

COMMONWEALTH OF MASSACHUSETTS

[SUFFOLK, ss.]

SUPERIOR COURT  
Civil Action No. **19-1753C**

ENERGY POLICY ADVOCATES,

Plaintiff,

v.

OFFICE OF THE ATTORNEY GENERAL  
OF MASSACHUSETTS, MAURA HEALEY,  
in her official capacity as Attorney General,  
OFFICE OF THE SECRETARY OF THE  
COMMONWEALTH, and WILLIAM  
FRANCIS GALVIN, in his official capacity  
as Secretary of the Commonwealth

SUFFOLK SUPERIOR COURT  
2019 JUN - 3 A 10:36  
MICHAEL JOSEPH DONOVAN  
CLERK / MAGISTRATE

Defendants.

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND ACTION IN  
THE NATURE OF CERTIORARI**

1. This is an action under the Massachusetts Public Records Law, M.G.L. c. 66, § 10A and c. 4, §7, Twenty-sixth, the Declaratory Judgment Act, M.G.L. c. 231A, §1, and M.G.L. c. 249, §4, seeking public records from the Office of the Attorney General of Massachusetts (“OAG”) (which claims the requested records are exempt from disclosure), seeking a declaration that *ex parte* communications during a pending Supervisor of Records appeal are prohibited by Article 29 of the Massachusetts Declaration of Rights, seeking a declaration nullifying the Supervisor of Records constructive denial of Plaintiff’s appeal by declining to rule on it, and finally, a petition to correct errors in proceedings not otherwise subject to motion or appeal, as authorized in M.G.L. c. 249, §4.

## **PARTIES**

2. Plaintiff Energy Policy Advocates (“EPA”) is a nonprofit organization incorporated in the state of Washington and dedicated to transparency and open government. EPA uses state and federal open records laws to shed light on - and thereby educate the public on - private influences on government policymaking and other actions. Part of EPA’s effort has been the two record requests at issue in this matter.

3. Defendant Maura Healey is the Attorney General of Massachusetts. Attorney General Healey is the formal custodian of all records for the OAG. She is being sued in her official capacity as Attorney General. Her usual place of employment is One Ashburton Place, 20<sup>th</sup> Floor, Boston, Massachusetts 02108.

4. Defendant Office of the Attorney General has physical custody of the public records sought. It is located at One Ashburton Place, 20<sup>th</sup> Floor, Boston, Massachusetts 02108.

5. Defendant William Francis Galvin is the Secretary of the Commonwealth of Massachusetts (“SOTC”). His Office includes the Supervisor of Records, which is legislatively assigned the duty to adjudicate administrative appeals under the public records law. Massachusetts Public Records Law, G.L. c. 66 § 10A. He is being sued in his official capacity as Secretary of the Commonwealth. His usual place of employment is One Ashburton Place, 17<sup>th</sup> Floor, Boston, Massachusetts 02108.

## **JURISDICTION AND VENUE**

6. This Court has jurisdiction over this action under M.G.L. c. 66, §10A(c), which states, “a requestor may initiate a civil action to enforce the requirements of this chapter,” and §10A(a) for the Supervisor of Records’ failure to satisfy its duty to issue a determination and/or for its constructive, improper denial of Plaintiff’s April 2019 request.

7. Venue is proper in Suffolk County because OAG and the Secretary of the Commonwealth are both state agencies and any action against a state agency must be filed in Suffolk County. M.G.L. c. 66, §10A(c).

## STATEMENT OF FACTS

### Background to EPA's Public Records Requests

8. This action involves two requests for records Plaintiff EPA sent in February and April 2019 to Defendant the Office of Attorney General, which denied both requests in full. EPA then appealed both denials to the Supervisor of Records in the Office of the Secretary of the Commonwealth.

9. The Supervisor of Records instructed OAG to provide a supplemental response and come into compliance with its statutory obligations in response to Plaintiff's February 5, 2019 request. This was on March 15, 2019. Defendant OAG has failed to comply with this ruling or the statute.

10. Plaintiff EPA also appealed OAG's denial in full of EPA's April 12, 2019 request for records. The Supervisor of Records owed Plaintiff a ruling on this appeal on or before May 23, 2019. It has declined or otherwise failed to rule, thereby also constructively issuing an improper denial of Plaintiff's appeal of OAG's denial of EPA's April 12, 2019 request.

11. The Supervisor of Records denied the Plaintiff its statutory right to a fair and transparent process, engaging in *ex parte* communications with OAG on the subject.

12. Public records EPA obtained from the Supervisor of Records, relating to that office's communications with OAG involving these matters, affirm the *ex parte* dealings.

13. OAG's denial of that April 12, 2019 request invoked a prior request by another party, the Competitive Enterprise Institute ("CEI"), that was similar to but different from EPA's request. OAG also denied that CEI request in full, an action which CEI appealed to the Supervisor of Records. Records also show that OAG and the Supervisor of Records engaged in *ex parte*

communications regarding that request. These records confirm that OAG influenced the Supervisor to reverse its own prior rulings, with the Supervisor ultimately declaring it “decline[d] to opine”.

14. All of these requests relate to OAG’s relationships with one or more of three outside parties, including a plaintiffs’ tort lawyer named Matthew Pawa, a climate activist named Naomi Oreskes, and an organization created by a major political donor called the State Energy and Environment Impact Center (“State Impact Center”). These parties advocate and have assisted or are assisting attorneys general investigations of private parties in the name of catastrophic man-made climate change.

15. Attorney General Healey, who received private briefings from Mr. Pawa about possible investigations sought by that attorney, then initiated and is pursuing such investigations.

16. Plaintiff’s February 5, 2019 request sought certain described records relating to the State Impact Center which is “financed by Michael Bloomberg,”<sup>1</sup> a former elected official and current “climate activist.” That organization hires and places privately-hired “Special Assistant Attorneys General” in attorneys general offices to pursue issues of concern to that donor. Defendant OAG is using two privately-funded “SAAGs” under this program, with salary and benefits paid by Mr. Bloomberg’s activist group.

17. A condition of receiving the donor’s underwriting was that each OAG, in its application, “identify any state-specific limitations or requirements governing the appointment of an

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<sup>1</sup> Juliet Eilperin, “NYU Law launches new center to help state AGs fight environmental rollbacks,” Washington Post, August 16, 2017, [www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496\\_story.html](http://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html). The group also describes itself to AGs as “the new Bloomberg-supported State Energy and Environmental Impact Center”. November 14, 2017 10:57 AM email from NYU’s Christopher Moyer to Virginia OAG’s Michael Kelly, Subject: Introduction.

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 SAAG (or equivalent title).”<sup>2</sup>

18. Plaintiff requested the “application” setting forth OAG’s promises to the donor, any such potential legal or ethical issues OAG considered applicable to bringing such “SAAGs” into the Office, and related records.

19. These records are of great public interest. One state legislature has already acted to prohibit its Attorney General from entering this program,<sup>3</sup> and another state’s legislative counsel has found that its Attorney General’s participation violates that state’s laws.<sup>4</sup>

20. Plaintiff’s second request at issue in this matter sought certain described correspondence concerning OAG’s work in early 2016 with Mr. Pawa and/or Ms. Oreskes in their campaign seeking “a single sympathetic attorney general” to initiate investigations of perceived opponents of their shared political and policy agenda.

21. Mr. Pawa is an attorney in Massachusetts in private practice who has filed numerous tort actions seeking damages from climate change. Pawa provided three separate presentations on legal strategies to a 2012 meeting in La Jolla, California which “discussed, among other things .. ‘strategies to win access to internal documents’ of fossil fuel companies.”<sup>5</sup> The published

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<sup>2</sup> August 25, 2017 email from the State Impact Center’s David Hayes to, *inter alia*, OAG’s Michael Firestone, Subject: State Energy & Environmental Impact Center.

<sup>3</sup> See, e.g., Charmaine Little, “Virginia doesn’t want one of Bloomberg’s environmental prosecutors sent to its AG’s office”, Legal Newsline, March 14, 2019, 2019, <https://legalnewsline.com/stories/512291503-virginia-doesn-t-want-one-of-bloomberg-s-environmental-prosecutors-sent-to-its-ag-s-office>; Valerie Richardson, “Virginia bill blocks Bloomberg from embedding climate lawyers in attorney general’s office”, Washington Times, March 3, 2019, <https://www.washingtontimes.com/news/2019/mar/3/virginia-blocks-mike-bloombergs-climate-lawyers/>.

<sup>4</sup> See, e.g., Nigel Jaquiss, Legislative Counsel Says Steve Novick’s New Gig at Oregon Department of Justice Violates State Law. DOJ Disagrees”, Willamette (OR) Week, September 25, 2018, <https://www.wweek.com/news/2018/09/25/legislative-counsel-says-steve-novicks-new-gig-at-oregon-department-of-justice-violates-state-law-doj-disagrees/>. Legislative Counsel opinion available at <https://freebeacon.com/wp-content/uploads/2018/09/Oregon-LCC-opinion-R.pdf>.

<sup>5</sup> Order, transferring *Exxon v. Eric Schneiderman and Maura Healey* from the Northern District of Texas to the Southern District of New York, Kinkeade, J., C.A. No. 4:16-CVK-469-K (N.D. TX, Mar. 29 2017).

summary of the meeting stated, *inter alia*, “State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.”<sup>6</sup> That summary lists Ms. Oreskes as a co-organizer of this meeting.

22. Pawa has previously suggested that this campaign use the courts in response to its failure to impose a policy agenda through the legislative process.<sup>7</sup>

23. Public records already obtained from other institutions affirm Defendant OAG’s participation in efforts led by Mr. Pawa and Ms. Oreskes. This includes OAG sending five attorneys<sup>8</sup> to a “secret” briefing<sup>9</sup> for OAGs and “prospective funders”<sup>10</sup> to consider “potential state causes of action against major carbon producers”.<sup>11</sup> Public records obtained from other

<https://www.mass.gov/files/documents/2017/03/zi/March%202029%252C%25202017%2520Order%2520of%2520the%2520United%2520State%2520Court%2520of%2520Appeals%2520for%2520the%2520Fifth%2520Circuit%2520Transferring%2520Case%2520to%2520Southern%2520District%2520of%2520New%2520York.pdf>

<sup>6</sup> Climate Accountability Institute, *Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control* (Oct. 2012).

<http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf> at p. 11. (Summary of the “Workshop on Climate Accountability, Public Opinion, and Legal Strategies”) (Last viewed May 16, 2019).

<sup>7</sup> Zoe Carpenter, *The Government May Already Have the Law It Needs to Beat Big Oil*, *The Nation* (July 15, 2015), <https://www.thenation.com/article/the-government-may-already-have-the-law-it-needs-to-beat-big-oil/> (quoting Pawa, in an article advocating RICO actions against fossil fuel companies: “Legislation is going nowhere, so litigation could potentially play an important role.”) (Last viewed May 16, 2019).

<sup>8</sup> See, e.g., March 17, 2016 email from OAG’s Melissa Hoffer to Harvard Law School’s Shaun Goho. Subject: RE: SAVE THE DATE—HLS/UCS Meeting on April 25, 2016 listing Andy Goldberg, Glenn Kaplan, Christophe Courchesne, Richard Johnson as participants in addition to herself.

<sup>9</sup> “I will be showing this Monday at a secret meeting at Harvard that I’ll tell you about next time we chat. Very [sic] exciting!” April 22, 2016, email from Oregon State University Professor Philip Mote to unknown party, Subject: [REDACTED], and “I’m actually also planning to show this in a secret meeting next Monday—will tell you sometime.” April 20, 2016, Philip Mote email to unknown party, Subject: [REDACTED]. Both obtained from Oregon State University on March 29, 2018, in response to January 9, 2018 Public Records Act request.

<sup>10</sup> “We will have as small number of climate science colleagues, as well as prospective funders, at the meeting.” March 14, 2016, email from Union of Concerned Scientists’ Peter Frumhoff to Mote; Subject: invitation to Harvard University-UCS convening. Obtained under same PRA request cited in FN 9.

<sup>11</sup> “Confidential Review Draft—March 20, 2016, Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal, and Historical Perspectives.” Obtained in *Energy & Environment Legal Institute v. Attorney General*, Superior Court of the State of Vermont, 349-16-9 Wnc, December 6, 2017.

OAGs, including that meeting's agenda and a document titled "Technical Advisors and Experts";

list Ms. Oreskes among the presenters at that briefing.

24. Public records obtained from another participating institution, UCLA Law School, describe the discussion as being "about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide".<sup>12</sup>

25. Pawa's early 2016 presentation to attorneys general was titled, "What Exxon Knew—And What It Did Anyway."<sup>13</sup> Contemporaneous with this, AG Healey declared at a Manhattan press conference, *inter alia*, "Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."<sup>14</sup>

26. Mr. Pawa also briefed the AGs, including AG Healey, in the moments prior to those remarks, a briefing which, one federal court has noted, OAGs sought to keep from public

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<sup>12</sup> "Hi Dan, Thought you would like to hear that Harvard's enviro clinic, UCLA Emmett Institute, and the Union of Concerned Scientists are talking together today about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide. Good discussion." April 25, 2016 email from UCLA Law School's Cara Horowitz to Harvard and UCLA center funder Dan Emmett, Subject: See, e.g., <https://climatelitigationwatch.org/on-the-subject-of-recruiting-law-enforcement-email-affirms-origin-of-prosecutorial-abuses/>. This email was sent from the event.

<sup>13</sup> See, e.g., April 19, 2016 calendar entry for Connecticut Deputy Attorney General Matthew Levine, produced under Connecticut's Freedom of Information Act. Other state public record productions show Pawa gave this presentation to Illinois OAG on DATE, 2016 and California OAG between April 1 and April 7, 2016, 2016. Public records also show Pawa provided OAGs a link to a video of his presentation. See, e.g., January 13, 2016, email from David Zonana to Sally Magnani, Martin Goyette, Amy J. Winn, Dennis Ragen, and Heather Leslie; Subject: Tomorrow's Meeting—Part 1 of 2.

<sup>14</sup> <https://ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneysgeneral-across>.

knowledge<sup>15</sup> and that their efforts “suggest that the attorneys general are trying to hide something from the public”.<sup>16</sup>

27. The public record suggests that AG Healey initiated this investigation at the urging of Mr. Pawa’s call for “a single sympathetic attorney general” to assist a tort litigation campaign and at his specific, private urging.

28. This collaboration using public office is the subject of great media and public interest due to the controversial origin of -- and OAG collaboration involved in -- these investigations.

### **EPA’s February 5, 2019 Public Records Request**

29. On February 5, 2019, Plaintiff submitted a public records request via email to Lorraine A. G. Tarrow, OAG’s Records Access Officer (“RAO”), for an OAG application to the State Energy and Environment Impact Center (“State Impact Center”) at New York University (“NYU”). EPA also requested whatever analyses it performed related to the statutory authority and ethics of OAG accepting a privately funded “Special Assistant Attorney General” (SAAG”) through NYU, which NYU requested OAG perform and address in its application. (Exhibit 1).

30. On February 22, 2019, Defendant OAG replied with a blanket refusal to produce any record or any part thereof, on the stated grounds that all records responsive to Plaintiff’s request

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<sup>15</sup> Sean Higgins, *NY atty. general sought to keep lawyer’s role in climate change push secret*, Washington Examiner (Apr. 18, 2016), <http://www.washingtonexaminer.com/ny-atty-general-sought-to-keep-lawyers-role-in-climate-change-push-secret/article/2588874>; Terry Wade, *U.S. state prosecutors met with climate groups as Exxon probes expanded*, Reuters (Apr. 15, 2016), <http://www.reuters.com/article/us-exxonmobil-states/u-s-state-prosecutors-met-with-climate-groups-as-exxon-probes-expanded-idUSKCN0XC2U2>.

<sup>16</sup> In an order transferring a case from the Northern District of Texas to the Southern District of New York, Judge Kinkeade of the Northern District Court noted “[t]he day after the closed door meeting, on March 30, 2017, Mr. Pawa emailed the Office of the New York Attorney General to ask how he should respond if asked by a reporter from *The Wall Street Journal* whether he attended the closed door meeting with the attorneys general. The Office of the New York Attorney General responded by instructing Mr. Pawa ‘to not confirm that you attended or otherwise discuss the event.’ Does this reluctance to be open suggest that the attorneys general are trying to hide something from the public?” *Exxon v. Healey*, Civil Action No. 4:16-CVK-469-K (N.D. TX, Mar. 29, 2017) at 8.

were exempted, in full, from disclosure as personnel files or information, confidential advisory opinions of the State Ethics Commission, or privileged attorney-client communications. (Exhibit 2)

31. On March 1, 2019, EPA appealed this response to the Supervisor of Records (Secretary of the Commonwealth) via counsel, Government Oversight & Accountability, P.C. (“GAO”). (Exhibit 3)

32. On March 15, 2019, the Supervisor of Records instructed OAG to provide EPA with a supplemental response consistent with its obligations under the public records law within ten business days. (Exhibit 4)

33. On April 1, 2019, on behalf of Plaintiff EPA and by electronic mail, counsel requested an update on the supplemental response from OAG.<sup>17</sup> (Exhibit 5)

34. On April 15, 2019, EPA counsel, having received no reply, again requested an update from OAG. (Exhibit 6)

35. On April 22, 2019 RAO Tarrow informed Plaintiff’s counsel that “The Supervisor has agreed to extend the time in which to respond concerning SPR 19/0501 for another 30 days (from April 16).” This was the first Plaintiff had been informed of any extensions or requests for extensions, or otherwise notified that OAG and the Supervisor of Records were in discussions regarding this appeal or regarding the Supervisor of Records’ instruction to OAG to comply with the law outside of the written record. (Exhibit 7)

36. Despite the 30-day extension, which lapsed on May 16, 2019, Plaintiff EPA has received no records responsive to the February 5, 2019 request, or other required response.

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<sup>17</sup> On April 3, 2019 RAO Tarrow responded to counsel requesting clarification of the proper recipient of future OAG responses. On April 4, 2019, GAO affirmed that OAG should correspond via counsel regarding the February 5 request going forward.

**EPA's April 12, 2019 Public Records Request**

37. On April 12, 2019, Plaintiff EPA submitted a public records request via email to OAG, again via RAO Tarrow, for certain 2016 correspondence of OAG staff containing the terms "mp@pawalaw.com" and/or "Oreskes". (Exhibit 8)

38. On April 29, 2019, OAG responded with a denial of all responsive records, in full, by copying Plaintiff with OAG's response to an earlier, similar but not identical request by the Competitive Enterprise Institute ("CEI").<sup>18</sup> (Exhibit 9)

39. CEI had twice appealed OAG's denial of its similar but broader request, to which OAG claims the same six pages are responsive as are responsive to EPA's narrower April 12, 2019 request.

40. In its response, OAG claimed it could not release any portion of these emails, even, e.g., the To, From, and Date fields of these six pages, "without compromising our investigation or litigation strategies to the same extent as disclosing the records themselves. The senders and recipients, the dates, and the content of these e-mails relate to [the AGO's] ongoing ExxonMobil investigation, or, in one instance, other potential environmental enforcement, and, if released, might not only prejudice the investigation going forward, but would also likely impact the related litigation."

41. The Supervisor of Records had agreed with both CEI appeals, instructing OAG to release at least parts of the (same) records.<sup>19</sup>

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<sup>18</sup> That January 17, 2019 request sought :all correspondence dated from January 1, 2016, through April 15, 2016, inclusive, which was sent to or from or copying (whether as cc: or bcc:) Christopher Courchesne and/or Michael Firestone, which also includes any party, be it to, from or copying (again whether as cc: or bcc:), a) mp@pawalaw.com, b) steve@hbsslaw.com c) any address ending in @sheredling.com, d) any address including Oreskes, and/or e) any address ending in @bordaslaw.com."

<sup>19</sup> The first Supervisor of Records determination was issued on March 5, 2019, in response to the January 17, 2019 CEI request. The response ordered a supplemental response to CEI. See Exhibit 10. The second response was issued

42. However, after twice siding with CEI's appeals, two days after the second ruling adverse to OAG, which came on April 8, 2019 (Exhibit 11), on April 10, 2019 the Supervisor of Records wrote again reversing its rulings and stating it *declined to rule* on OAG's persistent refusal to release the same records to CEI. (Exhibit 12)

43. Newly obtained records indicate that this reversal resulted from *ex parte* communications, described, *infra*. See, e.g., Exhibit 14.

44. In denying EPA's similar request, OAG attached this April 10 reversal by the Supervisor, "declin[ing] to opine". That prior, lengthy analysis set forth applicable Massachusetts law and precedent, concluding:

"Although the AGO has identified there are "six (6) pages of e-mails" responsive to Mr. Horner's request and indicates release of the records "might not only prejudice the investigation going forward, but would also likely impact the related litigation," it remains unclear why the AGO is withholding the records in their entirety. See *Reinstein v. Police Comm'r of Boston*, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Although the AGO states that "redaction in this case would render these e-mails meaningless," under the Public Records Law, any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). The AGO must explain why segregable portions cannot be provided."

45. The Supervisor of Records stated this April 10, 2019 "decline to opine" rescission of that analysis was "due to an oversight" in prior rulings. Specifically, the Supervisor of Records stated that it had failed to consider OAG's citation to ongoing litigation and its claim that release of any

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on April 8, 2019 and rescinded on April 10, 2019. The April 2019 responses are included in this complaint as Exhibits 11 and 12

part of the records at issue in this matter might “impact” it. In fact, the Supervisor of Records’ April 8, 2019 ruling against OAG serially and expressly acknowledged that very claim and litigation.

46. Further, public records obtained by Plaintiff EPA since this reversal reveal that OAG and the Supervisor of Records engaged in correspondence and verbal discussions about requests on this subject matter by both CEI and EPA prior to this reversal.<sup>20</sup> See, e.g., Exhibits 13, 14.

47. The Supervisor of Records’ sudden reversal of itself inherently raised questions, prompting RAO Tarrow to instruct OAG colleagues in an April 11, 2019 email, “Any questions re: the route this determination took and/or the email below, let me know”. (Exhibit 14)

48. OAG attached this OAG-influenced reversal as its basis for denying EPA’s similar if more narrow request, which EPA appealed on May 9, 2019. (Exhibit 15)

49. The Supervisor of Records has never ruled on EPA’s May 9 appeal, which was grounded in the logic and precedent the Supervisor employed in its April 8, 2019 ruling, failing to issue a determination within ten days as required in M.G.L. c. 66, §10A(a) and 950 C.M.R. 32.08(2)(a).

50. The Supervisor of Records failure to issue a timely determination constitutes a constructive denial, as well as an effective application of its reversal and “declining to opine” on a similar appeal after OAG intervention to reverse the Supervisor’s ruling

#### **Ex Parte Communications between Supervisor of Records and OAG**

51. Aware of the developments involving CEI’s appeal(s) and the Supervisor’s reversal of itself, on April 12, 2019, EPA submitted a request to the Secretary of the Commonwealth for correspondence of Supervisor of Records Murray to, from or referencing OAG for the period of

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<sup>20</sup> During that same period during which these communications occurred, Plaintiff EPA’s first appeal of a substantively related OAG denial, of EPA’s February 5, 2019 request, was pending before the Supervisor of Records

April 8, 2019 to April 12, 2019, as well as the calendar of Murray for the same period. (Exhibit

16)

52. On April 29, 2019, the Secretary of the Commonwealth produced three responsive emails, including an April 4, 2019 request by Ms. Tarrow's paralegal Jonathan Cubetus requesting a meeting with Ms. Murray, for an unstated reason but "on the advice of one of your staff members to set up a meeting between you and AAG Tarrow." (Exhibit 13)

53. The Secretary also produced Ms. Murray's calendar for the week of April 7 – April 13, 2019. This calendar contained one entry, stating only "LT", scheduled for the date and hour during that OAG's Lorraine Tarrow sought to meet with Murray. (Exhibit 17)

54. Among the records provided was an April 10, 2019, email from Tarrow to Murray notifying her that she intended to come alone to their meeting scheduled on April 11, 2019. Minutes later, Tarrow forwards Murray an email thread between her and EPA's counsel inquiring into the status of its February 5, 2019 appeal of OAG's denial to the Supervisor. See Exhibit 13.

55. RAO Tarrow added no commentary in forwarding the email thread. Other records confirm, however, that this was sent as a follow-up to other discussions between OAG and the Supervisor of Records about the six emails at issue in EPA's appeal.

56. On May 29, 2019, in response to another EPA public records request, OAG released correspondence of RAO Tarrow and her paralegal, John Cubetus, to, from, or referencing Murray and the Secretary of the Commonwealth for the period of April 1, 2019 through April 29, 2019, and calendars for the same period.

57. The released correspondence includes an April 2, 2019 email from RAO Tarrow to OAG colleagues about the aforementioned CEI appeal on the same matter stating, *inter alia*, "I will see

what Rebecca plans to do with this one when I talk to her tomorrow.” (Exhibit 18) OAG redacted two sentences from Ms. Tarrow’s email discussing her interactions with Supervisor Murray about these six pages of withheld emails

58. Another one of these emails combined discussions of OAG’s handling of CEI’s and EPA’s similar requests to which the same six pages of emails are responsive, stating, *inter alia*, ‘I’ve asked for a meeting with [Murray] to discuss the scope of her order when I get back on the 10<sup>th</sup>. I will see Rebecca tomorrow at the Records Conservation Board meeting and will ask her about it. RICH - can you give me a call about a related e-mail I received?’ (Exhibit 19)

59. On information and belief, the latter request directed to OAG Chief Legal Counsel Richard Johnson references an April 1, 2019 email from EPA counsel Neal Cornett requesting an update on EPA’s pending appeal SPR 19/0501.

60. An April 16, 2019 email from RAO Tarrow to Supervisor Murray and Secretary of State attorney Stephen Shorey confirms the April 11, 2019 meeting occurred to discuss the withheld emails at issue in this matter, and that there Supervisor Murray and Mr. Shorey advised OAG on how it should approach its “supplemental response” to EPA’s appeal. (Exhibit 20)

61. EPA was not provided any notice of this April 11, 2019 meeting nor notified of any of the *ex parte* communications between these offices relating to EPA’s requests or appeal.

62. The record reflects that neither EPA nor CEI were provided any notice of and were not party to any of the broader suite of *ex parte* discussions relevant to the six pages of withheld emails responsive to EPA’s (and CEI’s) requests, and the appeal at issue in the instant matter, whether OAG’s discussions with Ms. Murray obtaining an extension, the parties’ discussions about OAG’s concerns over “the scope of [Murray’s] order,” the discussions about Murray’s pending ruling on appeal, OAG’s April 10, 2019 discussions that preceded Ms. Murray’s

extraordinary rescission of her second ruling on CEI's appeal, or any of the discussions about EPA's administrative appeal on which the Supervisor has yet to issue a determination

63. On information and belief, RAO Tarrow affirms the effort to keep the various discussions out of the record with her April 11, 2019 instruction to colleagues, "Any questions re: the route this determination took and/or the email below, let me know". (Exhibit 14)

## STATEMENT OF CLAIMS

### Count I

(Violation of the Massachusetts Public Records Law, M.G.L. c. 66, §10 & M.G.L. c. 4, §7)

64. Plaintiff realleges and incorporates by reference the allegations above.

65. Under the Massachusetts public record law, a records custodian "...shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record". M.G.L. c. 66, §10(a). A public record in Massachusetts is defined by M.G.L. c. 4, §7 to include "documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency...of the commonwealth". The documents EPA requested constitute public records under the statute, and the Plaintiff requested the appropriate records custodian.

66. Regarding the May 6, 2019 request, Defendant OAG erroneously relied on Public Records Law exemption (f) in withholding public records responsive to Plaintiff's April 12, 2019 request, or in the alternative, failed to perform its statutory duty to redact segregable, exempt information from nonexempt information.

67. Exemption (f) exempts from disclosure "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." M.G.L. c. 4, § 7, Twenty-sixth(f).

68. Exemption (f) does not apply here. The OAG failed to meet its burden of demonstrating that the release of the requested records would “so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” While the exemption’s primary purpose is to avoid premature disclosure of the commonwealth’s case before trial, *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976), OAG has not demonstrated, with specificity, how disclosure of the records requested would impede any investigation. There is no blanket investigatory materials exemption; rather “it invites case-by-case consideration of whether disclosure ‘would so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest’” *Reinstein v. Police Comm’r of Boston*, 378 Mass. 281, 289 (1979).

69. Defendant OAG failed to demonstrate that Exemption (f) applies to any requested records, as required.

70. Even if OAG could have met its burden, OAG still has an affirmative duty to redact exempt, segregable information and produce the remainder. M.G.L. c. 66, §10(a).

71. Instead, OAG’s application of Exemption (f) to the entirety of the requested records – rather than only to those segregable portions – violates M.G.L. c. 66, §10.

72. By refusing to provide the records, or even redacted portions, Defendant’s actions violate M.G.L. c. 66, § 10.

## **Count II**

(Declaratory Judgment, M.G.L. c. 231A, §1)

73. Plaintiff realleges and incorporates by reference the allegations above.

74. There is an actual controversy between EPA and OAG regarding the requested public records.

75. Pursuant to M.G.L. c. 231A, §1 and the Massachusetts Public Records Law, Plaintiff is entitled to a declaration that the records requested are public records within the meaning of M.G.L. c. 4, §7, that their release is required by law, and that Defendant has no right to withhold such records.

### **Count III**

(Violation of M.G.L. c. 66, § 10)

76. Plaintiff realleges and incorporates by reference the allegations above.

77. Regarding the February 5, 2019 request, Defendant OAG has failed to comply with the Supervisor of Records' March 15, 2019 determination in SPR 19/0501 to provide a supplemental response to Plaintiff.

78. Defendant OAG's refusal to provide a supplemental response to Plaintiff, after a thirty-day extension and consultation with the Supervisor of Records on how to provide a satisfactory response, has deprived Plaintiff of access to records and violated the Massachusetts Public Record Law, M.G.L. c. 66, § 10(a).

### **Count IV**

(Declaratory Judgment, M.G.L. c. 231A, §1)

79. Plaintiff realleges and incorporates by reference the allegations above.

80. There is an actual controversy between EPA and OAG regarding the requested public records.

81. Pursuant to M.G.L. c. 231A, §1 and the Massachusetts Public Records Law, Plaintiff is entitled to a declaration that the records requested are public records within the meaning of M.G.L. c. 66, § 10(a), that their release is required by law, and that Defendant has no right to withhold such records. Plaintiff is also entitled to a declaration that, should any exemption apply

to its requests, OAG must redact those portions that constitute the exempted material, and produce the remainder.

### **Count V**

(Violation of Article 29 of the Massachusetts Declaration of Rights)

82. Plaintiff realleges and incorporates by reference the allegations above.

83. The *ex parte* communications between OAG and the Supervisor of Records – which, Plaintiff states on information and belief, also influenced the rescission of a proper determination directly relevant to the records at issue – deprive EPA of its right to a fair and impartial decision in violation of Article 29 of the Massachusetts Declaration of Rights, which provides:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.

84. The *ex parte* discussion between Defendants the Supervisor of Records and OAG relating to each of the decisions cited to in the two offices' responses, including the "decline to opine" reversal on which OAG bases its denial of EPA's request, was unlawful because (1) EPA was given neither notice nor opportunity to join, (2) EPA was deprived of information relevant to, and clearly affecting, the Supervisor's decision, and (3) the resulting asymmetry of information and access deprived EPA of its right to a fair and impartial decision.

85. The Supervisor's appellate process, including the process leading to its decision to grant or deny an appeal – or, in this case, to not rule at all – is a quasi-judicial proceeding and its decision the product of a quasi-judicial proceeding.

86. Pursuant to M.G.L. c. 231A, §§1 and 2, and Article 29 of the Massachusetts Declaration of Rights, Plaintiff is entitled to a declaration that *ex parte* communications between the Supervisor of Records and OAG were unlawful and that the Supervisor's decision should be considered null, void, and without legal effect.

#### Count VI

(Certiorari, M.G.L. c. 249, §4)

87. Plaintiff realleges and incorporates by reference the allegations above.

88. EPA is a requestor aggrieved by the Supervisor of Records' failure to issue a timely decision, and now seeks judicial review through an action in superior court seeking relief in the nature of certiorari pursuant to M.G.L. c. 66, §10A(a).

89. M.G.L. c. 249, §4 authorizes a party to bring a civil action in this Court in the nature of certiorari to correct errors in the Supervisor's proceedings that contravene the common law, and which are not otherwise reviewable by motion or appeal.

90. There were numerous errors in the Supervisor's proceeding that contravened the common law, the Public Records Law, and Article 29 of the Massachusetts Declaration of Rights, including the failure to issue a timely determination and the *ex parte* communications with RAO Tarrow.

91. The Supervisor's appellate process, including the process leading to its decision to grant or deny an appeal – or, in this case, to not rule at all – is a quasi-judicial proceeding and its decision the product of a quasi-judicial proceeding.

92. The Supervisor's failure to issue a timely determination constitutes a constructive denial of the appeal.

93. The Supervisor's *ex parte* communications related to these requests, and its constructive denial of Plaintiff's April 5, 2019 request contravened the common law and violated the Public Records Law and Article 29 of the Massachusetts Declaration of Rights.

94. If the Supervisor's constructive denial is permitted to stand, Plaintiff will suffer harm by being denied access to responsive public records to which it is entitled.

95. If the Supervisor's proceeding influenced by *ex parte* communications is permitted to stand, Plaintiff will have suffered harm by being denied access to a fair process required by law.

### Prayer for Relief

WHEREFORE, the Plaintiff requests that this Court:

1. Issue a declaratory judgment that the records requested are public records within the meaning of the Massachusetts Public Records Law, and that the OAG and the Supervisor of Records has no right to withhold such records;

2. Enter a permanent injunction requiring the OAG to disclose all of the records the Plaintiff has requested, subject to any legitimate redactions;

3. Issue a declaratory judgment that the *ex parte* communications between OAG and Supervisor of Records violate Article 29 of the Massachusetts Declaration of Right, and improperly influenced Defendant Secretary of the Commonwealth's constructive denial of Plaintiff's April 5, 2019 request, and thereby Defendant OAG's continued withholding of requested records;

4. Issue a declaratory judgment that the Supervisor of Records' constructive denial of Plaintiff's May 9, 2019 appeal is null, void, and without legal effect;

5. As to Count V, issue a judgment that the Supervisor of Records failure to issue a timely determination is unlawful;

6. Grant Plaintiff relief in the form of certiorari, declare the proceedings to be null, void, and without legal effect, and order release of the records

7. Award the Plaintiff its costs and attorneys' fees in bringing this action; and

8. Grant such other relief as the Court deems just and proper.

DATED: June 3, 2019

Respectfully submitted,  
The Plaintiff, Energy Policy Advocates,  
,  
by his attorneys,

/s/ Timothy Cornell

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