

1 ☐ EXPEDITE
2 ☐ No hearing set
3 ☐ Hearing is set
4 Date: _____
5 Time: _____
6 Judge: _____

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7
8 **SUPERIOR COURT OF WASHINGTON**
9 **FOR THURSTON COUNTY**

10 ENERGY POLICY ADVOCATES,)
11 a Washington Nonprofit Corporation,)

12)
13) Case No. _____
14) Plaintiff,
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28))

v.

OFFICE OF THE ATTORNEY GENERAL,

Defendant.

Case No. _____

COMPLAINT FOR VIOLATIONS
OF THE PUBLIC RECORDS ACT

18 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

19 Plaintiff Energy Policy Advocates, a Washington Nonprofit Corporation, by and through its
20 attorney, Matthew D. Hardin, brings this complaint against the Office of the Attorney General
21 (“OAG”), and in support thereof avers as follows:

- 23 1) This is an action under the Public Records Act, RCW 42.56.001 *et seq.* (“PRA”).
24 2) Specifically, on May 6, 2019, Energy Policy Advocates requested “copies of all electronic
25 correspondence, and its accompanying information, including also any attachments, that is
26 dated from January 1, 2016 through April 30, 2016, inclusive, which was sent to, from, cc: or
27 bcc:, Laura Watson and/or Bill Sherman, which also includes, anywhere, “Pawa” and/or
28

1 “Oreskes”, including, but not limited to, email addresses, e.g., mp@pawalaw.com or
2 oreskes@fas.havard.edu.” These are the names and certain email addresses of two “climate”
3 activists who have campaigned for attorneys general to pursue opponents of their preferred
4 policies, and to assist a private tort litigation campaign.
5

6 3) OAG is withholding certain information responsive to this request, including parts of emails
7 mentioning one or both activists, and memoranda withheld in full but-for the To, From and
8 Date fields, including the Subject fields, one or both of the activists’ names and other
9 reasonably segregable, purely factual information. OAG did not state if it withheld any
10 records in full.
11

12 4) On information and belief, and based upon productions responding to public records requests
13 filed nationwide by the Plaintiff, such records shine further light on a concerted campaign by
14 activist attorney Matt Pawa and others to recruit state attorneys general across the country to
15 pursue various civil (and possibly even criminal) actions against the targets of a private
16 “climate nuisance” tort litigation campaign.
17

18 5) OAG initially acknowledged receipt of the request on May 10, 2019. That day, Emily Kok
19 (“Kok”), Public Records Officer for OAG, estimated 20 additional days would be needed to
20 respond to the Plaintiff’s request.
21

22 6) Kok wrote to the Plaintiff twice more to delay estimated production of records.
23

24 7) On June 28, 2019, OAG finally produced a first tranche of responsive records to the Plaintiff.
25 The production consisted of only 30 pages of records, some of which were redacted. Kok
26 stated in an email accompanying the production that further records would become available
27 on July 22, 2019.
28

1 8) By letter dated July 16, 2019, OAG produced approximately 40 pages of additional records,
2 again containing significant redactions. Kok estimated further production of documents in
3 August of 2019.

4
5 9) On August 2, 2019, Kok wrote Plaintiff to state the Office had located no additional records
6 and it considered the production complete.

7 PARTIES

8
9 10) Plaintiff Energy Policy Advocates is a nonprofit corporation incorporated in the State of
10 Washington and maintains its principal place of business in Spokane County.

11 11) Defendant OAG is an agency of the State of Washington. It is led by Bill Ferguson, a
12 Constitutional Officer whose duties and powers are set forth in Wa. Const. Art. III. § 21 and
13 RCW 43.10 *et seq.* Wa. Const. Art. III. § 24 requires OAG to maintain “public records, books
14 and papers relating to” the office “at the seat of government.”

15 JURISDICTION AND STANDARD OF REVIEW

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17 12) This Court has jurisdiction pursuant to RCW 42.56.550, which provides that “the superior
18 court in the county in which a record is maintained may require the responsible agency to
19 show cause why it has refused to allow inspection or copying of a specific public record or
20 class of records.”

21
22 13) RCW 42.56.030 permits, but does not require, an aggrieved PRA requester to seek Attorney
23 General review of agency withholdings. Given OAG’s role as the withholding agency,
24 Plaintiff did not first seek OAG review of the propriety of its own actions.

25
26 14) This Court is required to review OAG’s response under the PRA *de novo*. RCW 42.56.550
27 (3) further provides that “Courts shall take into account the policy of this chapter that free
28 and open examination of public records is in the public interest, even though such
examination may cause inconvenience or embarrassment to public officials or others.”

LEGAL ARGUMENTS

15) Exemptions within the PRA are narrowly construed. RCW 42.56.030 provides that it is the public policy of the state that the voters “do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”

16) In this case, OAG relies upon two principal theories to withhold parts or all of certain records from the Plaintiff. The first is Attorney-Client Privilege. The second is Attorney Work Product Privilege. Neither privilege justifies OAG’s overly broad withholding of information at issue in this case.

17) The PRA incorporates the common law of privileges, including Attorney-Client Privilege, at RCW 42.56.290. (Exempting “Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.”).

18) However, application of privileges to withhold public information is disfavored in the law. (“Privileges are disfavored because they obstruct the truth-seeking process and, for that reason, are narrowly construed.” *Figueroa v. Mariscal*, 414 P.3d 590, 597 (Wash. App. 2018)).

19) Also, the Washington Supreme Court has recognized that “in our open civil justice system, parties may obtain discovery regarding any unprivileged matter that is relevant to the subject matter of the pending action. *Newman v. Highland Sch. Dist. No. 203*, 186 Wash.2d 769, 777 (Wash. 2016). The Washington Supreme Court has expressly declined to “shield facts from discovery, even if transmitted in communications between attorney and client.” *Id.* at 778.

- 1 20) “Facts are proper subjects of investigation and discovery, even if they are also the subject of
2 privileged communications.” *Youngs v. Peacehealth, Corp.*, 179 Wash.2d 645, 653 (Wash.
3 2014).
- 4
- 5 21) The work product privilege is also part of the common law of privileges incorporated into the
6 PRA at RCW 42.56.290. However, “attorney work product privilege is not absolute: work
7 product may be obtained if the opposing party has no other means of obtaining the
8 information without undue hardship. *Lowy v. PeaceHealth* (Wash. 2012, No. 85697-4,
9 Johnson, dissenting).
- 10
- 11 22) “The civil work product protection applies to documents and other tangible things that (1)
12 show legal research and opinions, mental impressions, theories, or conclusions of the
13 attorney or of other representatives of a party; (2) are an attorney’s written notes or
14 memoranda of factual statements or investigation; and (3) are formal or written statements of
15 fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of
16 litigation”. *Kittitas Cnty., Corp. v. Sky Allphin, Abc Holdings, Inc.*, 190 Wash.2d 691, 705
17 (Wash. 2017).
- 18
- 19
- 20 23) In this case, OAG is withholding from disclosure under the PRA communications that reflect
21 upon advocacy by outside parties lobbying for a desired use of the state’s top law
22 enforcement office, and a favored political result.
- 23
- 24 24) OAG is also withholding purely factual and other reasonably segregable information from
25 disclosure. The Washington Supreme Court has held that “the PRA requires redaction and
26 disclosure of public records insofar as all exempt material can be removed.” *Resident Action*
27 *Council v. Seattle Hous. Auth.*, 327 P.3d 600, 602 (Wash. 2014). OAG not only withholds
28 substantial portions of correspondence and the entire substance of memoranda apparently
discussing such lobbying requests and/or the prospective cases sought by such lobbying, but

1 also withholds subject lines of various emails and memos, memos in substantive full, and
2 even the titles of email attachments. Such information cannot conceivably have constituted a
3 mental impression or work product, even if, *arguendo*, exempt information was contained
4 elsewhere in the relevant document or documents.
5

6 **FIRST CLAIM FOR RELIEF**
7 **Duty to Produce Records under the PRA**
8 **Declaratory Judgment**

- 9 25) Plaintiff re-alleges paragraphs 1-24 as if fully set out herein.
10 26) Plaintiff is entitled to responsive records subject only to legitimate withholdings.
11 27) Plaintiff has no requirement to further pursue its administrative remedies.
12 28) Plaintiff asks this Court to enter a judgment declaring that:
13
14 a. The records requested in both the May 6, 2019 requests are agency records subject to the
15 PRA;
16
17 b. OAG's refusal to provide responsive records is unlawful; and
18
19 c. Defendant must reduce responsive records subject to legitimate withholdings.

20 **SECOND CLAIM FOR RELIEF**
21 **Duty to Produce Records Under the PRA**
22 **Injunctive Relief**

- 23 29) Plaintiff's re-allege paragraphs 1-28 as if fully set out herein.
24 30) Plaintiff is entitled to declaratory relief that defendant has failed to provide responsive
25 documents and/or injunctive relief compelling defendant to provide Plaintiff documents
26 response to its request.
27 31) Plaintiff asks the Court to enter an injunction ordering the defendant to provide Plaintiff
28 documents responsive to the request within 10 business days of the date of the order.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

32) Plaintiff re-alleges paragraphs 1-31 as if fully set out herein.

33) Pursuant to RCW 42.56.550, Plaintiff is entitled to recover costs and fees. ("Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.").

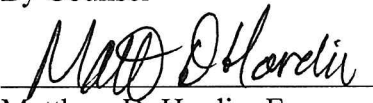
34) Pursuant to RCW 42.56.550, the Court is empowered to order exemplary damages. ("In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.").

35) 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 their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 5th day of February, 2020.

ENERGY POLICY ADVOCATES
By Counsel


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