

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Other Civil

Energy Policy Advocates,
Plaintiff,

v.

COMPLAINT

Keith Ellison, in his official capacity
as Attorney General, Office of the
Attorney General,

Defendant.

Plaintiff Energy Policy Advocates (hereinafter Plaintiff or “EPA”), by and through undersigned counsel, files this Complaint against Defendant, Attorney General Keith Ellison, in his official capacity, and the Minnesota Office of the Attorney General (hereinafter “OAG”), pursuant to Minn. Stat. § 13.08. EPA seeking the release of improperly withheld government data. Plaintiff states and alleges as follows:

INTRODUCTION

This lawsuit seeks to enforce the right to inspect government data pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 (hereinafter “MGDPA”). In two separate requests, EPA sought from OAG specific data of great public interest. These requested records include: (1) correspondence between OAG and a plaintiffs’ law firm; (2) correspondence between OAG and a specific individual in another state’s office of attorney general recruiting attorneys general to join a major political donor’s program to place privately hired attorneys in OAGs—to pursue issues of concern to that donor; and (3) certain records relating to

OAG's use of online, off-system storage locations. In response to these requests, OAG refused to release any data or even any reasonably segregable portion of any data. OAG claimed each and every record to be exempt in full as either nonpublic data or subject to one of several privileges.

Plaintiff and others have obtained voluminous information of the type requested of OAG from other attorneys general offices and other public institutions. These records demonstrate clear relationships between state attorneys general and the aforementioned major donor's group, and with certain plaintiffs' firms recruiting, as one party described it, "a single sympathetic attorney general" to initiate investigations of perceived opponents of a shared political and policy agenda.¹ These revelations have prompted substantial local and national media interest² and even, in one state, a prohibition enacted by the state legislature on that state's attorney general entering into the donor's group's proposed arrangement.³ Plaintiff has learned that OAG has brought aboard one such privately hired attorney, employed by the donor's group, but "embedded" as a "Special Assistant Attorney General".⁴ This information is of heightened public interest for many reasons, particularly the use of state power to further private aims. Plaintiff seeks this Court's intervention

¹ Climate Accountability Institute, *Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control* (Oct. 2012), <http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf> at p. 11. (Summary of the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies") (last viewed May 16, 2019).

² See, e.g., Editorials "State AGs for Rent", Wall Street Journal, November 6, 2018, <https://www.wsj.com/articles/state-ags-for-rent-1541549567>, "Don't let billionaires set priorities for attorneys general", New York Post, August 30, 2018, <https://nypost.com/2018/08/30/dont-let-billionaires-set-priorities-for-attorneys-general/>; Editorial, Fredericksburg (Va) Free Lance-Star, February 27, 2019, https://www.fredericksburg.com/opinion/editorials/editorial-no-insider-access-for-private-donors/article_f2f634a8-d90c-58f5-b5d6-e4182abfacab.html, "State AGs' Climate Cover-Up", Wall Street Journal, June 7, 2019, <https://www.wsj.com/articles/state-ags-climate-cover-up-11559945410>.

³ See, e.g., Valerie Richardson, "Virginia bill blocks Bloomberg from embedding climate lawyers in attorney general's office", Washington Times, March 4, 2019, <https://www.washingtontimes.com/news/2019/mar/3/virginia-blocks-mike-bloombergs-climate-lawyers/>.

⁴ LinkedIn profile of Pete Surdo, reviewed on 08/01/19, which reads, "After 15 years working at Robins Kaplan LLP, I am off on a new adventure as a Fellow with the NYU School of Law's State Impact Center. I will be embedded with the Minnesota Attorney General's Office as an Environmental Litigator and Special Assistant Attorney General."

to compel full release of all non-exempt information, compel OAG to identify and justify all withholdings, and to award costs and disbursements, including reasonable attorneys' fees to Plaintiff upon prevailing. Plaintiff also requests an expedited hearing as provided in Minn. Stat. § 13.08, Subdivision 4.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to Minn. Stat. § 13.08, Subdivision 3, and Minn. Stat. § 484.01.

2. Venue is proper in this Court pursuant to Minn. Stat. § 13.08, Subdivision 3, authorizing an action against the state under Chapter 13 to be brought in any county.

PARTIES

3. Plaintiff Energy Policy Advocates (EPA) is a nonprofit organization incorporated in the State of Washington and dedicated to transparency and open government. EPA uses state and federal open records laws to shed light on—and thereby educate the public on—private influences on government policymaking and the use of public office. Part of EPA's effort has been the record requests at issue in this matter and similar requests in attorneys general offices nationwide.

4. Defendant Keith Ellison is the Attorney General of the State of Minnesota.

5. Defendant OAG is the Attorney General's Office for the State of Minnesota. It is the recipient of the MGDPA request, authority responsible for the data sought, and was responsible for improperly withholding information from public view. Its address is 445 Minnesota Street, Saint Paul, Minnesota 55101.

STATEMENT OF FACTS

Plaintiff made proper requests under the MGDPA, and Defendant OAG is improperly withholding public data responsive to Plaintiff's requests

6. On December 20, 2018, EPA requested OAG provide copies of certain emails of Deputy Attorney General Karen Olson sent to, or from, or mentioning assorted outside parties, including (a) the lead plaintiffs' law firm recruiting litigants against energy companies in the name of "climate change;" (b) a political trade group; and (c) an employee of the Massachusetts Attorney General's Office who, records show, is coordinating recruitment of attorneys general offices to bring privately hired attorneys as "Special Assistant Attorneys General" to pursue issues of concern to the major political donor funding the operation. **Ex. A (EPA Dec. 20, 2018 MGDPA request).**

7. On January 4, 2019, OAG replied to that request claiming that no described records exist containing certain terms directly relating to the political trade group, and the remainder of the requested data are exempt under "a number of legal privileges, including the attorney work product, the attorney-client, and the deliberative process privileges". **Ex. C (OAG Response to Dec. 20, 2018 Request).**

8. On December 26, 2018, EPA also requested OAG provide copies of certain correspondence of Karen Olson containing the terms googlegroups.com, Google Doc(s), Sharepoint, Dropbox, and box.com, and/or @ucsusa.org. **Ex. B (EPA Dec. 26, 2018 MGDPA request).**

9. Public records show several "Google groups" created for the purpose of discussing these litigation campaigns that include public employees. Public records also show that @ucsusa.org is the email domain of a pressure group that both originally recruited AGs to investigate energy companies on various grounds tied to climate change, and also hosted a "secret"

briefing⁵ for OAGs and “prospective funders”⁶ to consider “potential state causes of action against major carbon producers”.⁷ One participant wrote one such funder from that meeting to describe the discussion as one “about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide.”⁸

10. On January 4, 2019, OAG replied to this request asserting the same privileges and stating that, based on its interpretation of EPA’s request and given OAG’s review of EPA’s website (in lieu of contacting EPA), OAG had no responsive data and, in the event its interpretation regarding EPA’s intent was incorrect, OAG nonetheless had no responsive data that it deems public information. **Ex. D (OAG Response to Dec. 26, 2018 Request).**

PUBLIC INTEREST IN THE DATA AT ISSUE

11. The out-of-state tort law firm named in Plaintiff’s December 20, 2018 request is recruiting governmental plaintiffs to pursue “climate” litigation. This pitch comes on the heels of a now infamous plea by another tort lawyer pursuing similar cases that, “State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney

⁵ "I will be showing this Monday at a secret meeting at Harvard that I'll tell you about next time we chat. very [sic] exciting!" April 22, 2016, email from Oregon State University Professor Philip Mote to unknown party, Subject: [REDACTED], and "I'm actually also planning to show this in a secret meeting next Monday-will tell you sometime." April 20, 2016, Philip Mote email to unknown party, Subject: [REDACTED]. Both obtained from Oregon State University on March 29, 2018, in response to January 9, 2018 Public Records Act request.

⁶ “We will have as small number of climate science colleagues, as well as prospective funders, at the meeting.” March 14, 2016, email from Union of Concerned Scientists’ Peter Frumhoff to Mote; Subject: invitation to Harvard University-UCS convening. Obtained under same PRA request cited in FN 4.

⁷ “Confidential Review Draft-March 20, 2016, Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal, and Historical Perspectives.” Obtained in *Energy & Environment Legal Institute v. Attorney General, Superior Court of the State of Vermont*, 349-16-9 Wnc, December 6, 2017.

⁸ “Hi Dan, Thought you would like to hear that Harvard’s enviro clinic, UCLA Emmett Institute, and the Union of Concerned Scientists are talking together today about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide. Good discussion.” April 25, 2016 email from UCLA Law School’s Cara Horowitz to Harvard and UCLA center funder Dan Emmett, Subject: See, e.g., <https://climatelitigationwatch.org/on-the-subject-of-recruiting-law-enforcement-email-affirms-origin-of-prosecutorial-abuses/>. This email was sent from the event.

general might have substantial success in bringing key internal documents to light.”⁹ Subsequent to this plea, numerous attorneys general recruited by this attorney did in fact initiate investigations, and the same offices have brought in the privately hired attorneys described, *supra*, to pursue those investigations and other, similar work.

12. The general public interest in transparency in the work of their elected, constitutional officers and offices is heightened concerning the possible use of state power to advance private interests. Similarly, the public has a great interest in how public office, particularly law enforcement, is used in combination with private interests.

13. In addition, the Minnesota Attorney General, as the chief legal officer of the State of Minnesota, is the only attorney who can represent the State in legal proceedings except in two very rare circumstances: (i) if the governor, attorney general, and chief justice of the Minnesota Supreme Court agree in writing to employ additional attorneys; or (ii) the governor decides that the attorney general is interested adversely to the state. Otherwise, “[t]he attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties.” Minn. Stat. § 8.06.¹⁰

STATEMENT OF CLAIMS

Count I

(Action to Compel Disclosure Pursuant to Minn. Stat. § 13.08)

14. Plaintiff realleges and incorporates by reference the allegations above.

⁹ Climate Accountability Institute, *Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control* (Oct. 2012), <http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf> at p. 11. (Summary of the “Workshop on Climate Accountability, Public Opinion, and Legal Strategies”)(Last viewed May 16, 2019).

¹⁰ Even if he wanted to, former Governor Tim Pawlenty could not fire then-Attorney General Mike Hatch despite substantial acrimony between their respective offices, http://news.minnesota.publicradio.org/features/2003/08/01_mccalluml_pawlentyhatch/.

15. The MGDPA “establishes a presumption that all government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01, Subdivision 3.

16. In response to Plaintiff’s requests, OAG has erroneously relied on conclusory claims of attorney-client privilege, the work product doctrine, the deliberative processes privilege, and the common interest doctrine to withhold public records.

17. Plaintiff is entitled to disclosure of the requested data pursuant to Minn. Stat. §§ 13.03, Subdivision 1, and 13.08, Subdivision 4.

18. Defendant denied Plaintiff access to requested records in violation of the MGDPA.

19. Defendant’s denial of access was willful.

20. Plaintiff was harmed as a result of Defendant’s willful violation of the MGDPA.

21. For these reasons, Plaintiff has standing to challenge Defendant’s response.

22. Defendant’s willful violations of the MGDPA entitles Plaintiff to their costs and disbursements, including reasonable attorneys’ fees. Minn. Stat. § 13.08, Subdivision 4.

23. Defendant’s willful denial of Plaintiff’s requests justifies assessment of a civil penalty under Minn. Stat. § 13.08, Subdivision 4.

24. Plaintiff is entitled to an immediate injunction preventing continuation of Defendant’s willful and continued violations of the MGDPA. Minn. Stat. § 13.08, Subdivision 2.

Count II

(Disclosure of Civil Investigative Data Pursuant to Minn. Stat. § 13.39, Subdivision 2a)

25. Plaintiff realleges and incorporates by reference the allegations above.

26. OAG denied Plaintiff’s request for records because the records are “part of an active

investigation undertaken for the purpose of the commencement or defense of a pending civil legal action.”

27. This includes invoking attorney-client privilege to withhold requested correspondence with a plaintiffs’ tort firm that, public records suggest, is recruiting the OAG to undertake actions in support of a tort-litigation campaign. Defendant also asserts, in response to another MGDPA request, that it has not entered into any common interest or representational agreement with said firm.

28. The MGDPA allows disclosure of government records related to a pending civil legal action if “the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data.” Minn. Stat. § 13.39, Subdivision 2a.

29. The public has a substantial interest in learning how private law firms are recruiting elected officials to further private goals and what if any such discussions OAG had.

30. Disclosure of the records sought will provide a significant benefit to the public by demonstrating how private law firms recruit attorneys general to support or otherwise collaborate in their contingency-fee campaigns as well as provide transparency on the operations of an elected, constitutional officer or his/her office.

31. A possible chilling effect on tort lawyers recruiting sympathetic attorneys general to subpoena documents and otherwise assist “‘strategies to win access to internal documents’ of fossil fuel companies,”¹¹ cannot plausibly outweigh the public’s interest. Additionally, Defendant has identified no harms to the public or their office in their response.

¹¹ Order, transferring *Exxon v. Eric Schneiderman and Maura Healey* from the Northern District of Texas to the Southern District of New York, Kinkeade, J., C.A. No. 4:16-CVK-469-K (N.D. TX, Mar. 29 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170329_docket-416-ev-00469_order-1.pdf.

32. The benefits of disclosure outweigh any harms and the Court should authorize disclosure under Minn. Stat. § 13.39, Subdivision 2a.

COUNT III

(Disclosure of Information Pursuant to Minn. Stat. § 13.393)

33. Defendant's claim of investigative privilege also relies on unsupported claims of attorney-client, work product, and common interest privileges.

34. Minn. Stat. § 13.393 requires the dissemination of data by an attorney acting in a professional capacity for a government agency to be governed by the statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility.

35. Defendant has presented no evidence to support an attorney-client relationship between Defendant and any outside party relevant to these requests and have claimed they have no records reflecting such a relationship and no common interest agreement.

36. Absent a demonstrated attorney-client relationship in fact, the Court should order disclosure of the requested records.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully prays, through counsel, that this Court,

- a) Enter an injunction directing Defendant to comply fully with the MGDPA, and without further delay, to furnish Plaintiff the government data at issue in this matter, in the native format requested, subject only to legally-allowable withholdings justified by sufficient identification of the reasons for withholding;
- b) Assess a civil penalty as authorized in Minn. Stat. § 13.08, Subdivision 4;
- c) Alternately, perform an *in camera* review of the information sought to be redacted

by OAG and compel OAG to release all information for which the OAG is unable to carry its burden to prove each withholding is privileged and not subject to disclosure;

d) Award Plaintiff fees, costs, and disbursements, including reasonable attorneys' fees, as authorized in Minn. Stat. § 13.08, Subdivision 4; and

e) Order such additional relief as the Court may deem just and proper.

DATED: _____

By: _____

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