

**STATE OF MICHIGAN
COURT OF CLAIMS**

ENERGY POLICY ADVOCATES,
A Washington nonprofit corporation,

Docket No. 20 -- -- MZ

Plaintiff,

v.

DANA NESSEL, in her official capacity as the
Attorney General of the State of Michigan

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

There is no other pending or resolved civil action arising out of the transition or occurrence
alleged in this Complaint

INTRODUCTION

This action under the Michigan Freedom of Information Act (“FOIA”), MCL 15.231 *et seq.*, seeks to remedy a state agency invoking FOIA’s exemptions to shield from the public the agency’s involvement with outside pressure groups and plaintiff’s tort attorneys. The Plaintiff in the instant matter, Energy Policy Advocates (“EPA”), is a nonprofit corporation dedicated to transparency relating to environmental and energy policy and how policymakers use public resources. EPA regularly uses state and federal public records laws to obtain documents from government bodies to educate the public on the interaction between private interests and public office.

EPA made several requests for electronic correspondence of certain Department of Attorney General (“DAG”) staff members and one contractor, time sheets and billing records of that contractor, and purported common interest agreements entered into by DAG during 2019.

DAG has asserted that most records responsive to these requests are exempt from disclosure as attorney work product and/or privileged attorney-client communications. This Complaint demonstrates three troubling developments in the Department of Attorney General, the further record of which the public has a strong interest in seeing.

First, DAG began a practice of increasingly-broad application of statutory exemptions to withhold even previously-released records, records that clearly are not subject to the statutory or other exemptions now asserted. That practice is the result of DAG and other state offices of attorneys general coordinating responses to Plaintiff's requests for public records, requiring consent by other states before releasing records. Finally, the purported common interest agreements DAG has joined related and responsive to Plaintiff's requests at issue here place an affirmative obligation on DAG to litigate FOIA requests absent the consent of all parties. DAG claims to have effectively contracted away not only its discretion on what it can and cannot disclose to public, but its ability to independently decide what record requests it will and will not require litigation to resolve and to apply Michigan law.

DAG's expansive interpretation of Michigan's FOIA exemptions prevents the public from obtaining the "full and complete information regarding the affairs of government" that is the purpose of the FOIA. MCL 15.231. The lack of demonstrated attorney-client relationships with some parties in certain withheld correspondence, inconsistent and even haphazard application of privileges, and expansive definition of attorney work product makes plain that DAG is applying FOIA not as a transparency statute but as a means to shield the operation of the agency from public oversight.

PARTIES AND JURISDICTION

1. Plaintiff 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.

2. Defendant Attorney General Dana Nessel is the head of the Department of Attorney General in the executive branch of state government, which is a “public body” as defined in MCL 15.232(h)(i) and which creates and maintains “public records” as defined in MCL 15.232(i).

3. The Court of Claims has jurisdiction over this matter pursuant to MCL 15.240(1)(b) and MCL 600.6419(1)(a).

4. Venue is proper in this Court pursuant to MCL 15.240(1)(b).

THE FOIA REQUESTS

The August 2019 Requests

5. On August 28, 2019, Plaintiff submitted a FOIA request for correspondence between Attorney General Dana Nessel, Deputy Attorney General Kelly Keenan, and Division Chief Peter Manning, which included individuals associated with the New York University (NYU) School of Law’s State Energy and Environmental Impact Center (“SEEIC”) (**EXHIBIT A**). SEEIC is a group created by former New York City Mayor and current “climate” policy activist Michael Bloomberg to place privately-hired attorneys in state attorneys general offices, as “Special

Assistant Attorneys General”, to pursue particular energy and environmental enforcement and policy issues of concern to Mr. Bloomberg.^{1 2}

6. The same request also sought correspondence of the same individuals with and/or Stanley “Skip” Pruss. Mr. Pruss is currently a “Special Assistant Attorney General” or SAAG retained under contract for “specialized expertise and experience in a particular area of law.” While not apparently an SEEIC SAAG, Mr. Pruss did serve as a liaison between DAG and Mr. Bloomberg’s group for the purpose of placing other, privately-hired attorneys in DAG.

7. On August 29, 2019, Plaintiff submitted a FOIA request for correspondence between Assistant Attorney General Neil Gordon and individuals associated with the SEEIC and/or Stanley “Skip” Pruss. **(EXHIBIT B)**.

8. Public records obtained from DAG show that, in that capacity, Mr. Pruss also serves a liaison function between tort lawyers, activist groups and others seeking DAG to use its authorities in particular ways.

9. On September 19, 2019, Defendant provided Plaintiff a detailed itemization fee form assessing \$3,956.22 to process both requests. **(EXHIBIT C)**. As requested, EPA mailed a check for half of the total amount as a deposit.

10. On December 4, 2019, Defendant provided a partial grant and partial denial to the request and sought the balance of the assessed fee. The partial denial cited MCL 15.243(1)(g) and (h), which allow nondisclosure of information or records subject to attorney-client privilege and

¹ For this request, as for each of the requests identified in this complaint, EPA asked for records in native format and were not provided with those documents. Per MCL 15.234(1)(c), Plaintiff may request and Defendant is required to provide the documents in such format.

² See, e.g., 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

nondisclosure of information or records subject to privileges recognized by statute or court rule, in this case the attorney work product doctrine. **(EXHIBIT D)**. EPA mailed a check for the remaining balance for the fee assessed to process the requests.

11. On December 19, 2019, by U.S. Mail, Defendant provided a physical cover letter and electronic copies of records it claimed were non-exempt.

12. On January 7, 2020, Plaintiff submitted an administrative appeal to Defendant challenging its use of statutory exemptions to withhold an unstated number of records in full, including entirely factual information such as the identities of senders and recipients, dates/times, subject fields and the title of any attachments. **(EXHIBIT E)**.

13. On January 23, 2020, Defendant responded to this appeal by agreeing to provide privilege logs of records withheld in full. **(EXHIBIT F)**.

14. Defendant provided five (5) pages of privilege logs on February 11, 2020, eighty-four (84) pages on March 25, and forty-one (41) pages on March 30, 2020. The privilege logs identified withheld records, authors, subject field, recipients, date/time, privilege asserted and a privilege description. **(EXHIBITS G, H, & I)**.

15. Although Plaintiff concedes that the logs suggest that certain records are subject to legitimate claims of either privilege or are otherwise exempt under FOIA, DAG has not met its burden to demonstrate the propriety of each withholding. Thus, on information and belief, EPA alleges that DAG continues to unlawfully withhold records and portions of records subject to Plaintiff's August 2019 requests.

The November 13, 2019 FOIA Request

16. On November 13, 2019, Plaintiff submitted a FOIA request for any employment contracts with "Skip" Pruss, applications to participate in the SEEIC's Fellows program, and any

common interest agreements, contingency or other fee agreements, secondment agreements, retainer agreements, and engagement agreements entered into by DAG in 2019. **(EXHIBIT J)**.

17. On December 9, 2019, Defendant responded to the request with a detailed itemization fee form requesting \$156.62. EPA mailed a check for that amount on December 19, 2019.

18. On January 10, 2020, Defendant provided notice that it located no responsive records pertaining to the SEEIC, and copies of both Mr. Pruss' initial contract with DAG and an amendment to that contract.

19. On January 17, 2020, Defendant provided copies of several records purporting to be common interest and/or joint defense and confidentiality agreements, redacting substantial portions as attorney work product pursuant to MCL 15.243(1)(h). **(EXHIBITS K)**. Defendant redacted, *inter alia*, the purpose and subject matter of the common interest agreements. The records largely appear to be drafted from the same template, from some of which DAG redacted provisions that appear to be uniform, boilerplate language that it released in other records.

20. On March 20, 2020, Plaintiff appealed DAG's redaction of the agreements, challenging the claim that the subject matter of such agreements constitutes attorney work product as defined in MCR 2.302(B)(3)(a). **(EXHIBIT L)**.

21. On April 6, 2020, Defendant upheld the redactions for the majority of the agreements, but agreed to provide copies of two agreements, asserting that, in the interim, "circumstances changed with regard to the partially-redacted common interest agreements included at pages 63-71 and 142-158 of the disclosed records. . . . Certain information redacted in those parts has been made public." **(EXHIBIT M)**.

22. On April 13, 2020, Defendant provided a copy of a less redacted version of the agreement found on pages 142–158 of the disclosed records. **(EXHIBIT N)**.

23. Defendant did not in fact produce pages 63–71.

24. On information and belief, Plaintiff asserts that the entirety of the common interest agreement redactions and/or withholdings are improper under FOIA and that DAG continues to withhold from Plaintiff records to which it is statutorily entitled.

The January 7, 2020 FOIA Request

25. On January 7, 2020, Plaintiff requested all billing records and invoices submitted by Stanley “Skip” Pruss to Kelly Keenan and/or Susan Bannister at DAG. **(EXHIBIT O)**.

26. On January 15, 2020, Defendant provided heavily-redacted copies of these invoices, withholding substantial portions as attorney work product pursuant to MCL 15.243(1)(h). **(EXHIBIT P)**.

27. On January 27, 2020, Plaintiff administratively appealed these denials. **(EXHIBIT Q)**.

28. On February 11, 2020, Defendant provided a partial reversal of the initial decision.

29. On February 17, 2020, Defendant provided a revised version of the redacted billing summaries, revealing substantially more information including, e.g., the names of individuals participating in telephone calls, while still withholding significant portions of the contractor’s itemized bills. **(EXHIBIT R)**.

30. On information and belief, certain of these withholdings are improper under FOIA.

The January 10, 2020 FOIA Request

31. On January 10, 2020, Plaintiff submitted a request for correspondence of DAG’s Kelly Keenan and Peter Manning related to certain climate litigation which, other public records

show, outside activists are recruiting attorneys general to file against private parties. The request also sought any correspondence with Mr. Manning containing the word “Hayes.” **(EXHIBIT S)**. Hayes is the last name of SEEIC’s director.

32. On January 21, 2020, Defendant responded with a detailed itemization fee form and a request for \$892.85. Plaintiff mailed a check for the requested deposit.

33. On March 12, 2020, Defendant provided a final fee notice for the balance of the request and a partial denial of records as either attorney work product or privileged attorney-client communications pursuant to MCL 15.243(1)(g) & (h). Plaintiff mailed a check for the balance of the assessed fee to process the request.

34. On March 26, 2020, Defendant provided a final response with copies of nonexempt records and one hundred-twenty-four (124) pages of privilege logs. **(EXHIBIT T)**.

35. Among the many records identified in the privilege logs as withheld as attorney work product were numerous records DAG had previously released in full. These include five (5) emails between DAG staff and Plaintiffs’ “climate nuisance” tort law firm Sher Edling, LLP, five (5) emails involving Michigan League of Conservation Voters’ desire that DAG file suit against Exxon Mobil corporation, and one (1) email about Rhode Island’s climate nuisance litigation filed by Sher Edling, and two (2) emails about multi-state Attorney General coordination call subgroups and Mr. Pruss’s possible role therein, all of which DAG had released in full in response to the August 28 & 29, 2019 requests.

36. In the intervening period, public records show, various state offices of attorney general provided notice to each other of Plaintiff’s requests, invoking purported common interest agreements whose (typically) paragraph 8 agrees to a default position that a state's public records

on certain topics, when requested, will only be released if other states consent. This coordinated opposition to release of public records has forced Plaintiff to either drop or litigate its requests.

37. On information and belief, Plaintiff asserts that certain of these withholdings are improper under FOIA.

The March 27, 2020 Request

38. On March 27, 2020, Plaintiff submitted a request seeking correspondence of Mr. Pruss and Elizabeth Morrisseau containing the words “Bachmann” and/or “Goffman.” (**EXHIBIT U**).

39. On April 6, 2020, Defendant responded to the request providing responsive records and claiming to withhold a single email in full as attorney work product pursuant to MCL 15.243(1)(h), providing a privilege log for it. (**EXHIBIT V**).

40. Among the records provided was a March 20, 2020 email from David Hoffmann of the Office of the Attorney General for the District of Columbia providing one of the notices described, *supra*, pursuant to a common interest agreement, of a public records request that Office received. (**EXHIBIT W**).

41. On information and belief, Plaintiff asserts that the record(s) at issue must be disclosed under FOIA.

The April 17, 2020 Request

42. In its March 26, 2020 privilege log, Defendant identified three emails with the Subject field “RE: Multi-state group discussing CO2 as a criteria pollutant,” all among Ms. Morrisseau, Mr. Manning, and Mr. Gordon and all dated October 7, 2019. By virtue of being responsive to the January 10, 2020 request, each email contains one or more of four search terms.

43. Typical email “subject” practice, which public records indicate Defendant follows, suggests that all three emails were replies in an email “thread” whose original subject field is “Multi-state group discussing CO2 as a criteria pollutant.” Conceivably, the original email(s) to which these correspondence responded did not contain one or more of those key phrases and were not responsive to Plaintiff’s request.

44. Therefore, on April 17, 2020, Plaintiff submitted a request seeking all correspondence of Ms. Morrisseau, Mr. Manning, Ms. Keenan and/or Mr. Gordon with “CO2 as a criteria pollutant” in the subject line. **(EXHIBIT X)**. The request sought such records dated from October 1, 2019 through the date the request was processed, but also clearly stated, “We request entire ‘threads’ of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.”

45. On May 11, 2020, DAG responded to that request for all such correspondence from October 1, 2019 onward as well as any earlier parts of the “thread,” e.g., the original email that they replied to. **(EXHIBIT Y)**. Defendant again identified only the three October 7, 2019 emails among Ms. Morrisseau, Mr. Manning and Mr. Gordon replying to an earlier email(s), withholding all three in full, claiming attorney work product in a privilege log. Defendant’s privilege log also did not acknowledge the original email to which these emails responded, which, like all elements of the thread, were specifically covered by Plaintiff’s request. In a departure, this privilege log omitted the subject field information.

46. Public records obtained by Plaintiff show that, by this point, the coordinating attorneys general had notified each other of Plaintiff’s requests on that topic.

47. On information and belief, Plaintiff asserts that the withheld information is properly subject to disclosure under FOIA and that it is withheld unlawfully.

The May 1, 2020 Request

48. On May 1, 2020, Plaintiff submitted a request for all purported common interest agreements entered into by DAG at any time in 2020. **(EXHIBIT Z)**.

49. On May 11, 2020, Defendant notified Plaintiff of an extension to May 26, 2020 to respond to the request.

50. On May 26, 2020 Defendant demanded \$565.56 to process whatever purported common interest agreements it had entered in the first few months of 2020. **(EXHIBIT AA)**.

51. Plaintiff asserts that this is *prima facie* proof of a groundless fee-as-barrier in violation of Michigan law, and arbitrary and capricious application of FOIA.³

52. Plaintiff also asserts that this reflects DAG's punitive application of FOIA, and is part of its coordinated resistance to Plaintiff's information requests as agreed in the (typically) ¶ 8 of its purported common interest agreements with other state attorneys general.

53. On information and belief, Plaintiff further asserts that the withheld information is properly subject to disclosure under FOIA and that it is withheld unlawfully.

STATEMENT OF CLAIMS

Duty to Produce Records Under the FOIA

Declaratory Judgment

54. Plaintiff re-alleges paragraphs 1–53 as if fully set out herein.

55. Plaintiff has sought and been denied access to responsive records reflecting the conduct of official business, including correspondence of DAG officials with outside parties, the billing records of a DAG contractor, and contracts DAG entered on behalf of the State of Michigan.

³ Prior to the parties to these agreements coordinating their responses to Plaintiff's various records requests, Defendant charged Plaintiff \$156.62 to review all purported common interest agreements entered into in the entire year of 2019. See ¶, *supra*.

56. Plaintiff asks this Court, upon reviewing the records at issue in this matter or mutually-agreed upon exemplars of such records, to enter a judgment declaring:

A. The records specifically described in Plaintiff's FOIA requests identified above are public records as defined in MCL 15.232(i) and, as such, are subject to release under the Michigan FOIA barring a specific, applicable exemption;

B. The exemptions and privileges DAG asserts do not exempt the records from disclosure, or, in the alternative, DAG's interpretation of the exemptions is overly-expansive and DAG must release the records subject only to narrow application of statutory exemptions; and

C. DAG is unlawfully withholding these records;

SECOND CLAIM FOR RELIEF

Duty to Produce Records Under FOIA

Injunctive Relief

57. Plaintiff re-alleges paragraphs 1–56 as if fully set out herein.

58. Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's FOIA requests described, *supra*, without fees, and subject only to legitimate withholdings.

59. 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.

60. Plaintiff asks the Court to order OAG to submit the withheld documents, or mutually-selected exemplars of such records, to the Court for *in camera* review of whether and to what extent any exemptions found in MCL 15.243 apply.

61. Alternatively, 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 MCL 15.243 apply.

62. Alternatively, and if necessary to reduce the number of documents that must be reviewed *in camera*, Plaintiff asks the Court to allow counsel for the parties to meet and confer to reach an agreement for a reduced number of withheld records subject to challenge.

THIRD CLAIM FOR RELIEF

Costs and Fees

63. Plaintiff re-alleges paragraphs 1–62 as if fully set out herein.

64. Pursuant to MCL 15.240(6), the Court shall award reasonable attorney fees and other litigation costs to any party prevailing in a FOIA action.

65. Plaintiff is statutorily entitled to recover fees and costs incurred as a result of bringing this action.

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

67. Plaintiff asks the Court to award punitive damages for the arbitrary and capricious withholding of records pursuant to MCL 15.240(7).

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 27th day of May, 2020.

ENERGY POLICY ADVOCATES
By Counsel

/s/ Eric Neal Cornett
Eric Neal Cornett
Kentucky State Bar. No. 96266
Application to appear *Pro Hac Vice* to follow
NCornettLaw@gmail.com

CLARK HILL PLC

/s/ Zachary C. Larsen
Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
212 East Cesar E. Chavez Ave.
Lansing, MI 48906
(517) 318-3100
ZLarsen@ClarkHill.com
CLawler@ClarkHill.com

VERIFICATION

Per the requirements of MCL 600.6434(2), I, Matthew D. Hardin depose and say the following:

1. I am a member of the Board of Directors of Energy Policy Advocates, and was formerly Executive Director of Energy Policy Advocates. I am duly authorized to sign this Verification for and on behalf of Plaintiffs in this matter.
2. Pursuant to MCR 1.109(D)(3)(b), I declare under the penalties of perjury that this Verified Complaint has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Energy Policy Advocates

/s/Matthew D. Hardin
By: Matthew D. Hardin
Its: Board Member