privileged material and work-product (which may be applicable under common interest once an agreement is signed and litigation is contemplated or reasonably anticipated), it is our view that such exemptions may not cover the full scope of cooperative material exchanged in furtherance of the investigation objectives expressed in the CIA.

Additionally, while our FOIA law has a "catch-all" provision requiring disclosure except as "otherwise prohibited by law," many of the discretionary provisions for investigative action assume that Virginia is actively participating in or conducting the investigation. While Virginia may possess a specific exemption for prosecutorial privilege related to a criminal investigation or in furtherance of a civil investigative demand under the antitrust provisions, the ability to assert a joint investigative privilege would hinge on Virginia's substantive involvement in the investigation and a clear nexus to an express statutory exemption.

Accordingly, we believe if there is information shared with Virginia under the common interest agreement which has no legitimate exception to disclosure expressed in Virginia law, we would have no choice but to produce it when requested. We would certainly work with the state participants to notify them of the disclosure, and be receptive to their comments and concerns regarding the production, but we would still be obligated by law to produce it. It is our view that the common interest agreement does not inoculate us from production of information or documents not clearly exempted from mandatory disclosure by our public records statute.

We wanted to be clear at the outset that our office is taking this position, before signing on to the CIA and asserting this position after the fact. Please let me know if this is a problem for you or the group, and we can proceed accordingly.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [<mailto:Monica.Wagner@ag.ny.gov>]

Sent: Thursday, April 28, 2016 6:20 PM

To: Ritenour, Rhodes B.

Subject: RE: Common interest agreement

I asked my paralegal to go ahead and send you the final agreement and your signature page, and then you can sign it when you get approval. Thanks.

From: Monica Wagner

Sent: Wednesday, April 27, 2016 5:37 PM

To: Rhodes Ritenour

Subject: FW: Common interest agreement

Rhodes -- checking in on whether VA has made a decision on the common interest agreement yet?

Thanks,

Monica

From: Monica Wagner

Sent: Wednesday, April 20, 2016 7:25 PM

To: 'Allen Brooks'; 'Amy Winn'; 'Christopher Courchesne'; 'Dennis Ragen'; 'Elizabeth Wilkins'; 'Greg Schultz'; 'Heather Leslie'; 'James Gignac'; 'Jerry Reid'; 'John Daniel'; John Oleske; 'Josh Auerbach'; 'Karen Olson'; 'Laura Watson'; Lemuel Srolovic; 'Leslie Seffern'; Mandy DeRoche; 'Matthew Levine'; 'Melissa Hoffer'; Michael J. Myers; 'Michele Van Gelderen'; 'Nick Persampieri'; 'Patrick Flanagan'; 'Paul Garrahan'; Peter Washburn; 'Ralph Durstein'; 'Renee Gumbs'; 'Rhodes Ritenour'; 'Robert Snook'; 'Sally Magnani'; 'Scot Kline'; 'Tania Maestas'; 'Tannis Fox'; 'Tim Nord'; 'Wendy Morgan'; 'William Grantham'

Subject: RE: Common interest agreement

Here's another draft incorporating California's change to the opening paragraph. If you've already reviewed the draft I sent around 3:30, the only change since then is to the opening paragraph.

Thanks,

Monica << File: Climate Change Common Interest Agreement 042016 redlined #2.docx >>

From: Monica Wagner

Sent: Wednesday, April 20, 2016 4:07 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: RE: Common interest agreement

That draft didn't incorporate some of California's changes so please hold off on reviewing it (and apologies if you already reviewed). I'll send a new draft by the end of the day.

From: Monica Wagner

Sent: Wednesday, April 20, 2016 3:33 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: Common interest agreement

I'm sending out a revised draft of the common interest agreement that shows changes made since the draft I sent last Tuesday. Please let me know if the changes work for you.

We're working on the signature pages and will send those separately. If you haven't had a chance to send me a signature block for your state, I'd appreciate it if you would.

Thanks,

Monica

Monica Wagner
Deputy Chief
Environmental Protection Bureau
Office of the Attorney General of New York
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-6351

<< File: Climate Change Common Interest Agreement 042016 redlined.docx >>

IMPORTANT NOTICE: This e-mail, including any attachments, may be confidential, privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.

Smith, Ruth Ann.

From: Monica Wagner <Monica.Wagner@ag.ny.gov>
Sent: Friday, May 06, 2016 2:03 PM
To: Ritenour, Rhodes B.
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement

Rhodes,

Thanks for letting us know your office's understanding of your obligations under VA's FOI Act. That does not present a problem for NY and we're comfortable with VA signing the common interests agreement. If you'd like to raise it with the other states, do you want to do that on next Tuesday's call?

Would you have time to talk to John Oleske and me about the coalition more generally before next Tuesday's call?

Thanks,

Monica

From: Ritenour, Rhodes B. [mailto:RRitenour@oag.state.va.us]
Sent: Tuesday, May 03, 2016 5:18 PM
To: Monica Wagner
Cc: Daniel, John W.
Subject: RE: Common interest agreement

Monica:

I hope this finds all well.

Thank you for your patience with our signing on to the Common Interest Agreement.

Before signing on to the Agreement, I wanted to make certain we were clear on our Office's understanding of the CIA and how it impacts (or doesn't) our duty to comply with Virginia's Freedom Of Information Act.

Virginia's public records law is interpreted with an eye toward transparency and its 144 exemptions are rarely applied broadly. Unlike the federal FOIA scheme, Virginia's FOIA law reflects years of specific modifications and carve-outs unique to Commonwealth agencies, not broad based categories of information which are applicable over various state and local public entities. While there are general discretionary exemptions for attorney-client privileged material and work product (which may be applicable under common interest once an agreement is signed and litigation is contemplated or reasonably anticipated), it is our view that such exemptions may not cover the full scope of cooperative material exchanged in furtherance of the investigation objectives expressed in the CIA.

Additionally, while our FOIA law has a "catch-all" provision requiring disclosure except as "otherwise prohibited by law," many of the discretionary provisions for investigative action assume that Virginia is actively participating in or conducting the investigation. While Virginia may possess a specific exemption for prosecutorial privilege related to a criminal investigation or in furtherance of a civil investigative demand under the antitrust provisions, the ability to assert a joint investigative privilege would hinge on Virginia's substantive involvement in the investigation and a clear nexus to an express statutory exemption.

Accordingly, we believe if there is information shared with Virginia under the common interest agreement which has no legitimate exception to disclosure expressed in Virginia law, we would have no choice but to produce it when requested. We would certainly work with the state participants to notify them of the disclosure, and be receptive to their comments and concerns regarding the production, but we would still be obligated by law to produce it. It is our view that the common interest agreement does not inoculate us from production of information or documents not clearly exempted from mandatory disclosure by our public records statute.

We wanted to be clear at the outset that our office is taking this position, before signing on to the CIA and asserting this position after the fact. Please let me know if this is a problem for you or the group, and we can proceed accordingly.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [<mailto:Monica.Wagner@ag.ny.gov>]
Sent: Thursday, April 28, 2016 6:20 PM
To: Ritenour, Rhodes B.
Subject: RE: Common interest agreement

I asked my paralegal to go ahead and send you the final agreement and your signature page, and then you can sign it when you get approval. Thanks.

From: Monica Wagner
Sent: Wednesday, April 27, 2016 5:37 PM
To: Rhodes Ritenour
Subject: FW: Common interest agreement

Rhodes -- checking in on whether VA has made a decision on the common interest agreement yet?

Thanks,

Monica

From: Monica Wagner
Sent: Wednesday, April 20, 2016 7:25 PM
To: 'Allen Brooks'; 'Amy Winn'; 'Christopher Courchesne'; 'Dennis Ragen'; 'Elizabeth Wilkins'; 'Greg Schultz'; 'Heather Leslie'; 'James Gignac'; 'Jerry Reid'; 'John Daniel'; John Oleske; 'Josh Auerbach'; 'Karen Olson'; 'Laura Watson'; Lemuel Srolovic; 'Leslie Seffern'; Mandy DeRoche; 'Matthew Levine'; 'Melissa Hoffer'; Michael J. Myers; 'Michele Van Gelderen'; 'Nick Persampieri'; 'Patrick Flanagan'; 'Paul Garrahan'; Peter Washburn; 'Ralph Durstein'; 'Renee Gumbs'; 'Rhodes Ritenour'; 'Robert Snook'; 'Sally Magnani'; 'Scot Kline'; 'Tania Maestas'; 'Tannis Fox'; 'Tim Nord'; 'Wendy Morgan'; 'William Grantham'
Subject: RE: Common interest agreement

Here's another draft incorporating California's change to the opening paragraph. If you've already reviewed the draft I sent around 3:30, the only change since then is to the opening paragraph.

Thanks,

Monica << File: Climate Change Common Interest Agreement 042016 redlined #2.docx >>

From: Monica Wagner

Sent: Wednesday, April 20, 2016 4:07 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: RE: Common interest agreement

That draft didn't incorporate some of California's changes so please hold off on reviewing it (and apologies if you already reviewed). I'll send a new draft by the end of the day.

From: Monica Wagner

Sent: Wednesday, April 20, 2016 3:33 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: Common interest agreement

I'm sending out a revised draft of the common interest agreement that shows changes made since the draft I sent last Tuesday. Please let me know if the changes work for you.

We're working on the signature pages and will send those separately. If you haven't had a chance to send me a signature block for your state, I'd appreciate it if you would.

Thanks,

Monica

Monica Wagner
Deputy Chief
Environmental Protection Bureau
Office of the Attorney General of New York
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-6351

<< File: Climate Change Common Interest Agreement 042016 redlined.docx >>

IMPORTANT NOTICE: This e-mail, including any attachments, may be confidential, privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.

Smith, Ruth Ann.

From: Ritenour, Rhodes B.
Sent: Friday, May 13, 2016 10:39 AM
To: Monica Wagner
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement
Attachments: CIA -- Executed by COV.pdf

Monica:

I hope this finds all well with you.

With the below caveats, which were also conveyed to the greater group by John during this past Tuesday's call, attached please find the CIA executed by Virginia.

Please let me know if you have questions.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [<mailto:Monica.Wagner@ag.ny.gov>]
Sent: Friday, May 06, 2016 2:03 PM
To: Ritenour, Rhodes B.
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement

Rhodes,

Thanks for letting us know your office's understanding of your obligations under VA's FOI Act. That does not present a problem for NY and we're comfortable with VA signing the common interests agreement. If you'd like to raise it with the other states, do you want to do that on next Tuesday's call?

Would you have time to talk to John Oleske and me about the coalition more generally before next Tuesday's call?

Thanks,

Monica

From: Ritenour, Rhodes B. [<mailto:RRitenour@oag.state.va.us>]
Sent: Tuesday, May 03, 2016 5:18 PM
To: Monica Wagner
Cc: Daniel, John W.
Subject: RE: Common interest agreement

Monica:

I hope this finds all well.

Thank you for your patience with our signing on to the Common Interest Agreement.

Before signing on to the Agreement, I wanted to make certain we were clear on our Office's understanding of the CIA and how it impacts (or doesn't) our duty to comply with Virginia's Freedom Of Information Act.

Virginia's public records law is interpreted with an eye toward transparency and its 144 exemptions are rarely applied broadly. Unlike the federal FOIA scheme, Virginia's FOIA law reflects years of specific modifications and carve-outs unique to Commonwealth agencies, not broad based categories of information which are applicable over various state and local public entities. While there are general discretionary exemptions for attorney-client privileged material and work product (which may be applicable under common interest once an agreement is signed and litigation is contemplated or reasonably anticipated), it is our view that such exemptions may not cover the full scope of cooperative material exchanged in furtherance of the investigation objectives expressed in the CIA.

Additionally, while our FOIA law has a "catch-all" provision requiring disclosure except as "otherwise prohibited by law," many of the discretionary provisions for investigative action assume that Virginia is actively participating in or conducting the investigation. While Virginia may possess a specific exemption for prosecutorial privilege related to a criminal investigation or in furtherance of a civil investigative demand under the antitrust provisions, the ability to assert a joint investigative privilege would hinge on Virginia's substantive involvement in the investigation and a clear nexus to an express statutory exemption.

Accordingly, we believe if there is information shared with Virginia under the common interest agreement which has no legitimate exception to disclosure expressed in Virginia law, we would have no choice but to produce it when requested. We would certainly work with the state participants to notify them of the disclosure, and be receptive to their comments and concerns regarding the production, but we would still be obligated by law to produce it. It is our view that the common interest agreement does not inoculate us from production of information or documents not clearly exempted from mandatory disclosure by our public records statute.

We wanted to be clear at the outset that our office is taking this position, before signing on to the CIA and asserting this position after the fact. Please let me know if this is a problem for you or the group, and we can proceed accordingly.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [<mailto:Monica.Wagner@ag.ny.gov>]
Sent: Thursday, April 28, 2016 6:20 PM
To: Ritenour, Rhodes B.
Subject: RE: Common interest agreement

I asked my paralegal to go ahead and send you the final agreement and your signature page, and then you can sign it when you get approval. Thanks.

From: Monica Wagner
Sent: Wednesday, April 27, 2016 5:37 PM
To: Rhodes Ritenour
Subject: FW: Common interest agreement

Rhodes -- checking in on whether VA has made a decision on the common interest agreement yet?

Thanks,

Monica

From: Monica Wagner
Sent: Wednesday, April 20, 2016 7:25 PM
To: 'Allen Brooks'; 'Amy Winn'; 'Christopher Courchesne'; 'Dennis Ragen'; 'Elizabeth Wilkins'; 'Greg Schultz'; 'Heather Leslie'; 'James Gignac'; 'Jerry Reid'; 'John Daniel'; 'John Oleske'; 'Josh Auerbach'; 'Karen Olson'; 'Laura Watson'; 'Lemuel Srolovic'; 'Leslie Seffern'; 'Mandy DeRoche'; 'Matthew Levine'; 'Melissa Hoffer'; 'Michael J. Myers'; 'Michele Van Gelderen'; 'Nick Persampieri'; 'Patrick Flanagan'; 'Paul Garrahan'; 'Peter Washburn'; 'Ralph Durstein'; 'Renee Gumbs'; 'Rhodes Ritenour'; 'Robert Snook'; 'Sally Magnani'; 'Scot Kline'; 'Tania Maestas'; 'Tannis Fox'; 'Tim Nord'; 'Wendy Morgan'; 'William Grantham'
Subject: RE: Common interest agreement

Here's another draft incorporating California's change to the opening paragraph. If you've already reviewed the draft I sent around 3:30, the only change since then is to the opening paragraph.

Thanks,

Monica << File: Climate Change Common Interest Agreement 042016 redlined #2.docx >>

From: Monica Wagner
Sent: Wednesday, April 20, 2016 4:07 PM
To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham
Subject: RE: Common interest agreement

That draft didn't incorporate some of California's changes so please hold off on reviewing it (and apologies if you already reviewed). I'll send a new draft by the end of the day.

From: Monica Wagner

Sent: Wednesday, April 20, 2016 3:33 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: Common interest agreement

I'm sending out a revised draft of the common interest agreement that shows changes made since the draft I sent last Tuesday. Please let me know if the changes work for you.

We're working on the signature pages and will send those separately. If you haven't had a chance to send me a signature block for your state, I'd appreciate it if you would.

Thanks,

Monica

Monica Wagner
Deputy Chief
Environmental Protection Bureau
Office of the Attorney General of New York
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-6351

<< File: Climate Change Common Interest Agreement 042016 redlined.docx >>

IMPORTANT NOTICE: This e-mail, including any attachments, may be confidential, privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.

CLIMATE CHANGE COALITION COMMON INTEREST AGREEMENT

This Common Interest Agreement (“Agreement”) is entered into by the undersigned Attorneys General of the States, Commonwealths, and Territories (the “Parties”) who are interested in advancing their common legal interests in limiting climate change and ensuring the dissemination of accurate information about climate change. The Parties mutually agree:

1. Common Legal Interests. The Parties share common legal interests with respect to the following topics: (i) potentially taking legal actions to compel or defend federal measures to limit greenhouse gas emissions, (ii) potentially conducting investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change, (iii) potentially conducting investigations of possible illegal conduct to limit or delay the implementation and deployment of renewable energy technology, (iv) potentially taking legal action to obtain compliance with federal and state laws governing the construction and operation of fossil fuel and renewable energy infrastructure, or (v) contemplating undertaking one or more of these legal actions, including litigation (“Matters of Common Interest”).

2. Shared Information. It is in the Parties’ individual and common interests to share documents, mental impressions, strategies, and other information regarding the Matters of Common Interest and any related investigations and litigation (“Shared Information”). Shared Information shall include (1) information shared in organizing a meeting of the Parties on March 29, 2016, (2) information shared at and after the March 29 meeting, pursuant to an oral common interest agreement into which the Parties entered at the meeting and renewed on April 12, 2016, and (3) information shared after the execution of this Agreement.

3. Legends on Documents. To avoid misunderstandings or inadvertent disclosure, all documents exchanged pursuant to this Agreement should bear the legend “Confidential – Protected by Common Interest Privilege” or words to that effect. However, the inadvertent failure to include such a legend shall not waive any privilege or protection available under this Agreement or otherwise. In addition, any Party may, where appropriate, also label documents exchanged pursuant to this Agreement with other appropriate legends, such as, for example, “Attorney-Client Privileged” or “Attorney Work Product.” Oral communications among the Parties shall be deemed confidential and protected under this Agreement when discussing Matters of Common Interest.

4. Non-Waiver of Privileges. The exchange of Shared Information among Parties—including among Parties’ staff and outside advisors—does not diminish in any way the privileged and confidential nature of such information. The Parties retain all applicable privileges and claims to confidentiality, including the attorney client privilege, work product privilege, common interest privilege, law enforcement privilege, deliberative process privilege and exemptions from disclosure under any public records laws that may be asserted to protect against disclosure of Shared Information to non-Parties (hereinafter collectively referred to as “Privileges”).

5. Nondisclosure. Shared Information shall only be disclosed to: (i) Parties; (ii) employees or agents of the Parties, including experts or expert witnesses; (iii) government officials involved with the enforcement of antitrust, environmental, consumer protection, or securities laws who have agreed in writing to abide by the confidentiality restrictions of this Agreement; (iv) criminal enforcement authorities; (v) other persons, provided that all Parties consent in advance; and (vi) other persons as provided in paragraph 6. A Party who provides Shared Information may also impose additional conditions on the disclosure of that Shared Information. Nothing in this Agreement prevents a Party from using the Shared Information for law enforcement purposes, criminal or civil, including presentation at pre-trial and trial-related proceedings, to the extent that such presentation does not (i) conflict with other agreements that the Party has entered into, (ii) interfere with the preservation of the Privileges, or (iii) conflict with court orders and applicable law.

6. Notice of Potential Disclosure. The Parties agree and acknowledge that each Party is subject to applicable freedom of information or public records laws, and nothing in this Agreement is intended to alter or limit the disclosure requirements of such laws. If any Shared Information is demanded under a freedom of information or public records law or is subject to any form of compulsory process in any proceeding ("Request"), the Party receiving the Request shall: (i) immediately notify all other Parties (or their designees) in writing; (ii) cooperate with any Party in the course of responding to the Request; and (iii) refuse to disclose any Shared Information unless required by law.

7. Inadvertent Disclosure. If a Party discloses Shared Information to a person not entitled to receive such information under this Agreement, the disclosure shall be deemed to be inadvertent and unintentional and shall not be construed as a waiver of any Party's right under law or this Agreement. Any Party may seek additional relief as may be authorized by law.

8. Independently Obtained Information. Provided that no disclosure is made of Shared Information obtained pursuant to this Agreement, nothing in this Agreement shall preclude a Party from (a) pursuing independently any subject matter, including subjects reflected in Shared Information obtained by or subject to this Agreement or (b) using or disclosing any information, documents, investigations, or any other materials independently obtained or developed by such Party.

9. Related Litigation. The Parties continue to be bound by this Agreement in any litigation or other proceeding that arises out of the Matters of Common Interest.

10. Parties to the Agreement. This Agreement may be executed in counterparts. All potential Parties must sign for their participation to become effective.

11. Withdrawal. A Party may withdraw from this Agreement upon thirty days written notice to all other Parties. Withdrawal shall not terminate, or relieve the withdrawing Party of any obligation under this Agreement regarding Shared Information received by the withdrawing Party before the effective date of the withdrawal.

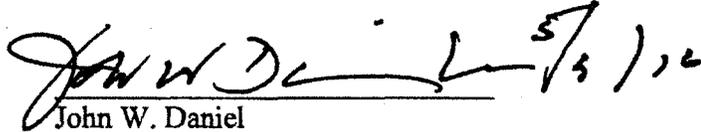
12. Modification. This writing is the complete Agreement between the Parties, and any modifications must be approved in writing by all Parties.

Dated: May 9, 2016



5/9/16

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
E-mail: RRitenour@oag.state.va.us



John W. Daniel
Deputy Attorney General
Commerce, Environmental, and Technology
Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6053
E-mail: JDaniel@oag.state.va.us

Smith, Ruth Ann.

From: Monica Wagner <Monica.Wagner@ag.ny.gov>
Sent: Friday, May 13, 2016 11:39 AM
To: Ritenour, Rhodes B.
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement

Thanks, Rhodes.

From: Ritenour, Rhodes B. [mailto:RRitenour@oag.state.va.us]
Sent: Friday, May 13, 2016 10:39 AM
To: Monica Wagner
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement

Monica:

I hope this finds all well with you.

With the below caveats, which were also conveyed to the greater group by John during this past Tuesday's call, attached please find the CIA executed by Virginia.

Please let me know if you have questions.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [mailto:Monica.Wagner@ag.ny.gov]
Sent: Friday, May 06, 2016 2:03 PM
To: Ritenour, Rhodes B.
Cc: Daniel, John W.; John Oleske
Subject: RE: Common interest agreement

Rhodes,

Thanks for letting us know your office's understanding of your obligations under VA's FOI Act. That does not present a problem for NY and we're comfortable with VA signing the common interests agreement. If you'd like to raise it with the other states, do you want to do that on next Tuesday's call?

Would you have time to talk to John Oleske and me about the coalition more generally before next Tuesday's call?

Thanks,

Monica

From: Ritenour, Rhodes B. [<mailto:RRitenour@oag.state.va.us>]
Sent: Tuesday, May 03, 2016 5:18 PM
To: Monica Wagner
Cc: Daniel, John W.
Subject: RE: Common interest agreement

Monica:

I hope this finds all well.

Thank you for your patience with our signing on to the Common Interest Agreement.

Before signing on to the Agreement, I wanted to make certain we were clear on our Office's understanding of the CIA and how it impacts (or doesn't) our duty to comply with Virginia's Freedom Of Information Act.

Virginia's public records law is interpreted with an eye toward transparency and its 144 exemptions are rarely applied broadly. Unlike the federal FOIA scheme, Virginia's FOIA law reflects years of specific modifications and carve-outs unique to Commonwealth agencies, not broad based categories of information which are applicable over various state and local public entities. While there are general discretionary exemptions for attorney-client privileged material and work product (which may be applicable under common interest once an agreement is signed and litigation is contemplated or reasonably anticipated), it is our view that such exemptions may not cover the full scope of cooperative material exchanged in furtherance of the investigation objectives expressed in the CIA.

Additionally, while our FOIA law has a "catch-all" provision requiring disclosure except as "otherwise prohibited by law," many of the discretionary provisions for investigative action assume that Virginia is actively participating in or conducting the investigation. While Virginia may possess a specific exemption for prosecutorial privilege related to a criminal investigation or in furtherance of a civil investigative demand under the antitrust provisions, the ability to assert a joint investigative privilege would hinge on Virginia's substantive involvement in the investigation and a clear nexus to an express statutory exemption.

Accordingly, we believe if there is information shared with Virginia under the common interest agreement which has no legitimate exception to disclosure expressed in Virginia law, we would have no choice but to produce it when requested. We would certainly work with the state participants to notify them of the disclosure, and be receptive to their comments and concerns regarding the production, but we would still be obligated by law to produce it. It is our view that the common interest agreement does not inoculate us from production of information or documents not clearly exempted from mandatory disclosure by our public records statute.

We wanted to be clear at the outset that our office is taking this position, before signing on to the CIA and asserting this position after the fact. Please let me know if this is a problem for you or the group, and we can proceed accordingly.

Best,

Rhodes B. Ritenour
Deputy Attorney General
Civil Litigation Division
Office of the Attorney General
900 East Main Street

Richmond, VA 23219
Office: (804) 786-6731
Mobile: (804) 517-2931
E-mail: RRitenour@oag.state.va.us
<http://www.ag.virginia.gov/>

From: Monica Wagner [<mailto:Monica.Wagner@ag.ny.gov>]
Sent: Thursday, April 28, 2016 6:20 PM
To: Ritenour, Rhodes B.
Subject: RE: Common interest agreement

I asked my paralegal to go ahead and send you the final agreement and your signature page, and then you can sign it when you get approval. Thanks.

From: Monica Wagner
Sent: Wednesday, April 27, 2016 5:37 PM
To: Rhodes Ritenour
Subject: FW: Common interest agreement

Rhodes -- checking in on whether VA has made a decision on the common interest agreement yet?

Thanks,

Monica

From: Monica Wagner
Sent: Wednesday, April 20, 2016 7:25 PM
To: 'Allen Brooks'; 'Amy Winn'; 'Christopher Courchesne'; 'Dennis Ragen'; 'Elizabeth Wilkins'; 'Greg Schultz'; 'Heather Leslie'; 'James Gignac'; 'Jerry Reid'; 'John Daniel'; 'John Oleske'; 'Josh Auerbach'; 'Karen Olson'; 'Laura Watson'; 'Lemuel Srolovic'; 'Leslie Seffern'; 'Mandy DeRoche'; 'Matthew Levine'; 'Melissa Hoffer'; 'Michael J. Myers'; 'Michele Van Gelderen'; 'Nick Persampieri'; 'Patrick Flanagan'; 'Paul Garrahan'; 'Peter Washburn'; 'Ralph Durstein'; 'Renee Gumbs'; 'Rhodes Ritenour'; 'Robert Snook'; 'Sally Magnani'; 'Scot Kline'; 'Tania Maestas'; 'Tannis Fox'; 'Tim Nord'; 'Wendy Morgan'; 'William Grantham'
Subject: RE: Common interest agreement

Here's another draft incorporating California's change to the opening paragraph. If you've already reviewed the draft I sent around 3:30, the only change since then is to the opening paragraph.

Thanks,

Monica << File: Climate Change Common Interest Agreement 042016 redlined #2.docx >>

From: Monica Wagner
Sent: Wednesday, April 20, 2016 4:07 PM
To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham
Subject: RE: Common interest agreement

That draft didn't incorporate some of California's changes so please hold off on reviewing it (and apologies if you already reviewed). I'll send a new draft by the end of the day.

From: Monica Wagner

Sent: Wednesday, April 20, 2016 3:33 PM

To: Allen Brooks; Amy Winn; Christopher Courchesne; Dennis Ragen; Elizabeth Wilkins; Greg Schultz; Heather Leslie; James Gignac; Jerry Reid; John Daniel; John Oleske; Josh Auerbach; Karen Olson; Laura Watson; Lemuel Srolovic; Leslie Seffern; Mandy DeRoche; Matthew Levine; Melissa Hoffer; Michael J. Myers; Michele Van Gelderen; Nick Persampieri; Patrick Flanagan; Paul Garrahan; Peter Washburn; Ralph Durstein; Renee Gumbs; Rhodes Ritenour; Robert Snook ; Sally Magnani; Scot Kline; Tania Maestas; Tannis Fox; Tim Nord; Wendy Morgan; William Grantham

Subject: Common interest agreement

I'm sending out a revised draft of the common interest agreement that shows changes made since the draft I sent last Tuesday. Please let me know if the changes work for you.

We're working on the signature pages and will send those separately. If you haven't had a chance to send me a signature block for your state, I'd appreciate it if you would.

Thanks,

Monica

Monica Wagner
Deputy Chief
Environmental Protection Bureau
Office of the Attorney General of New York
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-6351

<< File: Climate Change Common Interest Agreement 042016 redlined.docx >>

IMPORTANT NOTICE: This e-mail, including any attachments, may be confidential, privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.