

**STATE OF VERMONT**

**SUPERIOR COURT  
Washington Unit**

**CIVIL DIVISION  
Docket No. \_\_\_\_\_**

**Energy & Environment** )  
**Legal Institute,** )  
 )  
**Plaintiff,** )  
 )  
**v.** )  
 )  
**The Attorney General of Vermont** )  
 )  
**Defendant.** )

**COMPLAINT**  
**FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff ENERGY & ENVIRONMENT LEGAL INSTITUTE (“E&E Legal”) for its complaint against Defendant Attorney General for the State of Vermont (“the AG” or “OAG”), allege as follows:

**Nature of Action**

1. This is an action under the Vermont Public Records Law, 1 V.S.A. §§ 315-320 (“PRA”), to compel production under an August 1, 2016 records request.

**Jurisdiction and Venue**

2. This Court has jurisdiction pursuant to 4 V.S.A. § 31 and 1 V.S.A. § 319, because the defendant refused to produce records, in violation of the PRA. Plaintiff then appealed this refusal, which defendant denied. Therefore, plaintiff has exhausted all administrative remedies. Furthermore, jurisdiction and venue are proper under 1 V.S.A. § 319, because this matter is brought in the Superior Court of Washington County.

**Parties**

3. Plaintiff E&E Legal is a nonprofit research and public policy organization incorporated in Virginia, with offices in Washington, DC. E&E Legal is dedicated to advancing responsible regulation and, in particular, economically sustainable environmental and energy policy. E&E Legal's programs include analysis, publication, and a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.
4. Defendant Attorney General of Vermont is a Constitutional Officer of the State of Vermont, and is in possession or has control of the records plaintiff seeks. He is sued in his official capacity only.

### **FACTUAL BACKGROUND**

#### **Plaintiff's August 1, 2016 Request for Records**

5. On April 29, 2016, Nicholas Persampieri of OAG signed an agreement purporting to memorialize the common legal interests of Vermont and various other states and/or individuals. The agreement purported to exempt records that would otherwise be subject to the PRA and other state transparency laws from disclosure, including those shared with other outside parties not party to the purported agreement, providing that "all Parties [to the Agreement] consent [to the selective sharing of such information] in advance."
6. Plaintiff alleges that the agreement described above is null and void insofar as it is contrary to public policy and to the PRA, as well as illustrative of a broader problem wherein OAG has embarked on a political campaign to prosecute dissent, rather than engage in legitimate law enforcement activity, while seeking to shield relevant public records under claims of legal privilege.

7. Plaintiff sent the PRA request at issue in this case via electronic mail on August 1, 2016,<sup>1</sup> seeking correspondence held by OAG reflecting parties to the purported common-interest agreement seeking consent to share records, consenting to the sharing of records, or objecting to the sharing of such records. **Exhibit 1.**
8. Specifically, on August 1, 2016, the plaintiff requested:

*copies of all email or text correspondence, attachments, and any other document recording, reflecting, discussing or mentioning:*

  - a) any request by any Party to the Agreement seeking consent to share records pursuant to this Agreement;*
  - b) any Party to the Agreement consenting to share records pursuant to this Agreement;*

*and,*

  - c) any record, as described above, reflecting any Party to the Agreement objecting to sharing records pursuant to this Agreement.*
9. Defendant denied the August 1, 2016 request in full on August 4, 2016, citing 1 V.S.A. 317(b)(3) and (b)(4). **Exhibit 2.**
10. Plaintiff administratively appealed the August 4, 2016 blanket denial of access to the records on August 17, 2016. **Exhibit 3.**
11. Defendant denied the administrative appeal in full and notified the Plaintiff of rights to judicial review by letter dated August 24, 2016. **Exhibit 4.**

### Legal Arguments

12. OAG cited only two bases for its categorical, blanket denial in full of the plaintiff's request, without searching for records or determining the volume of potentially responsive records that existed. First, OAG cited 1 V.S.A. 317 (b)(3), which exempts

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<sup>1</sup> The original request contained a minor typographical error which was corrected by letter dated August 9. OAG replied to the correction in writing, indicating that the correction of the typographical error in the original August 1 request did not change OAG's response.

production of records the disclosure of which “would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the State.” Second, OAG cited 1 V.S.A. 317 (b)(4), which exempts production of records the disclosure of which “would cause the custodian to violate any statutory or common law privilege other than the common law deliberative process privilege as it applies to the General Assembly and the Executive Branch agencies of the State of Vermont.”

13. OAG claimed that the records at issue are exempted from disclosure by either the Attorney-Client Privilege or the Attorney Work Product doctrines. These records as described in plaintiff's request, however, are not protected by Attorney-Client Privilege or the Attorney Work Product doctrines.
14. Communication can only be protected by attorney-client privilege if it meets very specific criteria. Usually, the courts characterize these criteria as having been met when a communication is engaged in “(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived.” *See, e.g., United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997). The attorney-client privilege is “narrowly defined, riddled with exceptions, and subject to continuing criticism.” *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).
15. While “the work product privilege is more broad than the attorney-client privilege,” *In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir. 2000), it too is subject to waiver

when information is voluntarily shared outside the confines of the attorney-client relationship. *Hartnett v. Medical Ctr. Hosp.*, 146 Vt. 297, 300 (1985).

16. The Office of the Attorney General has offered no information to support its categorical claims that all records, in their entirety and apparently without performing any review, meet the very strict criteria for attorney-client privileged information. Moreover, the Office of the Attorney General has not shown how voluntary sharing of information with the attorneys general of other states particularly in pursuit of what is, according to other records obtained under open records laws, a political coalition seeking political objectives, does not constitute a waiver of any attorney work product privilege.

**FIRST CLAIM FOR RELIEF**  
**Seeking Declaratory Judgment**

17. Plaintiff re-alleges paragraphs 1-16 as if fully set out herein.
18. Plaintiff sought and has been denied production of official state records responsive to the August 1, 2016 request. Specifically, the defendant has not produced records, has not indicated what if any efforts were made to search for records, apparently did not search for or review potentially responsive records, and has not provided any declaration relating to a search so that plaintiff can assess whether it was conducted in good faith.
19. Additionally, the defendant has relied on blanket, and legally insufficient, claims of privilege, and has failed to produce a privilege log indicating what if any documents it located. and claims are exempt under what privilege
20. Plaintiff asks this Court to enter a judgment declaring that:
- a. The Vermont Public Records Law requires a good-faith search for records;
  - b. The records as specifically described in plaintiff's records request described, *supra*, and any attachments thereto, are public records, not subject to any legal ex-

emption from disclosure, and as such, are subject to release under the Vermont Public Records Law;

- c. The defendant is estopped from seeking costs and fees for the requests at issue in this case, due to the balance of the equities and the incorporation of common law principles by 1 V.S.A. § 271 of the Vermont Public Records Law.

**SECOND CLAIM FOR RELIEF**  
**Seeking Injunctive Relief**

21. Plaintiff re-alleges paragraphs 1-20 as if fully set out herein.
22. Plaintiff is entitled to injunctive relief compelling defendant to produce all records in its possession responsive to plaintiff's August 1, 2016 PRA request, without fees, subject to legitimate withholdings.
23. Plaintiff is entitled to an order compelling defendant to search in good faith for public records responsive to the August 1, 2016 request, and to provide proper proof of such search and the results thereof to the Court and plaintiff, including a written certification by each custodian of records that it produced all responsive records or that there were no responsive records.
24. Plaintiff asks the Court to order the defendant to produce to plaintiff, within 5 business days of the date of the order, the requested records described in plaintiff's request, and any attachments thereto, subject to legitimate withholdings.
25. Plaintiff asks the Court to require that defendant create a withholdings log, listing the date, recipients, the basis for withholding, and subject matter of any potentially responsive records that are not produced for future, potential *in camera* review by this Court

26. Plaintiff asks the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 10 days after plaintiff receives the last of the produced documents, addressing defendant's preparation of a withholdings log and a briefing schedule for resolution of remaining issues associated with plaintiff's challenges to defendant's withholdings and any other remaining issues.

**THIRD CLAIM FOR RELIEF**

**Seeking Costs and Fees**

27. Plaintiff re-alleges paragraphs 1-26 as if fully set out herein.

28. Pursuant to 1 V.S.A. § 314(d), in most cases, the Court shall award reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

29. Plaintiff is statutorily entitled to recover fees and costs incurred as a result of defendant's refusal to fulfill the open records requests at issue in this case.

30. Plaintiff asks the Court to order the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Dated at Charlotte, Vermont this \_\_\_\_<sup>th</sup> day of September 2016.

**Energy & Environmental Legal Institute  
and  
Free Market Environmental Law Clinic**

By: \_\_\_\_\_

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