STATE OF VERMONT

SUPERIOR COURT
Washington Unit

2017 APR 10 A 11:53

CIVIL DIVISION
Docket No. 349-6–16 Wncv

Energy & Environment Legal Institute, et al.

Plaintiffs,

v.

The Attorney General of Vermont

Defendant.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs and respectfully submit this opposition to the Defendant's Motion for Summary Judgment. Plaintiffs submit herewith a separate statement of undisputed material fact, a response to the Defendant's statement of purportedly undisputed facts, and a supporting affidavit.

I. Issues not Addressed in Defendant's Motion for Summary Judgment

The Vermont Office of Attorney General (OAG) briefed only its withholdings of certain documents in its Motion for Summary Judgment. Thus, OAG failed to address a variety of legal issues in this matter, including the adequacy of OAG's search for records responsive to the Plaintiffs' request, and several claims for relief set forth in the Second Amended Complaint,[1] including:

a) Plaintiffs' claim for declaratory judgment relating to violation of statutory deadlines, as set forth in paragraphs 46, 47, and 48 (c) of the Second Amended Complaint;

[1] The relevant claims of the proposed Third Amended Complaint are identical.

b) Plaintiffs' claim for declaratory judgment relating to the issue of costs and fees, as set forth in paragraphs 48 (d) through 48 (f) of the Second Amended Complaint;

c) Plaintiffs' claim for reimbursement of attorney's fees as set forth in paragraph 56 of the Second Amended Complaint; and

d) Plaintiffs' claim for reimbursement of charges made by the defendant in excess of those contemplated by the Vermont Access to Public Records Act (PRA), as set forth in paragraph 59 of the Second Amended Complaint. 1 V.S.A. 316 (b) or (c)

The OAG's Motion for Summary Judgment leaves so many issues unaddressed, that it would better be described as a *partial* Motion for Summary Judgment. In the interests of judicial economy, Plaintiffs address the adequacy of the defendant's search for records in this Opposition. Plaintiffs respectfully submit that resolution of the remaining unaddressed issues, as set forth in items (a) through (d) above, are best addressed through supplemental briefing or motions practice, after the Court has addressed the threshold issue of Plaintiffs' entitlement to the records requested in this case.

II. Introduction

This case began with a May 16, 2016 PRA Request ("the Request" or "Request"), which was reduced in scope on May 18, 2016, and later narrowed further in September 2016. To facilitate processing of the request while litigation continued, Plaintiffs submitted three payments to OAG under protest, which OAG believes it was entitled to pursuant to 1 V.S.A. 316 (b) or (c), but which fees Plaintiffs expressly challenged.

OAG responded to the request, after long delays, on September 19, 2016. It produced 43 records and withheld 193 records.[2] OAG provided an "Index of Withheld Records" to the Court and (in redacted form) the Plaintiffs on February 27, 2017. On March 17, 2017, Plaintiffs responded to that Index, challenging the withholding of particular records. In that filing, Plaintiffs expressly noted that OAG had not demonstrated the adequacy of any search for records, and that Plaintiffs were limited to challenging the withholding of records which OAG had identified. Plaintiffs voluntarily waived any challenges to all but 79 of the disputed documents.

III. Standard of Review

The Vermont Supreme Court imposes 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 Plaintiffs, bears the lawful burden of proof in a case brought under the statutory provisions of the 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, Plaintiffs have responded to OAG's "Statement of

[2] Initially OAG estimated over 200 records were withheld; OAG corrected that estimate in the cover letter in which it submitted the Index of Withheld Documents.

Undisputed Facts" line-by-line. Moreover, Plaintiffs have pointed out OAG's failure to address a variety of issues raised by the complaint.

IV. OAG Has the Burden of Proving that the Search for Records Was Adequate

In order to produce records in response to a request, OAG must first conduct an adequate search for those records. 1 V.S.A. § 318 provides that "upon request, the custodian of a public record shall promptly produce the record for inspection." The law expressly contemplates that a search is required (and may sometimes be difficult) at 1 V.S.A. § 318 (5) (A) and (B), which allows an agency to extend the time to process a request when a search is particularly difficult. The burden to demonstrate compliance with the law is on the state, rather than the requester. 1 V.S.A. § 315 states that "the provisions of this subchapter shall be liberally construed... and the burden of proof shall be on the public agency to sustain its action."

Federal courts include in a "duty to search" an implied duty to search in all relevant offices and locations. See, e.g., *Raulerson v. Reno*, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999). "[A] search need not be perfect... and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). In construing Virginia's Freedom of Information law, the Virginia Supreme Court recently held that "'Search' means: (1) 'to look into or over carefully or thoroughly in an effort to find something'; or (2) 'to uncover, find, or come to know by inquiry or scrutiny.'" *American Tradition Institute v. Rector and Visitors, Univ of Va.*, 287 Va. 330 (2014). Federal courts have further defined the duty to search as meaning an agency must have employees trained to distinguish between public and private records conduct the search. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (finding record search inadequate because

employees were "not properly instructed on how to distinguish personal records from agency records").

In this case, OAG has submitted no evidence that it searched for records held by the former Attorney General (AG) of Vermont, William Sorrell, on his Gmail account. Plaintiffs have submitted evidence that the then-AG used his Gmail account to conduct official business of the state of Vermont.[3] Thus, a search for records only on official email accounts, without also searching for records held on Gmail, is *per se* an inadequate search because OAG has not searched for records in all locations where records are likely to be found. While OAG has located some records and OAG has submitted those records to this Court for *in camera* review, there is no assurance that those records comprise the entirety of the records requested by the Plaintiffs. Thus, while the remainder of this brief addresses specific withholdings, Plaintiffs expressly challenge the predicate issue, which is whether the records OAG located are, in fact, all of the records that Plaintiffs requested and which exist.

V. The Withheld Documents

OAG's Motion contains extensive discussion of various documents it has chosen to withhold from the Plaintiffs. Certain of these records are records which Plaintiffs have already waived any challenge to, as set forth in their response to the Index of Withheld Documents of March 17, 2017. Plaintiffs challenge other withholdings, and respond to Defendant's discussion of each withheld record as set forth below:

Documents 1-33 (*New York et al. v. NRC, Case No. 14-1210*)

[3] See Mot. to Join William Sorrell.

Plaintiffs waived their challenge to these withholdings on March 17, 2017 in the interest of judicial economy. As such, addressing OAG's arguments related to *New York et al. v. NRC* is unnecessary.

Document 34 (*Entergy Nuclear, Docket No. 50-271*)

Plaintiffs waived their challenge to this withholding on March 17, 2017 in the interest of judicial economy. As such, once again, addressing OAG's arguments related to *Entergy Nuclear* is unnecessary.

Documents 35-38 and 95 (*West Virginia v. EPA*)[4]

Plaintiffs waived their challenge to these withholdings on March 17, 2017 in the interest of judicial economy. As such, addressing OAG's arguments related to *West Virginia v. EPA* is unnecessary.

Documents 39-45 (*Corps of Engineers v. Hawkes*)[5]

Plaintiffs waived their challenge to these withholdings on March 17, 2017 in the interest of judicial economy. Here, too, addressing OAG's arguments related to *Corps of Engineers v. Hawkes* is unnecessary.

Documents 46-47 (*Purportedly Confidential Multi-State Matter*)

Documents voluntarily shared outside Vermont OAG with non-clients are not "confidential" within the meaning of the PRA or any other relevant statutory or common-law privilege or rule of professional responsibility. Plaintiffs also note that no case number or

[4] OAG provides no case number for this litigation. However, the issue is moot in light of Plaintiffs' voluntary waiver of any challenges to the relevant withholdings.

[5] As discussed in not 4, supra, OAG provides no case number for this litigation. However, the issue is moot in light of Plaintiffs' voluntary waiver of any challenges to the relevant withholdings.

litigation has been cited as part of this "multi-state matter."

Documents 48-57 (*Ozone Transport* Petition)

Plaintiffs waived their challenge to these withholdings on March 17, 2017 in the interest of judicial economy. Here again, addressing OAG's arguments related to *Ozone Transport* is unnecessary.

Documents 58-59 (purportedly related to *State v. Atlantic Richfield, Dkt. No. 640-6-14-Wncv*)

The relevant records appear to have been shared outside OAG with non-clients, and, from the Index of Withheld Documents, it appears these two records may not have been related to the representation in A*tlantic Richfield.* The mere inclusion of an attorney in correspondence does not automatically cloak that correspondence in privilege. Because Plaintiffs' counsel has not seen the relevant records, Plaintiffs cannot describe them particularly, but note that the Index appears to suggest the parties may have been discussing a topic other than the *Atlantic Richfield* case, and were perhaps specifically discussing the political coalition against "climate deniers."

Documents 60-74 (*State v. Atlantic Richfield, Dkt. No. 640-6-14- Wncv*)

Plaintiffs waived their challenge to these withholdings on March 17, 2017 in the interest of judicial economy. Therefore, addressing the remainder of OAG's arguments related to *State v. Atlantic Richfield* is unnecessary.

Documents 75-94; 96-190 (*Purportedly Confidential Multi-State Matter*)

Plaintiffs challenge the withholdings of certain of these documents, as set forth in their Response to the Index of Withheld Documents. Specifically, Plaintiffs challenge the withholding of 75-77, 90, 101, 143-147, 153, 163, 169, 176, 180, 182-190. The documents appear to have been shared outside OAG with non-clients.

Plaintiffs have waived their challenge to the remaining documents at issue in this series, also as set forth in their response to the Index of Withheld Documents.

Document 191 (*Consumer Protection Matter*)

Plaintiffs agree Document 191 is exempt from production under relevant law.

Documents 192-193 (NAAG/ Dept. of Justice Training)

Plaintiffs waived their challenge to these withholdings on March 17, 2017 in the interest of judicial economy. As such, addressing OAG's arguments is unnecessary.

VI. The Defendant Must Demonstrate Documents Relate "to litigation to which the public agency is a party of record."

OAG makes a blanket argument[6] that all documents it possesses which *it claims* are related to *West Virginia v. EPA* or *Atlantic Richfield* are exempt from production. 1 V.S.A. § 317(c)(14). However, the State carries the burden of proof which must be satisfied in this case. 1 V.S.A. § 319(a). The Index of Withheld Documents provides clues that the two documents Plaintiffs continue to seek are unrelated to the identified, ongoing litigation to which the state is a party of record. The Court should review the documents *in camera* to investigate this concern.

Specifically, Plaintiffs waived any challenge to the documents OAG asserts are related to *West Virginia v. EPA*, so no review or discussion of those records is necessary. However, Plaintiffs do challenge the withholding of certain records OAG claims are related to *Atlantic Richfield*. That action is a currently pending case in Washington Superior Court, and this Court may take judicial notice of the fact that OAG has filed pleadings in that case, that litigation is ongoing between certain parties, and that the pleadings relate to certain legal and

[6] Defendant's Mot. for Summary Judgment, pp.11-12.

factual issues in dispute. However, OAG must also prove that the documents in question are "relevant" to the *Atlantic Richfield* case for these purposes.

OAG asserts that documents 58 through 74 are related to the *Atlantic Richfield* case. Plaintiffs challenge only the withholding of documents 58 and 59. The Index uses deliberate wording, seemingly cagey about the nature of these documents. It asserts merely that the recipients of the correspondence were co-counsel with OAG in a pending litigation matter, but makes no assertion that the correspondence was related to that ongoing litigation. The mere fact that attorneys write to one another does not indicate that all correspondence is related to a case on which those attorneys are co-counsel.[7]

VII. OAG Must Prove That Records are Exempt from Production under 1 V.S.A. 317 (c)(3) and Rule 1.6 of the Vermont Rules of Professional Conduct

It is OAG's burden to demonstrate that records are exempt from production. 1 V.S.A. § 319(a). While the PRA incorporates "duly adopted standards of ethics or conduct for any profession" as a grounds for exempting documents from production, and OAG attorneys are in fact bound by Rule 1.6, Rule 1.6 does not prevent disclosure of the records that remain disputed in this case.

Rule 1.6 states that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized, or

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[7] To the extent the relationship between the correspondence and the legal representation at issue could be unclear from a review of the documents, Plaintiffs rely upon the proposition that the PRA, like all transparency statutes, is to be interpreted broadly in favor of disclosure, with exemptions narrowly construed. See, e.g., *Gifford v. Freedom of Information Commission*, 227 Conn. 641 (1993), *Chief of Police v. Freedom of Information Commission*, 252 Conn. 377, 387 (2000), *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986); *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). The burden of proving the applicability of an exemption is on the person claiming it. See, e.g. 1 V.S.A. § 319 and the discussion of the principles underlying such a burden in *Chairman, Criminal Justice Commission v. Freedom of Information Commission*, 217 Conn. 193, 196 (1991).

the disclosure is required..." Here, two issues are relevant to a Rule 1.6 analysis. First, does the information "relate to the representation" of a client? Second, assuming *arguendo* that the information does relate to the representation of a client, is the disclosure authorized by the client?

a) Rule 1.6 Does Not Protect Political Communications

On March 7, 2016, New York AG Eric Schneiderman and then-AG Sorrell sent a letter (Recruitment Letter) to the attorneys general of several other states, requesting that those AGs join them in "an informal coalition of attorneys general", to "ensur[e] that the promises made in Paris [at a United Nations climate conference] become a reality" and said that "much more action to stem climate change and expand the availability and usage of renewable energy is needed, and is needed now."[8] This call to arms to promote an inescapably political agenda represented a next-step in the campaign encouraged by activists discussed in numerous media reports since.[9] It is against this background that then-AG Sorrell's purportedly "confidential information relating to the representation of a client" efforts must be evaluated.

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[8] Exhibit A.

[9] See e.g., Amy Harder, "Exxon Fires Back at Climate-Change Probe", *Wall Street Journal*, April 13, 2016, http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535; Valerie Richardson, "Democratic prosecutors invited to help Obama, join pursuit against climate change skeptics", Washington Times, August 9, 2016, http://www.washington-times.com/news/2016/aug/9/democratic-prosecutors-sought-boost-obama-climate-/; Lachlan Markay, "Tom Steyer Denies Involvement in Anti-Exxon Campaign Promoted by His Groups", Washington Free Beacon, September 21, 2016, http://freebeacon.com/issues/tom-steyer-falsely-claims-his-groups-havent-pushed-exxon-investigation/ Katie Brown, PhD, "Rockefellers: Not Only Did We Pay for #ExxonKnew, We Were the Ones Who Pulled in NY AG", Energy in Depth, December 7, 2016, https://energyindepth.org/national/rockefellers-not-only-did-we-pay-for-exxonknew-we-were-the-ones-who-pulled-in-ny-ag/.

To roll this effort out, on March 29, 2016, then-AG Sorrell hosted a press conference in New York City with those AGs he and Mr. Schneiderman recruited to this coalition. This also included former Vice President and current private citizen Al Gore as the featured speaker to add what one NY OAG aide called, to another AG office, "star power."[10] Entirely consistent with the Recruitment Letter for a political coalition sent by then-AG Sorrell, AG Schneiderman pledged that the coalition would "deal with the problem of climate change" by using law enforcement powers "creatively" and "aggressively" to force ExxonMobil and other energy companies to support the coalition's preferred policy responses to climate change. Considering climate change to be the "most pressing issue of our time," Attorney General Schneiderman said the coalition was "prepared to step into this [legislative] breach."[11]

In the months leading up to the press conference, various political activists and attorneys met at the offices of the Rockefeller Family Fund in New York to discuss the "[g]oals of an Exxon campaign," which included to "delegitimize [it] as a political actor" and to "force officials to disassociate themselves from Exxon."[12] On the morning of the press conference, attendees were treated to a presentation by some of the Rockefeller-hosted meeting's same participants, including Peter Frumhoff. Mr. Frumhoff is a campaigner for the Union of Concerned Scientists. Other emails obtained from other states under open records laws show this group was involved in developing an AGs' climate campaign for many months before NY OAG issued any subpoenas, or recruiting letters, in the matter.[13]

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[10] Exhibit B.
[11] See *Exxon v. Healey et al.*, Case No. 4:16-cv-00469-K (N.D. Tex.), Doc 100, para. 2.
[12] Id. at para. 5.
[13] Exhibit C.

Another advocate who also participated in the Rockefeller-organized meeting, and who then-AG Sorrell's office also arranged to brief the coalition at the pre-press conference meeting, was activist-group attorney Matt Pawa. Notably, a U.S. District Court dismissed a suit previously brought by Mr. Pawa against ExxonMobil on the grounds that regulating greenhouse gas emissions is "a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[14] Following that dismissal, Mr. Pawa was quoted in 2015 admitting the political nature of this very approach of using racketeering investigations to obtain ends that have been frustrated by the democratic process:

> 'I've been hearing for twelve years or more that legislation is right around the corner that's going to solve the global-warming problem, and that litigation is too long, difficult, and arduous a path,' said Matthew Pawa, a climate attorney. 'Legislation is going nowhere, so litigation could potentially play an important role.'[15]

The records at issue in this case appear from the Index to relate to a political campaign conducted by the AG, rather than any typical representation between an attorney and a client. OAG dedicates much time and space to arguing that Rule 1.6 is distinct from Attorney-Client Privilege and the Work Product Doctrine as defined at common law. Nevertheless, the Commentary to the Rule, which OAG quoted in its brief, describes Rule 1.6 as being a "related" body of law to the common law privileges. Moreover, the commentary makes clear that disclosure is permitted, or even required, under certain circumstances.

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[14] *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871–77 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012).

[15] Zoe Carpenter, "The Government May Already Have the Law it Needs to Beat Big Oil", The Nation, July 15, 2015, https://www.thenation.com/article/the-government-may-already-have-the-law-it-needs-to-beat-big-oil/.

Attorney-Client Privilege and Rule 1.6 protection are matters of both statutory and common law. It is "[t]he party asserting the privilege [that] bears the burden of establishing its entitlement to protection." *Matter of Jacqueline F.*, 47 NY2d 215, 219 (1979). V.R.E. Rule 502 states that a privilege exists for "confidential communications made f*or the purpose of facilitating the rendition of professional legal services* to the client." *(emphasis added)* Notably, however, it is insufficient to show only that the correspondents are attorney and client. Rather, the communication must be of a legal character.

Moreover, "not every manifestation of a lawyer's labors enjoys the absolute immunity of work product...the exemption should be limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor, 73 A.D.2d 207, 211* (1st Dept. 1980), cited with approval in *Spectrum Sys. Int'l Corp.* 78 N.Y.2d at 381.

OAG can only exempt records as Attorney-Client Privileged communications or Attorney Work Product when all attorneys involved are acting as lawyers, rather than as e.g., politicians or parties in what their own words describe as a political coalition. Records the Plaintiffs have obtained from other states leave no doubt that the correspondence at issue here pertains to a *political* coalition, to support an expressly political agenda, that is also inherently political in character (use more renewable energy, make non-binding promises made at a Paris "climate" conference "reality," etc.). Other documents by their nature are plainly correspondence with outside supporters and parties encouraging this campaign. These cannot be shielded from production under the PRA or any of Vermont's statutory or common law privileges, or Rule 1.6.

b. Rule 1.6 Does Not Prevent Disclosure When the Client Consents

Rule 1.6 contains an express authorization to disclose information when "the client gives informed consent" for disclosure or when "the disclosure is impliedly authorized." Rule 1.6 presents unique challenges in the context of government attorneys who hold positions created by law. Government attorneys have clients whose wishes and identities can sometimes be more difficult to identify than those of a private client. Because of this, some of the Rules of Professional Conduct treat government attorneys differently than private attorneys and other rules are interpreted differently as applied to government lawyers. Rule 3.8, for example, contemplates that prosecutors cannot assume the same purely adversarial positions that civil litigators are entitled (or even required) to assume.

Legal scholarship indicates that consent to disclose, as contemplated by Rule 1.6, and in the context of a government representation, is determined as a matter of law. "To determine whether the client of a government lawyer has consented to a specific disclosure, the lawyer need not rely solely on a particular government official's *ad hoc* decision about whether to consent. Instead, that official is bound to respect the legal regime controlling government information. If that legal regime requires that information be disclosed, then the institutional client has consented to its disclosure. If that legal regime prohibits the information from being disclosed, then the institutional client has withheld consent to disclosure." Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 Washington Univ. Law Rev. 1033, 1038.

In this case, OAG asserts that its client is the State of Vermont. In Vermont, the "the Supreme Legislative power shall be exercised by a Senate and a House of Representatives." Vt. Const. § 2. The Vermont AG is not a Constitutional Officer, and his office is a creation of

the legislature. 3 V.S.A. § 151. Thus, the AG holds an office created by statute and derives all of his powers and responsibilities from the legislature. In Vermont, it is the legislature that is the AG's client and which directs his actions.

Fortunately for the AG, the legislature has provided him with clear direction on when to disclose information. The legislature has made express its intention and finding that "Officers 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. The client's consent to disclosure is anything but ambiguous: "the General Assembly hereby declares that certain public records shall be made available to any person as hereinafter provided." *Id.* The legislature made a similar declaration in the Open Meetings Law, stating "the legislature finds and declares that public commissions, boards, and councils and other public agencies in this State exist to aid in the conduct of the people's business and are accountable to them pursuant to Chapter I, Article VI of the Vermont Constitution." 1 V.S.A. § 311 (a). It is hardly difficult to discern the intent of the AG's client, the Vermont Legislature, as it relates to disclosure of records under the PRA.

Because the legislature has consented to disclosure both implicitly and explicitly, and the legal regime in place governing consent under Rule 1.6 is the PRA, the records at issue in this case must be disclosed.

VIII. Neither the Attorney-Client Privilege, nor the Work Product Doctrine, nor the Common Interest Doctrine, Apply to the Records in Question

OAG asserts that numerous records are protected from disclosure by either the Attorney-Client Privilege or Attorney Work Product Doctrine. Here again, and even assuming *arguendo* that OAG has conducted a diligent search and that the records reflected in the

privilege logs constitute the entire universe of responsive documents, petitioners are entitled to relief.

a) Attorney-Client Privilege and the Work Product Doctrine do not Apply

Attorney-Client Privilege is a matter of common law. As with Rule 1.6, discussed above, and consistent with 1 V.S.A. § 319(a), it is OAG's burden to establish that Attorney-Client Privilege or the Work Product Doctrine applies. Plaintiffs note that, as discussed above in the context of a Rule 1.6. analysis, attorney-client privilege must relate to a communication between an attorney and a client about a legal representation, rather than a political campaign. Further, Attorney-Client Privilege is subject to waiver when shared with parties outside of the attorney-client relationship.

b) The Common Interest Doctrine Does not Apply

OAG uses the Common Interest Doctrine in an attempt to justify its sharing of purportedly privileged communications with parties outside OAG. Ordinarily, sharing of privileged communications outside of the attorney-client relationship waives the privilege. Thus, OAG resorts to a common interest analysis as an attempt to justify its actions in sharing records with select offices and individuals, without also sharing those same records with the public under the PRA.

OAG and one of the Plaintiffs in this case (the Energy & Environment Legal Institute) recently briefed this issue for this Court where OAG also raised this doctrine as a defense to justify nondisclosure under the PRA. Rather than fully re-brief the same issues in this case, Plaintiffs incorporate the arguments made in that case on this subject and attaches for the Court's convenience a relevant brief and transcript. *Energy & Environment Legal Institute v. Attorney General of Vermont*, 558-9-16 (Washington Superior Court). Exhibits D and E.

In short, Plaintiffs assert that the purported Common Interest Agreement at issue in this case is void for such purposes as a matter of public policy, or because it did not relate to active or anticipated litigation. In the alternative, Plaintiffs assert that the purported Common Interest Agreement could not protect information voluntarily shared with parties OAG knew or should have known could not enforce the agreement, such as the State of New York, where the agreement was inarguably void pursuant to *Ambac Assurance Corp., et al. v. Countrywide Home Loans, Inc.*, et al., 2016 N.Y. Slip. Op. 04439 (N.Y. June 9, 2016).

IX. Conclusion

For the foregoing reasons, Plaintiffs respectfully oppose defendant's Motion for Summary Judgment. Plaintiffs respectfully request that the Court set a supplemental briefing schedule for the issues that remain after disposition of the instant motion.

Dated at Charlotte, Vermont this 7th day of April 2017.

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[16] Plaintiffs' *pro hac vice* counsel notes, for purposes of all future correspondence and pleadings, that his suite number recently changed from 304 to 308.