

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

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

Energy Policy Advocates, )  
)  
Plaintiff, )  
)  
v. )  
)  
Attorney General's Office, )  
)  
Defendant. )

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

Plaintiff ENERGY POLICY ADVOCATES, for its complaint against Defendant

ATTORNEY GENERAL'S OFFICE ("hereinafter "AGO"), allege as follows:

**Nature of Action**

1. This is an action under the Vermont Public Records Law, 1 V.S.A. §§ 315-320, to compel production under four records requests Plaintiff sent to AGO during April 2020.
2. 1 V.S.A. § 319 (b) provides that this case should "take precedence on the docket... and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
3. Because the parties are identical, and the legal issues in this matter are largely similar, to those in the pending case *Energy Policy Advocates v. Attorney General's Office*, 173-4-20 Wncv, the Court may elect to consolidate the matters pursuant to V.C.R.P. 42 (a). Plaintiff neither requests nor opposes such consolidation, and leaves the issue to the sound discretion of the Court.

### **Jurisdiction and Venue**

4. This Court has jurisdiction pursuant to 1 V.S.A. § 319, because the Defendant has violated the Vermont Public Records Law.
5. 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**

6. Energy Policy Advocates is a nonprofit research and public policy organization incorporated in Washington State. Its programs include a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.
7. Defendant AGO is an agency of the State of Vermont, led by the Attorney General of Vermont, who holds office and performs duties under the laws of the State of Vermont, including 3 V.S.A. § 151, and is in actual or constructive possession of the records Plaintiff seeks.

### **FACTUAL BACKGROUND**

8. OAG received the first of the requests at issue in this suit on April 13, 2020.
9. In this request Plaintiff sought 2 categories of records, only one category of which is at issue in this suit. Specifically, Plaintiff requested that AGO provide copies of:  
  
*“all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) Nick Persampieri, that b) includes in*

*the subject field, i) GHG Emissions Affirmative Legislation and/or ii) Affirmative Climate, and c) is dated from June 17, 2019 through April 9, 2020, inclusive.”*

10. AGO initially delayed responding to Plaintiff’s request, then responded on April 27, 2020, stating that it was withholding “forty-one records because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product).” AGO further stated that “Six of the withheld records consist of internal Vermont Attorney General’s Office communications or communications between the Vermont Attorney General’s Office and the Vermont Agency of Natural Resources” but acknowledged that other records had been shared outside the State of Vermont.
11. With respect to records shared outside these two agencies, AGO stated: “The other thirty-five withheld records consist of communications among Attorney General’s offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation. We do not have any records responsive to this request that are not exempt from disclosure.”
12. Plaintiff administratively appealed the denial of records responsive to its April 13 request as required by 1 V.S.A. § 318 (c)(1). AGO denied the administrative appeal in full on May 26, 2020.
13. AGO received the second request at issue in this suit on April 14, 2020.
14. In its second request Plaintiff sought three categories of records, only two of which are at issue in this suit, to wit:
  1. *all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a)*

*sent to or from or copying (whether as cc: or bcc:) Nick Persampieri, that b) includes, anywhere, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email "thread", including also in any attachments, i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request, inclusive;*

*2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) Nick Persampieri, that b) was sent from michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive and November 17, 2019.*

15. AGO responded on April 28, 2020, stating that it had "withheld 7 records because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation)." However, AGO admitted that the records at issue had been shared with outside parties, writing further that "these records consist of communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation."
16. AGO further states that it had "withheld 3 records responsive to this request because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation)." Of those three records, AGO described one as "a communication among the

Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing litigation.”

17. Plaintiff administratively appealed AGO's April 28, 2020 denial of access to records on May 18, 2020. AGO denied Plaintiff's administrative appeal in full on May 26, 2020.

18. AGO received the third request at issue in this suit on April 17, 2020. In that request, Plaintiff sought:

*1. all a) notices of, cancellations of, and/or invitations to participate in a "Multistate" call and/or "Coordination Call"; that b) were sent to Nick Persampieri, c) from Emma Borg and/or Steve Novick, that d) are dated October 22, 2019 through the date you process this request, inclusive; and*

*2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, infra), including also any attachments, a) sent to Nick Persampieri, b) from Emma Borg and/or Steve Novick, that c) is dated July 10, 11, or 12, 2019.*

19. AGO replied to Plaintiff's request by letter dated May 1, 2020, stating, *inter alia*, “We have withheld 9 records responsive to this request because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product). These records consist of communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation.” AGO further stated “we have withheld 3 records because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product). These records consist of

communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation."

20. Plaintiff administratively appealed AGO's May 1, 2020 denial of access to records by email dated May 19, 2020. AGO denied Plaintiff's administrative appeal in full on May 26, 2020.

21. AGO received the fourth request at issue in this suit on April 28, 2020. Specifically, in that request Plaintiff sought emails to or from one AGO employee, which:

*1. includes, anywhere, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email thread or attachment, and including as part of that record, a) the word "complaint" and b) i) "criteria pollutant" (which also includes "criteria pollutants"), ii) "greenhouse gas", (which includes "greenhouse gases"), and/or iii) "GHG"; or that*

*2. provides notice pursuant to any common interest agreement of any public records request, or otherwise discusses or references any public records request or public records lawsuit, submitted to any party by a) Matthew Hardin, b) Neal Cornett, c) Chris or Christopher Horner, and/or d) Energy Policy Advocates.*

22. AGO replied by letter dated May 12, 2020, stating that it was withholding 35 total records, ostensibly "because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation)." However, AGO stated that the records at issue had been shared with outside parties, stating that "these records consist of communications

among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation.”

23. Plaintiff administratively appealed the May 12, 2020 denial of access to records on May 20, 2020. AGO denied Plaintiff's administrative appeal in full on May 26, 2020.

### **Legal Arguments**

24. 1 VSA § 315 (a) provides that “provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action.”

25. Although the Public Records Act reflects the legislative intent of making records available to the public on a liberal basis, and Chapter 1, Article 15 of the Vermont Constitution provides that only the legislature has the power to suspend the laws of the State of Vermont, AGO has admitted in various fora, including this Court in a related matter, that it has entered into at least seven purported “Common Interest Agreements” during 2019-2020, which obligate AGO to consult with and obtain consent from other parties about possible release of Vermont records. AGO uses these pacts to shield records from the public eye, while nevertheless sharing such records with actors not employed by the State of Vermont.

26. The Common Interest Doctrine has never been recognized in Vermont Law.

27. Moreover, even if the law of other states applies in Vermont, there is no reason to believe that AGO has entered into a legally enforceable Common Interest Agreement. Such an agreement requires a clear and limited scope, a clear commonality of interests, and

ongoing or reasonably anticipated litigation. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 NY Slip Op 4439 (N.Y. 2016).

28. As federal courts have noted in open records cases, “any attempt to invoke the common interest doctrine in order to avoid disclosures under FOIA must be... carefully scrutinized.” *Hunton & Williams v United States Dept. of Justice*, 590 F.3d 272, 284 (4th Cir. 2010).
29. AGO’s reliance on the Attorney-Client Privilege and Attorney-Client Work Product is also misplaced. As a judge of this Court wrote in a July 27, 2017 order in the matter of *Energy & Environment Legal Institute v. The Attorney General of Vermont*, Docket No. 558-9-16 Wncv, the common interest doctrine as recognized in other states “does not create a separate freestanding privilege but is based on applications of the recognized attorney client privilege.” See Exhibit A.
30. The Attorney-Client privilege is referred to as “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Its purpose is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Id.* However, because “the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.” *Fisher v. United States*, 425 U.S. 391, 403.
31. As courts have made clear, “because the privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process,” it must be

narrowly construed. *Ambac* at 8, quoting *Matter of Jacqueline F.*, 47 NY2d 215, 219 (1979). Moreover, “[t]he party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,’ that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.” *Id.*

32. These considerations take on a heightened importance when the privilege is invoked to shield from the public a contract entered into by a public office, particularly one purporting to create a double wall of secrecy in that the office invokes it to shield still more public records from the public.
33. In the instant case, none of the hallmarks of Attorney-Client Privilege are present, because records were shared outside the state of Vermont.
34. Even in states where the Common Interest Doctrine is recognized, absent a valid Common Interest Agreement, “a client waives the privilege if a communication is made in confidence but subsequently revealed to a third party.” *Ambac* at 8, quoting *People v. Patrick*, 182 NY 131, 175 (1905). On information and belief, the records at issue in this case were shared with actors in states other than Vermont. Certain of the records sought are those that, by definition, were shared with outside parties including actors in the State of New York, a state whose courts have expressly rejected an expansive interpretation of the common interest doctrine. See ¶¶ 14, 18, *supra*.
35. AGO’s reliance on the Attorney Work Product Doctrine is similarly misplaced.

















