GOVERNMENT ACCOUNTABILITY & OVERSIGHT, Plaintiff, v. DIVISION OF LAW & PUBLIC SAFETY, OFFICE OF THE ATTORNEY GENERAL, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY DOCKET NO. MER-L-1396-23 Civil Action

BRIEF IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Through this litigation, Plaintiff Government Accountability & Oversight ("GAO") seeks to use New Jersey's Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, to gain access to wholly unredacted outside counsel retainer agreements that reveal legal strategy and information protected by the attorney-client privilege and attorney work-product doctrine. This case is part of Plaintiff's broader campaign to target states and municipalities engaged in climate change and other environmental litigation with public records requests and lawsuits under the guise of pursuing transparency.

Granting Plaintiff its requested relief, particularly while litigation is ongoing, would expose confidential portions of privileged retention agreements in two significant, ongoing environmental litigations. It also would allow both the public and the defendants in those litigations to gain insight into the State's litigation and settlement strategy. To prevent disclosure of such privileged information, the State has carefully and properly redacted the requested retainers under New Jersey's Open Public Records Act. Because these redactions are well-supported and appropriate under the law, this court should find that Plaintiff's OPRA request has been satisfied in full and dismiss its complaint with prejudice.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

A. The Underlying Litigations

On August 10, 2022, the Division of Law ("DOL") retained outside counsel Sher Edling, LLP, to represent the Attorney General of the State of New Jersey, the New Jersey Department of Environmental Protection ("DEP"), the Commissioner of DEP, the Administrator of the New Jersey Spill Compensation Fund, and the Acting Director of the New Jersey Division of Consumer Affairs ("DCA") in its 1,4-dioxane litigation, Attorney General of New Jersey v. Dow Chemical Co. et al., MER-L-000552-23 (filed Mar. 23, 2023). See Certification of Assistant Attorney General Aaron Kleinbaum dated September 22, 2023 ("Kleinbaum Cert."), at ¶ 3. The State asserted environmental and consumer fraud claims against companies it alleged were responsible for widespread 1,4-dioxane contamination across New Jersey. Ibid. The State also alleged that the defendants knowingly and willfully manufactured, promoted, and/or sold products containing 1,4-dioxane despite knowing that the chemical was toxic and would cause harm to the environment and human health. Ibid.

On October 17, 2022, the DOL, again on behalf of DCA, DEP, and the Attorney General, retained outside counsel Sher Edling, LLP, to represent the Attorney General, the DEP, and the Acting Director of DCA in the second environmental lawsuit of Platkin v. Exxon Mobil Corp. et al., MER-L-001797-22 (filed Oct. 22, 2022).

The State alleged that the defendants – members of the fossil fuel industry – deceived the public about the climate-change impacts of fossil fuels. Kleinbaum Cert., at ¶ 4. The complaint asserted claims under state common law and the New Jersey Consumer Fraud Act. Ibid.

Both matters are in active litigation. Id. at ¶ 6.

B. Prior OPRA Requests

Prior to receiving the OPRA request at issue in this case, the State received a nearly verbatim request from Robert Shilling, of Energy Policy Advocates,[1] on November 3, 2022. See Certification of Deputy Attorney General Rachel Manning dated September 22, 2023 ("Manning Cert."), Exhibit A. In response to that request, in January 2023, the State produced the same climate change and 1,4-dioxane retainers at issue here. Manning Cert., Exhibit B. At that time, however, the 1,4-dioxane complaint had not yet been filed and, as a result, the 1,4-dioxane retainer produced to EPA was more heavily redacted than the version produced to Plaintiff. Ibid.

[1] According to their public-facing websites, Energy Policy Advocates and Plaintiff share Board members in common. Compare epadvocates.org/about-2/ (last accessed September 22, 2023), with https://govoversight.org/#contact (last accessed September 22, 2023).

C. Current OPRA Request and Litigation

On May 24, 2023, after the retention agreements were signed and the complaints were filed, but while the cases remain in active litigation, Joe Thomas of GAO submitted an OPRA request seeking all common interest, engagement, retainer, pro bono, representation, nondisclosure, confidentiality and/or fee agreements that were entered into between the State and the law firm of Sher Edling, LLP, in 2021 or 2022. Manning Cert., Exhibit C. The request did not articulate any public interest in disclosure of those records. Ibid.

On June 8, 2023, the State timely responded to the OPRA request and provided Mr. Thomas with two retention agreements and a letter in response to his request. Manning Cert., Exhibit D. The State's cover letter explained that certain information had been redacted from the retainers because it revealed case or matter specific legal strategy or advice, attorney work product, attorney-client privileged material, or other privileged material pursuant to OPRA and the relevant regulations and case law. Ibid.

On July 21, 2023, after receiving the redacted versions of the retention agreements, Plaintiff filed this complaint, asserting only a single cause of action under OPRA. This opposition follows.

ARGUMENT

POINT I

DEFENDANTS APPROPRIATELY REDACTED THE RESPONSIVE RECORDS UNDER OPRA.

This court should find that the State properly redacted portions of the two retainers responsive to Plaintiff's OPRA request because they contain material protected by the attorney-client privilege and attorney work-product doctrine, as well as case or matter specific legal strategy or advice, and thus are exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)(2).

OPRA's "core concern is to promote transparency in government." Rivera v. Union Cnty. Pros. Office, 250 N.J. 124, 141 (2022). It "is designed to give members of the public 'ready access to government records' unless the statute exempts them from disclosure." Ibid. (quoting Burnett v. County of Bergen, 198 N.J. 408, 421 (2009)); see also N.J.S.A. 47:1A-1 ("[G]overnment records shall be readily accessible for inspection, copying, or examination . . . with certain exceptions."). A "government record" is "any document 'made, maintained or kept on file in the course of . . . official [government] business.'" Rivera, 250 N.J. at 141 (alterations in original) (quoting N.J.S.A. 47:1A-1.1). Despite that "expansive definition," "not all documents prepared by public employees are considered government records

pursuant to OPRA." O'Boyle v. Borough of Longport, 218 N.J. 168, 184 (2014). Where "the value of disclosure is outweighed by the need to maintain privacy or confidentiality," OPRA "exempts . . . documents from disclosure that would be inimical to the public interest or other important public values." Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 550 (2012).

OPRA explicitly excludes "any record within the attorney-client privilege" from the definition of "government record." N.J.S.A. 47:1A-1.1; see also Paff v. Div. of Law, 412 N.J. Super. 140, 150 (App. Div. 2010). This privilege protects communications between attorneys and their clients that are "expected or intended to be confidential." O'Boyle, 218 N.J. at 185. Communications between attorneys and their clients are "presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege." N.J.S.A. 2A:84A-20(3); N.J.R.E. 504(3). "The policy underlying this privilege is to promote full and free discussion between a client [and their] attorney . . . in order to prepare one's case." Macey v. Rollins Envtl. Servs. (N.J.), Inc., 179 N.J. Super. 535, 539 (App. Div. 1981).

While retainer agreements are not automatically shielded from disclosure, documents that "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular

areas of law, fall within the [attorney-client] privilege." Jean-Pierre v. J&L Cable TV Servs., No. 1:18-cv-11499, 2021 U.S. Dist. LEXIS 252697, *6-7 (D. Mass. June 28, 2021) (alteration in original) (quoting Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999)).[2] Manning Cert., Exhibit E.

In Jean-Pierre, the court held that certain paragraphs of the retainer agreements could be redacted because they "discuss[ed] specific paths that th[e] litigation could take and counsel's recommended approach under different eventualities," and thus "divulge[d] confidential information regarding legal advice." Id. at *7 (quoting Chaudhry, 174 F.3d at 403). On the other hand, paragraphs that provided "a general description of the relationship" between the plaintiffs and their counsel, rather than "legal theories or advice that are specific to th[e] case," were not privileged. Id. at *8; see also Stanziale v. Vanguard Info-Sols. Corp., No. 06-2208, 2008 Bankr. LEXIS 1454, *5 (D.N.J. Apr. 21, 2008) (finding "a portion of the documents discloses more than merely the general purpose of the retention, and in fact reveals specific areas of concern and anticipated issues for further research and/or action," and was therefore protected by the attorney-client privilege). Manning Cert., Exhibit F.

[2] As required by Rule 1:36-3, copies of all unpublished or unreported decisions have been furnished with this filing. Counsel is unaware of any contrary authority.

"Documents that fall within the scope of the work-product doctrine are also shielded from OPRA." O'Boyle, 218 N.J. at 185. By its own terms, OPRA does not "abrogate or erode any executive or legislative privilege or grant of confidentiality" that is "established or recognized by" the State's constitution, statutes, court rules or case law, and that "may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9(b); see also Sussex Commons, 210 N.J. at 542 ("Documents covered by the work-product privilege are exempt to the extent they are protected by N.J.S.A. 47:1A-9."). Falling squarely within that provision, the work-product doctrine has long been recognized in New Jersey's Court Rules and jurisprudence. See, e.g., O'Boyle, 218 N.J. at 183 ("[T]he need for an attorney and his client to communicate in confidence and the closely related need for an attorney to keep work performed for a client from disclosure to an adversary" are "well-recognized public policies.").

First established by the United States Supreme Court in 1947, the work-product doctrine recognizes "the need for lawyers to 'work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" Id. at 189 (quoting Hickman v. Taylor, 329 U.S. 495, 510 (1947)). New Jersey's codification of the doctrine in 1948 "was considered broader than the rule recognized in Hickman." Ibid. (citing Crisafulli v. Pub. Serv. Coordinated Transp., 7 N.J. Super. 521, 523 (Cty. Ct. 1950)).

It protects from disclosure "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." R. 4:10-2(c). To qualify for the privilege, the "materials sought to be discovered" must have been "prepared in anticipation of litigation rather than in the ordinary course of business." Pressler & Verniero, N.J. Court Rules, cmt. 4.1 on R. 4:10-2(c) (2022) (citing Miller v. J.B. Hunt Transp., 339 N.J. Super. 144, 148 (App. Div. 2001)).

Courts have found that the work-product doctrine can shield parts of retainer agreements from disclosure. For example, redactions to a retainer were proper where they "disclose[d] Plaintiff's litigation strategy" and "sp[oke] directly to what Plaintiff can expect from the action moving forward, how Plaintiff's counsel may proceed, and certain expectations." Ramirez v. Marriott Int'l, No. 7:20-cv-02397, 2022 U.S. Dist. LEXIS 209256, *7 (S.D.N.Y. Nov. 16, 2022). Manning Cert., Exhibit G. And, faced with a nearly identical public records request and lawsuit as the present matter, the Maryland Special Court of Appeals held that, in light of the "ongoing litigation involving the City," "the City's agreement with outside counsel constituted attorney work product in anticipation of litigation and was, therefore, protected from disclosure" under Maryland's Public Information Act. Energy Policy Advocates v. Mayor of Baltimore,

No. 1059, 2021 Md. App. LEXIS 607, at *18 (Md. Ct. Spec. App. July 15, 2021). Manning Cert., Exhibit H.

Finally, duly-promulgated Department of Law and Public Safety ("LPS") regulations, made operative by N.J.S.A. 47:1A-9(a), shield records "that may reveal[] case or matter specific legal strategy or advice, attorney work product, attorney-client privileged material, or other privileged material." N.J.A.C. 13:1E-3.2(a)(3). Outside counsel in this case was retained by the DOL on behalf of its client agencies and the Attorney General, and is subject to the Attorney General's Outside Counsel Guidelines. See Kleinbaum Cert., at ¶ 5. Therefore, as outside counsel supervised by the DOL, N.J.A.C. 13:1E-3.2(a)(3) protects its work product.

The State, especially when litigating a case or supervising litigation, is at least entitled to the same protections as would be guaranteed to private litigants when it comes to attorney work product or attorney-client privilege. See Sussex Commons, 210 N.J. at 548 (recognizing that applying OPRA to public education legal clinics but not private legal clinics would lead to an "absurd" and inequitable result). Indeed, as the Appellate Division recognized in both Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489 (App. Div. 2011) ("Drinker I"), and Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 431 N.J. Super. 85 (App. Div. 2012) ("Drinker II"), when it denied access to unfiled deposition transcripts under both

OPRA and the common law right of access, allowing release of these records to the requestor, which was the State's adversary in ongoing litigation, would expose "the mental processes and strategy of the attorneys representing the State in those matters." Drinker II, 431 N.J. Super. at 90. "The State, on the other hand, would have no reciprocal right to the unfiled discovery in the custody of plaintiff and other private attorneys who represent parties in environmental litigation." Ibid. This would result in the State—and by extension the public—being placed at a "severe disadvantage in prosecuting such matters." Ibid.

Here, adhering closely to this well-settled law, the State properly redacted the 1,4-dioxane and climate change retainers in accordance with the OPRA exemptions described above. Like other courts to consider similar lawsuits by the same plaintiff and its sibling organization, Environmental Policy Advocates, this court should reject this effort to obtain privileged material under the guise of protecting the public fisc. See, e.g., Energy Policy Advocates v. Ellison, 980 N.W.2d 146 (Minn. 2022); Energy Policy Advocates v. Mayor of Baltimore, 2021 Md. App. LEXIS 607; Gov't Accountability & Oversight, P.C. v. Frosh, No. 2602, 2021 Md. App. LEXIS 174 (Md. Ct. Spec. App. Mar. 1, 2021). Manning Cert., Exhibits I; J.

A. Defendants Properly Redacted Portions of the Retention Agreements That Contain Contingency Fee Grids.

This court should find that the State properly redacted contingency fee grids from page B-3 of both the 1,4-dioxane and climate change retainers. Manning Cert., Exhibit D; see also Kleinbaum Cert., at ¶ 15. Unlike hourly billing rates or fixed fee schedules, the contingency grids provide insight into how the State and its outside counsel value these two cases by describing how counsel will be paid as a percentage of various recovery outcomes. Kleinbaum Cert., at ¶ 15. Those contemplated recovery outcomes indicate what the State and outside counsel believe to be likely scenarios in a judgment or settlement. Ibid. And those likely scenarios were the product of confidential communications between the attorney and client, subject to the attorney-client privilege. Ibid.

These contingency grids also disclose "specific paths that this litigation could take," Jean-Pierre, 2021 U.S. Dist. LEXIS 252697, at *7, and "speak directly to what [the State] can expect from the action moving forward" and "certain expectations" regarding litigation outcomes, Ramirez, 2022 U.S. Dist. LEXIS 209256, at *7. Embedded in retention letters for litigation, these grids were clearly created "in anticipation of litigation," Pressler & Verniero, cmt. 4.1 on R. 4:10-2(c), and constitute the DOL's and Sher Edling's "mental impressions, conclusions,

opinions, or legal theories. R. 4:10-2(c); Kleinbaum Cert., at ¶ 15. Therefore, they are protected from disclosure under OPRA as attorney work-product.

The contingency fee grids are also exempt from production because they "reveal case or matter specific legal strategy." N.J.A.C. 13:1E-3.2(a)(3); N.J.S.A. 47:1A-9(a). The contingency grids describe the percentage of counsel's fees with respect to differing thresholds of recovery. Kleinbaum Cert., at ¶ 15. These thresholds are important to DOL's legal strategy, as the real value of a settlement after attorney fees are paid will necessarily inform the State's position in settlement negotiations. Ibid. Furthermore, if revealed publicly during the course of the litigation, and placed in a skilled adversary's hands, these thresholds could be used to drive a wedge between the State and Sher Edling by targeting "pressure points" at which the attorney's and client's incentives may differ. Ibid.

For all of these reasons, this court should find that the contingency grids in both retainers are exempt from disclosure under OPRA because they reveal case-specific legal strategy, and material protected by the attorney-client privilege and work-product doctrine.

B. Defendants Appropriately Redacted Information About the Calculation of Attorneys' Fees Under OPRA.

This court should also find that the State appropriately redacted other details regarding how attorneys' fees will be calculated because they also will reveal attorney-client privileged information, attorney work product, and case-specific legal strategy.

Specifically, information redacted on page B-2 in both retainers discusses how attorneys' fees will be calculated based on various forms of relief that the State could potentially recover in litigation. Id. at ¶ 16. For example, the redacted paragraphs specify certain costs that will or will not be included in any recovery for the purpose of calculating attorneys' fees, as well as by what methods Sher Edling can be paid. Ibid. Those details provide insight into how Sher Edling's fees will be calculated and paid in different scenarios, which is an important aspect of the State's negotiation strategy. Ibid. Thus, like the contingency fee grids, disclosing this information would indicate to opposing counsel how attorneys' fees factor into an overall settlement and give insight into how the State and Sher Edling value different settlement outcomes. Ibid.

These portions of the retention agreements are also protected by the attorney-client privilege because they were conveyed with the expectation that they would remain confidential, particularly

during the course of the litigation. See O'Boyle, 218 N.J. at 185; Kleinbaum Cert., at ¶ 12. Likewise, because they describe the specific internal processes by which attorneys' fees and their inputs are calculated, and were prepared in anticipation of litigation, these sections disclose case-specific legal strategy and attorney work product. See N.J.A.C. 13:1E-3.2(a)(3); R. 4:10-2(c); Pressler & Verniero, cmt. 4.1 on R. 4:10-2(c); Kleinbaum Cert., at ¶ 16. Therefore, this court should find that details regarding how attorneys' fees will be calculated and paid were properly redacted under OPRA.

C. Defendants Appropriately Redacted Details About Litigation Costs Under OPRA.

The State also correctly redacted multiple sections of both retainers that describe certain potential litigation costs, who will incur them, how they will be calculated, and how they may or may not form the basis of a recovery and attorneys' fees. Kleinbaum Cert., at ¶ 17. These redactions can be found on the cover pages and page B-1 of both retainers, as well as on page C-1 of the climate change retainer. Ibid. They are exempt from OPRA for multiple reasons.

First, with respect to the redactions on the cover page of both retention agreements, they would reveal information that would not be releasable in discovery as attorney work product, including potential information about whether the State might be

retaining consulting experts. Ibid. Rule 4:10-2(d), recognizing the need to protect attorney work product, places a high bar on the discovery of records related to consulting experts, providing that such materials are discoverable "only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." See also State v. Campione, 462 N.J. Super. 466, 506 (App. Div. 2020) ("It is the clear intention of [Rule 4:10-2(d)(1)] that it generally apply only to experts who will be testifying at trial, leaving parties free to consult with other experts whose opinion is not discoverable. A party's consultation with an expert whose identity and opinion is not disclosed to the adversary is privileged, precluding the adversary from himself producing that expert in the absence of exceptional circumstances within the meaning of [Rule 4:10-2(d)(3)].") (quoting Pressler & Verniero, cmt. 5.2.1 on R. 4:10-2(d)(1)) (alterations in original) (citation omitted).

These redactions also implicate the attorney-client privilege because the redacted information goes beyond disclosing "merely the general purpose of the retention, and in fact reveals specific areas of concern and anticipated issues for further research and/or action." In re Stanziale, 2008 Bankr. LEXIS 1454, at *5; see also Ramirez, 2022 U.S. Dist. LEXIS 209256, at *8 (quoting In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979)) ("[T]he Retainer

Agreement invokes the attorney-client privilege because certain provisions were 'made in contemplation of future professional action by the attorney.'").

Second, these redacted portions indicate how certain litigation costs will be calculated and incorporated into a recovery and attorneys' fees. Revealing how a recovery is defined with respect to certain costs, and how numbers are calculated for the various types of relief that form the basis of attorneys' fees, would likewise disclose attorney work product and provide specific insight into the State's negotiation strategy. See N.J.A.C. 13:1E-3.2(a)(3); R. 4:10-2(c); Ramirez, 2022 U.S. Dist. LEXIS 209256, at *7. These sections were unquestionably prepared in anticipation of litigation and were intended to stay confidential, especially during the course of the litigation. See Pressler & Verniero, cmt. 4.1 on R. 4:10-2(c); O'Boyle, 218 N.J. at 185. For these reasons, the court should find that the State properly redacted information about specific litigation costs.

D. Defendants Appropriately Redacted Information Regarding The Outside Counsel Guidelines.

Finally, the State redacted two paragraphs on page C-1 of the climate change retainer.[3]

[3] The title of this section is "Exceptions to Outside Counsel Guidelines," but it is certain text preceding the exceptions—not the exceptions themselves—that are redacted in this section. These exceptions appear, unredacted, on pages C-2 and C-3 of the climate change retainer.

The redacted part of this section discusses case-specific legal strategy and work product, including how Sher Edling and the State would approach settlement negotiations in various scenarios. Kleinbaum Cert., at ¶ 18; see also N.J.A.C. 13:1E-3.2(a)(3). Revealing this information would disclose "legal theories or advice that are specific to this case," Jean-Pierre, 2021 U.S. Dist. LEXIS 252697, at *8, as well as what the State "can expect from the action moving forward, how [its] counsel may proceed, and certain expectations," Ramirez, 2022 U.S. Dist. LEXIS 209256, at *7. Because this information was conveyed in anticipation of litigation and with the expectation of confidentiality at least while litigation is ongoing, it is exempt from disclosure under the attorney-client privilege and work-product doctrine. See N.J.S.A. 47:1A-1.1; Pressler & Verniero, cmt. 4.1 on R. 4:10-2(c); O'Boyle, 218 N.J. at 185.

E. The Active Litigation Requires Strict Application Of These Privileges.

Here, the State has already shown that it is committed to "maximiz[ing] public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008). But the release of unredacted retention letters during

the active litigation of both cases at issue would not only intrude on the attorney work product doctrine, attorney-client privilege, and legal strategy, it also would risk opening the door to gamesmanship that has no place in litigation.

Discovery rules "were designed to eliminate, as far as possible, concealment and surprise in the trial of law suits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990). "'A lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law.'" Herrick v. Wilson, 429 N.J. Super. 402, 407 (Law Div. 2011) (quoting Kurdek v. W. Orange Bd. of Educ., 222 N.J. Super. 218, 226 (Law Div. 1987)). For this reason, courts have tried for the last fifty years "'to transform civil litigation from a battle royal to a search for truth.'" Ibid. (quoting Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 467 (1998)). OPRA recognizes these same principles. Drinker I, 421 N.J. Super. at 498; Drinker II, 431 N.J. Super. at 91; see also Spectraserv, Inc. v. Middlesex Cty. Utils. Auth., 416 N.J. Super. 565, 581 (App. Div. 2010) ("Although the pendency of collateral litigation 'neither diminishes nor expands the requestor's right of access to government records under OPRA,' it is not a fact to be ignored.") (citation omitted).

Here, the State has already shown its commitment to maximizing transparency under OPRA by appropriately moving the needle on these redactions with respect to the nature of the investigations or litigation. When EPA requested the 1,4-dioxane retainer in November 2022, the State produced a more heavily redacted version because the complaint had not yet been filed and internal investigations were still underway. Manning Cert., Exhibit B. By the time Plaintiff requested the same retainer in June 2023, the complaint had been filed, and the State voluntarily amended its prior redactions to reveal information that was no longer confidential. Manning Cert., Exhibit D.

In a similar public records lawsuit by Plaintiff against the Maryland Attorney General's Office, the circuit court granted summary judgment for the government, finding that the redacted sections of the documents were attorney-client privileged because they revealed the Attorney General's "potential legal plans and litigation strategies." GAO v. Frosh, 2021 Md. App. LEXIS 174, at *18. The appellate court affirmed, recognizing that the Attorney General "redacted only the portions . . . that it determined to be protected by the attorney-client privilege" and, after "reconsider[ing] its initial redactions," "determined that additional portions . . . could be released." Id. at *21.

Like Maryland, the State here has already reconsidered its initial redactions and determined that additional portions could

be released. See ibid. And, after the climate change and 1,4-dioxane litigations are resolved and the risk of intruding on legal and settlement strategy is diminished, the State recognizes that a further reduction in redactions may be appropriate. But allowing access to unredacted records now, during active litigation would, like in Drinker II, place the State at the same "severe disadvantage" the Appellate Division declined to endorse. 431 N.J. Super. at 90.

F. The Rules of Professional Conduct Do Not Compel a Contrary Conclusion.

Plaintiff insists that, under the New Jersey Rules of Professional Conduct (RPC) 1.8(f), the public is entitled to know whether Sher Edling disclosed any outside funding sources for its climate change litigation work to the State, and whether the State gave informed consent to the compensation terms in Sher Edling's retainer. See Compl. ¶¶ 8, 11; Moving Br. at 2, 4. But this argument is unavailing because Plaintiff misconstrues the RPC and the role of the State in this litigation.

RPC 1.8(f) provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
> (3) information relating to representation of a client is protected as required by RPC 1.6.

This RPC governs an attorney's obligations to their client. The State, not the public, is the client in the Platkin v. Exxon climate change litigation. Therefore, it is the State – not the public – that may assert its rights under the RPC if it did not give informed consent to its attorney's fee arrangement. Nothing in RPC 1.8(f) compels public disclosure of the unredacted retainer or gives private citizens standing to enforce that RPC. And, Plaintiff's argument that it brings this action in the name of protecting the public fisc is belied by the fact that it seeks attorneys' fees and costs to be shouldered by the very taxpayers it claims to defend. Therefore, the court should reject this argument.

POINT II

PLAINTIFF IS NOT ENTITLED TO ACCESS TO THE REDACTED INFORMATION UNDER THE COMMON LAW RIGHT OF ACCESS.

It is undisputed that Plaintiff did not assert a common law cause of action in its Verified Complaint. Nor did it mention the common law right of access anywhere in its brief. It has therefore waived any claim under the common law right of access.

Nevertheless, even had Plaintiff pursued a common law right of access claim in addition to an OPRA one, the State would prevail under a common law right of access analysis because there is no public interest or need expressed in Plaintiff's OPRA request,

Verified Complaint, or brief. See O'Boyle, 218 N.J. at 196-97. By contrast, the State has a strong interest in preventing disclosure of the redacted information while the litigation is ongoing for the reasons described in the preceding sections. See Drinker II, 431 N.J. Super. at 90-91. Thus, Plaintiff has either waived any common law argument, or has failed to meet its burden to demonstrate that a public interest in disclosure outweighs the government's interest in confidentiality.

CONCLUSION

For all of these reasons, this court should find that the State fully and appropriately responded to Plaintiff's OPRA request by providing the 1,4-dioxane and climate change retainer agreements, redacted to protect case specific legal strategy and material within the attorney-client privilege and work-product doctrine. Plaintiff's Verified Complaint and Order to Show Cause should be dismissed with prejudice.

Respectfully submitted,
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By: /s/ Rachel Manning
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GOVERNMENT ACCOUNTABILITY & OVERSIGHT, Plaintiff, v. DIVISION OF LAW & PUBLIC SAFETY, OFFICE OF THE ATTORNEY GENERAL, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY DOCKET NO. MER-L-1396-23 Civil Action **CERTIFICATION OF COUNSEL**

Aaron Kleinbaum, of full age, hereby certifies as follows:

1. I am an Assistant Attorney General in the Department of Law and Public Safety, Division of Law. I have been with the Division of Law since August 5, 2019. I have been a member of the New Jersey bar for over 30 years, practicing environmental law and litigation in private practice, at a non-profit public interest law center, and in-house at a major New Jersey based company. I am fully familiar with the facts stated in this certification and base the same on firsthand knowledge.

2. This certification is submitted in support of Defendants' opposition to Plaintiff's Verified Complaint and Order to Show Cause.

3. On or about August 10, 2022, the Division of Law ("DOL") retained the law firm Sher Edling, LLP, to represent the Attorney General of the State of New Jersey, the New Jersey Department of Environmental Protection ("DEP"), the Commissioner of DEP, the Administrator of the New Jersey Spill Compensation Fund, and the Acting Director of the New Jersey Division of Consumer Affairs ("DCA") in the matter of Attorney General of New Jersey v. Dow Chemical Co. et al., MER-L-000552-23 (the "1,4-dioxane matter"). This case, which was filed on March 23, 2023, involves common law, environmental, public trust and consumer fraud claims by the State against companies it alleged were responsible for widespread 1,4-dioxane contamination across New Jersey. The complaint alleged that the defendants knowingly and willfully manufactured, promoted, and/or sold products containing 1,4-dioxane despite knowing, or should have known, that the chemical was toxic and would cause harm to the environment and human health.

4. On or about October 17, 2022, the DOL retained Sher Edling, LLP, to represent the Attorney General, the DEP, and the Acting Director of DCA in the matter of Platkin v. Exxon Mobil Corp. et al., MER-L-001797-22 (the "climate change matter"). In this case, filed on October 22, 2022, the State alleged that the

defendants—members of the fossil fuel industry—deceived the public about the climate-change impacts of fossil fuels. The complaint asserted claims under state common law and the New Jersey Consumer Fraud Act.

5. As outside counsel to the State, Sher Edling is subject to the Attorney General's Outside Counsel Guidelines.

6. Both cases are in active litigation at this time.

7. I participated in the process to retain Sher Edling as outside counsel in both the climate change and 1,4-dioxane matters, including discussing and reviewing the terms of the retainer agreements.

8. Throughout my involvement in these matters, I, along with other attorneys in the DOL, engaged in extensive communications with attorneys from Sher Edling, and with representatives of DCA and DEP.[1] We discussed the facts and allegations, discovery, and legal strategy. Sher Edling, the clients, other attorneys at the DOL and I shared insights and analysis of the legal issues, including the strengths and weaknesses of the cases.

9. I am aware of Plaintiff's May 24, 2023 OPRA request for all common interest, engagement, retainer, pro bono, representation, nondisclosure, confidentiality and/or fee

[1] The DEP and the Acting Director of DCA were among the plaintiffs named in the climate change and 1,4-dioxane litigation.

agreements that were entered into between the State of New Jersey and Sher Edling, LLP in 2021 or 2022.

10. I personally reviewed the responsive records to Plaintiff's request, which include the retainer agreements with Sher Edling for the climate change and 1,4-dioxane matters.

11. I also personally reviewed all redactions made to those retainers, including for attorney-client privilege, the attorney work product doctrine, and case or matter specific legal strategy or advice.

12. The redactions made to both retainers under the attorney-client privilege reflect the substance of the above-mentioned communications between the DOL, Sher Edling, and NJDEP and NJDCA. Those communications were intended to remain confidential during the course of litigation.

13. The redactions made to the retainers under the work product doctrine reflect counsel's research, thought processes, and mental impressions regarding calculation of litigation costs and attorneys' fees with respect to different potential litigation outcomes.

14. The redactions made pursuant to N.J.A.C. 13:1E-3.2(a)(3) reveal legal strategy that is specific to the climate change and 1,4-dioxane matters. Those redacted entries contain sensitive information about the State's litigation and settlement strategy.

15. In particular, the contingency grids on page B-3 of both retainers reveal how the State values the two cases, as well as the percentage of outside counsel's fees with respect to different thresholds of recovery. Those thresholds and percentages are the product of confidential communications between the DOL, Sher Edling, DEP, and DCA that indicate what counsel views as likely outcomes in this litigation. They reveal numbers and calculations that reflect counsel's research, mental impressions, legal advice and strategy, assessment of the strengths and weaknesses of the cases, and prediction of potential outcomes. They also indicate "pressure points" at which the State's and Sher Edling's incentives may differ, which could be used to drive a wedge between the State and Sher Edling in settlement discussion. This is in part because the State's position in negotiations will be influenced by what the real value of a settlement is to the State after attorneys' fees are paid. Overall, the contingency grids would reveal and compromise the State's legal strategy in both cases, especially if disclosed together with the other redacted parts of the retainers.

16. The redacted material on page B-2 of both retainers describes how certain costs will be factored into Sher Edling's attorneys' fees, by what means Sher Edling will be paid under various litigation outcomes, and how attorneys' fees will be calculated based on different potential forms of relief, including what costs will or will not be included in any recovery for the

purpose of calculating attorneys' fees. These sections describe the specific internal processes by which attorneys' fees and their inputs are calculated, which reveals counsel's mental impressions, conclusions, legal strategy and advice. They also indicate how attorneys' fees will be calculated and paid in different scenarios, and how the State and its counsel may value settlement outcomes differently. That reveals an important aspect of the State's negotiation strategy because it would allow opposing counsel to discern how attorneys' fees factor into an overall outcome and where the State's and Sher Edling's settlement incentives differ, similar to the contingency grids.

17. The redacted sections on the cover pages and page B-1 of both retainers, and page C-1 of the climate change retainer, discuss details about litigation costs, including who will incur them, how they will be calculated based on different forms of relief, and whether a recovery will include certain costs. Those numbers and calculations reveal counsel's mental impressions, conclusions, legal theories, and strategy, and were the subject of confidential discussions between the DOL, Sher Edling, DEP, and DCA. Disclosing the redacted material would give the defendants in the ongoing litigations insight into case-specific legal strategy that it would not be entitled to obtain in discovery, such as potential retention of consulting experts.

18. Within the section titled "Exceptions to Outside Counsel Guidelines" on page C-1 of the climate change retainer, the two redacted paragraphs discuss counsel's specific legal strategy and legal theories with respect to the climate change matter. Those paragraphs implicate the State's approach to settlement under various circumstances. If publicly disclosed, this redacted information would reveal an important part of the State's negotiation strategy.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Aaron Kleinbaum
Aaron Kleinbaum (ID: 002681991)
Assistant Attorney General

Date: September 22, 2023