

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF THURSTON

3
4 ENERGY POLICY ADVOCATES, a)
Washington nonprofit)
5 corporation,)
6 Plaintiff,) NO. 20-2-01433-34
7 vs.)
8 STATE ATTORNEY GENERAL'S)
OFFICE, an agency of)
9 Washington State,)
10 Defendant.)

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12 VERBATIM REPORT OF PROCEEDINGS
13
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16 BE IT REMEMBERED that on October 16, 2020,
17 the above-entitled and numbered cause came on for a
18 merits hearing before the HONORABLE CHRIS LANESE, judge
19 of Thurston County Superior Court, Olympia, Washington.
20
21

22
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I N D E X

<u>Description</u>	<u>Page</u>
Preliminary Remarks	4
Plaintiff's Argument	5
Defendant's Argument	8
Plaintiff's Rebuttal Argument	14
Ruling of the Court	16

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1 The documents were then filed under seal, and I have
2 reviewed those documents. So technically we're here
3 for the merits hearing.

4 I have looked at the documents. I understand, as
5 is the nature of these types of cases, that only one
6 side has seen the documents, so it puts the requester
7 in a difficult position in terms of arguing about the
8 substance of the documents, but the requester has
9 received the briefing, the declarations, and the
10 exemptions. And so I will hear argument to the
11 extent that you are able to advance additional
12 arguments beyond what you have briefed, counsel.

13 Mr. Hardin, you may proceed first.

14 MR. HARDIN: Thank you, Your Honor. I think
15 that what we have seen in this case, which we briefed
16 initially -- essentially we're arguing that any
17 privilege that may have attached was waived by
18 sharing it outside the ambit of an attorney-client
19 relationship either between the Attorney General's
20 Office --

21 THE COURT: Mr. Hardin, you will want to slow
22 down just a little bit. We have our court reporter
23 here typing. Thank you.

24 MR. HARDIN: I apologize.

25 THE COURT: That's fine.

1 MR. HARDIN: Any privilege would have been
2 waived either by sharing these documents outside the
3 attorney-client relationship that may have existed
4 between the AG's Office and any state agency or other
5 client that the AG's office might have, but I think
6 that before we even get to a waiver issue we also
7 have an issue of what is the ambit of any litigation.
8 Is there even an attorney-client relationship that
9 could come out of this, or is this more of a lobbying
10 relationship? And I think that what we've pointed to
11 -- there is a purported common interest agreement
12 that we submitted. The Attorney General's Office
13 says that wasn't properly authenticated, but I
14 believe that the court has now reviewed in camera a
15 common interest agreement that is either the same
16 agreement or a similar one, and I think that the
17 court can see that this is not a case of reasonably
18 anticipated litigation. These agreements are so
19 broad that it encompasses anything at all that the
20 Attorney General's Office might want to do. I think
21 that that is not going to be a valid basis to give
22 rise to an attorney-client privilege or to a common
23 interest privilege when documents are shared outside
24 the Attorney General's Office.

25 I think that the Attorney General, in defending

1 this case, is actually broadening the problem into
2 her conclusion in this case and because the code,
3 32.56.550, says that the agency's actions are what
4 this court is reviewing de novo. It's not
5 necessarily a limited review to the group. This
6 court is reviewing the agency's actions de novo, and
7 I think that the Attorney General's Office has shown
8 through its affidavits that at least an initial
9 canvas of the documents may have been insufficient,
10 and I think that they have injected the insufficiency
11 of the search into this case, and I think that if you
12 look at the complaint, the second count in the
13 complaint seeks declaratory judgment that not all
14 responsive records were produced to the plaintiff,
15 and I think that that certainly requires a search to
16 be conducted. I think that the Attorney General's
17 Office has injected a potentially inadequate search
18 into this case, and there's no proof that the records
19 that this court has reviewed in camera were found
20 after a reasonably diligent search, so I think that
21 that's another problem.

22 Again, it's the Attorney General's burden in this
23 case. It's an odd civil posture where the defense
24 has the burden of proof, but we would submit that the
25 Attorney General's Office has failed to meet its

1 burden because it hasn't shown that there was an
2 adequate search, because it hasn't shown that the
3 documents at issue were not shared outside the ambit
4 of the attorney-client relationship, or even that the
5 documents at issue relate to litigation within the
6 meaning of the Public Records Act or sort of the
7 discovery precedent that the Public Records Act
8 incorporates.

9 On that, Your Honor, I'll rest.

10 THE COURT: Thank you.

11 So I will hear from Ms. Steele next. I will just
12 note that Ms. Steele does not need to respond to the
13 adequacy of the search argument. However that may
14 have been remotely implicitly referenced in the
15 complaint, it definitely wasn't in the plaintiff's
16 merits briefing, and so that is not going to be
17 considered as part of this case.

18 Ms. Steele, you may proceed..

19 MS. STEELE: Thank you, Your Honor. Jennifer
20 Steele for the Attorney General's Office.

21 We're asking this court to dismiss this action and
22 find no violation of the Public Records Act. Energy
23 Policy Advocates, EPA, is seeking from the Attorney
24 General's Office in multiple requests but
25 specifically the two that are at issue here,

1 information and records that include work product.
2 As we produced records in response to the two
3 requests here, we redacted specific privileged work
4 product information, and that work product privilege
5 is essential for attorneys to develop and litigate
6 cases and to keep the exempt information from
7 getting, you know, into somebody's hands who isn't
8 entitled to it, who isn't part of the privilege.

9 The policy behind the work product privilege
10 remains intact before litigation, and as in the case
11 here, this is affirmative litigation, and the very --
12 you know, it's much different than if something were
13 already out there. So the parties are actively
14 looking at it, and there has been no evidence to show
15 otherwise established from EPA.

16 As you're aware, the two records at issue in this
17 case -- excuse me. There are two public records
18 requests at issue in this case, and the emails that
19 are -- excuse me. The records that are under dispute
20 at this point involve an email string that's about
21 five pages long and that has an attached record to it
22 that was the ClimateNAAQS.ppt, and that record was
23 withheld in its entirety. That email that's at issue
24 is an email string. The last email, which was the
25 only one to come to our office, was sent from the

1 Oregon Department of Justice attorney to a senior
2 AAG, a former senior AAG at our office, and was
3 marked specifically confidential and protected by the
4 work product privilege, and we carefully redacted the
5 work product that was present in that email in the
6 email string below it. The ClimateNAAQS.ppt that was
7 attached to that email was only attached at the point
8 that it came from the Oregon Department of Justice to
9 our office. And so that was clearly a common
10 interest party discussing potential anticipated
11 litigation, and the attachment was specifically
12 related to that and, again, marked privileged
13 confidential and only between those two agencies,
14 which are part of the common interest.

15 The other record at issue was involved in the
16 second public records request wherein EPA asked for
17 the records that justified the common interest
18 agreement that had been -- or the common interest
19 privilege that we had cited, you know, as
20 justification for exemptions in the first request.
21 And so that's the common interest agreement. It was
22 withheld entirely because it, you know, involved
23 un-filed potential litigation that the parties are
24 actively working on.

25 Again, the fact of the affirmative litigation is

1 important here because it's not -- certainly not
2 known to anyone, and it's necessary for the parties
3 to be able to collaborate and discuss these types of
4 issues in order to analyze and determine whether or
5 not to proceed with a specific lawsuit. The common
6 interest agreement itself contains, you know, the
7 parties that are involved, the potential, you know,
8 division of labor, how they're gonna go about things,
9 and obviously the subject of what they're looking at.
10 It is not so broad as to encompass everything, as Mr.
11 Hardin is arguing. It's very narrowly tailored and
12 specific to the issue of what the states are looking
13 at here and continue to look at in this potential
14 litigation that is still very active, and work is
15 still being done on it. I mean, all of these records
16 here, we have evidence that -- well, they're quite
17 recent, the email I believe from the very beginning,
18 or excuse me, the very end of last year.

19 Let's see. The Attorney General's Office has
20 properly redacted the specific work product. We did
21 not redact work -- or information that wasn't work
22 product. The information was created and the
23 information that we redacted was created in
24 anticipation of potential affirmative litigation. It
25 discusses and analyzes the potential affirmative

1 litigation, and it contains substantive information,
2 you know, related to what the parties are discussing.

3 Specific to the PowerPoint slides that were
4 withheld, those contain substantive analysis in
5 response to an inquiry from one of the common
6 interest states. Mr. Bachman, who was involved in
7 the email string below and who created the PowerPoint
8 slide, is a consulting expert, and he need not be a
9 client. We don't need to have an attorney-client
10 relationship for the work product privilege to
11 attach. We have not argued attorney-client. What
12 we're noting is that he's a consulting expert that's
13 working potentially with the State or providing some
14 information to the State, and that information the
15 department of justice from Oregon determined was, you
16 know, relevant to what they were discussing and so
17 forwarded that specific PowerPoint to our office
18 specifically related to discussing and analyzing the
19 potential litigation. You know, Bachman wasn't on
20 that email. That email was just between common
21 interest parties or, you know, within the common
22 interest, and requiring the Attorney General's Office
23 to reveal information in such a manner would hinder
24 future open discussions and really inhibit our
25 ability to participate in these multi-state

1 litigations which are paramount to any Attorney
2 General's Office, and certainly ours.

3 That type of information that the slides -- the
4 Bachman slides are not the type of information that
5 could be obtained through discovery. It's
6 information from a consulting expert, and the type of
7 information that's redacted in the emails, as well as
8 the common interest agreement itself, contain
9 impressions that are not available to another party
10 in discovery.

11 THE COURT: Anything else you want to add?

12 MS. STEELE: Regarding the issue of waiver,
13 there's no evidence of any waiver in this case. EPA
14 has not shown any waiver. It's kind of just
15 generally asserting that there is waiver without
16 specifically, you know, noting who it's to or
17 describing where it occurred. These communications
18 -- well, the email really. There's only this one
19 email string that's the communication, and that
20 communication was made in a privileged manner. The
21 email is clearly marked that it's privileged, and
22 again, it's -- there's a string below which contains
23 some redactions, but the part that came from outside
24 the office to our office are between two parties who
25 are part of the common interest privilege, and it's

1 marked confidential.

2 If there is -- there is just no evidence of waiver
3 here. Moreover, another party cannot waive the
4 Attorney General's Office work product privilege. So
5 there is no evidence, and another party can't waive
6 it. There's certainly no evidence that we waived it
7 in this case.

8 Unless Your Honor has questions, I'll rest at
9 that.

10 THE COURT: No questions.

11 Plaintiff gets the last word.

12 MR. HARDIN: Thank you, Your Honor. And I'm
13 understanding that the court has ruled on the issue
14 of the search. I do believe that I have to preserve
15 my record. I think that we raised the issue of the
16 search on page 9 through 10 of our brief on the
17 merits, page 9, line 22, through page 10 at line 6.
18 Having preserved that, I'll move on to what the
19 Attorney General has argued.

20 I think that we submitted requests for admissions
21 about who created this record. I think that the --
22 the PowerPoint record is what I'm referring to. And
23 I think that the Attorney General's Office has
24 admitted today that this record was created outside
25 of the Attorney General's Office.

1 They characterize Mr. Bachman as a consulting
2 expert, but we have seen no evidence put before the
3 court that establishes this consulting expert role.
4 We would suggest that this is more appropriately a
5 lobbying role or an advocacy role where someone is
6 seeking the Attorney General's Office to undertake
7 certain action and that when someone, obviously the
8 Attorney General's Office -- or seeks the Attorney
9 General's Office in any state to undertake an action,
10 that is, of course, their right in the Democratic
11 process, but that does not create a consulting expert
12 privilege.

13 Neither does marking something confidential make
14 it so. I think we discussed that in our brief, where
15 if you label something confidential or even the
16 understanding of one party that something is
17 confidential doesn't make it confidential. It either
18 is or is not as a matter of law.

19 I think that when the Attorney General raises this
20 issue of waiver, I think -- we have not seen,
21 obviously, the documents that are withheld in full,
22 so we can't raise exactly who the document may have
23 been shared with when we haven't seen all the
24 information that the court has. But I think the
25 essential character of our waiver argument is that

1 the common interest doctrine does exist, and it
2 protects information shared between parties, so it is
3 a narrow and discrete legal interest or litigation
4 interest that is shared between those parties. The
5 common interest privilege or the common interest
6 doctrine does not protect everything shared between
7 parties, and I think that attorney work product and
8 attorney-client privilege -- there are ways to waive
9 that. The common interest doctrine protects you
10 against waiver under certain narrow circumstances if
11 you meet all of the requirements. We're suggesting
12 that those requirements are not met either in the
13 facts of this case or in the agreement that we
14 believe is at issue, and I think that that is belied
15 by the Attorney General's privilege log that they
16 submitted with their in camera documents where they
17 sort of characterized this as common interest or
18 joint defense protection that applies here.

19 There's no identified litigation. There's no --
20 there's no concrete issue that is supposedly shared
21 between the parties. This is an incredibly broad
22 sharing arrangement, and we think that such a broad
23 arrangement would constitute a waiver.

24 Thank you, Your Honor.

25 THE COURT: Thank you. The court is prepared

1 to rule at this time.

2 This comes before the court for a merits hearing
3 on a Public Records Act case. As I indicated
4 earlier, we had a prior hearing where this was
5 scheduled where the court asked that the documents be
6 submitted for in camera review. My comments about
7 the explanation for my ruling will be necessarily
8 more abstract in nature because I am going to be
9 finding in favor of the State in this particular
10 case. Thus, those documents at this time will
11 continue to be protected, and, thus, I cannot
12 describe them any further than what has already been
13 described at this time without undermining the fact
14 that they were properly withheld.

15 First, regarding the argument that the search
16 claim was preserved, counsel pointed to page 9, line
17 22, through page 10, line 6. That is a single
18 sentence with a single case cite and is not
19 sufficient, in this court's opinion, to preserve that
20 issue in this case, particularly given the nature of
21 the complaint or petition in this case.

22 When it comes to whether or not the documents were
23 properly withheld under the common interest or work
24 product doctrine, based on this court's review of the
25 documents in question, they were not lengthy. There

1 were not gratuitously excessive redactions or
2 withholdings. The documents that I reviewed fell
3 squarely within the confines of the work product
4 doctrine as further explained by the common interest
5 doctrine. There does not need to be a specific
6 identifiable case for that doctrine to adhere or
7 apply to certain documents but, rather, as the State
8 has described it, it is broader than that, including
9 prospective future litigation.

10 Additionally, the record does not establish that
11 work product protection was waived by any conduct by
12 a relevant party. Each of the documents falls within
13 that articulation of the work product doctrine as it
14 is described by Washington law. They were properly
15 withheld.

16 I will allow the parties an opportunity to confer
17 about the form of this order and submit it later
18 through the ex parte process or note it up for
19 presentation if there are any issues.

20 Does anyone have any questions?

21 MR. HARDIN: Nothing from plaintiff, Your
22 Honor.

23 MS. STEELE: No. Thank you, Your Honor.

24 THE COURT: Thank you. Again, I would
25 ordinarily give a more detailed explanation of the

1 specific documents, but given that I am upholding the
2 agency action here with respect to those
3 withholdings, if I were to describe it further, that
4 would be undermining the purpose of withholding it.

5 So that is going to conclude this matter. Thank
6 you for your argument and good advocacy in this case.
7 We are going to end this hearing at this time and go
8 off the record. Thank you.

9 MS. STEELE: Thank you.

10 (Proceedings were concluded.)
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