STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. 349-6-16 ~~Cncv~~ Wncv

ENERGY & ENVIRONMENT LEGAL INSTITUTE and FREE MARKET ENVIRONMENTAL LAW CLINIC,

Plaintiffs

v.

THE ATTORNEY GENERAL OF VERMONT,

Defendant

DEFENDANT'S REPLY IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

In their April 7, 2017 opposition to the AGO's motion for summary judgment, plaintiffs announce that they are abandoning their pursuit of a majority of the documents withheld by the AGO in response to plaintiffs' records request.[1] Plaintiffs have now limited their challenge to 28 of the 193 listed documents. *See* Opposition, 4/7/17, at 6-7.[2] Plaintiffs attempt to mount a challenge to the remaining withheld documents. In addition, they argue that summary judgment should not be granted as to their claims for declaratory relief and attorney's fees. The AGO replies as follows.

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[1] This abandonment amounts to a validation of the AGO's efforts to get plaintiffs to narrow and clarify their records request. As is now apparent, plaintiffs could easily have narrowed and clarified their request further, but chose not to do so.

[2] Previously, in their March 17, 2017 Response to the AGO's Index of Withheld Documents, plaintiffs indicated that they were waiving their challenge to all but 79 of the 193 documents listed on the Index. The opposition further reduces plaintiffs' challenge to 28 documents.

1. **Plaintiffs fail to identify any dispute of material fact with respect to the adequacy of the AGO's search for records.**

Plaintiffs argue that the AGO "has submitted no evidence that it searched for records held by the former Attorney General (AG) of Vermont, William Sorrell, on his Gmail account." Opposition at 5. They cite to their February 7, 2017 Motion to Join William Sorrell in an attempt to support this argument. Their argument fails for two reasons.

First, to the extent that plaintiffs assert that the AGO is obligated to demonstrate that it conducted an adequate search for records responsive to plaintiffs' request, that argument is squarely contradicted by the representations that plaintiffs' counsel made to the Court during the January 17, 2017 status conference. In response to the Court's question of "where are you?" Attorney Hardin stated during the January 17 conference that "we believe that the State should file a motion for summary judgment," **Exhibit 1 (Transcript, 1/17/17, at 3) (attached hereto)**, and further stated as follows:

> *[W]e're not seeking additional records or an additional search.* Some records that they searched for and located, they withheld, and we do seek those records. But I mean, *it's an identifiable universe.* They have searched for and found records, they have provided some, they have not provided some.

Id. (Transcript at 4) (emphasis added).

In preparing its Motion for Summary Judgment, the AGO justifiably relied on this concession by plaintiffs' counsel in open court that they were not questioning the adequacy of the search by the AGO. Plaintiffs conceded the adequacy of the search of AGO office records and are bound by their concession.

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Second, in light of the undisputed fact that William Sorrell has left office – a fact subject to judicial notice – and that he was not named as a party to this lawsuit, plaintiffs cannot block summary judgment based on their desire to compel a search of his personal email account. William Sorrell no longer serves as the Attorney General. While plaintiffs have filed a motion to join William Sorrell (and thereby attempt to obtain a search of his personal email account), they delayed in filing that motion until *after* William Sorrell had left office. Mr. Sorrell is now a private citizen. Moreover, the motion to join William Sorrell is a separate motion and cannot be used to disrupt the summary judgment motion.[3] For all the foregoing reasons, plaintiffs' argument should be rejected.

2. Plaintiffs' analysis of Rule 1.6 of the Rules of Professional Conduct is fundamentally flawed.

Plaintiffs' challenge is now principally directed at certain documents within two groupings that involve communications between the Vermont AGO and other states' offices of attorney general.[4] The Court must determine whether these communications contain "information relating to the representation of a client" under Rule 1.6.

[3] The AGO maintains that plaintiffs' motion to join the former attorney general should be denied for all the reasons stated in the AGO's Opposition dated February 27, 2017 and Sur-Reply dated March 14, 2017. Those reasons include the fact that plaintiffs delayed filing their motion to join until after William Sorrell had left office and until after a pretrial order had been entered providing for submission of the case on the merits.

[4] In addition, plaintiffs have requested that the Court examine Documents # 58 and 59 *in camera* to determine whether they are related to the pending lawsuit entitled *State of Vermont v. Atlantic Richfield Co. et al.*, Docket No. 340-6-14 Wncv. Examination by the Court will confirm that, in fact, they are related to that pending action and therefore exempt under 1 V.S.A. § 317(c)(14).

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Plaintiffs make three arguments. First, they argue that any communications between a group of attorneys general, including Vermont's and New York's attorneys general, who have identified common legal interests associated with issues of climate change and global warming should be viewed as intended to advance a "political agenda" rather than legal representation.

Secondly, plaintiffs argue that the "information related to the representation of a client" standard in Rule 1.6 does not go beyond the standard for attorney-client privilege and work product protection. And, finally, plaintiffs argue that, assuming the withheld communications contain information relating to representation, the Legislature nevertheless provided consent to disclosure of that information for purposes of Rule 1.6 through the provisions of the PRA.

A. Plaintiffs' "political agenda" argument has no legal or factual basis.

Not surprisingly, plaintiffs have not cited a single case employing a "political agenda" analysis in connection with Rule 1.6. Of course, any entity opposed to a course of governmental action can conveniently allege that a decision to engage in such action is politically motivated. The fact is that decisions are made by governmental officials and those decisions are open to criticism on any ground. But plaintiffs' allegations do not substitute for the requisite analysis under Rule 1.6.

That point is illustrated here, where plaintiffs attempt to selectively cherry-pick statements from a March 7, 2017 letter sent by attorneys general Schneiderman and Sorrell and put their spin on those statements. *See*

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Opposition at 10. Plaintiffs have conveniently ignored what a full examination of the document reveals – namely, that the attorneys general have identified common legal interests relating to climate change which they seek to advance by working together as a group. For example, the March 7, 2016 letter refers to: prior "*legal actions* [undertaken by a group of attorneys general] to help protect our citizens from the adverse consequences of climate change and to promote energy efficiency"; "*tak[ing] concerted action* to protect our citizens from the public safety, health, and environmental harms created by climate change"; and "our work *defending* the Clean Power Plan." Hardin Affidavit, Exhibit A (emphasis added). The letter is referring to *legal* action. Moreover, it goes on to describe the purpose of the climate change coalition of attorneys general as "working together to take effective *investigative and legal steps* to address the risks that climate change poses to all of our citizens" and "discuss[ing] ongoing and potential *legal actions* and [ ] consider[ing] mechanisms to support these actions." *Id.* (emphasis added). The document identifies purposes that are legal in nature.

Likewise, the document that plaintiffs cite for a comment that an appearance by former Vice President Al Gore at a press conference would provide some "star power," *id.* at 11 – a rather obvious observation – includes the following statement of the purpose of the coalition of attorneys general: "to work together *to fully enforce the State and federal laws* that require progressive action on climate change and that prohibit false and misleading statements to

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the public, consumers and investors regarding climate change." Hardin Affidavit, Exhibit B (emphasis added). Rule 1.6.

In sum, plaintiffs' attempt to cast communications between a group of attorneys general concerning climate change as somehow not related to legal representation is a red herring.[5] The proper inquiry focuses on whether the communications between the attorneys general contain "information related to the representation of a client." Rule 1.6(a).

B. Plaintiffs fail to address the broad scope and application of Rule 1.6.

Plaintiffs try to argue that Rule 1.6 does not extend beyond the scope of the attorney-client privilege and work product doctrine. They are mistaken.

The Court must determine in this action whether the withheld communications between offices of the attorney general relate to the representation of a client within the meaning of Rule 1.6. Under Rule 1.6, the Court must review these communications not by reference to the narrower attorney-client privilege that applies in proceedings "in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client," *see* Rule 1.6, Comment 3, but rather under the broader standard of Rule 1.6(a) that protects "information relating to the representation of a client." In the context of an action under the PRA, Rule 1.6 applies through the exemption

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[5] Plaintiffs' citations to various other purported factual materials in their Opposition fail to comply with the procedural requirements of V.R.C.P. 56(c), and the affiant obviously does not have the requisite personal knowledge with respect to such materials. Moreover, plaintiffs' arguments with respect to those materials are disjointed and unpersuasive.

set forth in 1 V.S.A. 317(c)(3). The Court must give effect to the broader language of Rule 1.6.[6]

The term "information" is broad. The term can be applied to documents obtained through research undertaken by an attorney. Such research would include conventional legal research. But research would also include, for example, newspaper articles or publicly available reports that an attorney has obtained or transmitted. Rule 1.6 does not distinguish between different types of information.

The term "information" also includes information obtained or transmitted through verbal or written **communication.** Thus, verbal or written communications related to a matter on which an attorney is working for a client are within the scope of Rule 1.6. Such communications could be either with a client or with others. For example, if an attorney wrote to a third-party business in connection with evaluating a matter for a client and wrote in the letter that "I'm looking for the following records: . . . ." that communication would by itself constitute information relating to the representation. Why? Because it would reflect the attorney's course of action on behalf of the client.

Emails are an increasingly common form of communication. Like other forms of written communication, emails contain **information.**

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[6] Of course, Rule 1.6 does not protect every document that is generated or received by the AGO. There are many documents that are not related to actual "representation" and that therefore would not be covered by Rule 1.6 – for example, office budgets; personnel procedures; guidance documents; correspondence with the Legislature and legislative reports; consumer complaints; published legal opinions; and correspondence to inquiries from members of the public.

It is important to recognize that Rule 1.6 does not qualify the term "information" based on any concept of relative significance to the representation. Rule 1.6 is purposely broad to err on the side of protecting the client's interests. This broad rule ensures that no information related to the representation – regardless of whether such information would appear to be significant or insignificant to someone not familiar with the matter – is disclosed by an attorney unless the client has first consented to the disclosure.

* * *

In addressing what may constitute "information relating to the representation of a client" in this case the Court should consider the manner in which private attorneys routinely render legal services to a client and the types of information that are generated in the course of representation. In addition, the Court should consider the unique authority that lawyers in a public law firm – the Office of the Attorney General – exercise in representing the interests of the State of Vermont.

Legal services provided by private attorneys include not only the communication of legal opinions and advice to clients and preparation of legal documents, but also the transmission and collection of **information** for purposes of evaluating legal issues. When attorneys send or receive communications in connection with a matter, those communications convey a broad range of information. Moreover, such communications are not confined to active or anticipated litigation.

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For example, an attorney might send an email to a person outside his or her law firm for purposes of obtaining documentary information in connection with a matter that involves rendering legal advice to a client without any litigation dimension – for example a business transaction or request for a legal opinion. That email could reveal what information the attorney was seeking and from whom and when information was first sought. Or, in connection with a similar retention to provide legal services, an attorney might use an email to arrange a meeting with a non-client or to arrange a conference call. In that case, the email would reveal with whom the attorney was communicating, and when the meeting or conference was proposed or occurred; and it could possibly reveal the subject matter of that attorney's work. All of this would be information relating to the representation of a client.

Of course, such information would not easily fit the mold of the narrower attorney-client privilege. But Rule 1.6 is worded more broadly. Rule 1.6 is designed through its broad wording to avoid any possibility that information might someday be used against a client's interest without the client's consent. The broad formulation of Rule 1.6 eliminates any subjective judgment on the part of the attorney as to the potential usefulness of information, or lack thereof, to a possible adversary of the client's.

Based on the broad language of Rule 1.6, any attorney who is working on a matter for a client must adhere strictly to the broad prohibition in Rule 1.6 or face potential disciplinary action. This reality must necessarily inform the Court's application of Rule 1.6 in this case.

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Specifically, the Court should consider whether a private attorney who conducts an investigation in the course of preparing advice not related to active or reasonably anticipated litigation would feel free to disclose to a third party, without first obtaining the client's consent, any of the various types of information identified above that routinely appear in emails generated and received by attorneys. The AGO submits that a private attorney would disclose none of it without client consent. Why? Because all of the information relates to the representation of a client and because Rule 1.6 is written to give every consideration to protecting the client's interests.

* * *

Moreover, the Court should consider the unique authority of the Attorney General and the nature of the work that is performed by assistant attorneys general. By law, the AGO is charged with the authority to "represent the State in all civil and criminal matters," 3 V.S.A. § 152, and is vested with broad prosecutorial authority. *See id.* § 153(a). Thus, unlike a private attorney – who is retained by individual clients to work on individual cases or matters and whose representation has a discrete beginning and ending – the Attorney General has continuing authority to represent the State of Vermont's interests. The Rules of Professional Conduct confirm this unique authority. *See* Vt. Rules of Professional Conduct, Preamble and Scope, Comment 18 (acknowledging that the Attorney General "may also have the authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.").

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This is an important distinction between representation undertaken by private attorneys and by public attorneys. Representation of the public interest by assistant attorneys general is a fluid undertaking that involves a broad range of information gathering and communication. In addition, government attorneys maintain the confidentiality of their work so that potential enforcement targets or other potential adversaries do not obtain information that could be used against the State's interests.

Assistant attorneys general represent the State's interest when they evaluate matters for potential action by the Attorney General. Under Vermont law, the Attorney General is charged with that authority. In the course of evaluating matters, assistant attorneys general routinely pursue information, and the pursuit of such information necessarily entails communications, such as email.

Not surprisingly, assistant attorneys general frequently communicate with assistant attorneys general from other offices of attorneys. Why? Because such communications facilitate the exchange of useful information – both factual and legal – regarding matters of common interest. Networking with other AGOs necessarily expands the potential to acquire factual information and allows for collaboration with other like-minded AGOs on legal analyses and strategies. In fact, in this age where the ability to communicate has been so enhanced by technology, the AGO would be remiss if it did *not* engage in such communications with other like-minded AGOs on matters with multi-state implications.

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Absent a client's consent to disclosure, Rule 1.6 protects not only the substantive communications between two AGOs, but other information as well: the subject of their communication, the identity of the communicants, and the dates when they communicated. Such information can conceivably be useful to a potential adversary seeking to discover how an AGO is going about pursuing a matter of interest. Not surprisingly, even at the earliest stages of an inquiry, AGOs do not want potential targets of AGO action to acquire information concerning an inquiry.[7]

* * *

Applying these guiding principles, the Court's review of the withheld communications should evaluate whether they relate to a matter that may implicate the legal authority of the Attorney General. Potential legal action need not be imminent. Communications deserving of Rule 1.6 protection can occur at the very outset of learning about or pursuing a matter of interest. The Court should guard against the possibility that a potential target or other adversary might obtain information concerning an AGO inquiry by means of a public records request. If there is any conceivable connection with a potential future legal action, then the Court should consider such information related to the representation of the public interest and covered under Rule 1.6.

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[7] Here, the AGO submitted pursuant to the Court's pretrial order an Index that identifies the communicants and the dates of each withheld communication. However, to prevent any adverse party from using that information against the State, the AGO requested and the Court's order included a protective order provision that enjoins the plaintiffs from disseminating that information. Moreover, the Index does not identify the specific subject of the communications. That information is available to the Court through *in camera* inspection of the documents and should remain confidential.

Here, the Court's examination of the withheld documents will reveal that they pertain to a matter that could potentially involve legal action by the AGO. Once the Court makes that determination, the Court should avoid attempting to evaluate the significance of the information contained in the communications. What might appear to be insignificant to the Court might actually be useful to a potential adversary. Under Rule 1.6, all related information is covered – without any judgment as to significance.

C. Plaintiffs' theory that the Legislature has provided consent to disclosure of the withheld documents through the PRA is meritless.

In their Opposition, plaintiffs argue in essence that the Attorney General is without authority as a matter of law to withhold consent to disclose information relating to his or her representation of the public interest. According to plaintiffs, the Legislature has dictated this result through the language in § 315 of the Public Records Act ("PRA"). *See* Opposition at 15. The argument should be rejected for several reasons.

First, plaintiffs' argument ignores the fact that the Legislature included exemptions, including the exemption in § 317(c)(3) that incorporates the obligations under the Code of Professional Responsibility, and made them available to governmental agencies. The language of the exemption is plain and the Legislature inserted no qualifying language that would prevent the Attorney General from invoking Rule 1.6 of the Code. The statute must be read according to its plain language. *See, e.g., Caledonian-Record Publ'g Co. v. Vt. State College*, 2003 VT 78, ¶ 13, 175 Vt. 438, 833 A.2d 1273 (courts are "not at

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liberty" to question express statutory exemption); *Rutland Herald v. Vermont State Police,* 2012 VT 24, ¶ 12, 191 Vt. 357, 49 A.3d 91 ("We look first to the plain meaning of [the] statutory language, and if the plain meaning resolves the interpretation issue, we generally look no further.").

Second, as is the case with all statutes, the language of the PRA must be read as a whole. The language of § 315 is general purpose language and it cannot supplant the specific exemptions set forth in § 317(c). All statutory provisions must be read together and given meaning.

Third, under the rules of statutory construction the PRA must be read to avoid absurd consequences. *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 14, 177 Vt. 287, 293, 865 A.2d 350, 356 (2004) (recognizing presumption "that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences") (quotations omitted). Plaintiffs' interpretation of § 315 would render every exemption set forth in 317(c) inoperative not only for the AGO, but for every other state agency as well. After all, plaintiffs' argument hinges on its assertion that the AGO is a creature of the Legislature and every other Executive Branch agency was also created by the Legislature.

And, finally, plaintiffs' assertion that the AGO is without authority to decline disclosure of the withheld documents is fundamentally inconsistent with the statutory provisions that confer authority on the Attorney General. *See* 3 V.S.A. § 152 (conferring authority to "represent the State in all civil and criminal matters"); *id.* § 153(a) (vesting broad prosecutorial authority); *see also id.* § 157 (authority to appear "in the preparation and trial of all prosecutions

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for homicide and civil or criminal causes in which the State is a party or is interested *when, in his or her judgment, the interests of the State so require.*") (emphasis added). And, as noted previously, the Code of Professional Responsibility acknowledges that unique authority. *See* Rules of Professional Conduct, Preamble and Scope, Comment 18.

3. Plaintiffs' efforts to dismiss the common interest doctrine are unavailing.

Plaintiffs argue that the common interest doctrine does not extend attorney-client privilege or work product protection to the documents withheld in this case. According to plaintiffs, the common interest doctrine is limited to situations where the common interests pertain to active or anticipated litigation. They cite to V.R.E. 502(b)(3) and a New York decision, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E. 3d 30 (2016).

V.R.E. 502(b)(3) recognizes one application of the common interest doctrine – for a confidential communication "by [a client] or his representative or his lawyer, or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." For several reasons, that provision does not preclude application of the common interest doctrine under the factual circumstances presented in this case.

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First, under Vermont law, privileges and protections that derive from the common law are not cast in stone but, rather, are subject to development through case law over time. *See, e.g., Cockrell v. Middlebury College*, 148 Vt. 557, 558 536 A.2d 547, 548 (1987) (recognizing litigant's right to "ask[ ] this

Court to make a decision establishing for Vermont a so-called 'academic' privilege, *not now recognized by the Vermont Rules of Evidence,*" and observing that "V.R.E. 501(a) does provide that '[t]his rule shall not be construed to prevent the development at common law of other privileges.'" *Id.* (quoting V.R.E. 501(a)) (emphasis added); *see also Killington, Ltd. v. Lash*, 153 Vt. 628, 642-43, 572 A.2d 1368, 1377 (1990) (recognizing, in a PRA lawsuit, the applicability of the work product doctrine in connection with contested administrative proceedings and observing that "[t]he common law is an active, not a static, flow of ideas and principles, a living stream, constrained by policy and precedent within this branch, and by the supervening guides of constitution and statute.") (citing *Hay v. Medical Center Hospital of Vermont*, 145 Vt. 533, 542-44, 496 A.2d 939, 944-46 (1985)). Thus, the common interest doctrine is subject to development through case law.

As explained in the AGO's motion for summary judgment, federal and state courts have over time concluded that expansion of the common interest doctrine beyond circumstances involving active litigation is appropriate. *See* Motion for SJ at 22-25 (and cases cited therein). The fact is that the weight of authority in jurisdictions that have considered the issue now favors the Restatement standard, which extends the common interest doctrine to both litigated and non-litigated matters, provided there exists a common legal interest. It is appropriate for the Vermont courts to consider the evolution of the doctrine in the federal and state courts.[8]

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[8] It should also be noted that V.R.E. 502 was last amended in 1995 – more than twenty years ago.

Second, there is Vermont precedent for extending a "codified" protection through the development of the common law. In *Killington*, a PRA case, the Supreme Court did just that. It held that the work product doctrine – as set forth in V.R.C.P. 26 of the Rules of Civil Procedure which are applicable only in Superior Court actions – could also be asserted, without adoption of any substantive rule or regulation, in contested administrative cases throughout state government. This ruling was a pronouncement of common law.

Third, plaintiffs' assertion that V.R.E. 502(b)(3) limits the application of the common interest doctrine to a litigation context ignores the fact that confidential attorney-client communications are entitled to protection even in the complete absence of litigation. For example, attorney-client communications are protected in connection with a client's consideration and pursuit of transactions. The broad scope of the attorney-client privilege warrants a co-extensive application of the common interest doctrine, as the majority of federal and state courts have concluded.

Finally, application of the common interest doctrine under the specific circumstances presented in this case is in the public interest. Unlike private parties, attorneys general are uniquely situated as government officials with broad authority and the duty to serve the public interest. It is in the public interest to facilitate the ability of like-minded attorneys general to communicate with one another.

The unique attributes and authority of the office of attorney general were the basis for the decision in *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526

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(S.C. 2010), in which the South Carolina Supreme Court held that the common interest doctrine protected communications between multiple states' attorneys general where the attorneys general were "involved in coordinating [tobacco] regulation and enforcement." *Id.* at 531. In *Tobaccoville*, the Court recognized a general legal interest in coordinating regulatory and enforcement efforts involving tobacco. It did not require any finding that litigation was reasonably anticipated at the various times that information was shared among the attorneys general.

Likewise, in *State ex rel. Bardwell v. Ohio Attorney General*, 910 N.E.2d 504 (Ohio Ct. App. 2009), the Court upheld the application of the common interest doctrine to an email reflecting a planned phone conference between the Ohio Attorney General and the New York Attorney General. *Id.* at 518-19. The matter of common interest was described only as "a student-loan investigation." *Id.* There was no conclusion by the court that litigation was reasonably anticipated or imminent.[9]

In this day and age, attorneys general are faced with a plethora of issues that transcend state boundaries. Moreover, they must contend with well-funded adversaries who have every reason to pry into the communications between attorneys general.

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[9] An alternative reading of these decisions might be that in light of the unique nature of the authority of offices of attorneys general – which includes the general authority to investigate, to enforce the states' rights through prosecution, and to otherwise advance the states' interests through litigation – a liberal standard of "anticipated litigation" should be applied to communications among attorneys general that pertain to a matter under consideration, regardless of how incipient or advanced the inquiry may be. In any event, these cases are directly contrary to plaintiffs' argument.

From a public policy perspective, allowing attorneys general to undertake confidential communications with other attorneys general serves the public interest by optimizing the exchange of information and coordination of efforts that can translate into multi-state benefits. As explained in the AGO's motion for summary judgment, attorneys general routinely collaborate on complex matters that transcend state boundaries. Conversely, if attorneys general cannot ensure the confidentiality of multi-state communications unless litigation is pending or imminent, the ability to communicate will be inhibited and the public interest will not be served. Attorneys general cannot collaborate effectively with one another if they are compelled to share their communications with potential adversaries.

Plaintiffs also cite to a recent decision from New York, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E. 3d 30 (2016), as support for its argument. That decision, however, is readily distinguishable and otherwise unpersuasive. First, the court in *Ambac* did not address a situation involving communications among state attorneys general. It held that communications between two corporate entities pertaining to a proposed transaction – a corporate merger – could not receive protection under the common interest doctrine absent pending or anticipated litigation. 57 N.E.3d at 32; *see also id.* at 38 (citing the lack of evidence that "licensing agreements and other complex commercial transactions have not occurred in New York because of our State's litigation limitation on the common interest doctrine; nor is there evidence that corporate clients will cease complying with the law."). Multi-state

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communications among attorneys general enhance their ability to protect civil rights, consumer rights, and the environment. Such public interests were not at stake in *Ambac*, a lawsuit between private entities.

In addition, the reasoning of the majority decision in *Ambac* (a 4-2 decision) is not persuasive. In a well-reasoned dissent, two of the justices in *Ambac* present an extensive critique of the majority opinion. After observing that "the majority of federal courts that have addressed the issue have held that the privilege applies even if litigation is not pending or reasonably anticipated," *id.* at 43, the dissent points out that "the common interest doctrine is grounded in the attorney-client privilege, which has no litigation requirement." *Id.* at 44; *see also id.* at 48 ("[The attorney-client privilege] has never been limited to client communications involving pending or anticipated litigation."). The dissent also notes the vagueness of a "reasonable anticipation of litigation" standard and the resulting uncertainty of application: "[The majority] ignores the inherent vagueness in the term. Indeed, whether the parties reasonably anticipate litigation inevitably requires judicial consideration of case-specific facts." *Id.* at 45. The dissent concludes that in the context of a modern-day corporate merger, the interest of the parties in successful compliance with statutory and regulatory requirements constituted a sufficient legal interest that should have been recognized. *Id.* at 47. In sum, *Ambac* is a minority decision and, even in the limited context presented (a corporate merger), it was wrongly decided.[10]

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[10] Plaintiffs also assert that *Ambac* would prevent the New York AGO from obtaining common interest protection without active or anticipated litigation and, therefore, the

In sum, the Court's examination will reveal that the common interest doctrine should be applied to the withheld communications between the Vermont AGO and other AGOs.

4. The AGO is entitled to summary judgment with respect to plaintiffs' claims that the AGO violated the time period and cost provisions of the PRA.

In their Opposition, plaintiffs fail to brief their claims that the AGO violated the time period and cost provisions in the PRA. Instead, they argue that the Court should defer consideration of those claims until after it has addressed whether plaintiffs are entitled to the documents withheld by the AGO. *See* Opposition at 2. Plaintiffs' eleventh-hour attempt at avoidance should be rejected.

Plaintiffs cannot ignore the fact that they – not the AGO – bear the burden of proof on their "violation" claims and that, in response to a motion for summary judgment, they cannot rest on their allegations:

> Summary judgment is mandated under the plain language of V.R.C.P. 56(c) where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof at trial. In determining whether summary judgment is appropriate, we must consider the record in light most favorable to the nonmoving party. Nevertheless, in opposing summary judgment, the nonmoving party may not rest on bare allegations to demonstrate that disputed material facts remain.

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Vermont AGO had no reasonable expectation at the time of being able to protect such communications with the New York AGO. But, as demonstrated above, the facts presented in *Ambac* did not involve a governmental agency with authority to represent the public interest. Moreover, plaintiffs have cited no New York decision that applies *Ambac* to the New York AGO. The argument is meritless.

Baptie v. Bruno, 2013 VT 117, ¶ 10, 195 Vt. 308, 313, 88 A.3d 1212, 1216 (2013) (quotations omitted).

Moreover, plaintiffs' attempt to obtain what would amount to a bifurcation of this proceeding – in essence, breaking up this litigation into pieces and removing some of plaintiffs' claims from the current summary judgment process – comes too late and is otherwise procedurally defective. Plaintiffs cannot make such a request for the first time in an opposition to a summary judgment motion. If such a request were going to be made, it should have been made previously by motion and long before the summary judgment process had commenced. Plaintiffs' attempt to sidetrack for later consideration their violation claims should be rejected as untimely.

The bottom line is that plaintiffs have failed to identify any dispute of material fact with respect to their time-period and cost-provision claims. In addition, it is apparent that these claims fail as a matter of law.

A. alleged violation of the PRA's time-period provisions

Plaintiffs wish to pursue a claim that the AGO "violated" the time periods for responding to public records requests set forth in 1 V.S.A. § 318. *See* Opposition at 1 – Item (a) (citing ¶¶ 46, 47, 48(c) of 2nd Amended Complaint). Summary judgment should be entered for several reasons.

First, it is clear from the record that to the extent that plaintiffs attempt to assert a violation of the statutory time periods based on its original May 6, 2016 public records request, *see* 2nd Amended Complaint ¶ 47, that claim is rendered moot by plaintiffs' eventual revision of their public records request.

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On September 2, 2016, plaintiffs reduced the scope of the May 6, 2016 public records request which was the original basis for their claims in this action. **See Affidavit of William Griffin, 3/10/17, at ¶ 2 & Ex. 1 (letter, 9/2/16, M. Hardin to W. Griffin).** The letter reduced the scope of the request "from 16 to just 4 search terms," as well as the time periods for which records were sought. The letter confirmed that plaintiffs were offering "to limit our original request to only certain of the search terms and only certain time periods." **Id., Ex. 1 at 2.** And it characterized the revised request as a "substantial narrowing." **Id.** To the extent that plaintiffs rely on their May 6 request to allege violations of the statutory time periods, those claims were rendered moot by plaintiffs' September 2 revision.

Secondly, the factual record shows that when plaintiffs narrowed their request on September 2, 2016, the AGO promptly transmitted its response to plaintiffs within both the time allowed by the statute and the time allowed by the Court in its September 19, 2016 Order. The AGO responded to the September 2 revised request on September 19, 2016 – within the 10-day period provided in 1 V.S.A. § 318(a)(5). **See Griffin Affidavit at ¶ 3 & Ex. 2 (Letter, 9/19/16, W. Griffin to M. Hardin).**

Moreover, the Court's order allowed the AGO's response to be filed on or before October 3, 2016 and the AGO complied with that deadline. Based on the Court's authority under 1 V.S.A. § 319(c) to "allow the agency additional time to complete its review of the records," the Court concluded that it was appropriate to enlarge the response date:

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> Pursuant to 319(c), the AG has shown that there are exceptional circumstances given the breadth of the request and the need for the documents to be individually reviewed to redact privileged material. Therefore, it is reasonable for the Court to exercise its discretion to allow the AG additional time to complete its review of the requested documents and production to Requestors.

Decision, 9/19/16, at 3; see also id. ("[The record] shows that [the AG] had an exceedingly complex records request and that its efforts to clarify and narrow the request and produce responsive document reasonably justify exceeding the statutory timeframe."). The AGO's response was transmitted to plaintiffs' counsel more than two weeks before the October 3 deadline set by the Court in its Order. In sum, there is no factual basis in this case to even allege a "violation" of the statutory time periods.

Finally, plaintiffs' assertion of a violation of the statutory time periods fail as a matter of law. In *Shlansky v. City of Burlington*, 2010 VT 90, 188 Vt. 470, 13 A3d 1075 (2010), the Vermont Supreme Court rejected a public records requester's assertion that there arose an "independent violation of the [Public Records Act]" based on exceedance of the response periods set forth in 1 V.S.A. § 318. *Id.*, ¶ 17, 188 Vt. at 481, 13 A.3d at 1082–83. The Court concluded that the time periods in the statute are directory and not mandatory:

> Because the statute does not provide a negative consequence for an agency's failure to comply with the time requirement, nor does it specify a remedy such as a "deemed approval" or "waiver of exemptions," we conclude that the time requirement of § 318 is intended to be directory rather than mandatory. In those cases where failure to act within a given time frame results in a significant consequence for an agency, the Legislature has expressly stated so. Rather than providing for deemed approval or waiver, the Public Records Act explains that if a request is not timely fulfilled, it is

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> deemed denied. 1 V.S.A. § 318(c)(2). The requestor may grieve the denial by filing an action in superior court. Id. § 319(a).

Shlansky v. City of Burlington, 2010 VT 90, ¶ 17, (2010) (citation omitted).[11]

As *Shlansky* demonstrates, there is no "violation" claim available to the plaintiffs based on the time periods in the Act.

B. alleged violation of the PRA's cost provisions and request for reimbursement of amounts paid to the AGO

Plaintiffs claim that the AGO violated the provisions of the PRA that allow agencies to charge for the costs of processing public records requests. *See* Opposition at 2 – Items (b) and (d). However, these claims were rendered moot as a result of plaintiffs' decision to pay the amounts requested by the AGO for the time spent by AGO staff processing plaintiffs' request.

In their complaint, plaintiffs seek declarations that the AGO "is estopped from seeking costs and fees for the request at issue in this case, due to the balance of the equities and incorporation of common law principles by 1 V.S.A. § 271"; that "[c]osts incurred in retaining the services of an outside consulting company are not chargeable as 'staff time' within the meaning of 1 V.S.A. § 316(c)," and that the AGO "cannot collect fees pursuant to 1 V.S.A. § 316(b) or (c) in this matter because no fees were incurred 'complying with a request for a copy of a public record', or alternatively, because of the balance of the equities and the fact that plaintiffs offered on numerous occasions to obviate [the AGO's] perceived need to provide physical copies rather than in-person inspection." *See*

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[11] The holding of the Court in *Shlansky* is fully consistent with this Court's conclusion in its September 19, 2016 ruling that once an action has been initiated in Superior Court, the Court has discretion under § 319(c) to "allow the agency additional time to complete its review of the records."

2nd Amended Complaint, ¶¶ 48(d)-(f). In addition, plaintiffs seek "reimbursement" of payments they made to the AGO based on a theory that they are entitled to reimbursement of charges they allegedly paid "in excess of those required to 'comply with a request for a copy of a public record,' which is to say, an amount up to $1,500.00." *See id.* ¶ 59.

These claims have been rendered moot. As plaintiffs concede in their pleading, they chose to pay the sum of $1,500 that was demanded by the AGO. **See 2nd Amended Complaint, ¶ 24.** Plaintiffs made a first payment on September 2, 2016 and subsequently made two more payments, for a total of $1,500. **See id.** Those payments were made "to cover staff time" to process plaintiffs' public records request.[12]

If plaintiffs were dissatisfied with the AGO's requests for payment of costs, plaintiffs should have declined to pay and sought relief from this Court. Plaintiffs filed this lawsuit in June of 2016. At any time after initiating this lawsuit, they could have sought relief from the Court – by motion for summary judgment or motion for preliminary injunction – with respect to any dispute it may have had over the costs demanded by the AGO. Instead, beginning in September of 2016 plaintiffs decided to pay the requested amounts to the AGO. Plaintiffs' decision to pay the requested amounts mooted its claims.

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[12] Although the AGO initially proposed that plaintiffs pay for a private contractor to conduct the search that would have been required to respond to plaintiffs' extremely broad and complex request dated May 6, 2016, plaintiffs concede that the AGO withdrew that proposal, as confirmed by Attorney Griffin during the hearing on September 15, 2016. *See* 2nd Amended Complaint, ¶ 25. The AGO's demand for payment was based on the staff time utilized to process plaintiffs' records request. Therefore, any attempt by plaintiffs to litigate whether they could be required to pay for a private contractor to undertake a search is also moot.

Plaintiffs argue that they could pay the amounts requested and, at the same time, reserve a right to challenge the AGO's cost request and seek reimbursement of the amounts they paid. But the PRA does not include any right to seek reimbursement of costs paid to a state agency to process a request; nor does it provide for a requester to make such payments under protest.[13] The PRA provides that "[u]nless otherwise provided by law, in the following instances an agency may . . . charge and collect the cost of staff time associated with complying with a request for a copy of a public record. . . ." 1 V.S.A. § 316(c). In sum, plaintiffs had to pay the assessment or challenge it. They could not have it both ways. Their cost assessment-related claims are moot.

5. Because plaintiffs have now abandoned their pursuit of the majority of the 193 documents withheld by the AGO in response to their public records request, their request for attorney's fees must be denied.

In their Opposition, plaintiffs ask the Court to defer ruling on their claim for attorney's fees. *See* Opposition at 2 – Items (c) (citing ¶ 56 of 2nd Amended Complaint). However, given plaintiffs' abandonment of their pursuit of a majority of the documents withheld by the AGO, there is no point in deferring a ruling on the attorney's fees claim. It is apparent that the request for attorney's fees cannot succeed.

Plaintiffs request attorney's fees under 1 V.S.A. § 319(d)(1). That section provides, in pertinent part, that ". . . [t]he court shall assess against the public agency reasonable attorney's fees and other litigation costs reasonably incurred

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[13] Nor does the PRA provide for a "balancing of the equities" assessment in determining the amount that may be charged to a public records requester by a state agency for staff time spent processing a request.

in any case under this section *in which the complainant has substantially prevailed.*" 1 V.S.A. § 319(d)(1) (emphasis added).

Given plaintiffs' abandonment of their pursuit of more than half of the 193 withheld documents, it is obvious that there is no conceivable way for plaintiffs to "substantially prevail," 1 V.S.A. § 319(d)(1), in this litigation. Thus, when the Court issues its summary judgment ruling, it should also deny the request for attorney's fees.

Dated: April 24, 2017

STATE OF VERMONT

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