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IN THE VERMONT SUPERIOR COURT
WASHINGTON COUNTY CIVIL DIVISION

ENERGY & ENVIRONMENT LEGAL)	Case No. 558-9-16 Wncv
INSTITUTE,)	
Plaintiff,)	Montpelier, Vermont
)	
-against-)	March 28, 2017
)	1:05 PM
ATTORNEY GENERAL OF VERMONT,)	
Defendant.)	
)	
)	

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE MARY MILES TEACHOUT,
SUPERIOR COURT JUDGE

APPEARANCES:

MATTHEW D. HARDIN, ESQ.
Attorney for the Plaintiff

WILLIAM E. GRIFFIN, ESQ.
Attorney for the Defendant

Transcription Services:	eScribers, LLC
	352 Seventh Avenue
	Suite 604
	New York, NY 10001
	(973) 406-2250

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.

TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

1 (Proceedings convened at 1:05 PM)

2 THE COURT OFFICER: All rise.

3 THE COURT: Please be seated.

4 THE COURT OFFICER: The matter before the Court is
5 docket number 558-9-16 Wncv. Plaintiff Energy & Environment
6 Legal Institute represented by Attorney Hardin. Defendant
7 Attorney General of the State of Vermont represented by
8 Attorney Griffin.

9 THE COURT: Good afternoon.

10 MR. MATTHEW HARDIN: Good afternoon.

11 THE COURT: We're here for oral argument on the
12 pending motion for summary judgment. I've reviewed your
13 arguments. This is your opportunity to emphasize points that
14 you'd like to make. I have a few questions, but start with
15 your own --

16 MR. GRIFFIN: Thank you, Your Honor.

17 THE COURT: -- presentation.

18 MR. GRIFFIN: So I'd like to start with a brief
19 colloquy because I think it shows the arguments that the
20 parties have made in the proceedings before today.

21 This started with a request for records made by the
22 Energy Institute -- Environment Institute. They asked for
23 records relating to a common interest agreement: an agreement
24 between the Attorney General of Vermont and the attorney
25 general in other states. That's attached to the -- attached

1 to the complaint: attachment 1.

2 That request was reviewed and denied by an Assistant
3 Attorney General Melanie Kehne. She cited two statutes that
4 protected the information that was requested: a section in
5 Title 3, Section 317(b)(3). (B)(3) covers different ethical
6 standards, including the Vermont Rules of Professional
7 Conduct. And in particular, she cited Rule 1.6 Rules of
8 Professional Conduct. That's the rule that provides for the
9 confidentiality -- that protects the confidentiality of client
10 information.

11 She also cited 317(b)(4), another subsection. And
12 that section protects and applies common law privileges. And
13 in particular, she cited the attorney-client privilege and
14 also the work product privilege.

15 There was an appeal as provided by the Access to
16 Records Act. The appeal went to the Deputy Attorney General
17 who was then Susanne Young.

18 The appeal challenged only the Subsection (b)(4)
19 claim, the attorney-client privilege. It did not challenge
20 the assertion of the (b)(3) protection; the Rule 1.6, the
21 ethical rule.

22 That appeal letter is also attached to the complaint.
23 It's attachment 3 dated August 17th.

24 The Deputy Attorney General reviewed the appeal and
25 issued a written decision which is attached to the complaint:

1 attachment 4. She affirmed the decision and, with respect to
2 the matter that was appealed, the (b)(4) exemption. She also
3 pointed out that the -- that the assistant attorney general
4 had cited (b)(4) and she -- she meaning the Deputy Attorney
5 General -- indicated that that was a second ground for
6 exempting a document.

7 So at that point, the plaintiff filed a complaint in
8 this court. The exit complaint itself made a reference to
9 Rule 1.6, but the gist of the complaint focused on the
10 attorney-client privilege matter, the (b)(4) exemption.

11 The State -- on December 7, the State filed this
12 motion for summary judgment. In that motion, we argued both
13 subsections in the Access to Records Act in both (b)(3) and
14 (b)(4). We argued that Rule 1.6 applied because this was
15 information relating to the representation of a client. The
16 Attorney General's representation of the State of Vermont.
17 And we also argued the (b)(4) exemption -- the attorney-client
18 exemption.

19 THE COURT: Just one little detail. I think you've
20 been referring to (b) all the way along.

21 MR. GRIFFIN: Yes.

22 THE COURT: I don't have the statute right here, but
23 the other citations are 317(c).

24 MR. GRIFFIN: What'd I do? Get -- oh, (c). Yeah.

25 THE COURT: (3) and (4).

1 MR. GRIFFIN: Yeah, I've got that wrong.

2 THE COURT: Okay. All right.

3 MR. GRIFFIN: All the way through. Too many letters;
4 too many numbers. Thank you, Your Honor for catching that for
5 me.

6 So we're here today primarily, to -- what I really
7 want to emphasize is that in our motion we argued the
8 Professional Conduct Rule. The defendants have not responded
9 to that argument at all. The only reference in their memo to
10 Rule 1.6 is they suggest that that's -- that's the source of
11 the attorney-client privilege. I don't think that's accurate,
12 but regardless, Subsection (c)(3) is a free-standing exemption
13 in the Access to Records Law. And the Rules of Professional
14 Conduct generally, and Rule 1.6 in particular, is that it's a
15 free-standing body of law.

16 That question comes up from time to time. And
17 typically, what I find is the best source of law on that is,
18 if you still have some green books on the bench there, but in
19 the green books, the one that has the administrative orders on
20 page 738. There's a comment 3 to Rule 1.6. And in that
21 comment, they have a good short summary of the different
22 sources of confidentiality and privileges. And in plain
23 English, sort of distinguish the attorney-client privilege,
24 the confidentiality conferred by Rule 1.6 and the work product
25 common law privilege. But there are three distinct sources of

1 privilege and they're all brought into this case by
2 subsections (c)(3) and (c)(4).

3 So it's -- I guess at this point I'm responding to a
4 defense that hasn't been raised, but I just want to underscore
5 that, in this respect, dealing with the Climate Change
6 Coalition, the Attorney General is an attorney. We have a
7 client; the State of Vermont. Other attorneys general
8 represent their states, but what's important here is the
9 Attorney General of Vermont may have received a variety of
10 information relating to this representation. And that is
11 precisely what these plaintiffs want to see. And that is
12 precisely the information that is protected by the statute and
13 by Rule 1.6. I think that's the short categorical response to
14 their request and to their complaint.

15 We've also briefed the attorney-client privilege
16 aspect of it, because we think that applies. I think that
17 part of the debate here is they've cited a New York State
18 court decision which suggests that the -- the Common Interest
19 Doctrine does not apply unless there's litigation pending.
20 We've cited cases, including -- actually, this may have been
21 in a dissent in the New York case that pointed out the Second
22 Circuit recognizes that attorneys and clients have lots of
23 communications that are -- that are pre-litigation or they may
24 be transactional. They may be someone coming in for advice.
25 And these communications are protected and, by extension, to

1 the extent that an attorney is providing legal services and
2 consults with others on a confidential basis, I think it's
3 good policy and commonsense that that privilege should apply
4 here.

5 I think we pointed out in the Killington case --
6 Killington v. Lash -- that was not litigation in the sense
7 that the Rule of Evidence applied and the Court accepted the
8 attorney-client exemption in that case. I think there's
9 another case in our brief, but we're relying primarily on our
10 brief for the attorney-client privilege, but I think the Court
11 can reach it, but I think the case is really more simply
12 addressed by the categorical exemption that applies to matters
13 protected by Rule 1.6.

14 THE COURT: One question I have about that is, under
15 your Rule 1.6 argument and the argument that the client is the
16 State of Vermont, it seems to me that that rationale means
17 that the Attorney General's Office would never be responding
18 to any public records request. That anything that happens in
19 the Attorney General's Office would all fall within that
20 umbrella that you're claiming whether or not there's a common
21 interest agreement.

22 MR. GRIFFIN: That's right. We're not relying --
23 that's free-standing, apart from any common interest
24 agreement. And --

25 THE COURT: So is that your argument?

1 MR. GRIFFIN: That -- that is -- that is --

2 THE COURT: That the Attorney General's Office --

3 MR. GRIFFIN: That is --

4 THE COURT: -- never has to comply with any public
5 records request because it is the attorney for the State of
6 Vermont?

7 MR. GRIFFIN: We have to determine what is the
8 interest of the state and we have to do that because the
9 legislature gave us that direction in Title 3, Section -- try
10 to get the numbers right here -- Section 159, which is one of
11 the statutes that defines the authority and the responsibility
12 of the Attorney General. The Attorney General is obligated to
13 determine the interests of the state. And so when we have a
14 request for documents, obviously, some documents we -- a lot
15 of documents we produce, having determined it's in the
16 interest of this state. And that is -- that was -- I think
17 that's the way the statute -- that's the statutory framework
18 that the legislature has created. But it's really, in this
19 instance -- I don't know what alternative there would be. But
20 as a practical matter, the Attorney General then has to
21 answer, obviously, to the Court, as in this instance. Has to
22 answer to legislators. Well aware of that in the last couple
23 weeks as we're seeking an appropriation. I think the Attorney
24 General answers to the voters every two years. So it's --

25 THE COURT: Well, that leads into my next question.

1 MR. GRIFFIN: Yes?

2 THE COURT: Which is the argument that the Office of
3 the Attorney General itself is -- it's been argued that it's,
4 actually, is or can be something of a political position.
5 It's popularly elected. There's no requirement that the
6 Attorney General be an attorney. The staff members have to
7 be, but the Attorney General himself or herself does not. And
8 by appealing to the public voters, has the ability to really
9 set political agendas. And that whole type of activity seems
10 quite removed from the source of the Common Interest Doctrine
11 the way you, yourself, outlined it in your memo as having
12 started. Having grown out of the situation where there might
13 be related defendants.

14 MR. GRIFFIN: That's correct.

15 THE COURT: And who have parallel litigation who want
16 to exchange information.

17 MR. GRIFFIN: It could be litigation. It could be an
18 investigation. It could be action at federal agencies. And I
19 think the political aspect is sort of far-fetched in this
20 context. If you consider the -- this would be attachment 1, I
21 think, to my affidavit in this case. That's the common
22 interest agreement.

23 THE COURT: You're saying that issues regarding
24 climate change are not political?

25 MR. GRIFFIN: Well, I would refer the Court to

1 paragraph 1 where the Attorney General of Vermont and the
2 attorneys general of other states identify the legal
3 interests. And there are five interests identified. And item
4 1 is potentially taking legal actions. Item 2 is potentially
5 conducting investigations. Item 3 is potentially conducting
6 investigations of illegal conduct. 4 is legal action
7 contemplating legal action to obtain compliance with state and
8 federal laws relating to energy infrastructure. And item 5 is
9 another example of litigation.

10 THE COURT: Right. But you're --

11 MR. GRIFFIN: So it's core legal action; it is not
12 political action.

13 THE COURT: That is what the agreement says, but your
14 argument is that the exemption that you're relying on is
15 really much broader than that. It's that the Attorney
16 General's Office is, as the State of Vermont is a client;
17 therefore, anything with the Attorney General's Office does or
18 has in its possession is exempt from the Public Records Act
19 unless you choose to reveal it. I understand that that's your
20 argument.

21 MR. GRIFFIN: That is correct, and it's because we're
22 a law office by statute, by the people we employ who are
23 lawyers and people who support -- who support legal actions
24 and legal investigation, and if anyone could come in
25 randomly -- let me give one example. So someone -- big

1 business, small business gets information that the Attorney
2 General's Office may be -- may be looking at a consumer fraud
3 or a securities fraud problem. They consult with an attorney.
4 You know, I've got rumors someone's talking to someone; I
5 think the Attorney General is looking at it. So what can they
6 do? Then they can make a public records request. Send us
7 every email that -- or correspondence that mentions the X, Y,
8 Z Corporation. The information we might have would be
9 consultation with witnesses, emails within the office, maybe
10 communications with witnesses, maybe -- maybe public
11 information that we'd be gathering financial records, SEC
12 filings relating to a corporation. And if potential
13 adversaries in litigation or in negotiations have access to
14 all that information, which we -- we, the people -- we, the
15 State of Vermont would not be able to obtain with respect to
16 folks on the other side of the table. It would put the public
17 and the state at a tremendous disadvantage.

18 THE COURT: Well, that leads me to the question I
19 have related to the specific request here.

20 MR. GRIFFIN: Okay.

21 THE COURT: And the rationale for the common interest
22 agreement shield had to do with protecting mental impressions
23 and strategies and things like that.

24 MR. GRIFFIN: Right.

25 THE COURT: But the plaintiff here has argued that

1 they're not asking for that. They're only asking for -- not
2 for the content -- as I understand it, not for the content of
3 what communications were, but whether or not there was a
4 request, whether or not it was denied. And that's without
5 going --

6 MR. GRIFFIN: So -- so -- so --

7 THE COURT: -- into the content, or how would any
8 mental impressions be revealed at all under the circumstances?

9 MR. GRIFFIN: So let's assume that there was a
10 request for a document. That would come to an attorney in the
11 Attorney General's Office. He or she might communicate with
12 others in the office as to whether this would disadvantage the
13 State's interests in some ways. So there would be a mental
14 impression going on there. There would be a responsive mental
15 impression. There might be some legal analysis, if we're
16 doing an investigation or contemplating litigation. How would
17 that --

18 THE COURT: But if -- let me just give an example. I
19 forgot who all the states are that are a member. Let's just
20 say Virginia. I can't remember if Virginia is or not. Let's
21 just use it as an example. Let's just -- what the plaintiff
22 is asking for is a request by any party to the agreement to
23 share documents, any consent of such sharing and any objection
24 to such sharing. What's the matter with saying Virginia asked
25 for some information under this agreement on October 5th,

1 2016. Our office objected and did not, in a letter November
2 1st, and did not share it -- period with no content. I mean,
3 I'm going to be asking, of course, the plaintiff, but the way
4 I read it, it isn't asking for content. It's just asking was
5 there a request? Was consent given or was consent denied? So
6 how would there be any content that would -- deserving of
7 protection under the common interest theory.

8 MR. GRIFFIN: Let me find their language, if you'd
9 give me a minute here.

10 So I'm going to the statement of facts, paragraph 3,
11 which I think quotes their -- the plaintiff's request. And it
12 also may be attached to their complaint.

13 THE COURT: You're right.

14 MR. GRIFFIN: I think it's attachment 1 to the
15 complaint.

16 THE COURT: The requests are specifically set forth
17 on page 2 of your statement of facts.

18 MR. GRIFFIN: Okay. So they want all emails
19 reflecting any request by any party seeking consent to share.

20 THE COURT: Okay. I see that. Email or text
21 correspondence --

22 MR. GRIFFIN: So I'm sitting in the Attorney
23 General's Office. We're considering this matter. We're
24 contemplating investigations and other legal action and we get
25 a request from John Smith. Let's put a little more focus on

1 it. We get a request from EELI and so one thing we might
2 consider is where are they -- who are these people? Where are
3 they going with this? And we Google them and we find, you
4 know, coal or Exxon or whatever -- and so we're thinking this
5 is -- we better -- we better give this some thought before we
6 -- before we share information with this entity. Or it might
7 be a news organization and we think, well, what are they going
8 to do with it? Well, they're going to publish it to the
9 world. So that would be -- I mean, that would be my mental
10 impression and, you know, let's exercise some caution.

11 Is there some public interest in publishing this
12 information at this time? Probably not. As with a lot of
13 investigations, you like to talk to witnesses, gather
14 information before you announce to the world what -- you know,
15 what options are on the table.

16 So and again, I -- you know, I, from my own
17 perspective, I sort of turn it around. And if I'm on the
18 other side, if I'm representing a corporation or what have
19 you, and someone comes in and says, you know, I don't want
20 your substantive information; I just want to know who you
21 talked with last October. I want to know if this -- if this
22 phrase is in any of your emails. I mean, they'd laugh out
23 loud, because it's -- one, because it would be an ethical
24 violation for them to publish that information. And why
25 shouldn't the public have the same protection as a corporation

1 or private citizen.

2 THE COURT: Thank you.

3 MR. GRIFFIN: Thank you, Your Honor.

4 MR. HARDIN: Your Honor, I think there are several
5 issues and I think that the overarching theme that you see,
6 and you pointed it out, is the broadness of the argument that
7 the Attorney General is making, basically, that, under 1.6,
8 everything is confidential, except for things that they
9 selectively choose to disclose. They made that argument in
10 another case, 349, as well.

11 Everything is exempt except what they choose to
12 disclose, and now they say, because they've taken into
13 consideration the best interests of the State of Vermont.
14 They disclose what they feel like and they don't disclose what
15 they don't feel like. And it's now come out in oral argument
16 that one of the things that they do to determine who's
17 entitled or who they will provide public records to is they do
18 a Google search. And it turns out that, when you Google my
19 clients, you might find out things like coal or Exxon. So my
20 clients don't have rights under the Public Records Act because
21 a Google search conducted by Attorney General's employees says
22 that they're bad people, basically, and I just don't think
23 that's what the law is. I believe that the law is neutral. I
24 believe that it applies to all of the citizenry. And I
25 believe here that Your Honor also pointed out, my clients

1 didn't ask for substantive information. The same request that
2 was sent in this case was also sent to numerous other states.
3 What they intended to get back was copies of their own
4 requests, because we had sent requests -- my clients had sent
5 requests to numerous states all relating to the same topic;
6 basically, the same request that's at issue in this case was
7 sent to probably ten or twelve states. The other states
8 responded, gave us copies of public records requests that were
9 received by other states, exactly as Your Honor contemplated a
10 moment ago.

11 There is no substance to this. It's did you receive
12 a request to share? Did you consent or object? And I think
13 that that's something that the citizenry is interested in for
14 a couple of reasons. First, because the common interest
15 agreement, the states say that they're going to either consent
16 or object and so we want to know if they're complying. And in
17 the second case, because we want to know if the State is
18 adopting a de facto attitude that it will never consent. Or
19 if the State is making good efforts to consent where the
20 public has a right to know. What the State is, basically,
21 saying is not only do we not have to provide information
22 responsive to requests, we don't even have to tell you if we
23 have a blanket policy of providing information or not. The
24 State has this incredibly broad argument that everything's
25 exempt.

1 Now, I think that there are three basic ways to
2 approach this case, any of which we should prevail. I think
3 that one of them we've talked about extensively is the common
4 interest agreement could be considered void as an attempt,
5 basically, by the Attorney General's Office to write
6 themselves out of the statute. To create a contract that lets
7 them get out of the Vermont Public Records Act. You could
8 treat it as void, citing, for example, the New York Court of
9 Appeals in *Ambac v. Countrywide*, I believe it was.

10 You could also say that, when information is shared,
11 and all of the information in this request was inherently
12 shared with other states -- shared with New York, among other
13 states -- but it was inherently shared -- everything in this
14 request was already shared outside the Vermont Attorney
15 General's Office. You could also say that, when you share it,
16 you waive whatever confidentiality interest there is,
17 especially, for example, when you share that information with
18 the state where you know the courts have already declined to
19 enforce the common interest agreement such as New York. So
20 you could say that the common interest agreement is void in
21 Vermont. You could take a narrower approach and say that it
22 doesn't cover instances where you have shared the information
23 voluntarily with a party that you know cannot keep it
24 confidential. And the narrowest argument that this Court
25 could rule on is that the common interest agreement and

1 confidentiality and the common law exemptions under the law
2 just simply don't apply to the information that was requested
3 in this case.

4 So you could say the common interest agreement is
5 invalid always. You could say it's invalid as applied to the
6 information that's already been shared with New York, or you
7 could just say, you know, it doesn't cover -- confidentiality
8 doesn't cover, the common interest agreement doesn't cover the
9 information at issue in this case, which is not substantive,
10 but just consents and objections.

11 THE COURT: So in your memo on page 10 you said,
12 specifically, plaintiff sought request by any party to the
13 agreement to share documents and a consent to such sharing and
14 any objection to such sharing.

15 MR. HARDIN: That's correct, Your Honor.

16 THE COURT: Used as the basis for the question I
17 asked --

18 MR. HARDIN: Right.

19 THE COURT: -- Mr. Griffin, but he pointed out that
20 your actual request starts off with "we hereby request copies
21 of all email or text correspondence, attachments, and any
22 other document, recording, reflecting, discussing or
23 mentioning" -- it's much broader than just was there a
24 request, was it -- was there consent or was there objection.

25 MR. HARDIN: Well, I'll have two responses to that.

1 And the first response that I have is our experience in other
2 states. Basically, what they would do is they would forward a
3 request by email and they would say we received this request.
4 Do you consent or object? And so that's what we meant by
5 that.

6 THE COURT: And so --

7 MR. HARDIN: And that's outside the --

8 THE COURT: -- but that email request did include
9 specific content information --

10 MR. HARDIN: Well --

11 THE COURT: -- about what was being requested.

12 MR. HARDIN: Well, the second argument that I'll make
13 is that that could be solved by redaction of anything they
14 believe is confidential. And also what we received is a
15 blanket denial, both in the administrative process and in this
16 court. So if, for example, the Attorney General's Office says
17 that the request is not how I, myself, interpreted it, but is
18 more broad and encompasses more information, they could
19 provide the information that is not exempt and redact the rest
20 or deny the rest. But that's not the position that they've
21 taken. They've said that everything we requested is exempt
22 under the law. So that's why I come back to the same
23 fundamental argument: the Attorney General's Office,
24 essentially, wishes that it were exempt as a blanket matter
25 from the Vermont Public Records Act, but that's not -- that's

1 not how the legislature wrote the law. They have to claim the
2 same exemptions every other agency is entitled to and they
3 just don't fit in this case.

4 THE COURT: So do you recognize any circumstances or
5 content that the Attorney General's Office could validly claim
6 as an exemption in relation to the request you made?

7 MR. HARDIN: Well, I think to a -- sure, I understand
8 the question. It's an interpretation of the request, and I
9 believe I, myself, wrote the request, actually, so it's an
10 interpretation of the request which I didn't intend. So it's
11 sort of being run by me the first time in this court.

12 I can imagine a circumstance where an attorney
13 general's office employee would forward to another employee
14 and say do you think we should consent or object, you know,
15 here are the seven factors we should consider in that
16 analysis. And that might be validly exempt attorney-client
17 information. But that's not what I'm requesting or what my
18 client is requesting. What we're requesting is did the State
19 of Vermont consent or object to sharing. So in other states,
20 what we received back, we got -- you know, we received this
21 request attached, we object. You know, it's usually a two-
22 sentence email. We received it; we object. We received it.
23 I don't believe I've actually seen a consent, but --

24 THE COURT: I was going to ask you --

25 MR. HARDIN: Yeah.

1 THE COURT: -- if there's a consent.

2 MR. HARDIN: But we have received from other states
3 responses to the same request where all we're seeking is the
4 request you've received and consents or objections. So other
5 states give us the requests they've received and their
6 objections, basically.

7 THE COURT: Unfortunately, I wrote a question in
8 pencil and it's so faint, I can't read it. Let's see.

9 (Pause)

10 THE COURT: Oh, yeah, I did want to ask you, the --
11 Mr. Griffin argued in his memo that the common interest
12 agreements really do serve the public interest. And as I
13 understand it, one dimension of the argument was that, because
14 it is in the public interest to share information with
15 colleagues in other states and share their mental impressions
16 versus strategies, know what everybody else is doing.

17 MR. HARDIN: Sure.

18 THE COURT: And that, in doing so, they are serving
19 their client, the State of Vermont.

20 MR. HARDIN: So --

21 THE COURT: What's your response to that argument?

22 MR. HARDIN: Well, I think that one of the approaches
23 that you could take -- I said there's three basic ways that I
24 think we could prevail in this case. One of them is you rule
25 that common interest agreements generally, as a matter of law

1 in Vermont are valid. I'd prefer you didn't do that, but you
2 could. And then what you would say is that, when you
3 voluntary share information with a state that you know cannot
4 keep a secret pursuant to these agreements, you have waived
5 the privilege.

6 The example that I would give is if I was defending
7 someone on trial for murder and I was talking in the witness
8 room out there with my client about the case and a reporter
9 walked into the room, I would have to shut up. I couldn't
10 keep talking to my client about the case with the reporter in
11 the room.

12 The same thing could apply in this case. If you rule
13 that the common interest agreement, as a general matter, is
14 valid, you could still say information that is shared
15 voluntary outside Vermont with parties that we know don't
16 think it's valid or won't uphold this agreement is still
17 waived. You have to take reasonable efforts to preserve the
18 confidentiality of the information and that's not -- that's
19 not what's going on when you share it with a state that can't
20 enforce that agreement.

21 THE COURT: Say that last part again.

22 MR. HARDIN: About reasonable efforts?

23 THE COURT: Yes.

24 MR. HARDIN: So the general principle of
25 confidentiality or attorney-client privilege, however you want

1 to phrase it, is that an attorney has to take reasonable
2 efforts to protect that confidentiality. So my files in my
3 office are confidential, so long as they're kept secure. If I
4 lay them on my front porch, open to the elements, and somebody
5 walks by and picks them up, I've waived the confidentiality.

6 THE COURT: Right.

7 MR. HARDIN: The same thing, I think, applies in this
8 case, if you voluntarily share that information with a state
9 such as New York where the New York Court of Appeals has said
10 we will not enforce these common interest agreements, if you
11 share that information with New York, you know they can
12 enforce that agreement. I don't think that's taking
13 reasonable efforts to preserve the confidentiality of the
14 information. It's much the same as in my hypothetical where I
15 was talking to my murder defendant and a reporter walked in.

16 THE COURT: Okay.

17 MR. HARDIN: It's no longer reasonable if I keep
18 talking.

19 THE COURT: And then I think you also made reference
20 to -- or one of you did -- something about the common interest
21 agreement can apply, even if there isn't actual litigation,
22 but if there's feared litigation. But the Attorney General's
23 Office is often the instigator of litigation and, as Mr.
24 Griffin said, they may be collecting information without
25 knowing whether there's going to be litigation or not. But

1 there's the possibility that they may seek to pursue
2 enforcement.

3 MR. HARDIN: So I made that argument about fearing
4 litigation. And it's sort of a historical argument. When we
5 look at what happened, originally, there was no such thing as
6 a common interest agreement. It developed over time. And one
7 of the first developments of the Common Interest Doctrine,
8 which is still the law in New York, was you have to have
9 ongoing litigation -- active ongoing litigation; otherwise,
10 you've waived your privilege, you've waived confidentiality
11 when you talk to somebody. Some folks expanded that slowly.
12 A Common Interest Doctrine expanded to encompass parties who
13 fear litigation and it's -- commonly, it's the case law that
14 you'll look up is insurance companies, basically. They fear
15 litigation because they're insurers.

16 So we don't have -- we don't have case law in Vermont
17 about how broad the Common Interest Doctrine is. You can
18 expand it today or you can put reasonable limits on it. I
19 think that what I would ask is that this Court, when it looks
20 at the Common Interest Doctrine sees that it is evolving
21 still, but that it conflicts or can conflict, if it is read
22 broadly, with the Public Records Act. And this Court has to
23 strike that balance with how far do we want to expand the
24 Common Interest Doctrine. And I think that you see where that
25 could lead in this case, because you have the Attorney

1 General's Office, essentially, signing the contract in which
2 they attempt to write themselves out of the law. And if you
3 give a broad reading to the Common Interest Doctrine generally
4 and to this common interest agreement at issue in this case, I
5 think it punches a hole in the Vermont Public Records Act.

6 THE COURT: Anything that I've interrupted you from
7 saying?

8 MR. HARDIN: I don't believe so, Your Honor.

9 THE COURT: Okay. Thank you.

10 MR. HARDIN: Thank you.

11 THE COURT: Mr. Griffin?

12 MR. GRIFFIN: I'd like to come back to the Public
13 Records Act, since that's what this case is about, and just
14 picking up on the last point that the Attorney General's
15 Office and the State is trying to punch a hole through the
16 Act. The legislature in 317(c)(3) provided an exemption. And
17 I'm going to quote from the legislature's statute: "Records
18 which it made public pursuant to this subchapter would cause
19 the custodian to violate newly-adopted standards of ethics or
20 conduct for any professional regulated by the state." This
21 exemption was created by the legislature. It's not some
22 invention of the Attorney General's Office.

23 So that takes us to the standards of conduct for
24 lawyers and, in particular, 1.6: confidentiality of client
25 materials.

1 I think one major area of disagreement between the
2 parties here is -- I'm looking at page 5 of the plaintiff's
3 memo where they indicate that the Common Interest Doctrine is
4 an outgrowth of the attorney-client privilege which is found
5 in Rule 1.6 of the Vermont Rules of Professional Conduct. The
6 attorney-client privilege is not found in the Vermont Rules of
7 Professional Conduct. It is a common law doctrine. It's also
8 referenced in the Rules of Evidence. It's also referenced in
9 case law such as Killington. But we have, actually, three
10 separate bodies of law here: the work product, which we're
11 not arguing about today; the attorney-client privilege; and
12 the confidentiality rule.

13 So when the plaintiffs are arguing about waiver and
14 such, waiver is not a part of the Rule 1.6. If an attorney,
15 by accident or by recklessness releases information relating
16 to the representation of a client, that doesn't mean that the
17 client's file is now open to the public or to the press or to
18 groups like EELI. This is a free-standing body of law and
19 it's a free-standing argument in this case and I think it
20 really hasn't been argued at all by the -- by the plaintiffs
21 in the proceedings, the appeal to the Deputy and the briefing
22 in this case. And I think that's -- we're making both
23 arguments. We think we win on both arguments. But the claims
24 about waiver and what have you have nothing to do with the
25 confidentiality protection afforded by 1.6.

1 Just one minor point, but I use the example of -- the
2 question was what sort of mental impressions would a lawyer go
3 through if they got a request for communications between the
4 states here on releasing documents. And I started with the
5 example of this requester, because that's who we're dealing
6 with, and I don't even know if it was in this case, but we
7 have so much going on with these folks that, at one point, I
8 did Google to see why they were coming up here from Maryland
9 to engage in this. But I also gave the example of a media
10 requester, because that's going to have the same consequences
11 for my client, the State of Vermont, if they were going to
12 publish that information. And we agree totally with the
13 suggestion that the access to records law applies equally to
14 all of -- all requesters. I didn't mean to suggest otherwise
15 and I'm not suggesting otherwise. The question is what is the
16 interests of this state. Thank you.

17 THE COURT: Okay. I'll take it under advisement.
18 Thank you very much.

19 THE COURT OFFICER: All rise.

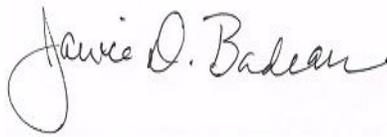
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C E R T I F I C A T I O N

I, Janice D. Badeau, the court approved transcriber,
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March 31, 2017

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