

COMMONWEALTH OF MASSACHUSETTS

[SUFFOLK, ss.]

SUPERIOR COURT  
Civil Action No. 19-1753 \_\_\_\_

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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

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Energy Policy Advocates (“EPA”), by and through undersigned counsel, submits this Memorandum of Law in support of its Motion for Summary Judgment against Defendant, the Massachusetts Office of Attorney General (“OAG”). In support of its Motion, EPA hereby states as follows:

**Introduction**

This lawsuit seeks to enforce the right to inspect public records pursuant to 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. In two separate requests, EPA requested certain public records from OAG, the backgrounds of both of which are important to informing a judgment on the remaining disputes.

The first request, made in February 2019, and described in Plaintiff’s original Complaint and Amended Complaint, ¶¶ 16-18, sought to inform the public about OAG’s relationship with a

private donor offering to provide attorneys general with privately hired and paid attorneys, to pursue issues of concern to the donor under the auspices of OAG.

Plaintiff made its second request in April 2019, described in Plaintiff's Complaint and Amended Complaint at ¶¶ 14-15, which sought information about OAG's involvement with an environmental tort lawyer named Matt Pawa. Mr. Pawa had long called for "a single sympathetic attorney general" to assist his private "climate" tort litigation campaign by investigating his targets in order to obtain private records that might help his cases.<sup>1</sup> Complaint, ¶¶ 20-27. Public records show that Mr. Pawa had aggressively marketed his services to attorneys general and otherwise sought to enlist them to initiate their own investigations to aid his litigation. Plaintiff's April request sought six pages of emails between OAG attorneys and Mr. Pawa which, we now know, led to a January 2016 Pawa briefing of that Office.

OAG withheld all records responsive to the April request, in full, stating in pertinent part:

The AGO has six (6) pages of e-mails that are responsive to your request. We can give you no further information about these records without compromising our investigation or litigation strategies to the same extent as disclosing the records themselves. The sender and recipients, the dates, and the content of these e-mails relate to our ongoing

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<sup>1</sup> Pawa laid out his plan in 2012. "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. In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery." Climate Accountability Institute, *Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control* 11 (Oct. 2012), at page 11. This reports the proceedings of a meeting in La Jolla California to strategize on this plan.

Relevant to this, one court has noted how: "In January 2016, Mr. Pawa engaged participants at the Rockefeller Family Fund offices in New York City to further solidify the "[g]oals of an Exxon campaign" that Mr. Pawa developed at the La Jolla conference. According to a draft agenda for the meeting, the goals of this campaign included: (i) "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (ii) "[t]o delegitimize [ExxonMobil] as a political actor"; (iii) "[t]o drive divestment from Exxon"; and (iv) "[t]o force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc." According to the draft agenda, Mr. Pawa and the other participants aimed to chill and suppress ExxonMobil's speech through "legal actions & related campaigns," including "AGs" and "Tort[]" suits. The draft agenda notes that participants planned to use "AGs" and "Tort[]" suits to "get[] discovery" and "creat[e] scandal." Findings of Fact and Conclusions of Law, Exxon Mobil Corporation, Petitioner, Cause No. 096- 297222-18, District Court of Tarrant County, TX, April 25, 2018, <https://climatelitigationwatch.org/wp-content/uploads/2019/10/Tarrant-County-Facts-and-Conclusions.pdf>, ¶¶11-12.

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.

(Complaint and Amended Complaint, ¶¶ 38, 52, Ex. 9; April 29, 2019 denial in full, OAG's Lorraine Tarrow to Plaintiff counsel Neal Cornett).

The public record suggests that AG Healey launched an investigation of ExxonMobil Corporation following Mr. Pawa's specific, private lobbying efforts. Complaint and Amended Complaint, ¶¶ 20-27. While this may prove to have legal import in OAG's ongoing litigation against that company, the fact of this private involvement on its face threatened political embarrassment, which may explain not only OAG's improper withholding of records responsive to the April request until Plaintiff filed this suit, but also why other OAGs had requested Mr. Pawa deliberately mislead the media about his meetings with them. Complaint and Amended Complaint, ¶ 25, FN 15, 16. Political embarrassment is not a recognized exemption from the broad mandate for disclosure found in the Massachusetts Public Record Law,<sup>2</sup> *Brogan v. School Committee of Westport*, 401 Mass. 306, 309 (1987), and OAG's claims of privilege over these and the records requested in February 2019 on their face appeared implausible, so Plaintiff filed suit.

As the day approached when OAG would have to answer Plaintiff's specific factual allegations about OAG's relationship with the attorney and the role of that lawyer in OAG's decision to investigate a private party the private attorney was targeting, on September 11, 2019, OAG instead released, in full, the six pages of records responsive to the April request.

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<sup>2</sup> Under the public records act, embarrassment is a factor in weighing relative *privacy interests* in public records determinations under Exemption (c). See, e.g., Secretary of the Commonwealth, Division of Public Records, "A Guide to the Massachusetts Public Records Law," (March 2020), at 18, available at <https://www.sec.state.ma.us/pre/prepdf/guide.pdf>.

By abandoning untenable claims of privilege, some of which were pure invention<sup>3</sup> yet all of which OAG put forth for months including through several stages of administrative appeal as described in Plaintiff's Complaint, Defendant mooted those claims. At the same time, however, OAG provided a lesson, with six exhibits, in its improper, overly broad invocation of claims of privilege to withhold records detailing its collaboration with outside interests to use this Office to pursue private parties at the request and with the assistance of other private parties.

These "Pawa" records are of a substantive part with those records still at issue in this matter responsive to Plaintiff's February 2019 request. Both matters are the subject of great media and public interest and are of greater legal and public policy importance. Both also have been the subject of extensive campaigns to keep the records and details from becoming public. Further, records released in the "Pawa" production also reveal a direct link between his

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<sup>3</sup> The belatedly released emails reveal Mr. Pawa describing his recruiting pitch, a slide show, as being about "documents that recently came to light", "a mini trial-type presentation on what Exxon knew about global warming, when it knew it and what it did anyway in the next 20 plus years". See December 1, 2015 email from Pawa to Massachusetts OAG's Christophe Courchesne and Melissa Hoffer, Subject: global warming.

The revealed correspondence specifies those documents he presented are public news stories that, the public record also shows, were arranged for by parties promoting this same campaign. *See, e.g.,* Jess Delaney, *Lee Wasserman Fights Climate Change with Rockefeller Funds*, Institutional Investor (Apr. 18, 2016), <https://www.institutionalinvestor.com/article/b14z9ppfj9nlv4/lee-wasserman-fights-climate-change-with-rockefeller-funds>. Lee Wasserman is the Director of the Rockefeller Family Fund, where he focuses on initiatives fighting climate change. Although Mr. Wasserman at first denied RFF had singled Exxon out when it granted about \$25,000 to *InsideClimate News*, he later appeared, with Valerie Rockefeller Wayne of the Rockefeller Brothers Fund, on CBS This Morning with Charlie Rose and confirmed they funded those groups with the explicit purpose of writing the original #ExxonKnew pieces. <https://www.cbsnews.com/news/rockefeller-family-feud-with-exxon-mobil-fossil-fuels-global-warming-climate-change/> He then wrote in the New York Review of Books, with David Kaiser, that the groups did fund those groups with the explicit purpose of writing the original #ExxonKnew pieces. <https://www.nybooks.com/articles/2016/12/08/the-rockefeller-family-fund-vs-exxon/> Both Wasserman and Kaiser then wrote in the New York Review of Books that they met with New York Attorney General Eric Schneiderman and pressured him to launch an investigation. <https://www.nybooks.com/articles/2016/12/22/rockefeller-family-fund-takes-on-exxon-mobil/>.

This is further confirmed by Pawa's own words, in a December 2015 email to OAG to arrange his slide show, in which Pawa revealed that this "information that had come to light" was in fact media "articles that have generated so much attention on this issue", presented "to various government officials", to which "is just information provided as a public service that [OAG] may be able to use as [OAG] consider whether to take a closer look at this matter."

recruiting of OAG and a privately hired lawyer OAG has brought in also to pursue “climate” litigation against Mr. Pawa’s target.

These remaining records are official correspondence documenting a related OAG collaboration, this time with the donor of “Special Assistant Attorneys General” (SAAGs) to OAG to pursue some of the same causes and parties. Specifically, these records concern representations and promises made by OAG in arranging this relationship with an outside donor, prior to that donor hiring and placing two SAAGs within OAG for the purpose of promoting specific, identified political and policy-making priorities of the program’s funder. The program is run out of a State Energy & Environmental Impact Center (SEEIC), created with \$5.6 million by climate activist, major political donor, and former New York City mayor Michael Bloomberg. The offer to OAG in return for OAG accepting the privately hired attorneys also included providing public relations and additional outside legal support for AG Healey.<sup>4</sup>

Again, only on August 9, 2019, after being sued for improperly withholding all records in full as purportedly exempt did OAG finally produce some of the records responsive to Plaintiff’s February 6, 2019 request.<sup>5</sup>

Defendant OAG did continue to withhold many records in full, which it classifies in its August 9, 2019 response as “Category 2” records, corresponding with parts ii-iv of Plaintiff’s February 2019 request. Plaintiff does not challenge those withholdings. OAG also redacted many of those records it released, often heavily. Plaintiff challenges all or parts of OAG’s withholdings

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<sup>4</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, Complaint ¶ 17, FN 2; memo available at <https://climatelitigationwatch.org/edit-fn-3-nyu-hayes-email-to-oags/>.

<sup>5</sup> Although Defendant claimed in its production letter it was producing these records and at that time simply because it had been considering its response – despite lapsed Supervisor of Records/administrative appeal deadlines having long passed, and with nothing but silence from OAG – the record as set forth in Plaintiff’s Original Complaint, ¶¶ 29-36, refutes this assertion, which appears to be as much a *post facto* effort to explain away the troubling history set forth in the original Complaint, ¶¶ 42-63.

in twelve of those records, including: redactions on one page of a five-page application to SEEIC (OAG's "Category 1" record), and redactions on ten out of 304 pages relating to Part V of the February request ("correspondence sent to, from, or copying (whether as cc: or bcc:) Mike.Firestone@state.ma.us that includes anywhere "NYU", be it in an email address (e.g., @nyu.edu), or otherwise" over a specific period of time). OAG classifies these in its August 9, 2019 response as "Category 3" records. A copy of each of these eleven pages with challenged redactions are attached hereto collectively and as a compilation PDF as Ex. C.

In its response to this offer, OAG said it would deploy these private resources, if granted by the outside donor following a lobbying campaign, in, *inter alia*, its investigation of energy companies<sup>6</sup> (which was the same pursuit lobbied for by Mr. Pawa). By asserting privilege over large portions of correspondence with and/or about a potential outside, activist entity which at the time was offering substantial resources to OAG on the condition the resources be used to "advanc[e] progressive clean energy, climate change, and environmental legal positions"<sup>7</sup>, OAG improperly withholds from the public important details of its discussions with this special interest group, offering things of value in return for specified use of the public's Office.

Plaintiff discerns a pattern in OAG's misapplication of the open records law, which is not intended to be a withholding statute but a disclosure statute. *See* M.G.L. Ch. 66, § 10A(d)(1)(iv); *Hastings & Sons v. City Treasurer of Lynn*, 374 Mass. 812, 816 (1978). This information is of heightened public interest for numerous reasons, including the extraordinary nature of the

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<sup>6</sup> To wit, "The AGO envisions that the NYU Fellow may also assist [with]... innovative ways to further environmental protection exercising the Attorney General's role as the Commonwealth's chief law officer, such as...investigating companies for investor and consumer protection violations related to environmental and climate claims". Massachusetts Office of the Attorney General Application for NYU Fellow", September 13, 2017, at page 3, <https://climatelitigationwatch.org/wp-content/uploads/2019/10/MA-AG-NYU-Application.pdf>.

<sup>7</sup> August 25, 2017 email from David Hayes to, *inter alia*, OAG's Firestone, Subject: State Energy & Environmental Impact Center.

arrangement by which a private special interest group places its own hires to pursue issues of concern to its funder, with overt political implications<sup>8</sup>, and the connection between the two private interests recruiting OAG to act in this way as revealed in the released “Pawa” records.

Plaintiff requests this Court's intervention to review these eleven records, and order OAG to release all but properly exempt information therein, and to award costs and attorneys' fees as provided in M.G.L. Ch. 66, § 10A(d)(2)<sup>9</sup>.

### **STATEMENT OF FACTS**

**A major political donor's special interest money is being used to privately finance, hire, and place assistant attorneys general for the purpose of pursuing the activist billionaire's special interest agenda, and to promote OAG as part of her agreement to accept these attorneys. The challenged withholdings of information detailing this courtship and the subsequent consummation of a questionable relationship are not privileged and the public interest in seeing withheld information outweighs any interest in withholding it.**

In 2017, billionaire activist and major Democratic Party political donor Michael Bloomberg gave \$5.6 million to New York University School of Law to establish the “NYU State Energy and Environmental Impact Center's fellowship program” (“Bloomberg Center”).<sup>10</sup>

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<sup>8</sup> See, e.g., Maryland Attorney General Carolyn Quattrocki explaining the program. “[T]he gist is that Bloomberg is funding through NYU some fellowship positions for mid-career mid-career environmental litigators to be farmed out to State Attorneys General to fight against Trump's rollback of our environmental laws and regulations.” November 7, 2017 email from Quattrocki to various colleagues, Subject: Environmental Fellowship Position. See also Maryland Attorney General Brian Frosh, who was this program's lead attorney general recruiter until AG Healey assumed that position in 2018, describing the program as a vehicle for attorneys “interested in saving the planet from the predations of Scott Pruitt and Ryan Zinke? This is a link to information about the program: <http://www.law.nyu.edu/centers/state-impact/apply>.” January 26, 2018 email from Frosh to Yale Law School Dean Heather Gerken, Subject: hello again.

<sup>9</sup> Plaintiff substantially prevailed when Defendant OAG reversed its thoroughly unsupportable withholding in full of all records responsive to this request and to one other, once Plaintiff incurred the time, effort and expense to file suit. Plaintiff requests costs and fees throughout the course of the litigation that followed OAG's reversal, as OAG is still improperly withholding non-exempt public information, as described, *infra*.

<sup>10</sup> See, e.g., Juliet Eilperin, “NYU Law launches new center to help state AGs fight environmental rollbacks,” *Washington Post*, August 16, 2017 at A15 (“NYU School of Law will launch a new center, financed by Michael Bloomberg . . .”)

This program was funded through Bloomberg Philanthropies,<sup>11</sup> a tax-exempt vehicle used by Bloomberg for both charitable work and to advance his personal political objectives.

The Bloomberg Center offered to hire and pay the salary and benefits of one or more SAAGs in attorneys general offices demonstrating a willingness to use these attorneys in accordance with the Center’s specific political agenda – “advancing progressive clean energy, climate change, and environmental legal positions.” Interested attorneys general were invited to submit an application outlining, among other things, “needs within their offices related to the advancement and defense of progressive clean energy, climate change, and environmental matters,” and a demonstrated “commitment to and acute need for additional support on clean energy, climate change, and environmental issues of regional or national importance, such as those matters that cross jurisdictional boundaries or raise legal questions or conflicts that have nationwide applicability.” *See* Ex. B (August 25, 2017, Application Invitation Email).

That email, in effect a Request for Proposals (or RFP), offered willing attorneys general whose application for resources SEEIC accepted to receive the various inducements, discussed, *infra*. To receive the SEEIC’s support and public-relations advocacy, OAGs were to ramp up pursuit of the agreed priorities and provide office space to the privately-employed prosecutors, bestowing on them all of the powers of the state’s top law enforcement officer on matters of interest to the donor.

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<sup>11</sup> That is “the informal name for Bloomberg Family Foundation Inc. According to the foundation's 2017 IRS 990 form, the \$5.6 million came in the form of one \$2.8 million payment in 2017 and another to follow in 2018. The Bloomberg Family Foundation's 990 forms are not available for 2018 or 2019, so it is unclear whether Bloomberg continued to fund the State Impact Center last year or if he has yet in 2020.” Tyler Olson, “Bloomberg’s ‘mercenaries’: Billionaire Dem funding network of climate lawyers inside state AG offices,” Fox News, February 18, 2020, <https://www.foxnews.com/politics/bloomberg-network-climate-lawyers-ag>. Forms 990 available at <https://www.guidestar.org/profile/20-5602483>.

On September 13, 2017, OAG applied to the Bloomberg Center for a SAAG (or SAAGs<sup>12</sup>) and for other offered inducements including access to Bloomberg Center legal and public relations consultants and a proffered “set of on-going relationships with advocates working in the area, and ...pro bono services”.<sup>13</sup> A true and correct copy of that Application as obtained from OAG is attached as Exhibit A, and redactions therefrom are among those the Plaintiff challenges. The salary OAG requested and justified is redacted, as the “Budget” discussion only reveals, “We note that the budget proposal assumes that NYU will pay the Fellow directly.” Ex. A at p. 4.

To make its case that OAG deserved to receive these resources, OAG suggested how it would put the SAAG(s) to work consistent with Bloomberg’s well-known priorities (see *infra*), citing work which OAG envisioned for a SAAG(s), including, *inter alia*, “investigating companies for investor and consumer protection violations related to environmental and climate claims.”

The Bloomberg Center emailed OAG almost immediately, on September 29, 2017, stating the application was approved and that the Bloomberg Center would provide two SAAGS.

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<sup>12</sup> Public records indicate that Defendant OAG has taken in two privately hired attorneys under this arrangement. SEEIC wrote to OAG it was “hoping to double down on an office that has such a proven record of results, and a clear intention to lead nationally. (September 29, 2017 email from Chief of Staff Mike Firestone describing a phone call with Hayes, to AG Healey and other colleagues, Subject: NYU fellows for the Massachusetts Attorney General’s Office. Firestone reported “some incredible news”, that SEEIC “just reached out to ask if we could take 2 fellows!!” Firestone wrote SEEIC stating MA OAG was “absolutely thrilled to accept your offer of 2 SAAGS ...[and] over the moon!!” September 29, 2017 email from Mike Firestone to David Hayes, Elizabeth Klein of SEEIC, copying six MA OAG colleagues). September 29, 2017 email from Sandra Waters of MA OAG, forwarding a transcribed voice mail from David Hayes to Mike Firestone, Subject: Message, “Your office applied for a special SAAG slot and we really like your application and would like to give you 2 SAAGs if you think your office could handle that.” Both emails were produced by OAG on August 9, 2019 as part of its “Category 3” records.

<sup>13</sup> Massachusetts was the only OAG other than Maryland to redact its application claiming any privilege. The sole redacted section of MA OAG’s application is the Budget discussion. The sole unredacted text in that discussion states, “We note that the budget proposal assumes that NYU will pay the Fellow directly”. This is followed by a redacted rest of the paragraph, joining two short paragraphs above it. All nine lines redacted are on the basis of a statutory exclusion for “internal personnel rules and practices”.

However, OAG and the Bloomberg Center did not formalize the agreement that the latter would hire and provide its privately-funded SAAGs for the use(s) requested by the Center until November 16, 2017;<sup>14</sup> OAG did not bring SAAGs in under this agreement until January 2018. All of Plaintiff's challenges are of redactions in records that are dated August 25, 2017 through November 6, 2017, inclusive.

On information and belief, the Bloomberg Center/SEEIC has two SAAGs pursuing this agenda out of OAG at present, one of whom is named Megan Herzog. Ms. Herzog is a former staff attorney with The Conservation Law Foundation, which is the group that – “Pawa” records released in this matter demonstrate – coordinated with Matt Pawa on “the Exxon issue” and Pawa’s briefing of OAG<sup>15</sup>. OAG is withholding discussion of why bringing Ms. Herzog in in this capacity.

**Facts Relevant to Privilege Claims: SEEIC and the AGs’ Ultimate Donor-in-Fact**

Among the Bloomberg Center’s, or SEEIC’s, various inducements to attorneys general was “direct legal assistance through our center here at NYU to interested AGs on specific administrative, judicial or legislative matters involving these subjects, with a focus in particular on areas of regional and national significance...[and] to help coordinate efforts across multiple state AG offices and with other parties that may be aligned with their interests, including identifying and coordinating outside lawyers who are interested in working on a pro bono basis with AGs on specific matters.” (August 25, 2017 email from the State Impact Center’s David

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<sup>14</sup>“ Attached are the secondment agreement and pro bono legal services agreement which I have signed on behalf of the AGO. We look forward to working with the Fellows and the Center.” November 16, 2017 email to Elizabeth Klein, from Tiana Nardelli on behalf of Judy Zeprun, Subject, Center/AGO Secondment Agreement and Pro Bono Legal Services Agreement, signed by both parties.

<sup>15</sup> “I have been in discussions with Brad Campbell of CLF about the Exxon issue and we are coordinating on this.” January 4, 2016 email from Pawa to OAG’s Christophe Courchesne and Melissa Hoffer, Subject: global warming, released by OAG on September 11, 2019 after Plaintiff filed this suit.

Hayes to, *inter alia*, OAG's Michael Firestone, Subject: State Energy & Environmental Impact Center, at p. 2 (Complaint ¶ 17, FN 2)).

It offered "a full time communications expert experienced in the clean energy, climate and environmental field to work with, and help leverage, the communications resources in your offices. It is a primary goal of the State Impact Center to draw regional and national attention to the important clean energy, climate and environmental initiatives that your offices are pursuing." (Id.) NYU expanded that staff to two full-time communications aides<sup>16</sup>, and one email obtained from the Pennsylvania OAG references "the public relations firm in CA",<sup>17</sup> suggesting that the communications services SEEIC provides are not limited to the dedicated SEEIC-based aides.

In short, the Bloomberg Center/SEEIC offered to provide applicant offices with attorneys and public advocacy and promotion if those offices pursue (or escalate pursuit of) issues of importance to the donor and advance the donor's priorities.

Records obtained from other OAGs show that the Bloomberg Center provides participating attorneys general offices with a Retainer Agreement. This Agreement requires OAGs to "provide periodic reports to the [Bloomberg Center] regarding the work of the [SAAGs]" including "a narrative summary" of her work.<sup>18</sup>

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<sup>16</sup> This was true in 2019 and into 2020 both according to <https://www.law.nyu.edu/centers/state-impact/about/director-and-staff>, viewed February 21, 2020, and the Internet Archive's "Wayback Machine" (see, e.g., <http://web.archive.org/web/20190924125921/https://www.law.nyu.edu/centers/state-impact/about/director-and-staff>). As of September 25, 2020, the same SEEIC web page listed one full-time communications aide.

<sup>17</sup> In the email with the subject line "NYU Law Fellow Program," Pennsylvania OAG's then Chief Deputy Attorney General for Environmental Protection Steven Santarsiero tells SEEIC's Liz Klein: "As we discussed, I am copying our Communications Director, Joe Grace, on this email so that you can connect him with the communications folks in CA." December 6, 2017, email from the Pennsylvania Chief Deputy Attorney General Steven J. Santarsiero to NYU's Elizabeth Klein, Subject: NYU Law Fellow Program, <https://climatelitigationwatch.org/wp-content/uploads/2020/01/NYU-Comms-people-in-CA-RTK-2018-055-000008.pdf>.

<sup>18</sup> The Center provided such an agreement to OAG on October 6, 2017, but OAG did not provide that to Plaintiff. Notably, when this contract item drew attention in litigation being undertaken by "SAAGs" placed in the New York Attorney General's Office, public records released by other OAGs show that SEEIC made the rounds among its partners to let them know they could dispense with these records that now appeared to be vulnerable to discovery.

In turn, the Bloomberg Center reports bi-weekly to a proxy or alter ego for the donor-in-fact, Mr. Bloomberg, a major political donor of advertisements<sup>19</sup> and other beneficial support<sup>20</sup> to candidates of Attorney General Healey's party. That proxy or alter ego is "Bloomberg Philanthropies". The Center specifically informed Maryland Attorney General Brian Frosh of this in an email dated December 17, 2017:

Brian: Per our conversation on Friday, attached is our latest biweekly report, which we prepare for Dan Firger at Bloomberg. I don't know if he shares these with Kevin Sheekey [sic]. My next email will attach the preceding biweekly report.

Ex. B (Complaint. Ex. H, Email from Center Director David Hayes to AG Frosh's Gmail account, Subject: Fwd: Bi-Weekly Report<sup>21</sup>). "Dan Firger at Bloomberg" directed the Environment Program at Bloomberg Philanthropies.<sup>22</sup> "Kevin Sheekey" [sic] was the Global Head of Communications, Government Relations and Marketing for Bloomberg L.P. and then became Mr. Bloomberg's presidential campaign manager.<sup>23</sup> It is apparently be well-known in certain circles that Mr. Sheekey collaborates with attorneys general on Mr. Bloomberg's behalf<sup>24</sup>.

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<sup>19</sup> See, e.g., Zack Budryk, "Democratic groups using Bloomberg money to launch \$6M in Spanish language ads in Florida," The Hill, September 23, 2020, <https://thehill.com/homenews/campaign/517929-democratic-groups-using-bloomberg-money-to-launch-6m-in-spanish-language>.

<sup>20</sup> See, e.g., Brian Schwartz, "Mike Bloomberg plots spending blitz to support Joe Biden's run for president," CNBC.com, May 15, 2020, <https://www.cnbc.com/2020/05/15/mike-bloomberg-plots-spending-blitz-to-back-joe-biden-campaign.html>; Mark Niquette, "Michael Bloomberg to Spend \$100 Million in Florida to Aid Biden," Bloomberg News, September 13, 2020, <https://www.bloomberg.com/news/articles/2020-09-13/michael-bloomberg-to-spend-100-million-in-florida-to-help-biden>; see also, Associated Press and Ariel Zilber, "Florida attorney general calls for investigation into Michael Bloomberg after billionaire Democrat paid off \$16million in felons' debts so they can be allowed to vote," Daily Mail (UK), September 23, 2020, <https://www.dailymail.co.uk/news/article-8765897/Florida-seeks-investigation-Bloomberg-donation-voting.html>.

<sup>21</sup> December 17, 2017 email from David Hayes to Brian Frosh, Subject Fwd: Bi-Weekly Report. "Brian: Per our conversation on Friday, attached is our latest biweekly report, which we prepare for Dan Firger at Bloomberg. I don't know if he shares these with Kevin Sheekey [sic]. My next email will attach the preceding biweekly report. Please give Kevin my best."

<sup>22</sup> See e.g., <https://www.zoominfo.com/p/Daniel-Firger/-1860991923>.

<sup>23</sup> <https://www.linkedin.com/in/kevin-sheekey-2387b530/>. Accessed January 9, 2020.

<sup>24</sup> Public records also show Sheekey and AG Healey's predecessor as the Bloomberg Center's recruiter, Maryland AG Brian Frosh, corresponding about, e.g., the Bloomberg Fellow hires, "possibilit[ies] for collaboration". See, e.g., respectively, January 3, 2018 email from Antha Williams of Bloomberg Philanthropies to Frosh, Sheekey, Subject:

Having spent millions of dollars in recent years backing candidates in state AG political races, Mr. Bloomberg funded the State Impact Center to advance his environmental and energy policy priorities. Given Bloomberg’s well-documented<sup>25</sup> and long-standing<sup>26</sup> priority to impose specific “climate” policies which, Bloomberg Philanthropies acknowledges, aim to regulate certain industries out of existence including by using his SEEIC to do so.<sup>27</sup> These same desired policy outcomes are expressly if more broadly laid out in SEEIC’s Request for Proposals and agreements.

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Clean Power Program (“Hi Brian, I’ve been so glad to hear about your new hire!”), and December 22, 2017 Frosh to Williams and Sheekey (“Kevin, Another possibility for collaboration. We are going to do a hearing on the Clean Power Program...”). [https://climatelitigationwatch.org/wp-content/uploads/2019/06/horner-pia-4-25-19-2\\_compressed.pdf](https://climatelitigationwatch.org/wp-content/uploads/2019/06/horner-pia-4-25-19-2_compressed.pdf). Hayes wrote to Frosh in the same message, “Please give Kevin my best”.

<sup>25</sup> See, e.g., “Michael Bloomberg Launches Beyond Carbon, the Largest-Ever Coordinated Campaign Against Climate Change in United States: \$500 Million Program Will Employ Advocacy, Legal, and Electoral Strategies to Accelerate Coal Plant Retirements, Stop Gas Rush, Win State and Local Policy Changes and Help Elect Candidates Who Are Climate Champions. Beyond Carbon Brings Bloomberg’s Global Investment in Fighting Climate Change to \$1 Billion”, Press Release, Bloomberg Philanthropies, <https://www.beyondcarbon.org/news/michael-bloomberg-launches-beyond-carbon-largest-ever-coordinated-campaign-climate-change-united-states/>, viewed November 19, 2019. Two of the four priorities are “Win state and local policy changes” and “Help elect climate champions”. “Beyond Carbon is the latest – and biggest – Bloomberg effort to combat the climate crisis...After leaving City Hall, Bloomberg has spent \$500 million to date driving countless climate-related efforts, from creating coalitions and initiatives that facilitate and enable global climate action, to driving the end of coal, elevating the global adoption of climate risk disclosure, combatting overfishing and protecting coral reefs, and bringing stories of community-led climate action to the public” (citations to groups omitted).

<sup>26</sup> This has been a high-profile Bloomberg priority since at least 2016, see, e.g., Ed King, “Bloomberg climate risk initiative targets secret polluters”, September 2, 2016, Climate Home News, <https://www.climatechangenews.com/2016/02/09/bloomberg-climate-risk-initiative-targets-secret-polluters/>, Michael Peltz, “Michael Bloomberg pushes companies to reveal climate risk”, Institutional Investor, June 1, 2016, <https://www.institutionalinvestor.com/article/b14z9mvpthqr5g/michael-bloomberg-pushes-companies-to-reveal-climate-risk>. The latter specifically claims that companies do not honestly report climate impacts and risks – a focus of, e.g., the New York and Massachusetts AG lawsuits, both of whose applications specifically cited pursuit of ExxonMobil, and “”, respectively, as projects to which they would put Bloomberg-financed attorneys to work. To which he continues to emphasize with new initiatives <https://www.fsb-tcfd.org>, <https://www.environmentalleader.com/2019/06/michael-bloomberg-launches-largest-ever-us-climate-change-campaign/?amp=1>

<sup>27</sup> For example, the Bloomberg Family Foundation’s 2018 IRS Form 990 described the 2018 tranche of \$2.8 million for the SEEIC, *in toto*, as “To support the effort to move the U.S. beyond coal”. [https://climatelitigationwatch.org/wp-content/uploads/2020/08/Bloomberg-Family-Foundation\\_2018-990.pdf](https://climatelitigationwatch.org/wp-content/uploads/2020/08/Bloomberg-Family-Foundation_2018-990.pdf).

It is notable that public records affirm a general and often very specific understanding among recipients that Bloomberg was providing these resources.<sup>28</sup> The Center described itself to OAGs as “the new Bloomberg-supported State Energy and Environmental Impact Center”.<sup>29</sup> AGs call the attorneys “Bloomberg Fellows”.<sup>30</sup> Maryland’s Deputy Attorney General Carolyn Quattrocki characterized the arrangement to colleagues: “the gist is that Bloomberg is funding through NYU some fellowship positions for mid-career environmental litigators to be farmed out to State Attorneys General to join the fight against Trump's rollback of our environmental protection laws and regulations.”<sup>31</sup>

### **The OAG Relationship with SEEIC**

Records show that Massachusetts AG Maura Healey became SEEIC’s principal recruiter in or before August 2018<sup>32</sup>. Prior thereto, the Bloomberg Center had recruited OAG to pursue its private political agenda and conditioned the above-described gifts on OAG putting the SAAG(s) to work on issues of concern to its activist donor.

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<sup>28</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).

<sup>29</sup> November 14, 2017 10:57 AM email from Christopher Moyer to OAG’s Michael Kelly, Subject: Introduction.

<sup>30</sup> For example, “Hi David and Liz, We’re really pleased to let you know that JB will be moving to the energy position, and Steve Goldstein has accepted JB’s current position.” March 15, 2019 email from Quattrocki to Hayes and Klein, copying AG Frosh, Subject: Candidate for Bloomberg Fellow.

<https://climatelitigationwatch.org/maryland-ag-brian-frosh-has-two-bloomberg-funded-climate-prosecutors/>

<sup>31</sup> November 7, 2018 email from Maryland Deputy Attorney General Carolyn Quattrocki to Dana Rosenfeld, Cindy Lewin, Louis Bograd and Eric Biel, Subject, Environmental Fellowship position.

<sup>32</sup> An August 30, 2018 email from the National Association of Attorneys General, “on behalf of Mike Firestone, Massachusetts Chief of Staff”, offered notice that three more NYU-employed SAAGs were available. August 30, 2018 email from NAAG chief of staff Albert Lama to “all chief deputies and chiefs of staff” recruiting OAGs to apply for Bloomberg-funded “Special Assistant AGs” for climate and renewable energy, copying the deputy AG for NYU’s NAAG “sponsor” AG Maura Healey, Firestone. Massachusetts OAG serving this role for Bloomberg/the Center may be related to an apparently *sui generis* provision in Massachusetts law stating, “The department may accept any gifts or grants of money or property, whether real or personal, from any source, whether public or private, including but not limited to the United States of America or its agencies, for the purpose of assisting the department in the discharge of its duties.” Massachusetts Code Part I, Title II, Ch, 12, §4A. This presents a curious inconsistency with a more typical provision in the OAG’s authorizing statute requiring that “the salaries of said officers and employees shall not exceed the sum annually appropriated therefor by the general court.” Massachusetts Code Part I, Title II, Ch, 12, §2.

OAG withheld all records relating to this relationship that were responsive to Plaintiff's February 2019 request, categorically claiming blanket privileges that clearly and now, by virtue of OAG's August 9, 2019 release, admittedly do not apply. This release of 304 pages in full or in part, again, came only after Plaintiff sued OAG. As part of this reversal, OAG stated, in pertinent part (citations omitted):

Some of these records have been redacted for information that falls within one or more exemptions to the definition of public records under M.G.L. c. 4, § 7, cl. 26 insofar as it is:

(b) information that relates solely to the internal practices of the AGO, the disclosure of which may inhibit the proper performance of necessary government functions; (c) personnel information and information relating to specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy; and (d) information that is deliberative or policymaking in nature and relates to an ongoing deliberative process such as ongoing or proposed litigation or that constitutes attorney work product as articulated in *DaRosa v. City of New Bedford*.

Additionally, some of these records have been redacted insofar as they contain communications between Assistant Attorneys General and the General Counsel of the AGO where legal advice has been sought and/or given. Portions of these communications are protected from disclosure by the attorney-client privilege and the common interest doctrine consistent with the holdings in *Suffolk Const. Co., Inc. v. Division of Capital Asset Management* and *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.* We also redacted a single attachment to one of the e-mails that represents a contract for legal services to be provided to the AGO by the NYU Center and which establishes an attorney-client relationship between the two entities.<sup>33</sup>

The eleven records whose redactions Plaintiff challenges here are fairly described as follows, in chronological order:

- 1) August 25, 2017 email from OAG's Judy Zeprun to Mike Firestone, others in OAG, Subject: Applying for an NYU Environmental Law fellow;
- 2) September 1, 2017 email from OAG's Judy Zeprun to OAG's Jason William Green, Christophe Courchesne, Mary Strother, Richard Johnston, and Mike Firestone, Subject: proposed budget for NYU fellow;
- 3) September 13, 2017 application to the Bloomberg Center, "Budget" discussion;

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<sup>33</sup> OAG also withheld in full "a limited number of responsive records that, in their entirety, constitute "personnel" records", and "the drafts of policy-making records". Plaintiff does not challenge these or other withholdings in full

- 4) October 1, 2017 email from OAG's Judy Zeprun to various within OAG, Subject: NYU fellows for the Massachusetts Attorney General's Office!!;
- 5) October 6, 2017 email from the Bloomberg Center's Elizabeth Klein to, *inter alia*, OAG's Christophe Courchesne, Subject: NYU fellows for the Massachusetts Attorney General's Office;
- 6) October 6, 2017 Courchesne response;
- 7) October 25, 2017 email from OAG's Judy Zeprun to OAG's Christophe Courchesne, Melissa Hoffer, and Mike Firestone, Subject: NYU fellows for the Massachusetts Attorney General's Office;
- 8) October 30, 2017 email from OAG's Mike Firestone to various within OAG, Subject: Draft agenda for meeting with David Haves and Liz Klein on NVU fellows;
- 9) October 30, 2017 email from OAG's Mike Firestone to the Bloomberg Center's David Hayes, Subject: Try me back?
- 10) November 6, 2017 email from OAG's Melissa Hoffer to various within OAG, Subject: NYU Fellow/Megan Herzog – Resume & Writing Samples.<sup>34</sup>
- 11) November 16, 2017 Pro Bono Services Legal Agreement, ¶ 1.<sup>35</sup>

The withheld portions of these records appear to reflect, and the public deserves to know the full extent of, OAG promises made to a wealthy private donor to use OAG's authority to support and advance the donor's priorities. The unredacted correspondence will inform the public of OAG's representations and promises in response to a solicitation from an activist private donor to provide OAG outside resources only if those resources pursue specific legal

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<sup>34</sup> Plaintiff acknowledges portions of this email are quite possibly legitimately withheld as exempt; it is simply not at all clear from the context that all of the substantial withholdings are properly exempt. Plaintiff notes that Ms. Herzog came from the Conservation Law Foundation, which emails released by OAG to Plaintiff show was the partner, with plaintiff's lawyer Matt Pawa, in developing the pitch to OAG to investigate ExxonMobil in an effort to assist Mr. Pawa's flailing tort campaign. Nora J. Chorover also joined in 2018, who also had professional ties to CLF. See, e.g., <https://casetext.com/case/conservation-law-found-inc-v-roland-teiner-co>.

<sup>35</sup> Other OAGs' agreements produced without such redactions indicate the redacted language is most likely "on administrative, judicial, or statutory matters involving clean energy, climate change, and environmental protection (the "Subject Matters"), including advice on the Subject Matters as may be sought in connection with potential litigation brought by or involving OAG." This is plainly not privileged and, like the previously withheld correspondence with the tort lawyer recruiting OAG to his cause to investigate ExxonMobil, is instructive in considering OAG's other claims of privilege.

positions of interest and concern to that donor, in which event the donor will provide public relations advocacy promoting OAG and the Attorney General for their “leadership”.

### ARGUMENT

**1. OAG bears the burden of showing the redactions fall within an exemption to the Public Records Law, M.G.L. ch. 66.**

The Massachusetts Public Records Law is a disclosure statute, not a withholding statute. *Hastings & Sons v. City Treasurer of Lynn*, 374 Mass. 812, 816 (1978). Public records are presumed to be subject to disclosure unless they can be shown to be exempt. M.G.L. Ch. 66, § 10A(d)(1)(iv). Therefore, OAG shoulders the burden of proving the propriety of any withholdings. *Id.*; see also *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61 (1976); *District Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995).

**2. The redacted portions are not exempt from disclosure as attorney-client privileged materials.**

The Public Records law defines public records broadly and include “all documentary materials made or received by an officer or employee of any corporation or public entity of the Commonwealth, unless one of [the] statutory exemptions is applicable.” *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993); see also *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 430-431 (1983) (public records broadly defined as records and documents in possession of public officials). All statutory exemptions must be strictly and narrowly construed. *Attorney Gen. v. Assistant Comm'r of the Real Prop. Dep't of Boston*, 380 Mass. 623, 625 (1980); *Attorney Gen. v. Assessors of Woburn*, 375 Mass. 430, 432 (1978).

Here, in search of an exemption from the broad, liberally-interpreted statutory mandate for disclosure, OAG withheld portions of the eleven records at issue by claiming they are

protected by “M.G.L. c. 4, § 7, cl. 26(a), as they are records specifically exempted from disclosure by statute (M.G.L. c. 268B, § 3(g)); and M.G.L. c. 4, § 7, cl. 26(c), as they are personnel files or information. Additionally, some of these records are privileged attorney-client communications that are likewise protected from disclosure.” (February 22, 2019 denial in full, OAG’s Lorraine Tarrow to Matthew Hardin of Plaintiff EPA).

Subsequently, on August 9, 2019 and when releasing 309 pages in whole or in part, OAG revised its rationale for withholding what was by this time a far smaller universe of information, by asserting expanded rationales (also affirming its initial blanket denial was reflexive):

Some of these records have been redacted for information that falls within one or more exemptions to the definition of public records under M.G.L. c. 4, § 7, cl. 26 insofar as it is: (b) information that relates solely to the internal practices of the AGO, the disclosure of which may inhibit the proper performance of necessary government functions; (c) personnel information and information relating to specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy;<sup>6</sup> and (d) information that is deliberative or policymaking in nature and relates to an ongoing deliberative process such as ongoing or proposed litigation or that constitutes attorney work product as articulated in DaRosa v. City of New Bedford.

Additionally, some of these records have been redacted insofar as they contain communications between Assistant Attorneys General and the General Counsel of the AGO where legal advice has been sought and/or given. Portions of these communications are protected from disclosure by the attorney-client privilege and the common interest doctrine consistent with the holdings in Suffolk Const. Co., Inc. v. Division of Capital Asset Management and Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc. We also redacted a single attachment to one of the e-mails that represents a contract for legal services to be provided to the AGO by the NYU Center and which establishes an attorney-client relationship between the two entities.

(August 9, 2019, Supplemental Response, OAG’s Lorraine Tarrow to Plaintiff counsel Neal Cornett (citations omitted).)

Later, in its answer, OAG asserted that “some material [was] redacted and some records withheld based on certain exemptions to the public records law and the attorney-client privilege.”

Ans. ¶ 9.

OAG’s conclusory statement(s) fails to meet its burden, including to show that an attorney-client relationship exists between it and the Bloomberg Center. It further fails to identify or explain who the attorney is or who is the relevant client might be in each item of its correspondence with outside parties (4 of the 11 challenged records), and how the privilege exempts all of the particular withheld information rather than just some subset thereof.

The Public Records Law contains no exemption for attorney work product. *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 803 (Mass. 1999). The law does provide an exemption for certain attorney-client communications. *Suffolk Cons., v. Division of Capital*, 449 Mass. 444, 448 (Mass. 2007) (“the attorney-client privilege shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice.”). As with all exemptions under the Public Records Law, the attorney-client privilege is to be construed “narrowly, in part to protect the competing societal interest of the full disclosure of relevant evidence.” *Commissioner of Rev. v. Comcast Corp.*, 453 Mass. 293, 304 (Mass. 2009)

OAG has not met its burden to overcome the statutory presumption in favor of disclosing the records. *Suffolk Cons., v. Division of Capital*, 449 Mass. 444, 450 n.9 (Mass. 2007), citing *Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda)*, 425 Mass. 419, 421 (1997).

Further, the redacted September 2017 application in response to an RFP offering, *inter alia*, public relations support, was made well before the alleged attorney-client relationship is

even purported to have initiated, in January 2018. Indeed, each of the eleven challenges are dated between August 25, 2017 (the date of SEEIC's "RFP" to OAG) and November 6, 2017, inclusive. Regardless, even assuming *arguendo* that an attorney client relationship exists, "the privilege applies 'to a confidential communication from an attorney to a client, but only if that information is based on confidential information provided by the client.'" *Savoy v. Richard A. Carrier Trucking, Inc.*, 178 F.R.D. 346, 350 (D. Mass. 1998). Numerous of the redacted correspondence pre-date any such relationship and the context suggests nothing to place the withheld documents under the protection of any of the cited privileges. The information is presumptively public and subject to release barring some showing otherwise. Merely establishing that OAG has an attorney-client relationship via the Application is not sufficient; OAG also carries the burden to prove that the redacted information is privileged. It has failed to satisfy that burden.

The redacted correspondence proposes, offers, discusses and otherwise addresses an arrangement providing for private resources to a public agency, a law enforcement agency with significant powers against private parties, expressly to pursue issues of concern to the donor. They generally are in response to a request for proposal. Some of the redacted records are analogous to retainer agreements and engagement letters, and such engagements are not generally viewed as subject to attorney-client privilege. This is so because the privilege applies "to a confidential communication from an attorney to a client, but only if that information is based on confidential information provided by the client." *Savoy v. Richard A. Carrier Trucking, Inc.*, 178 F.R.D. at 350. So "[u]nless the legal advice reveals what the client has said, no legitimate interest of the client is impaired by disclosing the advice." *Id.* And, importantly, the "structural framework" surrounding the substance of the communications is discoverable. *Id.*

Accordingly, the fact of the attorney-client relationship and the dates on which services were performed are not necessarily privileged. *Id.*

**3. Even lawful exemptions must be narrowly construed in favor of disclosure.**

An outside, well-monied organization is apparently funding the Attorney General's Office to advance the political and policy agenda the organization favors, with all of the OAG's statutory authority. OAG's denial of the requested documents reflects a continued effort to minimize the public's knowledge about this highly unique relationship – even the “Budget” promises made to the donor about this unprecedented partnership. The Public Records Act is meant to expose exactly these types of links to the disinfectant of public scrutiny.

Far from being exempt, politically embarrassing or legally problematic redactions are of the greatest public interest. For example, the Virginia Attorney General's application candidly admitted the financing was “to advance the agenda represented by” the Bloomberg Center. In response to this revelation, the Virginia legislature prohibited its Office of Attorney General from engaging in the arrangement, not once<sup>36</sup> but twice<sup>37</sup>.

Other OAG applications singled out a specific company known to be of interest to Bloomberg, ExxonMobil. The New York and Minnesota OAG applications were the most overt about their intentions to use the resources to target a specific company and otherwise to use these resources toward effecting Mr. Bloomberg's “climate” priorities – and not just to fight federal energy and environmental policy reforms.<sup>38</sup> Massachusetts OAG's application did not specify ExxonMobil but approached the matter by appealing to Bloomberg's broader priorities. Page 3

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<sup>36</sup> Budget Amendment to HB1700 Conference Report, Item 56 #1c, Attorney General and Department of Law, inserted on page 46, line 28 <https://budget.lis.virginia.gov/amendment/2019/1/HB1700/Introduced/CR/56/1c/>.

<sup>37</sup> Renewed on February 20, 2020, <https://budget.lis.virginia.gov/amendment/2020/1/HB30/Introduced/CR/57/1c/>.

<sup>38</sup> Although it is implicit some attorneys general offices made clear, sometimes rather clumsily, that but-for the provision of private resources they would not do the work described.

of the five-page application noted “The AGO envisions that the NYU Fellow may also assist [with]...investigating companies for investor and consumer protection violations related to environmental and climate claims”. The Office filed suit against ExxonMobil for those alleged offenses on October 24, 2019.<sup>39</sup>

OAG may of course argue that, although it appealed to consumer protection claims in its plea for SEEIC resources, it initiated investigation of ExxonMobil in 2016 — i.e., after the presentation by Matt Pawa in January of that year asking OAG to pursue the target of his own litigation campaign. Public records, therefore, only raise arguably more troubling questions about private influences on the Office.<sup>40</sup>

In fact, OAG’s SEEIC application described the very investigation that advocates were at that time urging AGs to initiate against “major carbon producers”, particularly at what one presenter told colleagues was a “secret meeting at Harvard”<sup>41</sup> in April 2016. The co-host Union of Concerned Scientists described the event, in an email to the same presenter, as a briefing for both AG staff and “prospective funders”<sup>42</sup> (funders of whom or what, and how they would fund AG litigation, the email did not specify, though it is possible that one such funding avenue was providing AGs with the “Special Assistant Attorneys General”).

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<sup>39</sup> <https://www.mass.gov/files/documents/2019/10/24/Complaint%20-%20Comm.%20v.%20Exxon%20Mobil%20Corporation%20-%2010-24-19.pdf>

<sup>40</sup> See, e.g., <https://climatelitigationwatch.org/wp-content/uploads/2019/10/Massachusetts-Timeline.pdf>. This history is set forth in a Massachusetts Public Records Law complaint against MA OAG, on which the authors serve as counsel to the plaintiff, in *Energy Policy Advocates v. Healey, et al.* Suffolk County, Civil Action 2084CV01858 Massachusetts Superior Court, Suffolk County, available at <https://govoversight.org/wp-content/uploads/2020/07/Final-complaint-EPA-v-MA-OAG-II.pdf>.

<sup>41</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>42</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.

Public records created by MA OAG and released by another OAG assert that AG Healey's Office had five attorneys in attendance at that briefing, all five of whom were among the seven MA OAG attorneys who filed the suit against ExxonMobil.<sup>43</sup> The agenda for that “secret meeting,” obtained over the course of eighteen months of litigation against the Vermont OAG, lists three topics under “State Causes of Action”: Public nuisance claims, Consumer protection claims, and Key obstacles & opportunities to address them. (Complaint and Amended Complaint at 6, ¶ 23, FN 11). The agenda lists the presenter of the “consumer protection claims” argument simply as “UCLA”. (Id.). A public record obtained from the California Office of Attorney General, titled “Technical Advisors and Experts” lists Cara Horowitz, Co-Executive Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law, as the sole UCLA-affiliated presenter.<sup>44</sup> (Complaint and Amended Complaint at 7, ¶ 23.) Correspondence, obtained in California Public Records Act litigation against The Board of Regents of the University of California, show UCLA Law School Prof. Horowitz writing that day to her Center’s namesake and principal private benefactor Dan Emmet (Emmett is also namesake of the event’s co-host, the Harvard Emmett Environmental Law and Policy Clinic):

“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 at Harvard about going after climate denialism—along with a bunch of state and local prosecutors nationwide. Good discussion”.<sup>45</sup>

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<sup>43</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. UCLA’s presentation is the subject of an outstanding California Public Records Act request by the authors.

<sup>44</sup> <https://climatelitigationwatch.org/wp-content/uploads/2020/08/Union-of-Concerned-Scientists-Technical-Advisors-and-Experts.pdf>.

<sup>45</sup> April 25, 2016 email from Cara Horowitz to Dan Emmett, Subject: UCLA and Harvard Emmetts come together today. <https://climatelitigationwatch.org/activists-academics-plan-legal-assaults-with-a-bunch-of-state-and-local-prosecutors-nationwide/>. Released by the University of California Board of Regents, April 30, 2019, in response to

(Complaint and Amended Complaint at 7, ¶ 24, FN 12)

Such machinations are of immense public interest.

The public deserves to know what OAG stated about its intentions and desired use of these non-public resources in exchange for the private use of a public office.

### **CONCLUSION**

This arrangement by which an out-of-state, activist political donor appears to have utilized his vast wealth to harness the police powers of the State of Massachusetts — by funding assistant attorneys general with the purpose of furthering the donor’s preferred, special-interest agenda — is of great public interest. This is one among several reasons – in addition to the lack of privilege, as evidenced by the class of records described in the request as well as specific context of each – that the withheld excerpts from the eleven records should be disclosed to the public. *See, e.g.*, Editorial, “State AGs for Rent: Privately funded litigators wield state police power,” *Wall Street Journal Online*,<sup>46</sup> Nov. 6, 2018; Editorial, “State AGs’ Climate Cover-up” *Wall Street Journal*, June 8, 2019, at A14.

These records address a plea for private, supplemental funding to perform OAG duties, which in Massachusetts is legally permissible (although *quid pro quos* are not, and no statutory grant of authority to take outside money negates due process or other constitutional protections, all of which are of great public interest, not merely the interest of those immediately targeted by these private resources). Arguable or even facial legality, however, does not make something no longer of public interest, or exempt from public scrutiny. To the contrary, the arrangement here involving an activist donor with a political agenda, which hired and placed two activist attorneys

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CPRA Request 18-5367, in *Competitive Enterprise Institute v. The Regents of the University of California*, Superior Court of California, County of Los Angeles, Case No. 18STCP02832.

<sup>46</sup> Available at <https://www.wsj.com/articles/state-ags-for-rent-1541549567>.

to advance this agenda after recruiting the AGO to wield its considerable authority in its favor, is inherently of great public interest. One need only pose a counterfactual – the National Rifle Association chairing a Special Assistant Attorney General to advance its agenda, or an anti-abortion group financing a Special Prosecutor to investigate abortion providers – to remove any doubt.

There is no actual basis to claim that the parties assumed privilege for the Application, or discussion thereof. Even had they attempted to do so, nothing in the available context suggests the information warrants such protection from public inspection. OAG has not satisfied its burden for any of the eleven challenged documents, and should be ordered to produce the records in unredacted form forthwith, and to pay the costs and attorneys' fees associated with bringing this action, which already has prompted OAG to drop its impermissible withholding of records responsive to one of the two requests at issue.

Dated: October 2, 2020

Respectfully submitted,

The Plaintiff, Energy Policy Advocates,

by its attorney,  
/s/ Timothy Cornell

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed first-class mail, postage prepaid, on October 2, 2020 to: Massachusetts Office of Attorney General, One Ashburton Place, 20<sup>th</sup> Floor, Boston, MA 02108

/s/ Timothy Cornell

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