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 its 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 four records requests Plaintiff sent to AGO during April 2020.
2. 1 V.S.A. § 319 (b) provides that this case should "take precedence on the docket… and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
3. Because the parties are identical, and the legal issues in this matter are largely similar, to those in the pending case *Energy Policy Advocates v. Attorney General's Office*, 173-4-20 Wncv, the Court may elect to consolidate the matters pursuant to V.C.R.P. 42 (a). Plaintiff neither requests nor opposes such consolidation, and leaves the issue to the sound discretion of the Court.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 1 V.S.A. § 319, because the Defendant has violated the Vermont Public Records Law.

5. 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

6. 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.

7. Defendant AGO is an agency of the State of Vermont, led by the Attorney General of Vermont, who holds office and performs duties under the laws of the State of Vermont, including 3 V.S.A. § 151, and is in actual or constructive possession of the records Plaintiff seeks.

FACTUAL BACKGROUND

8. OAG received the first of the requests at issue in this suit on April 13, 2020.

9. In this request Plaintiff sought 2 categories of records, only one category of which is at issue in this suit. Specifically, Plaintiff requested that AGO provide copies of:

"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:) Nick Persampieri, that b) includes in

the subject field, i) GHG Emissions Affirmative Legislation and/or ii) Affirmative Climate, and c) is dated from June 17, 2019 through April 9, 2020, inclusive."

10. AGO initially delayed responding to Plaintiff's request, then responded on April 27, 2020, stating that it was withholding "forty-one records because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product)." AGO further stated that "Six of the withheld records consist of internal Vermont Attorney General's Office communications or communications between the Vermont Attorney General's Office and the Vermont Agency of Natural Resources" but acknowledged that other records had been shared outside the State of Vermont.
11. With respect to records shared outside these two agencies, AGO stated: "The other thirty-five withheld records consist of communications among Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation. We do not have any records responsive to this request that are not exempt from disclosure."
12. Plaintiff administratively appealed the denial of records responsive to its April 13 request as required by 1 V.S.A.§ 318 (c)(1). AGO denied the administrative appeal in full on May 26, 2020.
13. AGO received the second request at issue in this suit on April 14, 2020.
14. In its second request Plaintiff sought three categories of records, only two of which are at issue in this suit, to wit:

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:) Nick Persampieri, 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:) Nick Persampieri, 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.

15. AGO responded on April 28, 2020, stating that it had "withheld 7 records because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation)." However, AGO admitted that the records at issue had been shared with outside parties, writing further that "these records consist of communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation."

16. AGO further states that it had "withheld 3 records responsive to this request because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation)." Of those three records, AGO described one as "a communication among the

Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing litigation."

17. Plaintiff administratively appealed AGO's April 28, 2020 denial of access to records on May 18, 2020. AGO denied Plaintiff's administrative appeal in full on May 26, 2020.

18. AGO received the third request at issue in this suit on April 17, 2020. In that request, Plaintiff sought:

1. all a) notices of, cancellations of, and/or invitations to participate in a "Multistate" call and/or "Coordination Call", that b) were sent to Nick Persampieri, c) from Emma Borg and/or Steve Novick, that d) are dated October 22, 2019 through the date you process this request, inclusive; and

2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to Nick Persampieri, b) from Emma Borg and/or Steve Novick, that c) is dated July 10, 11, or 12, 2019.

19. AGO replied to Plaintiff's request by letter dated May 1, 2020, stating, *inter alia*, "We have withheld 9 records responsive to this request because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product). These records consist of communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation." AGO further stated "we have withheld 3 records because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product). These records consist of

communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation."

20. Plaintiff administratively appealed AGO's May 1, 2020 denial of access to records by email dated May 19, 2020. AGO denied Plaintiff's administrative appeal in full on May 26, 2020.

21. AGO received the fourth request at issue in this suit on April 28, 2020. Specifically, in that request Plaintiff sought emails to or from one AGO employee, which:

1. 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 or attachment, and including as part of that record, a) the word "complaint" ***and*** *b) i) "criteria pollutant" (which also includes "criteria pollutants"), ii) "greenhouse gas", (which includes "greenhouse gases"), and/or iii) "GHG"; or that*

2. provides notice pursuant to any common interest agreement of any public records request, or otherwise discusses or references any public records request or public records lawsuit, submitted to any party by a) Matthew Hardin, b) Neal Cornett, c) Chris or Christopher Horner, and/or d) Energy Policy Advocates.

22. AGO replied by letter dated May 12, 2020, stating that it was withholding 35 total records, ostensibly "because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation)." However, AGO stated that the records at issue had been shared with outside parties, stating that "these records consist of communications

among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation."

23. Plaintiff administratively appealed the May 12, 2020 denial of access to records on May 20, 2020. AGO denied Plaintiff's administrative appeal in full on May 26, 2020.

Legal Arguments

24. 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."

25. 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 various fora, including this Court in a related matter, that it has entered into at least seven purported "Common Interest Agreements" during 2019-2020, which obligate AGO to consult with and obtain consent from other parties about possible release of Vermont records. AGO uses these pacts to shield records from the public eye, while nevertheless sharing such records with actors not employed by the State of Vermont.

26. The Common Interest Doctrine has never been recognized in Vermont Law.

27. Moreover, even if the law of other states applies in Vermont, 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).

28. 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).

29. AGO's reliance on the Attorney-Client Privilege and Attorney-Client Work Product is also misplaced. As a judge of this Court wrote in a July 27, 2017 order in the matter of *Energy & Environment Legal Institute v. The Attorney General of Vermont*, Docket No. 558-9-16 Wncv, the common interest doctrine as recognized in other states "does not create a separate freestanding privilege but is based on applications of the recognized attorney client privilege." See Exhibit A.

30. 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.

31. 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.*

32. 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 in that the office invokes it to shield still more public records from the public.

33. In the instant case, none of the hallmarks of Attorney-Client Privilege are present, because records were shared outside the state of Vermont.

34. Even in states where the Common Interest Doctrine is recognized, 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 were shared with actors in states other than Vermont. Certain of the records sought are those that, by definition, were shared with outside parties including actors in the State of New York, a state whose courts have expressly rejected an expansive interpretation of the common interest doctrine. See ¶¶ 14, 18, *supra.*

35. AGO's reliance on the Attorney Work Product Doctrine is similarly misplaced.

36. 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."

37. Based on the foregoing, and on information and belief, Plaintiff asserts that AGO is unlawfully withholding records responsive to all four of its April 2020 records requests, as described herein.

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

38. Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.

39. 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).

40. Plaintiff asks this Court to enter a judgment declaring that:

a. The records as specifically described in Plaintiff's records requests 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

41. Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.

42. Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's Vermont Public Records Law requests described, *supra*, without fees, subject to legitimate withholdings.

43. 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.

44. 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.

45. 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.

46. 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

47. Plaintiff re-alleges paragraphs 1-46 as if fully set out herein.

48. 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.

49. 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.

50. 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 its attorney fees and costs and such other and further relief as the Court shall deem proper.

Dated at Stanardsville, Virginia this 1st day of June, 2020.

Energy Policy Advocates

By: _____

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Exhibit A

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 558-9-16 Wncv

Energy & Environment Legal Institute,
Plaintiff,

v.

The Attorney General of Vermont,
Defendant.

DECISION
The State's Motion for Summary Judgment

Plaintiff Energy & Environment Legal Institute (EELI) sought certain documents under the Public Records Act, 1 V.S.A. §§ 315–320, from the Office of the Attorney General. All of the documents relate to the Attorney General's participation in a Common Interest Agreement with the attorneys general of several other states on the subject of climate change.

The Attorney General denied the request initially and upon administrative review. The request was denied in total in reliance on two statutory exemptions from access: 1 V.S.A. § 317(c)(3) (production would cause custodian to violate professional ethics standards) and § 317(c)(4) (production would cause custodian to violate statutory or common law privilege). EELI then filed this case. The Attorney General has filed a motion for summary judgment asserting that subsections 317(c)(3) and (4) bar all access to the requested documents.

The request is as follows:

> We hereby request copies of all e-mail or text correspondence, attachments, and any other document *recording, reflecting, discussing or mentioning*:
>
> (a) any request by any Party to the Agreement *seeking consent to share records* pursuant to this Agreement;
>
> (b) any Party to the Agreement consenting to share records pursuant to this Agreement; and,
>
> (c) any record, as described above, reflecting any Party to the Agreement *objecting to sharing records* pursuant to this Agreement.
>
> *Records responsive to this request will be dated April 28, 2016 through the date you process this request, inclusive.*
>
> We request entire e-mail/text threads.

EELI's e-mailed records request 2 (emphasis in original; footnote omitted).

At oral argument on the Attorney General's motion, EELI clarified that its request is limited to documents reflecting Party requests to share records and Party responses to those requests. It is not seeking substantive content that might have been communicated. This also is clarified in its opposition to summary judgment. Plaintiff's Opposition to Summary Judgment 10 (filed Jan. 5, 2017) ("The plaintiff requested only documents that would reflect Vermont's compliance or lack of compliance with Section 6 of the [Agreement]. Specifically, plaintiff sought requests by any party to the Agreement to share documents, any consent to such sharing, and any objection to such sharing. The plaintiff did not seek documents relating to Vermont's alleged potential litigation.").

The Agreement is a "Climate Change Coalition Common Interest Agreement" with the attorneys general of several other states. It provides for the party attorneys generals' offices to share information relating to their common legal interests on the subject of climate change while preserving any available claims of privilege or confidentiality. It provides for sharing with "other persons as provided in paragraph 6." Agreement ¶ 5(vi).

Paragraph 6 is as follows:

> Notice of Potential Disclosure. The Parties agree and acknowledge that each Party is subject to applicable freedom of information or public records laws, and nothing in this Agreement is intended to alter or limit the disclosure requirements of such laws. If any Shared Information is demanded under a freedom of information or public records law or is subject to any form of compulsory process in any proceeding ("Request"), the Party receiving the Request shall: (i) immediately notify all other Parties (or their designees) in writing; (ii) cooperate with any Party in the course of responding to the Request; and (iii) refuse to disclose any Shared Information unless required by law.

Agreement ¶ 6.

The Attorney General's position is *categorical*: all documents sought under the request are *necessarily* exempt under § 317(c)(3) (confidential) and under § 317(c)(4) (privileged).

The Attorney General relies primarily on section 317(c)(3), which exempts from access "[r]ecords which, if made public pursuant to this subchapter, would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the State." Lawyers are professionals regulated by the State according to standards set forth in the Rules of Professional Conduct. The Attorney General relies on the general proscription in Rule 1.6(a): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation." As the Comment explains, this rule helps to establish trust in the lawyer-client relationship. "The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."

The Attorney General argues that it is no ordinary law firm because its client is the State itself, and hence the public interest. As the Scope provision of the Rules of Professional Conduct

demonstrate, the Rules take into account that the role of government lawyers differs from lawyers for private clients: "the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. . . . Such authority in various respects is generally vested in the Attorney General." The Rules are not intended to "abrogate any such authority." The Attorney General references 3 V.S.A. § 159 as to the broad responsibility of the Attorney General, and argues that since the State as a whole and the public interest is its client, all of its work, including all of its records, qualifies for the professional ethics confidentiality exemption.

However, the Attorney General's office is not wholly exempt from the Public Records Act. See 1 V.S.A. § 317(a)(2) (defining public agency for purposes of the Act and not exempting the Attorney General's office). The preamble to the Public Records Act makes clear that transparency of government is the intent of the Act in furtherance of the same policy in the Vermont Constitution:

> It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.

1 V.S.A. § 315 (a). The Act's disclosure requirements are limited by its exemptions. 1 V.S.A. § 317(c). "We construe these exceptions strictly against the custodians of records and resolve any doubts in favor of disclosure." *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 10, 177 Vt. 287 (2004). While many records in the Attorney General's office no doubt qualify for specific exemptions due to nature of the legal work, the public has a legitimate interest in transparency as to some of its undertakings, particularly those of an administrative or operational nature. Thus, while many documents possessed by the Attorney General will be confidential or privileged, § 317(c)(3) cannot be read to reflect legislative intent that all records in the Attorney General's office would be completely exempt.

The Attorney General also relies on 1 V.S.A. § 317(c)(4) (production would cause custodian to violate statutory or common law privilege), and claims privilege on the grounds that the documents are part of attorney work product and that the court should recognize a privilege based on a "common interest doctrine." Such a doctrine has not been recognized as a privilege under Vermont law nor adopted in any reported decision. The Attorney General relies in part on Restatement (Third) of the Law Governing Lawyers, § 76 (1): "If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged [under sections pertaining to attorney-client privilege] that relates to the matter is privileged as against third persons."

However, even if the court were to recognize such a doctrine, the Restatement is clear that it applies to a communication that "otherwise qualifies as privileged" under recognized applications of the attorney client privilege. *Id.* The doctrine does not create a separate freestanding privilege but is based on applications of the recognized attorney client privilege.

EELI is not seeking content related to litigation and thus not seeking attorney work product or communications that qualify for the attorney client privilege. Rather, it is seeking documents related to administrative implementation of the Common Interest Agreement, which is itself a public document. EELI seeks records showing that requests were made by a party to the Agreement to share records, and records showing consent was given or objection made to such requests. This has to do with frequency and timing of the use of the Agreement and not with content. It is not necessary for the court to consider the request to adopt a broad privilege based on the common interest doctrine, as the claim of privilege based on either the work product or the attorney client privilege is inapplicable to the request made in this case.

Because the categorical claims of both confidentiality and privilege are too broad, the Attorney General's motion for summary judgment is denied. While it may be that some of the records sought contain confidential or privileged material that needs to be redacted and specific exemptions may reasonably apply to redacted material, the applicability of exemptions depends on the specific documents and their content.

ORDER

The Attorney General's motion for summary judgment is denied.

Within 30 days, the Attorney General shall deliver to EELI any responsive documents not subject to any claim of confidentiality or privilege as interpreted above, redacted documents if portions are subject to valid claims of confidentiality or privilege, and a log of withheld and/or redacted documents with identification of the redaction or document and the specific basis for any claimed exemption as to each item.

Dated at Montpelier, Vermont this 27th day of July 2017.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge