IN THE CIRCUIT COURT FOR
BALTIMORE CITY, MARYLAND

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, P.C.	)	
v.	)	Case No. 24-C-19-001095 OC
BRIAN E. FROSH, *in his official capacity as* ATTORNEY GENERAL OF MARYLAND	)	

CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, Government Accountability & Oversight, P.C. ("GAO"), by and through undersigned counsel, submits this consolidated Reply in Support of Plaintiff's August 8, 2019 Motion for Summary Judgment and Response to Defendant Office of the Attorney General's ("OAG's") August 26, 2019 Cross-Motion for Summary Judgment ("Cross Motion"). In support whereof, GAO hereby states as follows:

I. The document at issue is not subject to attorney client privilege.

OAG, while acknowledging that "the existence of a written agreement . . . is not dispositive of the existence of an attorney client relationship," Cross-Motion at 8, nevertheless relies heavily on the written terms of the purported "Retainer Agreement," Ex. G,[1] executed three months after the "Application" at issue was prepared and after the competitive process for selecting candidates had already been completed. It is, of course, true, that attorney client privilege may attach to certain communications made before a formal engagement is consummated. However, the communication must still follow the basic rule that "only those

[1] All of the exhibits cited herein are attached to Plaintiff GAO's Memorandum of Law in Support of Motion for Summary Judgment.

attorney-client communications pertaining to legal assistance and made with the intention of confidentiality are within the ambit of the privilege." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 415-16, 718 A.2d 1129, 1138 (1998) ("*Forma-Pack*"). "There is no such thing as a retroactive attorney client privilege to protect communications with the attorney before any attorney-client privilege relationship existed." *Hudson v. Gen. Dynamics Corp.*, 186 F.R.D. 271, 277 (D. Conn. 1999).[2] Here, the specific communication at issue—responses to a questionnaire, or request for proposals (RFP), establishing "eligibility" for an award of limited grant resources—contains no indicia it was made "for the purpose of seeking legal advice" on any particular issue, nor was it made with a reasonable expectation of confidentiality.

The solicitation from the Bloomberg Center to which the document at issue responds was addressed to over a dozen state attorneys general and speaks of an "opportunity" to hire a "limited number" of NYU fellows. Ex. B. at 2. It invites the attorneys general to "demonstrate a commitment to and acute need for additional support" on a range of general policy areas important to its donor. If the applicant wins the beauty contest, the attorney general will be given the "opportunity" to "hire," i.e., retain, one or more of the fellows[3] – whose duty of loyalty shall then be "to the attorney general who hired them." The Center in the Request for Proposals does not in any way offer legal advice on particular issues to be described in the applicants'

[2] Although GAO does not concede that an attorney client relationship between the Bloomberg Center and OAG exists by virtue of the December 18, 2017 "retainer agreement," Ex. G, resolution of that issue is not necessary to decide the applicability of the privilege to the document at issue in the instant case.

[3] Public record productions indicate that OAG now has *three* Bloomberg Center SAAGs, the only OAG to receive such largesse.

responses. The RFP shows the Center functioning instead as a lawyer referral service, which services have not enjoyed attorney client privilege at common law.[4]

More importantly, the solicitation makes no representation that the applicants' responses would be privileged or otherwise confidential. Indeed, the solicitation states that "[w]e are engaged with ethics experts and individuals in some of your offices to ensure confidentiality and work product privilege for matters that Sate Impact Center attorneys work with you on." Ex. B at 2. This statement warns the applicant that confidentiality and privilege under the unusual arrangement contemplated are major and unresolved concerns, which anticipate a collaborative process involving "ethics experts" and "individuals in . . . your offices" engaging with each other before a final arrangement "ensur[ing] confidentiality and work product privilege" is made with the successful applicants.

The preliminary and unprivileged nature of the applications for funding is especially clear given that attorney client privilege is a question of state law, and the identical solicitation is addressed to attorneys general in over a dozen jurisdictions. It would be nearly impossible for the Center to represent to all applicants that responses to its solicitation would be privileged under the particular laws of each jurisdiction. The issue becomes even more complicated when the common interest doctrine in three or more states needs to be considered. Ex. B was sent to well over a dozen attorneys general offices in other states (each thus subject to varying public records and professional responsibility rules in those states), and claims to seek from the successful applicants a "commitment to . . . issues of national importance, such as those that **cross jurisdictional boundaries** or raise legal questions or conflicts that have national

[4] No such privilege is recognized under Maryland law, which governs the Center's relationship to OAG (Ex. G at 3). Nor at the time of the communication in question was any such privilege recognized in the Center's jurisdiction of New York, which became only the second state to recognize such a privilege nearly a full later after legislation passed August 27, 2018.

applicability." Ex. B at 3-4 (emphasis added). It is unlikely that a sophisticated attorney general, upon receiving such a solicitation from an organization manifesting its clear intention to work collaboratively and share resources and information with other attorneys general, would not have insisted upon a proper agreement defining the scope and terms of common interest agreements with those other states before sharing any potentially privileged information.

Only *after* the contest was finished and the winners decided would it be feasible for the mentioned "ethics experts" and staff attorneys in the winning offices to draft an appropriate retainer agreement to "ensur[e]" confidentiality, taking adequate consideration of the particulars of the privilege law in the winner's jurisdiction, the Center's jurisdiction of New York, and any conflicts of laws that might arise from the interaction of the two. And only *after* such a well-researched and carefully drafted agreement was in place would any reasonable attorney (general or otherwise) contemplate sharing privileged information.

Case law speaks to the client's "reasonabl[e] expectat[ion]" of confidentiality. *Forma-Pack*, 351 at 415-16; see also *In Re Grand Jury Subpoena: Under Seal*, 415 F. 3d 333, 339 (4th Cir. 2005) ("An individual's subjective belief that he is represented is not alone sufficient to create an attorney-client relationship . . . rather, the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances." (Citations omitted).

When applying the doctrine of pre-engagement privilege to this case, the Court should consider that the "client" here is not the typical client of a legal services organization, of limited means and sophistication. Not only is he an attorney himself, but indeed he is the chief legal officer of the State of Maryland, entrusted with the confidential information of the state's most important legal matters. If OAG's responses at issue truly *did* reveal so casually as much

privileged information as it claims is obscured by the redactions at issue, it represents a stunning lapse in professional judgment.

Fortunately, Plaintiff does not believe OAG truly did make such a blunder. Indeed, the Retainer Agreement that OAG ultimately executed three months later, after winning the contest, contains four full paragraphs addressing confidentiality in connection with the common interest privilege. Ex. G at 1-2. But putting to the side the contractual terms that may ultimately have been decided upon by the "ethics experts" and others when the later Retainer Agreement (Ex. G) was executed, applicability of the privilege to Ex. B at issue in this case hinges on the OAG's reasonable expectation of confidentiality at the time it made the communication in September. *Forma-Pack*, 351 Md. at 416 (privilege does not attach to communications that "could not reasonably have been expected to remain confidential."). Taken as a whole, an attorney general could not reasonably believe that his responses to such a generic, multi-jurisdictional solicitation—one that explicitly warns that confidentiality safeguards are still under active consideration—would be invested with a privilege that all attorneys know only too well is incredibly fragile.

Finally, OAG is of course correct that the contents of other states' applications may differ and do not in and of themselves "mean that the privilege does not apply here." However, the fact that twelve other states[5] released their applications without claiming attorney client privilege – despite discussing the same issues identified as problematic by OAG, Cross Motion at 13-14, such as "resource limitations" and "types of cases and matters [they] would pursue" if successful

[5] Since the filing of Plaintiff's Motion for Summary Judgment, three additional states (Massachusetts, Connecticut, and Minnesota) have released their complete applications in response to analogous public records act requests. Massachusetts cited a statutory exclusion for "internal personnel rules and practices" to redact approximately nine lines (from a five page, single-spaced document) relating to "Budget" discussions.

speaks to the lack of reasonableness of OAG's claimed expectation of confidentiality. If in fact the solicitation from the Bloomberg Center was one that would, under the totality of the circumstances, cause a reasonable attorney general to believe he or she was making a privileged request for confidential legal advice, one would expect that at least one other attorney general would have taken advantage of the confidential forum to put forward a more compelling bid. That OAG stands alone in its breathtakingly overbroad assertion of the privilege should give the Court reason to doubt its reasonableness.

II. The SAAG is not "pro bono" within the meaning of Md. Code SG § 6-105(f).

OAG relies heavily upon *Henriquez v. Henriquez*, 413 Md. 287, 992 A.2d 446 (2010) to construe the term *pro bono* in Md. Code SG § 6-105(f). That case's extended discourse on statutory construction, 413 Md. at 297-298, is instructive. In particular, "[s]tatutory text should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory." *Id.* at 297. § 6-105(f) contains three requirements:

> (1) {The assistant} is on a pro bono basis;
>
> (2) {The appointment} will not result in more than minimal cost to the State; and
>
> (3) {The appointment} will not result in the payment to the assistant counsel of any portion of the State's recovery in any case or matter.

Md. Code SG § 6-105(f). OAG urges the Court to construe "*pro bono*" in subsection (1) to require only that the representation come at "little or no cost *to the State*," regardless of how handsomely compensated for the work the attorney may be personally.[6] Yet that concern is completely addressed by the plain language of subsection (2), which requires that the appointment "result in [no] more than minimal cost *to the State*." § 6-105(f)(2) (emphasis

[6] Cross-Motion at 17 (emphasis supplied).

added). The canon against surplusage, *Henriquez*, 413 Md. at 297, forbids a construction that would give an identical meaning to both subsection (1) and subsection (2). *Id.* ("Statutory text should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory.") *"Pro bono"* in subsection (1), then, must mean something different than "[no] more than minimal cost to the State." The most logical construction is that the legislature intended "pro bono" in subsection (1) to have its ordinary meaning, hinging on the lawyer's *own* expectation of receiving of little or no compensation.

This is the meaning given to the term in Md. R. 19-306.1(b)(1), which requires Maryland-licensed attorneys to engage in "pro bono publico legal service," defined as "rendering legal service, without fee or expectation of fee, or at a substantially reduced fee" to enumerated categories of public interests. It is difficult to conceive any arrangement more opposite to "without expectation of fee" than a contract asserting "[y]our annual base salary will be $125,000" plus employee benefits and that, "[d]uring your employment, you will be seconded to the Attorney General's Office of the State of Maryland as a Special Assistant Attorney General." Ex. E.

Additionally, Rule 19-306 notes that *pro bono* responsibilities lie with "the individual attorney," differentiating individual service from "legal aid offices, attorney referral services, and other related programs." *Id.* at Comment 3. Furthermore, Md. R. 19-503(b) required all Maryland-licensed attorneys to file an annual report listing their *pro bono* service hours in the foregoing year, with an aspirational target of 50 hours. The Court of Appeals' Standing Committee on Pro Bono Legal Services has issued non-binding guidance stating that "public interest lawyers" who "represent[] people of limited means . . . as part of their job," should aim to meet that target by reporting as *pro bono* only "work they do outside of their jobs" rather than

reporting all hours spent in the course of their regular employment representing people of limited means.[7]

The most natural understanding of *pro bono* as used in § 6-105(f)(1), therefore, is that lawyers hired thereunder would be working "without expectation of fee, or at a substantially reduced fee."[8] This construction is consistent with common understanding of *pro bono* service as a professional obligation of individual members of the bar, and places limits on what would otherwise be an unbridled grant of authority to allow private parties to rent the public power of the Attorney General to pursue their own ends. If, as OAG urges, a highly compensated, full-time attorney employed by an outside interest group to pursue matters of concern to the donor can be called "pro bono," the label is reduced to a fig leaf whereby the original charitable meaning of the term is contorted to disguise naked political activism.

III. The Attorney Client Privilege should be narrowly construed in favor of disclosure.

OAG suggests dismissively that "Plaintiff can disagree with the Attorney General's progressive views on environmental issues." Cross-Motion at 19. That is not the point. There are many policy goals that reasonable citizens may subjectively consider to be "for the public good," and about which other reasonable citizens may disagree. Such is the essence of politics. But if "pro bono" as used in § 6-105(f) is divorced from its traditional notions of professional obligation and benevolent sacrifice, and reduced to meaning only what the sponsor of the attorney feels is "the public good," the statute frees private parties to use the power of the Attorney General for their own political ends.

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[7] Frequently Asked Questions, available at https://mdcourts.gov/probono/faqs. Accessed Sept. 19, 2019.

[8] The Attorney General, in the unredacted portion of its application, indicated his expectation that the law fellow would be compensated at "as high as $125,000" per annum, Ex. C at 6, and indeed that figure (plus benefits) is the salary the law fellow ultimately received. Ex. E at 1." Indeed, effective this month, the Bloomberg Center gave Mr. Segal a 5 percent raise.

Indeed, despite OAG's assertion that its privately-funded prosecutors are to be used in a noble crusade against "the arbitrary, unlawful, or unconstitutional actions of the Trump Administration," public filings show that SAAG Segal – and at least one other Bloomberg Center-funded SAAG – is exercising state authority to target not just the federal government, but private parties.[9] Earlier this month, Mr. Segal and SAAG Steven J. Goldstein filed a 37 page *amicus* brief supporting the Mayor of Baltimore's lawsuit "seeking to hold 26 fossil fuel companies liable for injuries resulting from climate change."[10]

However worthy or unworthy the Bloomberg Center's policy goals may seem to any one observer, there are other well-financed interests with the resources to similarly rent the prosecutorial power of the Attorney General to serve other ends that observer would find antithetical. If the Bloomberg Center is permitted to use its private wealth to rent the state's power to pursue its enemies, there is nothing stopping a less "progressive" billionaire (of which there are more than a few) from likewise purchasing his or her own prosecutor to engage in "non-progressive" behavior. For example, such prosecutors-for-hire would be free to use private resources to target so-called "sanctuary cities" based on their lack of support for and cooperation with federal immigration enforcement efforts.

"The attorney-client privilege withholds relevant information from the fact finder and should be narrowly construed. The privilege should be applied only when necessary to achieve

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[9] *Mayor and City Council of Baltimore v. BP, P.L.C. et al*, Case No. 19-1644, Dkt. No. 92-1 (4th Cir. Sept. 3, 2019).

[10] Notably, other OAG "Applications" to the Bloomberg Center released to the public expressly name supporting the tort litigation campaign against private energy companies as a use to which they would put Bloomberg Center-funded attorneys. The heavily redacted application by AG Frosh may have indicated it would do so, as well, although the public has no way of knowing this in the face of these redactions.

its limited purpose of encouraging full and frank disclosure by the client to his or her attorney." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 363, 32 A.3d 456, 489 (2011). The communication in question here represents a highly relevant piece of information as to the use of private money to engage in lawsuits purportedly brought in the name of the people of the State of Maryland. Hiding this information from the public is in no way "necessary to encourage full and frank disclosure" between a client and his attorney. It is simply a way for OAG to avoid disclosing potentially embarrassing information.

To the extent that the Court is inclined to accept OAG's invitation to review the document *in camera*, GAO urges the Court to be mindful of the mandate to "narrowly construe" the claims of privilege those "necessary" to encourage open communication.

Respectfully submitted,

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, PC

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed first-class mail, postage prepaid, on September 23, 2019 to:

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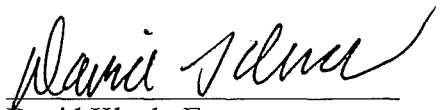

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