

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
Civil Action No.: 2084CV01858

ENERGY POLICY ADVOCATES,)
)
<i>Plaintiff,</i>)
v.)
)
OFFICE OF THE ATTORNEY GENERAL OF)
MASSACHUSETTS, MAURA HEALEY, in her)
official capacity as Attorney General, et al.,)
)
<u>Defendants.</u>)

PLAINTIFF’S OPPOSITION TO DEFENDANT’S CROSS MOTION FOR ENTRY OF SCHEDULING ORDER AND REPLY IN SUPPORT OF MOTION FOR ENTRY OF ORDER OF IMPOUNDMENT AND PROTECTIVE ORDER

INTRODUCTION

With the possible exception of the JFK files, few secret public records improve with age – most grow stale and useless. Stale records are of little use¹ to the electorate and deprive them of the opportunity to engage in thoughtful debate over government policy, i.e., self-governance, or democracy. Timely access to the record of how government institutions are used, with whom and even on occasion *for* whom, is the impetus behind public records laws. Had Defendant filed its motion three years ago, that would have facilitated a round of briefing to ultimately obtain what to this day we still do not have: sufficient information to brief on summary judgment. Today, Defendant’s filing amounts to little more than yet one more delaying tactic in a long line of the same in an action that is now nearly four years old. The Attorney General’s (“AGO”) motive of denial by delay has been on display from the beginning in this action and its sister

¹ *Payne Enterprises, Inc. v. U.S.*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“stale information is of little value yet more costly than fresh information ought to be.”)

action, *Energy Policy Advocates v. Maura Healey et al.*, Suffolk Sup. Ct., Civil Action. No. 1984CV01753, or “*EPA v. Healey I*” – two actions that, contrary to the AGO’s assertions, share numerous underlying facts and are procedurally very similar. In public record litigation such delaying tactics are routinely referred to as “bad faith” and justify exactly the intervention that Plaintiff now seeks.² For these reasons and for the additional and related reason of judicial economy, the AGO’s Opposition and Cross-Motion should be denied and Plaintiff’s Motion granted, so that the parties will be able to effectively and efficiently brief summary judgment rather than doing so on a threadbare and facially incomplete record.

ARGUMENTS

1. This action and its sister action, *EPA v. Healey I*, share underlying facts and are highly similar procedurally making the Gordon Protocol from that matter³ appropriate here.

Like its sister action *EPA v. Healey I*, the records sought here pertain to “secret meetings”⁴ between members of the AGO and private parties, including outside attorneys and special interest groups, seeking the AGO’s involvement in a climate litigation campaign against other private parties. Many of the same facts and actors are in play here. See e.g., AGO’s January 30, 2024 Index at record nos.: 17-19, 22-24, 26-28, 29-39 referencing allegedly privileged emails “discussing and attaching weekly updates from the State Energy and Environmental Impact Center at NYU.” This organization is the same organization that was

² See *In re Clinton*, 970 F.3d 357 (D.C. Cir. 2020) (noting that courts may order discovery in related FOIA actions where evidence of agency bad faith is shown).

³ See *Energy Policy Advocates v. Maura Healey et al.*, Suffolk Sup. Ct., Civil Action. No. 1984CV01753 at Docket no. 1, Procedural Order, hereinafter “Gordon Protocol”.

⁴ See FN nos. 1-2, Plaintiff’s Memorandum of Law in Support of Motion for Entry of Order of Impoundment and Protective Order.

placing, directing and funding the salaries of the “Special Assistant Attorney Generals” at the AGO, and the AGO’s relationship with that Center, for the purpose of advancing the outside parties’ preferred agenda, was the principal focus of *EPA I*. See *EPA v. Healey et al.*, Civil Action. No. 1984CV01753 at Docket no. 1, Complaint at paragraph 14.

Like that sister action⁵ the AGO’s overly expansive application of exemptions, including the attorney-client and work product privileges, are on display in the AGO’s January 30, 2024 Index. See e.g., Index record nos.: 17-19, 22-24, 26-28, 29-39 *supra* regarding discussions over a third-party actor – the State Energy and Environmental Impact Center at NYU. See e.g., Index record nos.: 20-21, 25, 40 and 59 which are allegedly privileged or exempt despite being about public newspaper “articles”. For another example of this continued and overly expansive use of exemptions the Court need only look at one document finally produced, after over four years, on January 29, 2024 and comprising one line “Pls call me if you have a sec. Any number below.” See Exhibit A (AGO’s production letter from January 18, 2024 and appended single document that was produced). The AGO previously deemed this record to be a privileged or exempt record.

Here, as in *EPA I*, the AGO employs repetitive boilerplate descriptions of the indexed and withheld information and broadly employs multiple exemptions. Nearly every single document still withheld after further narrowing (Plaintiff counts 96 out of 102 total records) is withheld because it allegedly “relates to” or is “concerning” material that is allegedly privileged or exempt. Needless to say, the term “relates to” or “concerning” is not the standard for the application of the attorney-client privilege. See *Upjohn Co. v. United States*, 449 U.S. 383, 395-

⁵ See *Energy Policy Advocates v. Maura Healey et al.*, Suffolk Sup. Ct., Civil Action. No. 1984CV01753 at Docket no. 41, Memorandum of Decision and Order on Plaintiff’s Motion for Attorney’s Fees (“EPA’s pursuit of these records was met with aggressive resistance from the AGO at almost every turn. *Such resistance took the form of expansive exemption and privilege claiming by the AGO...*”) (emphasis added).

96 (1981) (“[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.”) (internal quotations omitted). No matter. Perhaps emboldened by its limited success in applying this “relating to” standard recently in *EPA I*, the AGO now applies it liberally.⁶

To add insult to injury the AGO layers its claimed exemptions and boilerplate one over the other — leaving Plaintiff to guess at which applies and to what portion or attachment. Needless to say, it is unhelpful to Plaintiff which, the record of the past few years in these matters suggests, was exactly the point. Such tactics are justifiably frowned upon by courts and should not be allowed to stand here.⁷ If they are, the result will likely be the same as in the sister action *EPA I*, namely summary judgment motions followed by further delays and intervention of this Court when it becomes inescapable that insufficient information exists to rule on these.

2. As in *EPA I* the AGO has engaged in repeated tactical delaying actions thus meriting the Court’s intervention to break the cycle.

Plaintiff has made numerous attempts to minimize the need for this Court’s intervention both this matter and *EPA I*. *See e.g.*, Exhibit B (proposed joint motion to un-impound judicial records in the latter). At every turn these have been met with cursory denials ...and more motion practice. This Court has recently acknowledged exactly that in the prior matter. *See* FN 5, *supra*.

⁶ *See Energy Policy Advocates v. Maura Healey et al.*, Suffolk Sup. Ct., Civil Action. No. 1984CV01753, Defendants Motion in Opposition to Plaintiff’s Motion for Un-Impoundment at Docket 35, paragraph 13 (describing the AGO’s position that certain portions of judicial records that allegedly “describe” portions of exempt records should remain impounded).

⁷ *See Judicial Watch, Inc. v. Food Drug Admin*, 449 F.3d 141, 150 (D.C. Cir. 2006) (“[w]here the document description only vaguely indicates the information contained therein, the use of multiple exemptions for some documents adds to the confusion about which withheld information fits with which exemption.”)

Plaintiff's most recent further narrowing of the number of records in dispute⁸ were similarly met by more recalcitrance from the AGO. The January 30, 2024 index⁹ was still more unintelligible than the July of 2023 index.¹⁰ This newer index offered little intelligible new information on the massively narrowed (by 82%) list of records sought but rather was an entirely new creation that still re-asserted the same boilerplate descriptions and exemptions. By failing to produce a more factually descriptive version of the July 2023 Index, it was as if the AGO meant to deprive Plaintiff of the possibility of correlating the July 2023 and the January 2024 indexes to even minimally adding to its knowledge of the disputed records.

CONCLUSION

This Court has acknowledged Defendant's expansive use of exemptions and privileges and procedural delaying tactics in a virtually identical sister action to this action, *EPA I*. This old and anti-democratic habit now displays itself again here — both in the production of a late and seemingly intentionally confusing index and fierce opposition to the harmless but effective protocol put forth by Plaintiff in the subject of this motion practice. In retort the AGO asserts that 'this time is different.' It is not. For the foregoing reasons this Court should deny the AGO's cross motion and opposition and implement the Gordon Protocol. Only by doing so will this Court be able to promptly adjudicate summary judgment in this matter, without the need for further proceedings to flesh out the AGO's serial failures to provide logs which allow for intelligent and meaningful review.

⁸ See Exhibit D, Plaintiff's Memorandum of Law in Support of Motion for Entry of Order of Impoundment and Protective Order (memorializing Plaintiffs narrowing of records still being sought).

⁹ See Exhibit E, Plaintiff's Memorandum of Law in Support of Motion for Entry of Order of Impoundment and Protective Order. (comprising the indexes produced by AGO on January 30, 2024).

¹⁰ See Exhibit C, Plaintiff's Memorandum of Law in Support of Motion for Entry of Order of Impoundment and Protective Order. (comprising the indexes produced by AGO around July of 2023).

Dated: March 25, 2024

Respectfully Submitted
Energy Policy Advocates
By its attorneys,

/s/ Nathaniel M. Lindzen
Nathaniel M. Lindzen (BBO #689999)
nlindzen@corpfraudlaw.com
Law Office of Nathaniel M. Lindzen
57 School Street
Wayland, MA 01778
Phone: (212) 810-7627

Certificate of Service

I, Nathaniel M. Lindzen, attorney for plaintiffs Energy Policy Advocates, hereby certify that on March 25, 2024, I served the foregoing, electronically by email on:

Katherine Fahey, Esq.
Office of Massachusetts Attorney General
One Ashburton Place
Boston, MA 02108

Dated: March 25, 2024

/s/ Nathaniel M. Lindzen

Exhibit A



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

January 18, 2024

VIA E-MAIL

Re: 2084-cv-01858, *Energy Policy Advocates v. Office of the Attorney General of Mass.*

Counsel:

Consistent with our prior agreement and the Court's order at the December 6, 2023 status conference, enclosed please find an document-by-document index of withheld documents that fall into the below categories from the Attorney General's July 7, 2023 categorical index:

- Plaintiff's January 17, 2020 Public Records Request Letter – Category No. 18
- Plaintiff's April 28, 2020 Public Records Request Letter - Categories No. 9, 11, 29, 30, 31, 32, 33-38, 40, 41, 43, 50, 51

We will also be producing one document in response to Plaintiff's January 17, 2020 Public Records Request Letter previously identified as Category No. 24 on the Attorney General's July 7, 2024 categorical index.

In the process of reviewing potentially responsive and withheld documents that fall within the above categories, instances of duplicates, non-responsive files, incomplete families, and lesser inclusive chains were identified and remedied. As a result, there may be slightly higher or lower numbers of documents as to the counts provided by category on the July 7, 2023 Index. Any changes, however, reflect intent to ensure this index reflects only those unique files that were withheld in response to the above-referenced request letters.

Sincerely,

/s/ Katherine M. Fahey

Katherine M. Fahey
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108-1698
(617) 963-2078

enclosures

From: Bradley Campbell <bcampbell@clf.org>
Sent: Monday, March 28, 2016 9:47 PM
To: Hoffer, Melissa (AGO)
Cc: Bradley Campbell
Subject: ExxonMobil
Attachments: image001.jpg

Pls call me if you have a sec. Any number below.

Bradley M. Campbell
President
Conservation Law Foundation

62 Summer Street
Boston, MA 02110

Office: 617-850-1786
Mobile: [REDACTED]
Email: bcampbell@clf.org<mailto:bcampbell@clf.org>
Skype: bradcampbellus

[\[cid:image001.jpg@01D08734.BC133950\]](#)

Exhibit B



Securities Whistleblower <corpfraudlaw@gmail.com>

Impoundment Order

Nathaniel Lindzen <nindzen@corpfraudlaw.com>

Thu, Nov 9, 2023 at 3:23 PM

To: "Spector, Amy (AGO)" <amy.spector@mass.gov>, "r.meltzer mountainstateslawgroup.com" <r.meltzer@mountainstateslawgroup.com>

Cc: Chris Horner <chris@govoversight.org>, "Matthew D. Hardin" <matthewdhardin@protonmail.com>

Hi Amy,

As I just filed an appearance in this matter a little over a week ago, I still do not have all the impounded documents. I'll head over to Suffolk Superior tomorrow to obtain them and then will begin drafting a joint motion to lift the January 2023 order of impoundment and make public the March 2023 briefs and SJ order and memorandum.

Can we please set a date certain, preferably by the end of next week, to exchange drafts of such a joint motion and then hopefully file it with the court before Thanksgiving? My impression from her in-court statements was that Judge Squires-Lee anticipated this particular matter (unlike fees) should be straightforward and that she did not anticipate any opposition.

Best,

Nate

--

Law Office of Nathaniel M. Lindzen

BBO #689999

57 School Street

Wayland, MA 01778

Tel.: (212) 810-7627

Email: nindzen@corpfraudlaw.com



Securities Whistleblower <corpfraudlaw@gmail.com>

Impoundment Order

Spector, Amy (AGO) <amy.spector@mass.gov>

Tue, Nov 14, 2023 at 2:31 PM

To: Nathaniel Lindzen <nindzen@corpfraudlaw.com>, "r.meltzer mountainstateslawgroup.com" <r.meltzer@mountainstateslawgroup.com>

Cc: Chris Horner <chris@govoversight.org>, "Matthew D. Hardin" <matthewdhardin@protonmail.com>

Nate,

Sorry for my belated reply – I have had a busy past week. I think it makes more sense for you to serve your motion and then if I oppose it, I'll serve an opposition. It's much more efficient that way.

Amy Spector

Deputy Chief, Constitutional & Administrative Law Division

Office of Attorney General Andrea Joy Campbell

One Ashburton Place

Boston, Massachusetts 02108

(617) 963-2076

amy.spector@mass.gov

she/her/hers

From: Nathaniel Lindzen <nindzen@corpfraudlaw.com>

Sent: Thursday, November 9, 2023 3:23 PM

To: Spector, Amy (AGO) <amy.spector@mass.gov>; r.meltzer [mountainstateslawgroup.com](mailto:r.meltzer@mountainstateslawgroup.com) <r.meltzer@mountainstateslawgroup.com>

Cc: Chris Horner <chris@govoversight.org>; Matthew D. Hardin <matthewdhardin@protonmail.com>

Subject: Impoundment Order

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
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<u>Defendants.</u>)

AFFIDAVIT OF NATHANIEL LINDZEN PURSUANT TO PLAINTIFF ENERGY POLICY
ADVOCATES’ OPPOSITION TO DEFENDANT’S CROSS MOTION FOR ENTRY OF
SCHEDULING ORDER AND REPLY IN SUPPORT OF MOTION FOR ENTRY OF ORDER
OF IMPOUNDMENT AND PROTECTIVE ORDER

I, Nathaniel Lindzen, being over 18 years in age and a competent attorney, pursuant to Superior Court Rule 15, do swear that the following exhibits attached with the Plaintiff Energy Policy Advocates’ Memorandum in Support of its Motion for Entry of Order of Impoundment and Protective Order are true and correct copies.

1. Exhibit A is a copy of Defendants’ production letter from January 18, 2024 and appended single document that was produced.
2. Exhibit B is a copy of Plaintiff and Defendants’ email corresponded regarding a proposed joint motion to un-impound judicial records in the sister action *Energy Policy Advocates v. Maura Healey et al.*, Suffolk Sup. Ct., Civil Action. No. 1984CV01753.

I swear under pain and penalty of perjury that the foregoing is correct and to my knowledge.

Dated: March 25, 2024

Respectfully Submitted
Energy Policy Advocates
By its attorneys,

/s/ Nathaniel M. Lindzen
Nathaniel M. Lindzen (BBO #689999)
nlindzen@corpfraudlaw.com
Law Office of Nathaniel M. Lindzen
57 School Street
Wayland, MA 01778
Phone: (212) 810-7627

Certificate of Service

I, Nathaniel M. Lindzen, attorney for plaintiffs Energy Policy Advocates, hereby certify that on March 25, 2024, I served the foregoing, electronically by email on:

Katherine Fahey, Esq.
Office of Massachusetts Attorney General
One Ashburton Place
Boston, MA 02108

Dated: March 25, 2024

/s/ Nathaniel M. Lindzen