IN THE CIRCUIT COURT FOR BALTIMORE CITY

ACCOUNTABILITY & OVERSIGHT, P.C.,	*	
	*	
Plaintiff,	*	No. 24-C-19-001095 OC
v.		
BRIAN E. FROSH,	*	
Defendant.	*	

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DEFENDANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff is a law firm and advocacy group that opposes the efforts of government officials—like Attorney General Frosh—who seek responsible solutions to the problem of climate change. One focus of its efforts has been the NYU School of Law's State Energy & Environmental Impact Center ("Impact Center"), which "advanc[es] progressive clean energy, climate change, and environmental legal positions" by offering legal advice and attorney support to state attorney general's offices that have a proven track record of pursuing such positions. Complaint ("Compl.") at 4 (¶6). Plaintiff's specific focus here is the document through which the Maryland Attorney General's Office sought the legal services offered by the Impact Center ("application") and the Office's decision under the Public Information Act, Md. Code Ann., Gen. Prov. §§ 4-101–4-601 ("PIA"), to redact portions of the application as attorney-client privileged.

The information redacted from the application describes the reasons why the Office was seeking the legal support that the Impact Center offered and the specific types of cases that the Office would pursue if it received that additional support. Exhibit C at 2 (PIA Response Letter from Patrick B. Hughes to Christopher Horner (Jan. 3, 2019)).[1] As discussed below, the redacted portions of the application fit comfortably within the attorney-client privilege because they constitute preliminary communications exploring the potential for the formation of an attorney-client relationship and because they "'relate to professional advice and to the subject-matter about which the advice is sought.'" *Smith v. State*, 394 Md. 184, 203 (2006) (citation omitted). And because the Impact Center provided attorney representation at no cost to the State, the relationship also fits comfortably within the additional powers provided to the Attorney General under the 2017 Maryland Defense Act, which specifically authorizes the Attorney General to employ additional counsel "on a pro bono basis" and at no more than "minimal cost to the State." 2017 Md. Laws ch. 26 (codified at Md. Code Ann., State Gov't § 6-105(f)).

Because the redacted information is attorney-client privileged, it is exempt from disclosure under the PIA, which incorporates common-law privileges. *See* Gen. Prov. § 4-301(a)(1); *Caffrey v. Department of Liquor Control for Montgomery County*, 370 Md. 272, 303-04 (2002). Accordingly, plaintiff's motion for summary judgment should be denied and the Attorney General's cross-motion granted. But if the Court decides that it requires

[1] All of the exhibits cited here are attached to plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Pl's Memo."). Those exhibits include all of the exhibits attached to the Complaint.

additional evidence on that score, the Office submits as an exhibit to this filing a complete copy of the application, under seal, with the redacted portions revealed and highlighted for the Court's *in camera* review.

FACTS

Alarmed by the Trump Administration's efforts to roll back federal protections for the environment and public health and welfare, the Maryland General Assembly enacted the Maryland Defense Act, which authorizes the Attorney General to take legal action to "investigate, commence, and prosecute or defend any civil or criminal suit or action that is based on the federal government's action or inaction that threatens the public interest and welfare of the residents of the state" in a number of areas, including "the natural resources and environment of the State." 2017 Md. Laws ch. 26 (codified at State Gov't § 6-106.1(b)(1)). The additional authority granted to the Attorney General created the need for additional resources, which the Legislature met by authorizing the Attorney General to augment his staff by employing "any assistant counsel that the Attorney General considers necessary" so long as the arrangement: "(1) is on a pro bono basis; (2) will not result in more than minimal cost to the State; and (3) will not result in the payment to the assistant counsel of any portion of the State's recovery in any case or matter."[2] *Id.* (codified at State Gov't § 6-105(f)).

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[2] The Act also required the Governor to appropriate in fiscal year 2019 and thereafter "at least $1,000,000 to the Attorney General to be used only for: (1) carrying out this section; and (2) employing five attorneys in the Office of the Attorney General." *See* State Gov't § 6-106.1(c).

The NYU Impact Center

The Impact Center is a program associated with the NYU Law School that supports state attorneys general in pursuing clean energy, climate change, and other progressive environmental issues. *See* Exhibit B at 1-2. The Impact Center offers state attorneys general's offices two types of support: (a) "direct legal assistance to interested AGs on specific administrative, judicial or legislative matters involving clean energy, climate change, and environmental interests of regional and national significance" and (b) the recruitment, hiring, and compensation of "NYU fellows who will serve as Special Assistant AGs, working as part of the state OAG's staff." *Id.* at 2.[3]

Once the Impact Center identifies an attorney to serve as an NYU fellow, it hires the attorney and pays the attorney's salary and benefits. Although the salary is determined with the input of the attorney general's office to which the attorney will be "seconded," the attorney general's office receives the services of the attorney at no cost. The NYU fellow contracts with the Impact Center, *see, e.g.*, Exhibit E, and is then appointed by the relevant attorney general to serve as a special assistant attorney general within the attorney general's office.

The Application Process

As the materials attached to plaintiff's motion indicate, "[t]he opportunity to potentially hire an NYU Fellow [was] open to all state attorneys general who demonstrated

[3] Attorneys general's offices that enter into a relationship with the Impact Center also have access to a "full time communications expert experienced in the clean energy, climate and environmental field." Exhibit B at 2.

a need and commitment to defending environmental values and advancing progressive clean energy, climate change, and environmental legal positions." Exhibit B at 3. Interested attorneys general's offices were asked to describe "the extent to which funding or other capacity constraints have limited the ability to work on these issues," *id.*, and to provide evidence of their "commitment to and acute need for additional support on clean energy, climate change, and environmental issues of regional or national importance, such as those matters that cross jurisdictional boundaries or raise legal questions or conflicts that have nationwide applicability," *id.* at 3-4. The Impact Center also asked that interested attorneys general "identify any state-specific limitations or requirements governing the appointment of an employee paid by an outside funding source, and include a written confirmation that the attorney general has the authority to hire an NYU Fellow as a [Special Assistant Attorney General] (or equivalent title)." *Id.* at 4.

The Office submitted to the Impact Center an application in which it described the Attorney General's recognized "commitment to combatting climate change and promoting clean energy." Exhibit C (redacted application at 4). The application identified the many lawsuits that Maryland had initiated or joined in response to the Trump Administration's efforts to roll back environmental protections, *id.*, *see also id.* at Appendix A, and otherwise described the types of initiatives that the Office would pursue if it had the resources to do so, *id.* (redacted application at 1-2). The application also described the specific resource constraints under which the Office operates and the challenges of pursuing affirmative environmental litigation when the Office's environmental attorneys are already fully engaged in the representation of their State agency clients. *Id.* The application finished by

stating affirmatively that "Maryland does not have any state-specific limitations or requirements governing appointment of an employee paid by an outside funding source" and that the Attorney General "has the authority to hire an NYU Fellow as a [State Assistant Attorney General]." *Id.* at 6.

The Impact Center selected Maryland as one of several participating state attorneys general's offices and entered into two agreements with the Office. Under a retainer agreement, the Impact Center agreed to make available to the Office "lawyers who are working directly on behalf of or for the [Impact Center]," who provide legal advice on the clean energy, climate change, and environmental protection issues of mutual interest to the two parties. Exhibit G, Retainer Agreement at 1 of 4.[4] That agreement defines the Attorney General as the "Client" and the Impact Center as "Counsel," states that "[t]he relationship of Counsel to OAG arising out of this agreement is that of attorney and client," and includes the provisions regarding conflicts and professional liability insurance that typically appear in such retainer agreements. *Id.* at 1-2 (preface, ¶¶ 2, 13, 15). The second agreement sets forth the parties' obligations with respect to the secondment of attorneys to the Office of the Attorney General or "OAG." That agreement specifies that (a) the seconded attorneys "will be under the direction and control of, and owe a duty of loyalty to, OAG." Exhibit G, Employee Secondment Agreement at 1 of 5 (¶A.3).[5] With the agreements in place, the

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[4] The retainer agreement does not have a formal title, but it appears as the first document in Exhibit G and consists of four pages.

[5] The full title of this five-page agreement is "Employee Secondment Agreement between the Maryland Office of the Attorney General and the State Energy &

Impact Center hired Joshua Segal as an NYU fellow and seconded him to the Office, Exhibit E, which appointed him as "Pro Bono Assistant Counsel" under the additional authority provided under the Maryland Defense Act, Exhibit F (citing § 6-105(f) and stating that Mr. Segal "will not receive compensation for this appointment").

Plaintiff's PIA Requests

Plaintiff objects to state attorneys general taking advantage of the additional resources offered by the Impact Center and believes that the Center's principal funder—former Mayor of New York, Michael Bloomberg—is using his "vast wealth to harness the police powers of the state of Maryland" to carry out his "'progressive' ideological agenda." Compl. at 4 (¶7), 10 (¶23); *see also* Pl's Memo. at 11 (citing various articles published in the Wall Street Journal). To pursue its interest in Maryland's arrangement with the Impact Center, plaintiff first submitted a PIA request for any analysis by the Office demonstrating that the Attorney General had the authority to hire "legal fellows whose salary and benefits are provided by an outside funding source." Exhibit C at 1. Although the application itself was not the focus of plaintiff's request, the Office provided the document with certain passages redacted as attorney-client privileged. *Id.*

Plaintiff then submitted the request at issue here, which sought the application specifically. In light of plaintiff's specific interest in the document and the fact that other states that had submitted applications to the Impact Center had disclosed their applications

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Environmental Impact Center at NYU School of Law." It is the second document included in Exhibit G to plaintiff's memorandum.

without redactions, the Office took "a closer look" at the document in an effort to minimize the areas of conflict and disclosed some of the material it had previously redacted. *Id.* It continued, however, to redact those passages that discussed the reasons why the Office sough the additional legal support offered by the Impact Center and the initiatives the Office would consider pursuing if the two parties were to enter into a formal relationship. *Id.* at 1-2. The subject of this suit is the Office's decision to redact this information, totaling about three pages of a single eight-page document.

ARGUMENT

When stripped of its ideological polemics, plaintiff's argument is that the attorney-client privilege does not apply here because the communication at issue is between the Office and the Impact Center, and not with the attorney whom the Impact Center seconded to the Office, and because that attorney is paid by the Impact Center and thus does not serve "on a pro bono basis," as § 6-105(f) of the State Government Article requires. As discussed below, neither argument bears scrutiny under applicable Maryland law.

I. THE OFFICE HAS AN ATTORNEY-CLIENT RELATIONSHIP WITH THE IMPACT CENTER AND ITS COMMUNICATIONS PRELIMINARY TO THE FORMATION OF THAT RELATIONSHIP ARE PRIVILEGED.

The documents on which plaintiff bases its complaint and motion establish that the Office has an attorney-client relationship with the Impact Center. The retainer agreement expressly states that the relationship of the Impact Center to the Office "is that of attorney and client," with the Attorney General as the "Client" and the Impact Center as "Counsel." Exhibit G, Retainer Agreement at 1 of 4 (preface, ¶2). Of course, "a written agreement establishing the terms of lawyer[']s representation is not dispositive of the existence of an

attorney client relationship." *Attorney Grievance Comm'n of Maryland v. Stillwell*, 434 Md. 248, 265 n.15 (2013). Instead, the "'determination of whether an attorney-client relationship exists can, and often must, be implied from facts and circumstances of a given case.'" *Attorney Grievance Comm'n of Maryland v. White*, 448 Md. 33, 53 (2016) (quoting *Attorney Grievance Comm'n of Maryland v. Shaw*, 354 Md. 636, 650-51 (1999)). But in considering those facts and circumstances, the existence of a formal retainer agreement typically "'is rather conclusive evidence of the establishment of the attorney-client relationship.'" *Attorney Grievance Comm'n of Maryland v. Brooke*, 374 Md. 155, 173-74 (2003) (quoting *Attorney Grievance Comm'n of Maryland v. James*, 355 Md. 465, 476-77 (1999)).

That the Office entered into an attorney-client relationship with the Impact Center—as the retainer agreement states—is corroborated by the types of services the Impact Center agreed to provide to the Office. As plaintiff's exhibits establish, the Impact Center made available to participating attorneys general "three full time attorneys . . . to provide direct legal assistance to interested AGs on specific administrative, judicial or legislative matters involving clean energy, climate change, and environmental interests" of mutual interest to the parties. Exhibit B at 2. And the retainer agreement expressly contemplates that the Impact Center's attorneys will be called upon to "advise OAG" in connection with clean energy and climate change issues, and that the advice would involve "online legal research fees" and other expenses typically incurred by outside counsel. Exhibit G, Retainer Agreement at 1 of 4 (¶¶ 4, 6, 7); *see also id.* at 3 of 4 (¶19, anticipating that Impact Center attorneys would provide "opinions" and "other legal advice").

As plaintiff acknowledges, Maryland law will find the existence of an attorney-client relationship when "'(1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney's professional competence; [and] (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.'" Pl's Memo. at 7 (quoting *Stillwell*, 434 Md. at 260). The record establishes that all three criteria are met here: The Attorney General sought advice or assistance from the Impact Center, the advice or assistance he sought pertained to environmental subjects within the Center's specific focus, and the Impact Center expressly agreed to provide the requested advice and assistance.

Plaintiff makes three arguments why it nevertheless believes that the attorney-client privilege would not arise here, none of which is supported by the law or the exhibits on which plaintiff relies. First, plaintiff argues that there could not have been an attorney-client relationship between the Office and the Impact Center because, according to plaintiff, the Impact Center's Executive Director, in a letter to the Wall Street Journal, "denies . . . the existence of a confidential relationship." Pl's Memo. at 7-8. But the statements that plaintiff highlights refer to the NYU fellow's obligations, not the Impact Center's. That "'[t]he law fellow's duties of loyalty and confidentiality run solely to state attorneys general'" and that the fellow's work is assigned by the attorneys general "'without approval of NYU or, needless to say, any of its funders,'" *id.* at 7 (quoting Exhibit J), does not speak to whether the *Impact Center* has entered into a confidential relationship with the Office. What *does* speak to the existence of a confidential relationship between the Office and the Impact Center is the retainer agreement itself, which specifically states

that the Impact Center—which employs its own team of lawyers—owes a duty of confidentiality to the Office. *See, e.g.*, Exhibit G, Retainer Agreement at 1 of 4 (¶8).

The fundamentals of the arrangement between the Office and the Impact Center are analogous to representation by an outside law firm, which provides advice and legal representation and might, on occasion, second a firm attorney to the client's office. *See, e.g.*, David B. Wilkins, Team of Rivals? Toward A New Model of the Corporate Attorney-Client Relationship, 78 Fordham L. Rev. 2067, 2092 (2010) (discussing increased use of secondments). Under that type of arrangement, the seconded attorney owes a duty of loyalty and candor to the client and his work is controlled by the client. That does not mean, however, that the law firm does not also owe a duty of loyalty and candor to the client, particularly when that firm—here, the Impact Center—is itself serving in a direct advice role.

Plaintiff next argues that the communication cannot be privileged because it was "made well before" the attorney-client relationship was "initiated" and was in response to a solicitation that included "public relations support." Pl's Memo. at 8. But the attorney-client privilege extends to confidential discussions before the relationship is formed if those discussions—as these unquestionably do—concern the subject matter about which the representation is sought. *See, e.g.*, *Rubin v. State*, 325 Md. 552, 565 (1992); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) ("[C]onfidential communications made between a client and an attorney in an effort to obtain legal services are protected from disclosure."). Nor does it matter that the arrangement with the Impact Center also included public relations support. That a relationship between an attorney and a purported client

involves "services or advice that is not strictly legal in character" does not defeat the privilege or the confidential relationship upon which it is based. *Attorney Grievance Comm'n of Maryland v. Shoup*, 410 Md. 462, 489 (2009). Rather, the "key factor" remains "whether the purported 'client' sought legal advice," *id.*, which, as discussed above, is clearly the case here.

Finally, plaintiff insists that the communication at issue here could not qualify as attorney-client privileged because, according to plaintiff, "[i]t is nothing more than a request" for private funding. Pl's Memo. at 8. Factually, the record does not support plaintiff's assertion, as both the retainer agreement and the secondment agreement make clear that the Impact Center, like a law firm, provides direct legal advice and attorney services, not funding. *See* Exhibit G. But even putting that to one side, characterizing the document at issue here as a "request" or an "application" has no bearing on whether it is privileged.

Under Maryland law, the applicability of the privilege—like the formation of an attorney-client relationship itself—hinges on the substance of the communication, not on labels. Just as attorneys and their clients may choose to memorialize their relationship through a formal retainer agreement or through no writing at all, *White*, 448 Md. at 53, they may choose to communicate in any way that suits them, whether through letters, phone calls, or in-person interviews. Maryland law provides no basis on which to conclude that a would-be client's preliminary discussions with an attorney do not qualify as privileged simply because they appear in an "application" to a legal services-provider as opposed to some other writing. Nor is there any basis in Maryland law to conclude that the privilege

does not apply when the law firm involved, because of its expertise, is in a position to choose its clients.

Plaintiff is correct that the Office bears the burden to establish that the communication at issue here "'pertain[s] to legal assistance'" and was "'made with the intention of confidentiality,'" Pl's Memo. at 8 (quoting *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 415-16 (1998)), but the documents attached to plaintiff's own filings show that the Office carries that burden. The communication at issue was not limited to arrangements for a seconded attorney, as plaintiff suggests it was. It was for the purpose of obtaining *all* the legal assistance offered by the Impact Center, including both the secondment of a law fellow within the Attorney General's Office *and* the advice that the Impact Center's dedicated attorneys provide directly to the Office itself. There can be no reasonable dispute that the communication pertained to both aspects of the legal assistance provided by the Impact Center.

The communication also was made with the expectation of confidentiality, as the retainer agreement states and as the Office's redaction of the communication confirms. The "application" describes in detail the many initiatives that the Attorney General had undertaken in pursuit of the clean energy, climate change, and environmental goals that ultimately formed the basis of the relationship with the Impact Center. That much is clear from the unredacted portions of the application. What the *redacted* portions contain is information about the *reasons* why the Office was seeking legal assistance from the Impact Center (i.e., the resource limitations under which the Office operates) as well as the types of cases and matters that the Office would pursue if it received the additional resources that

the Impact Center offered. *See* Exhibit C (Letter from Patrick B. Hughes to Christopher C. Horner (Jan. 3, 2019) at 2). And in some instances, the description of those cases and matters included "information about [the] Office's litigation strategy." *Id.*

The privilege applies to the redacted information because it "relate[s] to professional advice and to the subject matter about which the advice is sought." *Smith*, 394 Md. at 203. As the Fourth Circuit explained in *Chaudhry*, the attorney-client privilege covers materials that "'reveal the motive of the client in seeking representation,'" the client's "'litigation strategy,'" and even "the identity of the federal statutes" that the representation involves. 174 F.3d at 402 (quoting *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127 (9th Cir. 1992)). A review of the unredacted portions of the communication make clear that it fits within this description of the privilege, and the Court's *in camera* review of the redacted portions—provided here under seal—will confirm as much.

That the other state attorneys general's offices that submitted applications to the Impact Center have disclosed their applications without redaction, as plaintiff claims, Pl's Memo. at 8-9, does not mean that the privilege does not apply here. Even assuming that those states entered into the same relationship with the Impact Center that Maryland has, the client—i.e., each participating state's attorney general—may always waive the privilege. It may well be that the other states' applications were not as forthcoming as Maryland's in describing how resource limitations constrain the attorneys general's ability to pursue environmental and energy initiatives. They also might not have been as candid as Maryland's in describing the specific initiatives that the Attorney General was

contemplating. Whatever the reason, the fact that another state-client chose to disclose the content of its communication says nothing about whether Maryland must do so.

II. THE MARYLAND DEFENSE ACT AUTHORIZES THE HIRING OF AN NYU LAW FELLOW BECAUSE THE FELLOW SERVES "ON A PRO BONO BASIS" AND AT NO MORE THAN "MINIMAL COST TO THE STATE."

Plaintiff's final argument—that the seconded NYU law fellows are paid a salary by the Impact Center and thus do not serve "on a pro bono basis," as § 6-105(f) of the State Government Article requires—is based on a misunderstanding of both the statute itself and the case law that plaintiff cites. To be sure, *State v. Westray* does contain the statement that plaintiff highlights—that pro bono "means that not only the client not need to pay, but also the attorney represents the client without compensation," 444 Md. 672, 677 n.2 (2015)—but the Court made that statement merely to explain why it was altering the question presented in the appellant's brief and not, as plaintiff suggests, as its holding or even part of its analysis.

The indigent defendant in *Westray* had dismissed the counsel provided to him by the Office of the Public Defender and had insisted that the trial court instead appoint him "pro bono counsel." *Id.* at 676. In making the statement that plaintiff quotes, the Court was simply clarifying that the appellant sought counsel that was *free to him*, and so it altered the question presented in appellant's brief to accurately reflect the appellant's argument. *Id.* at 677 n.2. If that statement was intended to define "Maryland law" on the topic, Pl's Memo. at 10, it would certainly be an odd way to do so.

The Court in other cases, moreover, refers to counsel as "pro bono" even when they are compensated, sometimes through the very judicial order under review. For example,

in *Henriquez v. Henriquez*, the Court addressed whether counsel provided by the House of Ruth Domestic Violence Legal Clinic could be the recipient of a court-ordered fee award when the counsel had been provided by the non-profit organization "on a pro bono basis." 413 Md. 287, 291 (2010). The attorneys from the Clinic obviously were paid by *someone*—the salaried staff attorneys paid by the Clinic itself and the volunteers paid by their everyday employer—and yet the Court referred to them repeatedly as serving "on a pro bono basis." *See, e.g., id.* at 302. And, in the end, the Court upheld the lower court's order awarding fees to the Clinic directly, even though the Clinic served its client "on a pro bono basis." *Id.*

All members of the Maryland bar have a professional responsibility to render pro bono legal service, Md. Rule 19-306.1(a), and nothing in the governing rules prohibits them from receiving compensation from someone other than their pro bono clients.[6] That should come as no surprise, as private law firms typically encourage pro bono service and some count pro bono service toward the attorney's billable hours for purposes of determining compensation. That the firm compensates those attorneys for their pro bono work does not disqualify that work for purposes of reaching the 50-hour aspirational goal that the Maryland Rules set.

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[6] In fact, the Maryland Rules do not even foreclose the possibility that an attorney could receive compensation from the pro bono client. *See* Md. Rule 19-306.1(b)(1) (providing for pro bono service "without fee or expectation of fee, or at a substantially reduced fee").

But regardless of what the term "pro bono" might mean in different contexts, here we are interpreting a *statute*, which requires the application of the usual canons of statutory construction. Within those canons, the "cardinal rule" is to "ascertain and effectuate the intent of the Legislature," drawing on both the "ordinary meaning of the language of the statute and how that language relates to the overall meaning, setting, and purpose of the act." *Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Lake Park*, 392 Md. 301, 316 (2006). In undertaking its interpretive task, the Court must "avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense." *Id.*

Application of those interpretive principles here leads to the conclusion that the General Assembly did not intend to limit the Attorney General to counsel *who are not paid by anyone*. That is made clear by the entirety of § 6-105(f), which is focused—not surprisingly—on ensuring that the additional counsel brought on to pursue the Act's goals come at little or no cost *to the State*: Counsel must serve "on a pro bono basis," without sharing in the State's recovery, and at no "more than minimal cost to the State."

That conclusion is also made clear by the larger context of the Maryland Defense Act, which was intended to *expand* the resources available to the Attorney General, not to hamstring his efforts in the way plaintiff suggests. *See Derry v. State*, 358 Md. 325, 336 (2000) (stating that courts consider the statute's "larger context" and the "purpose, aim, or policy" of the Legislature). The Act was designed to give the Attorney General the authority to "investigate and obtain relief from" the "arbitrary, unlawful, or unconstitutional" actions of the Trump Administration in a number of different areas,

ranging from the environment to immigration to the economic security of Maryland workers. State Gov't § 6-106.1(a)(2), (b). The breadth of that increased authority required additional staff, and the General Assembly provided for that additional staff in two ways: by appropriating "at least $1,000,000" in additional funding for "employing five attorneys in the Office of the Attorney General," *id.* § 6-106.1(c); and by authorizing the Attorney General to employ "any assistant counsel that [he] considers necessary" to carry out the Act's mandate, *id.* § 6-105(f). It is not plausible that the General Assembly would have intended for the Attorney General to limit the assistant counsel that he employs—counsel that he has deemed "necessary" to carry out the statutory duties assigned to him—to attorneys who either are independently wealthy, work only on weekends or evenings, or who cycle in and out of service for the short periods of time they can afford to serve without any compensation. The more likely and logical conclusion is that the Legislature intended to give the Attorney General the discretion to utilize whatever attorney resources he could arrange without budgetary impact.[7]

Finally, plaintiff's overarching theory—that Michael Bloomberg, through the Impact Center, is "induc[ing]" the Attorney General to pursue Mr. Bloomberg's ideological "agenda," Pl's Memo. at 5—is disproved, again, by its own evidence. That evidence demonstrates that the Attorney General was pursuing progressive environmental initiatives

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[7] Prior to the enactment of the Maryland Defense Act, it was not uncommon for the Office to appoint, as special assistant attorneys general, attorneys who had retired or moved on from State service so that they could conclude projects that they had handled as an employee. *See, e.g., Consumer Protection Div. Office of Atty. Gen. v. Consumer Publishing Company, Inc.*, 304 Md. 731, 769-70 (1985).

long before Mr. Bloomberg or the Impact Center came onto the scene. As a state legislator, Mr. Frosh "championed environmental causes through legislation and advocacy," serving in the General Assembly's "Green Caucus" and earning recognition as the Sierra Club's 1989 "Conservationist of the Year" and the Audubon Naturalist Society's 1999 "Public Official of the Year"—years before Mr. Bloomberg began his political career as Mayor of New York in 2002 and more than a quarter century before the establishment of the Impact Center in 2017. *See* Exhibit C (redacted application at 3-4). Plaintiff can disagree with the Attorney General's progressive views on environmental issues, but it cannot plausibly maintain that he adopted those views simply to take advantage of the Impact Center's offer of assistance.

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The Office of the Attorney General opposed plaintiff's motion and cross-moves for summary judgment because the exhibits on which plaintiff relies demonstrate that the Office entered into an attorney-client relationship with the Impact Center and that the redactions at issue here contain confidential communications pertaining to that relationship. The Office recognizes, however, that the Court may wish to review the redactions for itself. Accordingly, the Office provides with this filing an unredacted version of the application, under seal, with the redacted passages highlighted for the Court's convenience. Should it choose to review the redacted passages *in camera*, the Court will see that they contain nothing "[p]olitically embarrassing" or "legally problematic," Pl's Memo. at 10, and do no nothing more than substantiate the Office's interest in seeking the legal support that the Impact Center offered. There is, however, a

principle at stake, namely, that a client—even a government agency client—may communicate confidentially with its attorneys, even when the legal services they provide to the State come free of charge.

CONCLUSION

Plaintiff's motion for summary judgment should be denied and the Attorney General's cross-motion should be granted.

Respectfully submitted,

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