STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 558-9-16-Wncv

Energy & Environment Legal Institute,

Plaintiffs,

v.

The Attorney General of Vermont

Defendant.

# PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff ENERGY & ENVIRONMENT LEGAL INSTITUTE ("E&E Legal") and offers this opposition to the Defendant's Motion for Summary Judgment ("MSJ"). The Plaintiff submits a separate response to the Defendant's "Statement of Undisputed Facts." For the reasons set forth herein, the Defendant's Motion for Summary Judgment should be denied. Plaintiff respectfully requests oral argument on this motion.

## INTRODUCTION

This case began with a Vermont Access to Public Records Request ("the Request" or "Request") submitted by the plaintiff on August 1, 2016. In the Request, the plaintiffs noted that the Vermont Office of the Attorney General ("OAG") signed a document entitled "Climate Change Coalition Common Interest Agreement" on April 29, 2016 ("CIA"). That document contained a paragraph in which the signatories pledged not to share information pursuant to various public records laws, absent consent from the other parties. Plaintiff

therefore requested any documents reflecting a party to the agreement seeking consent of the other parties to share information, documents reflecting a party consenting to such sharing, or documents reflecting a party objecting to such sharing.

OAG denied the request, in full, claiming that all responsive documents are privileged under the Vermont Access to Public Records Act ("PRA"), or the Vermont Rules of Professional Conduct, or both. After an administrative appeal, OAG reiterated this position and denied the appeal. In its Motion for Summary Judgment, OAG makes clear what had previously only been implied: its claims of privilege are grounded in a belief that disclosure is prohibited by a purported common interest agreement entered into by OAG and various other state attorneys general. Thus, it is now the province of this Court to determine two simple questions: First, did the purported "Common Interest Agreement" create a shield by which OAG could hide records which would otherwise be subject to disclosure under the PRA? Second, assuming, *arguendo*, that the purported agreement was in fact valid and did give rise to an attorney-client privilege shield for certain outside correspondence, would that privilege shield the documents that the plaintiff sought? As a matter of law, the answer to both questions is no, and this Court should deny OAG's motion for summary judgment.

## STANDARD OF REVIEW

The Vermont Supreme Court has imposed a generally applicable test, with exceptions, that "where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case," and that "the burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact," *Ross v. Times Mirror, Inc.*, 665

A.2d 580, 582 (Vt. 1995). The present case offers one such exception to that generally-applicable test because the OAG, rather than the plaintiff, bears the lawful burden of proof in a case brought under the statutory provisions of PRA. 1 V.S.A. § 319(a). In causes of action created by that statute, it is the government's burden to prove full compliance with the law, so even a complete absence of any proof by a plaintiff would not justify judgment in favor of the agency. *Id.* Nevertheless, plaintiff has responded to OAG's "Statement of Undisputed Facts" line-by-line.

## LEGAL ARGUMENTS

While the parties differ on the characterization of the relevant, purported CIA,[1] there is nevertheless substantial agreement on the facts of this case, and the text of the CIA speaks for itself.[2] Thus, there are only two legal issues in this case which the Court must resolve to dispose of the instant motion. First, whether the April 29, 2016 memorialization by Vermont of joining a political coalition of Attorneys General to promote or support certain climate change policies gave rise to any legal privilege. Second, assuming *arguendo* that it did give rise to a legal privilege, whether the documents plaintiff seeks would be covered by any privilege.

---

[1] Plaintiff has only conceded that the CIA is a signed agreement. We expressly challenge the legal validity of the CIA and what it purports to accomplish.

[2] Further discussion of the facts of the Case is found in the annexed Response to the Defendant's Statement of Undisputed Material Facts. In short, areas of disagreement are legal rather than purely factual in nature, with the key disagreement being the legal effect of the CIA.

## 1. The CIA did not create a privilege.

OAG begins its brief with a cavalier statement trivializing legal common interests, which trivialization is the gravamen of its argument, that "attorneys general have chosen to associate with one another based on their common legal interests relating to climate change."[3] OAG goes on to claim that the "consensus of the scientific community" is that "unless it is addressed promptly, [climate change] could have additional serious consequences for our communities throughout the United States and the world." This statement about the alleged common interests shared by OAG in Vermont and various attorneys general in other states hints at the untenably broad nature of the alleged common interests, which are not legal but political, as well as the alleged scope of the privilege claimed.

A proper common interest agreement requires a clear and limited scope, a clear commonality of interests, and ongoing or reasonably anticipated litigation. Indeed the highest court of New York, one of the signatory states of the relevant document here (whose Attorney General is its apparent principal author), recently reaffirmed these requirements, mere weeks after the memorialization of this coalition. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 N.Y. Lexis 1649 (N.Y. June 9, 2016).[4] As federal courts have noted, "any attempt to invoke the common interest doctrine in order to avoid disclosures

[3] Motion for Summary Judgment, p. 1.

[4] The *Ambac* case is designated "to be published" and is binding precedent in New York. However, due to how recently the decision was handed down, it does not yet appear in published case reporters. Accordingly, counsel has filed the slip opinion in *Ambac* as Exhibit 1 to this Response, and all citations to *Ambac* contained herein reference the page numbers of the slip opinion.

under FOIA must be... carefully scrutinized." *Hunton & Williams v United States Dept. of Justice*, 590 F.3d 272, 284 (4th Cir. 2010).

"Under the common interest doctrine... an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest." *Ambac* at p. 2. Thus, the common-interest doctrine, as OAG correctly notes, is an outgrowth of Attorney-Client Privilege, which is found in Rule 1.6 of the Vermont Rules of Professional Conduct, and has long been recognized at common law. Attorney-Client Privilege, where it exists, is subject to waiver, for example when information is voluntarily shared outside of the attorney-client relationship,[5] unless a valid common interest agreement applies or the involved attorney(s) and client(s) are joint.[6]

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,

---

[5] *See* Vermont Rule of Evidence 502 (a)(5), 502 (b) and 502 (c), *Cf. State of Vermont v. Cecil Vivian*, 2012-051 (Vt. 2012) (non-precedential), *Chase v. Bowen*, 945 A.2d 901, 2008 VT 12 (Vt., 2008), and *Steinfeld v. Dworkin*, 147 Vt. 341, 515 A.2d 1051 (Vt. 1986).

[6] V.R.E 502 (d)(5)

it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403.

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.*

In the instant case, none of the hallmarks of Attorney-Client Privilege are present, especially considered in light of the narrowness of the privilege,[7] the broad construction of PRA,[8] the express purpose of the coalition according to its organizers' own recruiting letter, as well as the facts of what OAG was attempting to accomplish, by its own admission in its brief and in the CIA.

First, the records at issue do not reflect "communication" "between an attorney and a client" "in the course of a professional relationship." The records instead reflect communications between OAG and state officials in other states, in the course of what could

---

[7] *Matter of Jacqueline F.*, 47 NY2d at 219.

[8] 1 V.S.A. § 315 (a)

most gently be described as a political campaign.[9] The CIA itself describes the common legal interests as, e.g., "limiting climate change and ensuring the dissemination of accurate information about climate change." See Affidavit of William Griffin, Attachment 1. Quite simply, these are political, rather than legal, interests. A recruitment letter from the New York Attorney General to the Attorney General of Iowa describes the signatories to the agreement as "an informal coalition of Attorneys General in legal actions to help protect our citizens from the adverse consequences of climate change," though it then describes a political campaign, including an objective for the coalition they sought to organize is that "states must still play a vital role in ensuring that the promises made in Paris [at a United Nations conference] become a reality." See Exhibit 2. Thus, the signatories to the CIA give every indication that they intended to, *inter alia*, disseminate information about climate change and seek to implement a political, non-legally binding international climate change accord reached in Paris, France. However, OAG offers no evidence the signatories contemplated a professional relationship using the legitimate law enforcement powers of the Vermont Attorney General's Office.

Second, for the same reasons the records at issue do not reflect a communication "in the course of a professional relationship," as discussed above, the records at issue in this case do not reflect the communication being "of a legal character." However admirable the fight against climate change might be, the records at issue in this case were generated as part of a political coalition engaging in a political campaign. That political campaign sought to put

---

[9] In fact, the political nature of the legal actions of the Attorney General of New York and the Attorney General of Massachusetts have already led to federal civil rights litigation. See *Exxon v. Healy et al.*, 4:16-cv-00469-K (N.D. Tex.).

legal meat on the bare bones of a non-binding political agreement struck in Paris the preceding December.

Third, the records at issue in this case, by the very nature of the request, were necessarily shared outside OAG, and sharing of records waives any common-law or statutory privilege. "Generally, communications made in the presence of third parties... are not privileged from disclosure because they are not deemed confidential." *Ambac* at 8, quoting *People v. Harris*, 57 NY2d 335, 343 (1982). "Similarly, 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). In fact, the records at issue in this case would have inherently been shared with actors in states other than Vermont, and the text of the CIA itself recognizes that all signatories are subject to public records and transparency laws.

Sharing of records between separately retained counsel for different parties is excused under the common interest doctrine, rather than constituting a waiver of privilege, but only if the parties "fear" litigation.[10] Legal theorists and historians have remarked that "this seems to have been the common law rule." 24 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure: Evidence § 5493 at 467 (1986). At least eleven states have gone so far as to expressly declare in their evidentiary codes that the common interest doctrine is restricted to communications made in furtherance of ongoing litigation.[11] Here, Vermont is not a party to any litigation, and none was or is reasonably anticipated. While the CIA sets

[10] Wright & Graham § 5493 n. 67 (2015 Supp).

[11] See Ark. R. Evid. 502(b)(3); Haw. R. Evid. 503 (b)(3); Ky. R. Evid. 503(b)(3); Me. R. Evid. 502(b)(3); Miss. R. Evid. 502 (b)(3); NH Evid. R. 502 (b)(3); N.D. R. Evid. 502 (b)(3); 12 Okla. Stat. § 2502 (b)(3); S.D. R. Evid. § 19-19-502(a)(3); Tex. R. Evid. 503(b)(1)(C); cf. Vt. R. Evid. 502 (b)(3).

forth an incredibly broad sampling of litigation Vermont might "potentially" pursue— so broad that it verges on caricature— there are no signs Vermont has even begun to pursue such litigation, even seven months after that agreement was signed. Moreover, the agreement lists "common interests" which are common to all mankind, rather than unique to the state signatories (and of dubious "legal" character for such purposes). Climate change, as OAG points out, affects the entire globe. According to OAG's reading of the common interest doctrine, OAG might share ostensibly privileged documents with literally anyone, without waiving the privilege. This cannot be the law.

For the reasons set forth above, the OAG's MSJ should be denied because the CIA between OAG and officials in other states is a legal nullity, and does not work to shield OAG's communications at issue in this matter behind the veil of Attorney-Client Privilege. These records are subject to the PRA in which the legislature expressly declared "[o]fficers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment." 1 V.S.A. § 315(a).

## 2. Even assuming, *arguendo*, that the CIA is legally effective, the requested records are not covered by attorney-client privilege.

Plaintiff disputes the validity of the CIA and that requested records shared between Vermont and officials in other states would be protected by Attorney-Client Privilege. Without in any way conceding the validity of the agreement, however, the CIA does not, by its terms, extend Attorney-Client Privilege to cover the records requested by the plaintiff. As

such, even if this Court were to rule that a valid common interest existed between OAG and the attorneys general of other states, this court should still deny OAG's MSJ.

The CIA indicates on its face that it covers only "shared information," which can only be disclosed to "parties," "employees or agents of the parties," a variety of governmental officials, "other persons, provided that all parties consent in advance," and "other persons, as provided in paragraph 6." See Affidavit of William Griffin, Attachment 1, at p.2. Quite simply, the records the plaintiff requested either are not "shared information" or they reflect the consent process or notice provisions of paragraph 6, in which the parties acknowledged they were bound by transparency laws.

First, the documents requested by the plaintiff are not "shared information" as set forth in the agreement. The agreement says that the parties intend to share "documents, mental impressions, strategies, and other information regarding the Matters of Common Interest." Second, the purported "Matters of Common Interest" are set forth in item 1 of the agreement, and include potential litigation relating to: federal greenhouse gas measures, securities fraud, "possible illegal conduct to limit or delay the implementation of renewable energy technology," and infrastructure-related litigation (see Affidavit of William Griffin, Attachment 1, §1 for the exhaustive list). However, the documents requested by plaintiff relate to none of the parties' own identified "Matters of Common Interest."

The plaintiff requested only documents that would reflect Vermont's compliance or lack of compliance with Section 6 of the CIA. Specifically, plaintiff sought requests by any party to the agreement to share documents, any consent to such sharing, and any objection to such sharing. The plaintiff did not seek documents relating to Vermont's alleged potential

litigation. Plaintiff did not seek "documents, mental impressions, strategies, [or] other information" relating to Vermont's campaign against climate change. In fact, the plaintiff sought only information reflecting Vermont or other parties to the agreement seeking consent to share information, consenting to such sharing, or objecting to such sharing, which comports with the CIA's own acknowledgement that all parties were bound by various public records laws. None of this information is privileged.

OAG's MSJ treats the existence of a valid common interest agreement as dispositive in this case. However, even if the CIA were valid in every way, and legally unassailable, it would not suffice to deny the plaintiff's PRA request, which did not seek documents relating to the identified areas of "Common Interest."

## CONCLUSION

This Court should deny the Attorney General's Motion for Summary Judgment. The CIA is impermissibly broad and too political in nature to provide any privilege or shield of public records from public scrutiny and such factors, among others, inform a conclusion that it is in fact a transparent attempt by the signatories to write themselves out from public records laws all involved acknowledge govern them. For this reason, the purported Common Interest Agreement is in fact a legal nullity. However, even assuming the agreement at issue in this case is valid, it still would not shield the documents plaintiff's seek from disclosure under PRA. This Court must order OAG to comply with PRA and release records responsive to the request at issue in this matter.

Dated at Charlotte, Vermont this 5th day of January, 2017.

**Energy & Environmental Legal Institute**

By: _____

Brady C. Toensing
diGenova & Toensing
Attorneys for Plaintiffs
1776 K Street, NW
Suite 737
Washington, DC 20006
(202) 289-7701
Brady@digtoe.com

Matthew D. Hardin
Attorney for Plaintiffs, *Pro Hac Vice*
314 West Grace Street, Suite 304
Richmond, VA 23220
(804) 608-6456
MatthewDHardin@gmail.com