

MATTHEW D. HARDIN

ATTORNEY-AT-LAW

324 Logtrac Road · Stanardsville, VA 22973

Phone: (434) 202-4224 · Email: MatthewDHardin@protonmail.com

April 25, 2020

Margaret Villeneuve, Clerk of Court
Washington Unit - Vermont Superior Court
Civil Division
65 State Street
Montpelier, VT 05602

Via Overnight Mail and Email

Dear Ms. Villeneuve:

Please find enclosed an original complaint for filing in the matter of *Energy Policy Advocates v. Attorney General's Office*. Please also find enclosed a copy of the complaint, which I request that you return to me bearing the court's stamp. I have also enclosed a check in payment of the filing fee.

Pursuant to the Supreme Court's Administrative Order No. 49, as amended on April 21, 2020, I am also sending this letter via email to JUD.WashingtonUnit@vermont.gov. The relevant order provides, in section 6 (b) for filing by email in these unusual times.

Lastly, I note that 1 V.S.A. § 319 (b) provides for cases of this type to be "expedited" on the court's docket. Although I understand the operational difficulties posed by the current pandemic may make expediting this case more challenging than in ordinary times, I request that it be expedited on the docket to the greatest extent possible under these difficult circumstances.

Regards,



Matthew D. Hardin

cc: Attorney General's Office

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. _____

Energy Policy Advocates,)
)
Plaintiff,)
)
v.)
)
Attorney General's Office,)
)
Defendant.)

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff ENERGY POLICY ADVOCATES for their complaint against
Defendant Attorney General's Office ("hereinafter "AGO"), allege as follows:

Nature of Action

1. This is an action under the Vermont Public Records Law, 1 V.S.A. §§ 315-320, to compel production under one records request.

Jurisdiction and Venue

2. This Court has jurisdiction pursuant to 1 V.S.A. § 319, because the defendant has violated the Vermont Public Records Law.
3. Furthermore, jurisdiction and venue are proper under 1 V.S.A. § 319, because this matter is brought in the Superior Court of Washington County.

Parties

4. Energy Policy Advocates is a nonprofit research and public policy organization incorporated in Washington State. Its programs include a transparency initiative seeking

public records relating to environmental and energy policy and how policymakers use public resources.

5. Defendant AGO is an agency of the State of Vermont, led by the Attorney General of Vermont, who is a Constitutional Officer of the State of Vermont, and is in actual or constructive possession of the records plaintiff seeks.

FACTUAL BACKGROUND

6. Plaintiff requested certain of AGO's records on March 27, 2020. **Exhibit A.**
7. Specifically, plaintiff sought 4 categories of records in the aforementioned March 27 request. However, only one category of records is at issue in this lawsuit. Specifically, plaintiff requested that AGO provide copies of:

any common interest agreements concerning i) carbon dioxide or CO₂, ii) greenhouse gas emissions or GHG, and/or iii) National Ambient Air Quality Standards or NAAQS entered into by the Office of the Attorney General at any time in 2019 and/or 2020.

8. AGO denied plaintiff's request for these records by letter dated April 13, 2020. AGO stated that the withheld records were "exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product)." **Exhibit B.**
9. Plaintiff administratively appealed the denial of these records pursuant to 1 V.S.A. § 318 (c)(1), via email dated April 15, 2020. **Exhibit C.**
10. AGO again denied plaintiff access to the records in question by letter dated April 23, 2020. In that letter denying plaintiff's administrative appeal, AGO stated "The agreements are subject to attorney-client privilege because they are confidential communications between the parties' attorneys to facilitate the rendition of legal services to clients. In addition, the agreements constitute attorney work product because they were

prepared by attorneys in anticipation of litigation. Furthermore, the agreements are subject to the common interest privilege as they were made in furtherance of the parties' shared interests and strategies." **Exhibit D.**

Legal Arguments

11. 1 VSA § 315 (a) provides that "provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action."
12. Although the Public Records Act reflects the legislative intent of making records available to the public on a liberal basis, and Chapter 1, Article 15 of the Vermont Constitution provides that only the legislature has the power to suspend the laws of the State of Vermont, AGO has admitted in the exhibits mentioned above that it has entered into at least six purported "Common Interest Agreements" during 2019-2020, which it uses to shield records from the public eye, while nevertheless sharing such records with actors not employed by the State of Vermont.
13. Even assuming, *arguendo*, that AGO can exempt itself from the Public Records Act by contract, by entering into secrecy agreements with other states and/or private actors, the secrecy agreements themselves must be released to the public.
14. Moreover, there is no reason to believe that AGO has entered into a legally enforceable Common Interest Agreement. Such an agreement requires a clear and limited scope, a clear commonality of interests, and ongoing or reasonably anticipated litigation. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 NY Slip Op 4439 (N.Y. 2016).

15. As federal courts have noted in open records cases, “any attempt to invoke the common interest doctrine in order to avoid disclosures under FOIA must be... carefully scrutinized.” *Hunton & Williams v. United States Dept. of Justice*, 590 F.3d 272, 284 (4th Cir. 2010).
16. AGO’s reliance on the Attorney-Client Privilege and Attorney-Client Work Product is also misplaced.
17. The Attorney-Client privilege is referred to as “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Its purpose is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Id.* However, because “the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.” *Fisher v. United States*, 425 U.S. 391, 403.
18. As courts have made clear, “because the privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process,” it must be narrowly construed. *Ambac* at 8, quoting *Matter of Jacqueline F.*, 47 NY2d 215, 219 (1979). Moreover, “[t]he party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,’ that the communication is

predominantly of a legal character, that the communication was confidential and that the privilege was not waived.” *Id.*

19. These considerations take on a heightened importance when the privilege is invoked to shield from the public a contract entered into by a public office, particularly one purporting to create a double wall of secrecy allowing that office to shield still more records from the public.
20. In the instant case, none of the hallmarks of Attorney-Client Privilege are present, because plaintiff requested nothing other than signed contracts between the State of Vermont and outside parties. No communication of any type is being requested in this lawsuit, much less a communication involving the provision of legal advice.
21. Absent a valid Common Interest Agreement, “a client waives the privilege if a communication is made in confidence but subsequently revealed to a third party.” *Ambac* at 8, quoting *People v. Patrick*, 182 NY 131, 175 (1905). On information and belief, the records at issue in this case would have inherently been shared with actors in states other than Vermont, including, on information and belief, with actors in the State of New York, a state whose courts have expressly emphasized the narrow scope of the Common Interest Doctrine, and have previously dismissed such claims of privilege regarding a purported common interest agreement between, on information and belief, many of the very same parties to the purported agreements at issue in this matter, and likely concerning the very same subject. See *CEI v. Attorney General of New York*, N.Y.App.Div., 161 A.D.3d 1283 (2018), 76 N.Y.S.3d 640, opinion available at <https://www.nycourts.gov/record/161ad3d1283>

cei.org/sites/default/files/20180503%20-%20Memo%20and%20Order%20-%20NY%20Supreme%20Court%20Appellate%20Div.pdf.

22. AGO's reliance on the Attorney Work Product Doctrine is similarly misplaced.
23. The Vermont Supreme Court has expressly held that "the work-product exemption is a narrow one, both under *Hickman* principles and the civil rules. The litigation which serves as the basis for the claim must be in esse and not merely threatened. *Killington, Ltd. v. Lash*, 153 Vt. 628, 646, 572 A.2d 1368, 1379 (Vt. 1990). Moreover, Work Product Doctrine is designed to protect "mental impressions" of an Attorney, and the Vermont Supreme Court has cautioned against blurring the "distinctions between 'facts' on the one hand and 'mental impressions' or 'deliberations' on the other."

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

24. Plaintiff re-alleges paragraphs 1-23 as if fully set out herein.
25. Plaintiff has sought and been denied access to responsive records reflecting the conduct of official business, because defendant has failed to provide the records which plaintiff sought, subject only to the narrow exemptions of 1 V.S.A. § 317(c).
26. Plaintiff asks this Court to enter a judgment declaring that:
- a. The records as specifically described in plaintiff's records request described, *supra*, are public records, and as such, are subject to release under the Vermont Public Records Law;
 - b. No exemption under 1 V.S.A. 1 V.S.A. § 317(c) applies to the subject records;
 - c. AGO is unlawfully withholding these records;

- d. The defendant is estopped from seeking costs and fees for the requests at issue in this case, due to the balance of the equities and the incorporation of common law principles by 1 V.S.A. § 271 of the Vermont Public Records Law;
- e. The defendant cannot collect fees pursuant to 1 V.S.A. § 316 (b) or (c) in this matter because no fees were incurred “complying with a request for a copy of a public record”, or, alternatively, because of the balance of the equities.

SECOND CLAIM FOR RELIEF
Seeking Injunctive Relief

- 27. Plaintiff re-alleges paragraphs 1-26 as if fully set out herein.
- 28. Plaintiff is entitled to injunctive relief compelling defendant to produce all records in its possession responsive to plaintiff’s Vermont Public Records Law request described, *supra*, without fees, subject to legitimate withholdings.
- 29. Plaintiff asks the Court to order the defendant to produce to plaintiff, within 5 business days of the date of the order, the requested records described in plaintiff’s requests, and any attachments thereto, subject only to legitimate withholdings.
- 30. Plaintiff asks the Court to require that defendant create an index, listing the date, recipients, and subject matter of any potentially responsive records that are not produced for future, potential *in camera* review by this Court.
- 31. Plaintiff asks the Court to order OAG to submit the withheld documents to the Court for *in camera* review of whether and to what extent any exemptions found in 1 V.S.A. § 317 (c) apply.

32. Plaintiff asks the Court to allow counsel for the parties to review the documents under seal, pending further order of the court, and to make arguments relating to whether the exemptions found in 1 V.S.A. § 317 (c) apply.

THIRD CLAIM FOR RELIEF

Seeking Costs and Fees

33. Plaintiff re-alleges paragraphs 1-32 as if fully set out herein.

34. Pursuant to 1 V.S.A. § 319(d)(1), in most cases, the Court shall award reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

35. Plaintiff is statutorily entitled to recover fees and costs incurred as a result of defendant's refusal to fulfill the open records requests at issue in this case.

36. Plaintiff asks the Court to order the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper. Plaintiff further notes that 1 V.S.A. § 319 (b) provides that "Except as to cases the court considers of greater importance, proceedings before the Civil Division of the Superior Court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in

every way.” Plaintiff therefore requests this matter be expedited to the greatest extent possible under current conditions.

Dated at Stanardsville, Virginia this 25th day of April, 2020.

Energy Policy Advocates

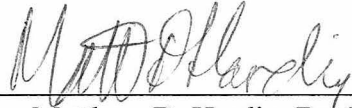
By: 
Matthew D. Hardin, Bar No. 5815
Attorney for Plaintiff
324 Logtrac Road
Stanardsville, VA 22973
(434) 202-4224
MatthewDHardin@gmail.com

Exhibit A

March 27, 2020 Request for Records

REQUEST UNDER VERMONT PUBLIC RECORDS ACT

March 27, 2020

Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

By Electronic Mail: ago.info@vermont.gov

Re: Certain Correspondence and Invitations

Dear Sir or Madam:

On behalf of Energy Policy Advocates (EPA), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Vermont Public Records Act, 1 V.S.A. §§315-320, I hereby request copies of the following records:

1. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) includes, *anywhere*, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email "thread", including also in any attachments, i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request, inclusive;
2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall,

that b) was sent from michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive *and* November 17, 2019;

3. any invitation sent or received from michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call, and
4. any common interest agreements concerning i) carbon dioxide or CO₂, ii) greenhouse gas emissions or GHG, and/or iii) National Ambient Air Quality Standards or NAAQS entered into by the Office of the Attorney General at any time in 2019 and/or 2020.

Regarding ## 1 & 2 above, we request entire “threads” of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.

Also for ## 1 & 2, to narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or ‘clippings’, such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only “fyi”, or “interesting”).

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices, news articles, and/or newsletters, as non-responsive, unless forwarded to or from the named persons with substantive commentary added by the sender.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential

information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, EPA is a non-profit public policy organization dedicated to informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. EPA's ability to obtain fee waivers is essential to this work. EPA intends to use any responsive information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how regulatory, policy and enforcement decisions are reached. EPA ensures the public is made aware of its work and findings via its partnership with the non-profit public interest law firm Government Accountability & Oversight, P.C., and the ClimateLitigationWatch.org project dedicated to broadly disseminating energy and environmental policy news and developments. The public information obtained by EPA and published on ClimateLitigationWatch.org have been relied upon by established media outlets, including the Washington Times and Wall Street Journal editorial page.¹

¹ See, e.g., The Editorial Board, "State AGs' Climate Cover-Up" Wall Street Journal, June 7, 2019, <https://www.wsj.com/articles/state-ags-climate-cover-up-11559945410>. Valerie Richardson, "Motivated or manipulated? Rise of youth climate activism fuels alarms over exploitation" Washington Times, March 15, 2019, <https://www.washingtontimes.com/news/2019/mar/13/youth-climate-strike-sparks-debate-use-students-pr/>, see also "Climate Strike Sparks Debate on Use of Students as Props", https://www.realclearpolicy.com/2019/03/15/climate_strike_sparks_debate_on_use_of_students_as_props_41180.html. Valerie Richardson, "Democratic AGs team up with George Soros-funded group on anti-Trump lawsuit" Washington Times, August 1, 2019, <https://www.washingtontimes.com/news/2019/aug/1/george-soros-funded-group-democratic-ags-partner-a/>. Anthony Watts, "Emails reveals how children become pawns of climate alarmism", Watts Up With That (two-time Science Website of the Year), March 13, 2019, <https://wattsupwiththat.com/2019/03/13/emails-reveal-how-children-become-pawns-of-climate-alarmism/>.

Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.² The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. *(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)*" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

² <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We look forward to your response. If you have any questions, do not hesitate to contact me by email at MatthewDHardin@protonmail.com.

Sincerely,

Matthew D. Hardin

Exhibit B

April 13, 2020 Letter from the Attorney General's Office

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON
CHIEF ASST. ATTORNEY
GENERAL



TEL: (802) 828-3171

<http://www.ago.vermont.gov>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

April 13, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates

By e-mail to: MatthewDHardin@protonmail.com

Re: Vermont Public Records Act Request

Dear Mr. Hardin:

I write in response to your Vermont Access to Public Records Act request dated March 27, 2020, which was received by the Vermont Attorney General's Office on the following business day, Monday, March 30. In that request you sought:

- 1. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) includes, anywhere, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email "thread", including also in any attachments, i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request, inclusive;*
- 2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) was sent from michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive and November 17, 2019;*

3. any invitation sent or received from michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call, and

4. any common interest agreements concerning i) carbon dioxide or CO2, ii) greenhouse gas emissions or GHG, and/or iii) National Ambient Air Quality Standards or NAAQS entered into by the Office of the Attorney General at any time in 2019 and/or 2020.

By letter dated April 2, 2020, this office invoked its right to additional time to respond.

In response to your request, please be advised that with respect to items 1 through 3, no responsive records were identified. Additionally, with respect to item 4, please be advised that 6 records which may be responsive to your request have been withheld as exempt from disclosure. These potentially responsive records are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product).

If you feel any information or records have been withheld in error, you may appeal to Deputy Attorney General Joshua Diamond at the following email address: Joshua.Diamond@vermont.gov.

Sincerely,

A handwritten signature in cursive script, reading "Alison Milbury Stone".

Alison Milbury Stone
Assistant Attorney General

Exhibit C

Administrative Appeal Dated April 15, 2020

From: Matthew D. Hardin MatthewDHardin@protonmail.com 
Subject: Vermont PRA Appeal
Date: April 15, 2020 at 9:48 PM
To: Joshua.Diamond@vermont.gov
Cc: alison.stone@vermont.gov
Bcc: ncornettlaw@gmail.com



Dear Mr. Diamond,

I write, on behalf of my client Energy Policy Advocates, to appeal a denial of access to public records pursuant to 1 V.S.A. § 318 (c)(1). Please see attached a public records request I submitted to the Attorney General's Office on March 27, 2020, and the Office's response, dated April 13, 2020.

With respect to items 1 through 3 of the request at issue, the Attorney General's Office has denied access to records on the basis that "no responsive records were identified." That appears to be intended as an assertion that no records exist. However, 1 V.S.A. § 318 (b)(4) requires that, if the Attorney General intends to assert no records exist, the Office "certify in writing that the record does not exist under the name given to the custodian by the applicant, or by any other name known to the custodian." It is the position of Energy Policy Advocates that the Attorney General's one-sentence statement does not comport with the requirements of 1 V.S.A. § 318 (b)(4). Additionally, to determine the accuracy of such an assertion, a brief description of the Attorney General's efforts to search for responsive records would be helpful.

With respect to item 4 of the request at issue, the Attorney General's Office has denied access to the records on the basis that "6 records which may be responsive to your request have been withheld as exempt from disclosure. These potentially responsive records are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product)."

However, 1 V.S.A. § 318 (b)(2) sets forth four specific requirements that apply when an agency wishes to deny access to a record. I discuss each statutory requirement in detail below. It is our position that none of the statutory requirements have been satisfied by the April 13, 2020 letter.

First, the agency is required to identify the records it is withholding. 1 V.S.A. § 318 (b)(2)(A). Here, the agency has only stated that it is withholding six records, and that they are "potentially" responsive. The agency has not identified records it is withholding, but has instead merely enumerated how many records it is withholding. It is Energy Policy Advocates' position that the Attorney General must specifically identify the records in some more descriptive fashion to satisfy its statutory burden.

Second, the agency must identify the "reasons and supporting facts for the denial." 1 V.S.A. § 318 (b)(2)(B). In the instant matter, the Attorney General's Office only asserts only two conclusory legal doctrines for denying access. No facts of any type or variety are to be found in the denial letter, much less facts that establish a *prima facie* case that attorney-client privilege exists or that the attorney work product doctrine applies. Moreover, Energy Policy Advocates doubts that privilege or work product protection could, as a matter of law, apply to the records at issue.

Third, the agency must "provide the names and titles or positions of each person responsible for the denial of the request." 1 V.S.A. § 318 (b)(2)(C). Here, although the letter is signed by an Assistant Attorney General, there is no assertion that she is the only agency official responsible for the denial of the request. Energy Policy Advocates has the statutory right to know whether any additional agency employees were responsible for denying access to records.

Fourth, the agency must "notify the person of his or her right to appeal to the head of the agency any adverse determination." 1 V.S.A. § 318 (b)(2)(D). Here, the agency gave notice of a right to appeal, but asked that such an appeal be directed to the Deputy Attorney General. While Energy Policy Advocates does not quarrel with how the agency wishes to handle administrative appeals internally, I do feel compelled to note, for purposes of clarifying the record should litigation ensue, that Energy Policy Advocates is following the procedures to appeal that the agency itself has requested be followed. It is for that reason that this correspondence is not directed to the "head of the agency," and we trust that the Attorney General will not later claim that this appeal was directed to the wrong party.

I look forward to your response. Let me know if you have any questions.

Matthew D. Hardin
(434) 202-4224
MatthewDHardin@protonmail.com

The information contained in this message may be privileged. It is intended by the sender to be confidential. If you suspect you may not be the intended recipient, please notify the sender and delete all copies.



VT OAG 20200413
Bachm...py.pdf Hardin...tes.pdf

Exhibit D

Appeal Response from Attorney General's Office
Dated April 23, 2020

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON
CHIEF ASST. ATTORNEY
GENERAL



TEL: (802) 828-3171

<http://www.ago.vermont.gov>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

April 23, 2020

BY EMAIL ONLY

Matthew D. Hardin
Executive Director
Energy Policy Advocates

By e-mail to: MatthewDHardin@protonmail.com

Re: Appeal of Vermont Public Records Act Request

Dear Mr. Hardin:

I write in response to your email dated April 15, 2020, which was sent after the close of business and therefore received by the Vermont Attorney General's Office on the following business day, Thursday, April 16. In that email you appealed a "denial" of access to public records pursuant to 1 V.S.A. § 318 (c)(1) relating to your request of March 27, which sought the following records:

1. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) includes, anywhere, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email "thread", including also in any attachments, i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request, inclusive;

2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) was sent from

michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive and November 17, 2019;

3. any invitation sent or received from michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call, and

4. any common interest agreements concerning i) carbon dioxide or CO₂, ii) greenhouse gas emissions or GHG, and/or iii) National Ambient Air Quality Standards or NAAQS entered into by the Office of the Attorney General at any time in 2019 and/or 2020.

Specifically, with respect to items 1 through 3 of your March 27 request, you seek a certification that the requested records do not exist, along with a brief description of the Office's efforts to search for responsive records. Please see the attached certification from Assistant Attorney General (AAG) Alison Milbury Stone. For item 1, the named AAGs searched their email mailboxes for the terms "Bachmann" and "Goffman," within the date range provided, and for item 2 they searched their email inboxes for michael.myers@ag.ny.gov within the date range provided. As to item 3, AAGs McDougall, Stone, and Persampieri searched their inboxes for invitations from michael.myers@ag.ny.gov relating to a November 18, 2019 telephone call, and also looked on their Outlook calendars for a record of such a call.

With respect to item 4 of the request at issue, the Attorney General's Office stated that "6 records which may be responsive to your request have been withheld as exempt from disclosure. These potentially responsive records are exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4) (attorney-client communications, attorney work product)." In response to your request that this Office identify the records in some more descriptive fashion, please be advised that six records are common interest agreements entered into by the Office of the Attorney General in the years identified – five in 2019 and one in 2020. These agreements relate to greenhouse gas emissions (GHG). None of the agreements relate to National Ambient Air Quality Standards (NAAQS).

Next, you asked that this Office further identify the "reasons and supporting facts for the denial." 1 V.S.A. § 318 (b)(2)(B). The common interest agreements that you request are exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4), which exempts from public inspection and copying "[r]ecords which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege...." The agreements are subject to attorney-client privilege because they are confidential communications between the parties' attorneys to facilitate the rendition of legal services to clients. In addition, the agreements constitute attorney work product because they were prepared by attorneys in anticipation of litigation. Furthermore, the agreements are subject to the common interest privilege as they were made in furtherance of the parties' shared interests and strategies.

Finally, please be advised that any person aggrieved by the denial of a request for public records may apply to the Civil Division of the Superior Court pursuant to 1 V.S.A. § 319.

Sincerely,

/s/ Joshua R. Diamond
Joshua R. Diamond
Deputy Attorney General

Enclosure

CERTIFICATION OF ASSISTANT ATTORNEY GENERAL
ALISON MILBURY STONE PURSUANT TO 1 V.S.A. § 318(b)(4)

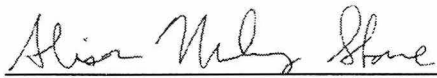
I, Alison Milbury Stone, Assistant Attorney General for the State of Vermont, hereby certify pursuant to 1 V.S.A. § 318(b)(4) that the following records do not exist:

1. electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) includes, anywhere, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email "thread", including also in any attachments, i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request, inclusive;

2. electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Alison Milbury Stone and/or ii) Robert McDougall, that b) was sent from michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive and November 17, 2019; and

3. any invitation sent or received from michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call.

Dated this 20th day of April, 2020.



Alison Milbury Stone, Esq.
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001