



diGENOVA & TOENSING, LLP  
ATTORNEYS-AT-LAW

September 15, 2016

VT SUPERIOR COURT  
WASHINGTON  
CIVIL DIVISION

2016 SEP 15 A 11:55

FILED

By Hand

Donna Waters  
Court Office Manager  
Washington Superior Court  
Civil Division  
65 State Street  
Montpelier, VT 05602

RE: Energy & Environment Legal Institute v The Attorney General of Vermont,  
Docket No. 558-9-16 wncv

Dear Ms. Waters:

Enclosed for filing with the Court is an original Complaint for filing in the above-referenced matter. Also enclosed is a check in the amount of \$295 for the filing fee. Please feel free to contact me if you have any questions. Thank you for your assistance with this matter.

Sincerely,

Brady C. Toensing

Enc.

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 558-9-16

Energy & Environment  
Legal Institute,

Plaintiff,

v.

The Attorney General of Vermont

Defendant.

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

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

**Nature of Action**

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

**Jurisdiction and Venue**

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

### **Parties**

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

### **FACTUAL BACKGROUND**

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

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

7. Plaintiff sent the PRA request at issue in this case via electronic mail on August 1, 2016,<sup>1</sup> seeking correspondence held by the OAG reflecting parties to the purported common-interest agreement seeking consent to share records, consenting to the sharing of records, or objecting to the sharing of such records. **Exhibit 1.**
8. Specifically, on August 1, 2016, the plaintiff requested:
- copies of all email or text correspondence, attachments, and any other document recording, reflecting, discussing or mentioning:*
- a) any request by any Party to the Agreement seeking consent to share records pursuant to this Agreement;*
- b) any Party to the Agreement consenting to share records pursuant to this Agreement;*
- and,*
- c) any record, as described above, reflecting any Party to the Agreement objecting to sharing records pursuant to this Agreement.*
9. Defendant denied the August 1, 2016 request in full on August 4, 2016, citing 1 V.S.A. 317(b)(3) and (b)(4). **Exhibit 2.**
10. On August 17, 2016, Plaintiff administratively appealed the August 4, 2016 blanket denial of access to the records. **Exhibit 3.**
11. Defendant denied the administrative appeal in full and notified the Plaintiff of rights to judicial review by letter dated August 24, 2016. **Exhibit 4.**

### **Legal Arguments**

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

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

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

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

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

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

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

17. Plaintiff re-alleges paragraphs 1-16 as if fully set out herein.
18. Plaintiff sought and has been denied production of official state records responsive to the August 1, 2016 request. Specifically, the defendant has not produced records, has not indicated what if any efforts were made to search for records, apparently did not search for or review potentially responsive records, and has not provided any declaration relating to a search so that plaintiff can assess whether it was conducted in good faith.
19. Additionally, the defendant has relied on blanket, and legally insufficient, claims of privilege, and has failed to produce a privilege log indicating what if any documents it located or the particular privilege relied upon for each document.
20. Plaintiff asks this Court to enter a judgment declaring that:
- a. The PRA requires a good-faith search for records;

- b. The records as specifically described in plaintiff's records request described, *supra*, and any attachments thereto, are public records, not subject to any legal exemption from disclosure, and as such, are subject to release under the PRA;
- c. The defendant is estopped from seeking costs and fees for the requests at issue in this case, due to the balance of the equities and the incorporation of common law principles by 1 V.S.A. § 271 of the PRA.

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

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

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

**THIRD CLAIM FOR RELIEF**

**Seeking Costs and Fees**

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

28. Pursuant to 1 V.S.A. § 319(d), the Court shall award reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

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

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

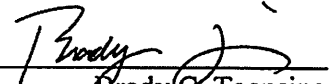


WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Dated at Charlotte, Vermont this 15<sup>th</sup> day of September 2016.

**Energy & Environmental Legal Institute**

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

  
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diGenova & Toensing  
Attorney for Plaintiff  
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Washington, DC 20006  
(202) 289-7701  
[Brady@digtoe.com](mailto:Brady@digtoe.com)

Matthew D. Hardin  
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Attorney for Plaintiff  
(Application for admission *pro hac vice* to be filed)  
314 West Grace Street, Suite 304  
Richmond, VA 23220  
(804) 608-6456  
[MatthewDHardin@gmail.com](mailto:MatthewDHardin@gmail.com)



## **REQUEST UNDER THE VERMONT PUBLIC RECORDS ACT**

August 1, 2016

Vermont Attorney General's Office  
109 State Street  
Montpelier, VT 05609-1001

**By Electronic mail: [ago.info@vermont.gov](mailto:ago.info@vermont.gov)**

**RE: Certain records pertaining to consent or objection to share information**

To Whom it May Concern:

Pursuant to the Vermont Access to Public Records Act, Vt. Stat. Ann. Title 1, §§ 315-320, the undersigned groups request copies of any and all records as described herein. The Free Market Environmental Law Clinic (FME Law) and Energy & Environment Legal Institute (E&E Legal) are both non-profit educational foundations incorporated in Virginia, with offices in Washington, DC, with established public records transparency practices. Consistent with the Vermont Access to Public Records Act, we expect a prompt, substantive reply to our request. Given the non-profit transparency and journalism activities of the requesters, described below, we ask that those limited fees permitted by § 316 be waived.

On April 29, 2016, Nicholas Persampieri of your office signed a document titled "Climate Change Coalition Common Interest Agreement" ("Agreement"), pursuant to a recruitment effort to form, or more precisely "renew" an "informal coalition of Attorneys General" whose work on a broad spectrum of policy advocacy "has been an important part of the national effort to ensure adoption of stronger federal climate and energy policies", this time with the political and policy agenda of "ensuring that the promises made in Paris become

reality” (referring to the December 2015 climate treaty negotiations). March 7, 2016 Letter from Attorneys General Schneiderman and Sorrell.

In that Agreement, paragraph 5(iv), your office declared in agreement with other state attorneys general that documents which, in some or all cases, would otherwise be public records, are privileged pursuant to this purported Agreement, even if disclosed to non-parties to the Agreement “provided that all Parties [to the Agreement] consent in advance”.

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

- a) any request by any Party to the Agreement<sup>1</sup> *seeking consent to share records* pursuant to this Agreement;
- b) any Party to the Agreement *consenting to share records* pursuant to this Agreement;
- and,
- c) any record, as described above, reflecting any Party to the Agreement *objecting to sharing records* pursuant to this Agreement.

*Records responsive to this request will be dated from April 28, 2016 through the date you process this request, inclusive.*

We request entire email/text threads.

If you have information to help further narrow this request please feel free to contact the undersigned. On information and belief, we suggest that the two Vermont OAG officials above

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<sup>1</sup> Attorneys General offices signing the Agreement, as reflected in signature pages sent to your office by Monica Wagner of the New York Office of Attorney General on May 25, 2016, are California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont and Washington.

may have conducted the public business of the state of Vermont on private email accounts. As you are aware, § 317 (b) provides that "public record" or "public document" means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business" regardless of that record's location.

**We request a rolling production, if/as you see necessary and appropriate within the Vermont Access to Public Records Act, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released.**

**We do not seek duplicates of responsive records.**

While we request that the limited fees allowed by statute be waived, we nevertheless agree to pay legitimate expenses up to \$150.00. If you estimate costs will exceed that please notify us and break down the expected costs.

**We request records in electronic form if available. By the nature of this request *all responsive records should be in electronic format, necessitating no photocopying expense.***

None of the undersigned seek the information for a commercial purpose. FME Law and E&E Legal are organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. As such, we also have no commercial interest possible in these records.

E&E Legal, for example, is also a media outlet for these purposes<sup>2</sup>: it not only serves as a regular source of public information and substantive editorial comment about this information to numerous national (and/or local) media outlets but also applies substantive editorial input in its own publications disseminating public information.

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<sup>2</sup> Examples of open records-derived publications by E&E Legal requesters include, Horner: *The FOIA coping response in climate scientists*, WATTS UP WITH THAT, Jan. 21, 2014 (where ATI/E&E Legal disseminated FOIA-obtained information from NASA, University of Arizona and EPA on many additional occasions, see <http://wattsupwiththat.com/?s=horner>); *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012. See also, Christopher Horner: *Yes, Virginia, you do have to produce those 'Global Warming' documents* (with David W. Schnare and Del. Robert Marshall), WASHINGTON EXAMINER, Jan. 5, 2011; David W. Schnare, "FOIA and the Marketplace of Ideas", E&E Legal Letter (Sept. 2013); *Why I Want Michael Mann's Emails*, THE JEFFERSON JOURNAL, The Thomas Jefferson Institute for Public Policy, Dec. 7, 2011. Information is also disseminated in issue-specific pages of E&E Legal's website, see, e.g. "FOIA Requests" section.

Others include Horner: *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks*, WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled*, WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP WITH THAT, Jan. 14, 2013; *EPA Doubles Down on 'Richard Windsor' Stonewall*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013, *Peeking behind the Green Curtain*, WASHINGTON TIMES, FEB. 17, 2015.

In addition to coverage of its FOIAs in print publications, E&E Legal regularly disseminates its findings on broadcast media. E&E Legal and FME Law are also regularly cited in newspapers and trade publications for their open records efforts.<sup>3</sup>

The requested information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with government activities on this critical subject, or as the United States Supreme Court once noted in the context of the federal FOIA, what their government is up to.

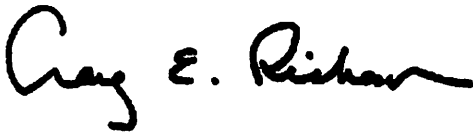
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<sup>3</sup> Print examples, only, to the exclusion of dozens of national electronic media broadcasts, include, *e.g.*, Dawn Reeves, EPA Emails Reveal Push To End State Air Group's Contract Over Conflict, *INSIDE EPA*, Aug. 14, 2013; Editorial, Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests, *WASHINGTON EXAMINER*, Jan. 28, 2013; Michal Conger, Emails show green group influence on EPA coal rule, *WASHINGTON EXAMINER*, Jan. 9, 2014; C.J. Ciaramella, Sierra Club Pressed EPA to Create Impossible Coal Standards, *WASHINGTON FREE BEACON*, Jan. 10, 2014; C.J. Ciaramella, Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs, *WASHINGTON FREE BEACON*, Jan. 15, 2014; Stephanie Paige Ogburn, Climate scientists, facing skeptics' demands for personal [sic] emails, learn how to cope, *E&E NEWS*, Jan. 21, 2014; Anthony Watts, New FOIA emails show EPA in cahoots with enviro groups, giving them special access, *WATTS UP WITH THAT*, Jan. 15, 2014; Stephen Dinan, Obama energy nominee Ron Binz faces rocky confirmation hearing, *WASHINGTON TIMES*, Sept. 17, 2013; Stephen Dinan, Top Obama energy nominee Ron Binz asked oil company employees for confirmation help, *WASHINGTON TIMES*, Sept. 17, 2013; Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts, *WATTS UP WITH THAT*, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, Obama energy nominee in danger of defeat, *WASHINGTON TIMES*, Sept. 18, 2013; Stephen Dinan, Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate, *WASHINGTON TIMES*, Sept. 12, 2013; Stephen Dinan, Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules, *WASHINGTON TIMES*, Sept. 22, 2013; Conn Carroll, FOIA reveals NASA's Hansen was a paid witness, *WASHINGTON EXAMINER*, Nov. 7, 2011; NASA Scientist accused of using celeb status among environmental groups to enrich himself, *FOX NEWS*, Jun. 22, 2011; Editorial, The EPA: A leftist agenda, *PITTSBURGH TRIBUNE-REVIEW*, Jan. 18, 2014; John Roberts, "Secret dealing"? Emails show cozy relationship between EPA, environmental groups, *FOX NEWS*, Jan. 22, 2014; Elana Schor, Proponents pounce on emails between EPA, enviros on pipeline, *E&E NEWS*, Jan. 23, 2014; Mike Bastasch, Analysis: Green Hypocrisy in Keystone XL pipeline opposition, *DAILY CALLER*, Feb. 6, 2014; Mark Tapscott, Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups, *WASHINGTON EXAMINER*, Jan. 23, 2014; Editorial, EPA has ties to radical environmentalists, *DETROIT NEWS*, Feb. 13, 2014; Michael Batasch, Report: EPA coal plant rule tainted by secretiveness, collusion with green groups, *DAILY CALLER*, Mar. 10, 2014; Jennifer G. Hickey, Legality of EPA Rules Questioned by Environmental Litigators, *NEWSMAX*, Mar. 21, 2014; Michael Bastasch, Confidential document reveals the Sierra Club's plan to shut down the coal industry, *DAILY CALLER*, Mar. 26, 2014; Michael Bastasch, Conservative group sues EPA over its 'IRS-like' tactics, *DAILY CALLER*, Apr. 1, 2014; Stephen Dinan, Conservative group sues EPA over open-records requests, *WASHINGTON TIMES*, Apr. 1, 2014.

We repeat our request for a rolling production of records, such that the State should furnish records electronically to the undersigned as soon as they are identified, on a rolling basis if necessary, and any hard copies to 9033 Brook Ford Road, Burke, Virginia 22015.

If you have any questions please do not hesitate to contact undersigned counsel.

Respectfully submitted,



Craig E. Richardson  
Executive Director, E&E Legal  
[Richardson@EELegal.org](mailto:Richardson@EELegal.org)  
703.981.5553



Christopher C. Horner, Esq.  
for the Free Market Environmental Law Clinic  
[chris@chornelaw.com](mailto:chris@chornelaw.com)  
202.262.4458

**WILLIAM H. SORRELL**  
ATTORNEY GENERAL

**SUSANNE R. YOUNG**  
DEPUTY ATTORNEY GENERAL

**WILLIAM E. GRIFFIN**  
CHIEF ASST. ATTORNEY  
GENERAL



TEL: (802) 828-3171  
FAX: (802) 828-3187  
TTY: (802) 828-3665

<http://www.ago.vermont.gov>

STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
109 STATE STREET  
MONTPELIER, VT  
05609-1001

August 4, 2016

Craig E. Richardson, Executive Director  
E&E Legal  
722 12<sup>th</sup> St., NW, 4<sup>th</sup> Floor  
Washington DC 20005

***CERTIFIED MAIL -  
RETURN RECEIPT  
REQUESTED***

Christopher C. Horner, Esq.  
Free Market Environmental Law Clinic  
9033 Brook Ford Road  
Burke, VA 22015

***CERTIFIED MAIL -  
RETURN RECEIPT  
REQUESTED***

Re: Public Records Request

Gentlemen:

This is to acknowledge receipt of your letter and access to records request dated August 1, 2016. In your letter you request that the Vermont Attorney General's Office produce emails and other Vermont Attorney General records relating to what you describe as a common interest agreement with attorneys general in other States. Please be informed that any records responsive to your request would be exempt from public inspection by 1 V.S.A § 317(b)(3) and (4).

1 V.S.A § 317(b)(3) protects the confidentiality of records which, if made public, would cause the custodian to violate duly adopted standards of ethics. Rule 1.6 of the Vermont Rules of Professional Conduct provides that a lawyer "shall not reveal information relating to the representation of a client." Any records responsive to your request would relate to the representation of the State of Vermont by the Attorney General's Office.

1 V.S.A § 317(b)(4) protects the confidentiality of records which, if made public, would cause the custodian to violate any statutory or common law privilege. Vermont recognizes the common law attorney-client privilege



Craig E. Richardson  
Christopher C. Horner, Esq.  
August 4, 2016  
Page 2 of 2

and the common law work product privilege. Any records responsive to your request would be protected by both of these privileges.

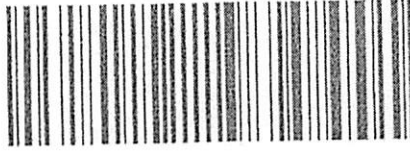
Therefore, your August 1, 2016 request to inspect records of the Attorney General's Office is denied. Vermont's access to records law provides that persons requesting records may appeal any adverse determination to the head of the agency. Any appeal should be directed to Deputy Attorney General Susanne Young, office of the Attorney General, 109 State Street, Montpelier, VT 05609.

Sincerely,

A handwritten signature in black ink, appearing to read "Melanie Kehne", with a long horizontal flourish extending to the right.

Melanie Kehne  
Assistant Attorney General

AG1  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609



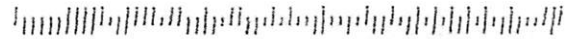
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Christopher C. Horner, Esq.  
Free Market Environmental Law Clinic  
9033 Brook Ford Road  
Burke, VA 22015

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**APPEAL UNDER THE VERMONT PUBLIC RECORDS ACT**

August 17, 2016

Deputy Attorney General Susanne Young  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609

**By FAX: 802-828-3187**

**RE: Appeal of August 4 Denial of Access to Public Records**

To the Office of the Attorney General:

Pursuant to 1 V.S.A § 318(c), the undersigned hereby appeal the August 4, 2016 determination of Assistant Attorney General Melanie Kehne to deny access to all records held by the Office of the Attorney General which are responsive to an August 1, 2016 request for certain described records. That request sought email or text correspondence, attachments, and any other document representing a request by any Party to a purported "Climate Change Coalition Common Interest Agreement" seeking consent to share records pursuant to this Agreement, consenting to share records pursuant to this Agreement, or objecting to sharing records pursuant to that purported Agreement, which are dated from April 28, 2016 through the date your Office processes this request, inclusive.

Ms. Kehne's determination to withhold all records, in full, without even a cursory determination of the number and nature of the records being withheld, violates the requesters' statutory rights under the Vermont Public Records Act. Specifically, Ms. Kehne cited only two possible bases for denying the records: the common-law attorney-client privilege, and the attorney work product doctrine.

However, neither privilege or doctrine protects information shared voluntarily outside of the attorney-client relationship. Communication can only be protected by attorney-client privilege if it meets very specific criteria. Usually, the courts characterize these criteria as having been met when a communication is engaged in “(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived.” *See, e.g., United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997). The attorney-client privilege is “narrowly defined, riddled with exceptions, and subject to continuing criticism.” *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

While “the work product privilege is more broad than the attorney-client privilege,” *In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir. 2000), it too is subject to waiver when information is voluntarily shared outside the confines of the attorney-client relationship. *Hartnett v. Medical Ctr. Hosp.*, 146 Vt. 297, 300 (1985).

The Office of the Attorney General has offered no information to support its claims that all records the requesters sought (in their entirety, no less) meet the very strict criteria for attorney-client privileged information. Moreover, the Office of the Attorney General has not shown how voluntary sharing of information with the attorneys general of other states would not constitute a waiver of any attorney work product privilege.

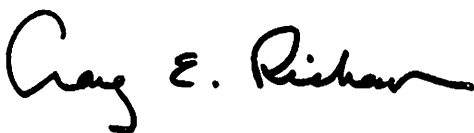
This raises one further point must be made, in the event the Attorney General’s Office grounds its ACP or AWP claims in the purported “Climate Change Coalition Common Interest Agreement” (which, we note, is not “what [we] describe as a common interest

agreement” (August 4, 2016 denial, page 1), but instead, as we wrote in our request, “a document titled “Climate Change Coalition Common Interest Agreement”” (August 1, 2016 request, page 1)). We do not see any way this document is in fact a proper common interest agreement and so do not describe it as such beyond noting its title.

A proper common interest agreement requires a clear and limited scope of the agreement, a clear commonality of interests, and ongoing or reasonably anticipated litigation. Indeed the highest court of New York, one of the signers of this document and its apparent principal author, recently reaffirmed these requirements. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 N.Y. Lexis 1649 (N.Y. June 9, 2016). The document that appears to be your office’s ultimate basis for withholding these public records fails to meet these requirements. As federal courts have noted, “any attempted to invoke the common interest doctrine in order to avoid disclosures under FOIA must be more carefully scrutinized.” *Hunton & Williams v United States Dept. of Justice*, 590 F.3d 272, 284 (4th Cir. 2010). This denial does not survive such scrutiny and we appeal any use of the purported Common Interest Agreement as a basis, be it direct or indirect, for withholding the records sought.

Accordingly we ask that you overturn Ms. Kehne’s decision and provide the records we requested on August 1, 2016.

Respectfully submitted,



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August 24, 2016

Craig E. Richardson, Executive Director  
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Washington DC 20005

***CERTIFIED MAIL -  
RETURN RECEIPT  
REQUESTED***

Christopher C. Horner, Esq.  
Free Market Environmental Law Clinic  
9033 Brook Ford Road  
Burke, VA 22015

***CERTIFIED MAIL -  
RETURN RECEIPT  
REQUESTED***

Re: Request under the Vermont Public Records Act

Dear Mr. Richardson and Mr. Horner:

This is a determination, pursuant to 1 V.S.A. § 318(a)(3), of your administrative appeal dated August 17, 2016, from the denial of your public records request.

Your initial request was made on August 1, 2016, and corrected on August 9, 2016. As corrected, you requested copies of all email or text correspondence, attachments, and any other document recording, reflecting, discussing or mentioning any request by any Party to the Agreement seeking consent to share records, consenting to sharing records, or objecting to sharing records under the Agreement, from April 28, 2016 to date.

Assistant Attorney General Melanie Kehne denied your request by letter dated August 4, 2016, on the basis that disclosure would violate the attorney-client privilege, attorney work product privilege, and Vermont Rule of Professional Conduct 1.6. Any such documents would be exempt from disclosure under 1 V.S.A. § 317(c)(3) and (c)(4). Your appeal letter disputes that the attorney-client privilege or the attorney work product privilege exemptions apply.

I deny your appeal for the following reasons. First, the documents you request would be exempt under 1 V.S.A. § 317(c)(4) as privileged attorney work product prepared in anticipation of litigation. Subsection (c)(4) exempts records which, if disclosed, "would cause the custodian to violate any statutory or common law privilege." The Vermont Supreme Court has recognized a common law privilege for attorney work product prepared in anticipation of litigation. *See Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368 (1990).

The requested records would also be exempt under Subsection (c)(4) as subject to the attorney-client privilege. "As codified in Vermont Rule of Evidence 502(b), 'a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between himself or his representative and his lawyer or his lawyer's representative.'" *232511 Investments, Ltd. v. Town of Stowe Dev. Review Bd.*, No. 2005-403, 2006 WL 5868424, at \*1 (Vt. Feb. 2006) (unpub. 3-justice mem.) (quoting V.R.E. 502(b), alterations omitted). The Rule defines the "client" to include public entities represented by government lawyers. *Id.* Disclosures remain privileged even when shared between multiple "parties and their respective counsel in the course of an ongoing common enterprise" where "multiple clients share a common interest about a legal matter." *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) (quotation and alterations omitted). "Parties may share a 'common legal interest' even if they are not parties in ongoing litigation." *Id.* To the extent that you have requested documents exchanged between counsel for parties engaged in an ongoing common enterprise and sharing a common legal interest for the purpose of facilitating the rendition of professional legal services to those parties, these documents would fall within the attorney-client privilege.

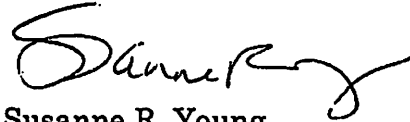
In addition, the requested documents would be exempt from public inspection and copying under 1 V.S.A. § 317(c)(3) because disclosure would violate the Vermont Rule of Professional Conduct 1.6, which provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." As discussed above, any requested documents would be confidential and privileged and concern the representation of the State of Vermont by attorneys in this office. Accordingly, disclosure would violate Rule 1.6 and any such documents would be exempt under 1 V.S.A. § 317(c)(3).

Mr. Craig E. Richardson  
Christopher C. Horner, Esq.  
August 24, 2016

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Therefore, your appeal is denied. Pursuant to 1 V.S.A. § 319, you may seek judicial review of this determination from the Civil Division of the Vermont Superior Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Susanne R. Young", with a stylized flourish at the end.

Susanne R. Young  
Deputy Attorney General