

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 2084CV1858

ENERGY POLICY ADVOCATES,

PLAINTIFFS,

vs.

OFFICE OF THE ATTORNEY GENERAL OF MASSACHUSETTS & ANOTHER,¹

DEFENDANTS.

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR ENTRY
OF ORDER OF IMPOUNDMENT AND PROTECTIVE ORDER TO OBTAIN
SUFFICIENT INFORMATION TO BRIEF SUMMARY JUDGMENT MOTIONS

The plaintiff, Energy Policy Advocates, brought this lawsuit to enforce four public records requests that it issued to the office of the Attorney General of Massachusetts pursuant to the Public Records Law, G. L. c. 66, § 10. The requests sought information about input that private entities may have had on the Attorney General's litigation strategy. The plaintiff's complaint alleges that the Attorney General's Office did not comply fully with its requests.

Since the plaintiff filed its lawsuit in 2020, the parties have engaged in negotiations about the scope of the requests and the requirements for sufficient response. Although the parties have made progress toward resolution of the issues –

¹ Maura Healey, in her official capacity as Attorney General of Massachusetts

with the plaintiff narrowing its requests somewhat and the Attorney General's Office providing responsive privilege logs – they have not reached an agreement. The plaintiff has, therefore, filed a Motion for Entry of Order of Impoundment and Protective Order to Obtain Sufficient Information to Brief Summary Judgment Motions ("Motion," Paper No. 16).

In support of its Motion, the plaintiff maintains that the Attorney General's Office's most recent responses do not provide it with enough information to assess whether the Attorney General's Office's assertion of various privileges are valid. The plaintiff suggests that the only practical way for it to assess whether the privilege assertions are justified is to allow counsel for the plaintiff to review the documents, albeit it under a strict protective order. The Attorney General's Office counters that permitting plaintiff's counsel to review the materials as to which it asserts privileges, even under a protective order, virtually ensures that plaintiff's counsel will be given access to highly sensitive, privileged information which it should not have. The Attorney General asks me to conclude that the case is ripe for resolution by summary judgment motions.

Recognizing that there is substantial validity to both sides' position, I have sought to craft a protocol that provides the plaintiff with sufficient information to assess whether individual records are privileged without unnecessarily requiring the Attorney General to turn over privileged records. The protocol is designed to allow the court to assess whether a particular document is privileged by examining the responses, as to the particular document, to the generic questions propounded by the plaintiff with respect to each type of privilege asserted as to that document.

To that end, after a hearing today, I hereby enter the **ORDER**:

1. No later than April 16, 2024, the plaintiff is to deliver to the Attorney General's Office a list of questions applicable to each type of privilege asserted by the

Attorney General's Office in its most recent index of records, produced in January 2024.

(a) The questions shall be addressed to issues generally applicable to the assertion of a particular privilege, rather than addressed to the substance or specific content of individual records.

(b) Further, such questions shall be narrowly tailored so that, as to the assertion of each type of privilege with respect to a particular document, the answers to the questions would allow a court to rule on whether the assertion of privilege is valid without reference to the specific content of the individual record.

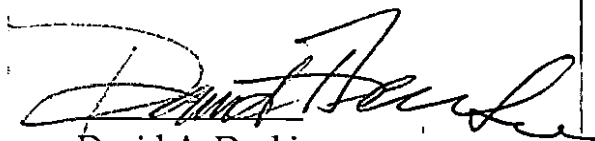
(c) If the plaintiff concludes that, to assess the validity of the assertion of a particular privilege, it must pose questions about the substance or content of documents as to which the privilege is asserted, the plaintiff must employ the following procedure. Any such question about the contents of documents must be broadly applicable to all records and not tailored to specific records. Further, such questions must only list topic areas and ask the Attorney General's Office for a yes-or-no answer as to whether a record includes any reference(s) to one or more of the listed topic area(s). That is, such questions may not require the Attorney General's Office to characterize the content of individual records beyond a yes-or-no answer to questions regarding specific topic areas.

2. No later than June 24, 2024, the Attorney General shall answer, as to each document, the questions promulgated by the plaintiff as to each assertion of a privilege. So, for example, if the Attorney General has asserted that a particular record is protected by both the attorney-client and the deliberative process privileges, the Attorney General shall answer the questions promulgated by the plaintiff as to both types of privilege *with respect to the record in question*.

3. If the Attorney General objects to any questions promulgated with respect to one or more of the privileges asserted, the Attorney General shall note its objection to such question(s) and answer the remaining, non-objectionable questions. Should the Attorney General conclude that most or all the questions promulgated by the plaintiff are objectionable, the Attorney General shall notify the plaintiff and the court of its objections in writing no later than April 9, 2024. In that event, the Attorney General shall request a hearing as soon as possible to address its objections.

4. Unless the Attorney General has requested an earlier hearing according to the procedure set out in Paragraph 3, *supra*, the court will conduct a further hearing on the Motion on June 26, 2024, at 2:00 p.m.

So **ORDERED** this twenty-sixth day of March 2024.



David A. Deakin
Associate Justice

