STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

ENERGY POLICY ADVOCATES,
a Washington Nonprofit Corporation,

Plaintiff,

v. No. D-202-CV-2020-03587

HECTOR BALDERAS, ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO,

Defendant.

PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S PRODUCTION OF DOCUMENTS AND FOR FEES

Plaintiff Energy Policy Advocates ("EPA"), by counsel, files this Motion to Compel the Production of Documents and for Sanctions against the Defendant. Despite multiple reasoned and supported requests and "good faith attempts" by Plaintiff to avoid unnecessary motions, delay and expense, the Defendant will not provide relevant documents in response to Requests for Production and continues to withhold documents on the basis of unsupported and improper objections. Defendant's refusal to provide good faith answers and an adequate privilege log necessitates this Motion to Compel and merits an award of fees and expenses in accordance with Rule 1-037 NMRA.

The Defendant's arguments to avoid producing public documents is particularly problematic in New Mexico given the Attorney General's obligation to enforce the Inspection of Public Records Act ("IPRA") and the bright lines and precedent related to IPRA. "New Mexico's policy of open government is intended to protect the public from having to rely solely on the representation of public officials that they acted appropriately." *City of Farmington v*

Daily Times, 2009-NMCA-057, ¶ 17, overruled in part on other grounds by *Republican Party v. NM Taxation & Revenue Dept*., 2012-NMSC-026.

1. INTRODUCTION.

This lawsuit originates from six IPRA public record requests submitted to Defendant by Plaintiff. The requests relate to a multi-state campaign by certain offices of state attorneys general to coordinate the advancement of a sweeping private policy agenda. Although this campaign was undertaken in consultation with outside activists and other parties, these AG offices are obscuring their involvement under so-called common interest agreements. These common interest agreements themselves are being withheld, now in discovery, so that the Plaintiff, the public and the Court are expected to simply trust OAG that the details of these common interest agreements—which in turn are used to justify the withholding of volumes of public documents—do represent valid common interest agreements, and are legally privileged.

Neither IPRA nor the New Mexico discovery rules support the Defendant's (Office of Attorney General or "OAG's") efforts to keep public documents secret and the differences begin with the effort to keep the agreements themselves, secret. One of the agreements on its face is no more than an attempted secrecy pact, claiming privilege for any discussions on a broad subject matter about any possible legal action, judicial or administrative, at the state or federal level, against individuals or governmental entities. The author, ringleader and lead signatory of the effort to shield discussions about suing to obtain federal "climate" regulations has just publicly denied that the parties have moved beyond such theoretical discussions, and flatly admitted that there is no reasonably anticipated litigation Defendant can point to supporting the claim that a preposterously broad purported common interest agreement shields the records Plaintiff seeks (see, *infra at 9*).

The Defendant has invoked these secret common interest agreements to withhold correspondence to and from outside parties, and at least one Power Point presentation prepared by an outside activist, while also withholding the very agreements themselves. Both the purported common interest agreements at issue in this case and certainly the correspondence with outside parties that the Defendant continues to withhold are of enormous public interest and importance for the light they shed on the use of a critical public office and public funds to pursue and keep secret a private agenda, the actual work of the "quasi-public employees" involved and the details of the collaboration between plaintiffs' attorneys, private partisan political donors, ideological activists and states' attorneys general.

Plaintiff filed the public record requests and then these requests for production to inform and educate the public about the private influences on government policymaking and the use or misuse of the Attorney General's office. This arrangement at the heart of Plaintiff's requests has been roundly criticized for the pursuit of "an agenda that puts something other than N.M. taxpayers first." Exhibit 1, Albuquerque Journal Editorial dated July 19, 2019 "NM AG's staff must serve public, not special interests."

The Defendant's astonishing response to the obvious criticism was Orwellian double-speak of the first order. For public consumption, sitting on the private secret agreements in which the Attorney General's office apparently agreed to keep public documents hidden, the Attorney General was quoted as insisting he has "nothing to hide." Exhibit 2, Albuquerque Journal July 15th, 2019 article (Dan McKay) "Outside attorneys in AG's Office face criticism". The Defendant simply insisted that the arrangement and the obvious questions raised about the conflicts of interest, the lack of transparency and accountability were actually proof of the exact opposite: "The Attorney General has a strong and transparent record of prosecuting political and

corporate corruption … and he makes no apologies to special interests who are afraid of increased accountability." Id.

Defendant's objections and refusal to properly respond to the discovery now pending is simply more of this same double speak and obfuscation to keep the public in the dark about the purchase and use of Defendant's offices and powers and resources to pursue a private agenda.

a. THE IPRA REQUESTS.

The six IPRA requests at issue in this case sought all common interest agreements entered into by one of three officials in the Office of the Attorney General[1] over a described period of time; correspondence related to multi-state coordination calls; notices to or from outside parties of public records requests and discussion therefore including coordinating responses; and records which included certain search terms related to the aforementioned campaign. Defendant's productions in response to these requests often redacted documents almost entirely, and reflected a shift in OAG's implementation of IPRA by suddenly withholding the identities of parties to correspondence. Records obtained from other states and even from earlier OAG IPRA productions in New Mexico of some of the same records demonstrate the release of non-exempt information was woefully incomplete.

The OAG's pattern and practice of over-withholding and under disclosing led to the current litigation, and now takes the form of meritless objections to routine civil discovery requests. As Plaintiff's requests began focusing on OAG's particular campaign with outside activists, Defendant also changed its practice of releasing the identities of outside parties to

[1] Plaintiff uses the term "official" or "quasi-public employees" colloquially here, as Ms. Anne Minard and Mr. Robert Lundin are not OAG employees. Public records indicate that both came to the OAG after being hired, then "seconded" to OAG, by a private entity that was created for this purpose of placing private attorneys in OAGs as "Special Assistant Attorneys General" to pursue energy and environment priorities of the organization's creator, activist Michael Bloomberg.

responsive correspondence, and began reflexively, automatically and improperly withholding the names and identities of all individuals from outside of the New Mexico Attorney General's Office who were copied on correspondence the Plaintiff requested. Listing all persons receiving copies of the secret documents is standard for any privilege log. Hiding the names makes it impossible to justify the withholding of the document on the basis that the documents are only distributed to persons subject to an enforceable secrecy agreement.

b. THE DISCOVERY REQUESTS GENERALLY

Plaintiff submitted Requests for Admissions and Requests for the Production of Documents on the 1st day of August 2020. After seeking an extension, Defendant provided objection-filled responses and a privilege log lacking associated page numbers, alongside a very few records (which the OAG produced in redacted form). On September 24, 2020, counsel for the Plaintiff initiated a call to discuss Defendant's responses. Defendant provided slightly amended responses on October 1, 2020. After another attempt by Plaintiff to obtain good faith answers, by letter sent October 12, 2020 (Exhibit 3 hereto) Defendant yet again asked for additional time before finally providing actual appropriate responses to the Requests for Admission, a privilege log lacking basic information and containing only conclusory explanations for the withholding of documents responsive to eighteen Requests for Production, objections relating to the specificity of nine Requests for Production, and denials that OAG possessed records responsive to the remaining twenty-two Requests for Production.

The records cataloged in the privilege log are eight purported common interest agreements and seventeen emails. The emails include ten that discuss notices of Plaintiff's public records requests, five related to draft, executed, or updated common interest agreements, one related to the addition of another individual to a distribution list, and one sent to or copying an

employee of the Washington State Attorney General from another privately hired "Special Assistant Attorney General", "seconded" to the Oregon Department of Justice.

2. SPECIFICITY OBJECTIONS

The Defendant's objections to Requests for Production 37, 38, 39, 40, 41, 42, 44, 45, and 47, as overly vague, are meritless. The Requests seek email correspondence between signatories of the purported common interest agreements on specific dates. Records received from other state attorneys general in response to similar requests reveal a pattern of notice and coordination related to Plaintiff's public records requests. Defendant's vagueness objections are nothing more than an attempt to further improperly delay or defeat the production of documents likely responsive to the initial IPRA requests and keep secret what is by statute public information.

The New Mexico Rules permit parties to "obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence." Rule 1-026 NMRA. The Committee Comments to Rule 1-026 NMRA note a "principal purpose of these provisions is to facilitate early discovery of necessary pretrial information to focus on later discovery. Early identification of potential witnesses and exhibits should expedite the litigation process."

"The general rule governing discovery is toward liberality rather than limitation." *Ruiz v. Southern Pacific Transp. Co.*, 1981-NMCA-094, ¶ 30, 97 N.M. 194. The rules are intended to enable a party to obtain "the fullest possible knowledge of the facts before trial" and "the presumption is in favor of discovery." *Marchiondo v. Brown*, 192-NMSC-076, ¶ 13, 98 N.M. 394. "[D]iscovery is designed to make a trial less a game of blind man's bluff and more a fair

contest with the basic issues and facts disclosed to the fullest practical extent." *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 169, 629 P.2d 231, 245 (1980).

As the Defendant, despite numerous opportunities and requests, has not explained how Requests for the Production of Documents seeking correspondence sent on specific single days could be considered vague or could possibly produce an unmanageable universe of responsive documents, Defendant's vagueness objections should be overruled and Defendant should be ordered to produce the documents requested in Requests for Production 37, 38, 39, 40, 41, 42, 44, 45, and 47.

3. DEFENDANT'S ATTORNEY WORK PRODUCT AND COMMON INTEREST OBJECTIONS ARE INADEQUATE

The Defendant is withholding records responsive to the Requests for Production 1, 2, 3, 4, 10, 21, 22, 23, 25, 27, 29, 30, 33, 34, 35, 36, 43, and 46 as attorney work product subject to the common interest rule. Defendant is asserting that common interest agreements, emails relating to the drafting and execution of those agreements, emails providing notice of public records requests and discussing and coordinating responses to those requests, and an email adding an additional party to a distribution list constitute materials made in anticipation of litigation that were shared among privileged parties with identical legal interests. This theory is no more than a facile, *post hoc* justification to withhold documents responsive to Plaintiff's Requests for Production; a theory that also ignores the Attorney General's Compliance Guide which provides "Merely declaring certain documents to be confidential by regulation or agreement will not exclude them from inspection." Attorney General's Guide to the Inspection of Public Records Act at 7.

The common interest doctrine allows documents disclosed to a third party to be protected from discovery if the party resisting discovery can demonstrate that the documents were created

during the course of a joint effort between the resisting party and the third party and that the documents were created in furtherance of that effort. *See Santa Fe Gold Corp. v. United Nuclear Corp.*, 175 P.3d 309, 316 (N.M. App. 2007). The doctrine is typically asserted as a defense to waiver of attorney-client privilege. *See In re Grand Jury Proceedings*, 616 F.3d 1172, 1183 (10th Cir. 2010); *Frontier Ref Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 705 (10th Cir. 1998).

The application of the doctrine to attorney work product to documents requested in an Inspection of Public Records lawsuit in New Mexico is without reported precedent, but at a minimum the Defendant must demonstrate "(1) that each document contains a privileged communication and (2) that each document disclosed [] was designed to further the common legal interest." *Santa Fe Gold Corp*., at 316. A more recent decision in the context of attorney clint privilege and common interest doctrine further requires, "(1) the parties to the communications shared an identical legal interest in the subject matter of each communication claimed to privileged; (2) the communication was made 'during the course of a joint [] effort between the resisting party and the third party' and 'in furtherance of that effort'; and (3) the shared identical legal interest existed at the time the communication was made as reflected by a preexisting, or at the very least contemporaneous, agreement of the parties." *Albuquerque Journal v. Board of Educ. of Albuquerque Pub. Schools*, 436 P.3d 1, 9 (N.M.App. 2018).

In the present discovery dispute, therefore, the Defendant must demonstrate at a minimum that each of the withheld agreements and emails contained privileged communications, *i.e.,* attorney work product, and that the documents were shared to further an identical common legal interest, including what that interest is. Instead, Plaintiff states on information and belief, Defendant claims that the common interest among these parties is "Anticipation Of Judicial Or Administrative Actions To Require The Federal Government (Or Private Parties) To Take

Action (Or To Defend The Federal Government's Authority To Take Action) To Reduce Or Limit Emissions Of Greenhouse Gases That Cause Climate Change." There is literally no conceivable action in the field of climate change litigation, whether against private parties or the federal government — under state, or federal, law, whether common or "including but not limited to the Clean Air Act" — that this does not claim shield discussion of, in otherwise public records, from the public. Indeed, that is to say, the common interest asserted here as underpinning the claimed privileges is *everything*. Whatever this document is, it is not a "common interest agreement" even in jurisdictions that have adopted the common interest doctrine.

Further, the author, ringleader and lead signatory of this effort which OAG cites to keep public records secret for being supposedly relating to pending litigation, the New York Attorney General, is quoted in a recent *Wall Street Journal* article about that precise scheming, denying that any suit is pending and more specifically that, "If we are to address this challenge, then all options must be on the table. With that said, we have no plans at this time to bring litigation seeking to promote one particular approach."[2] Exhibit 4.

Further still, the putative privilege log does not contain sufficient information about the recipients—information which is essential to ascertain whether the Attorney General sufficiently established the requisite underlying privilege in the first place. *See High Point SARL v. Sprint Nextel Corp*., 2012 WL 234024, at *3 (D. Kan. 2012). Documents for which no author or recipient or author is identified on the log must be produced. *Smithkline Beecham Corp. v Apotex Corp.*, 193 F.R.D. 530, 539 (ND Ill. 2000); *Highpoint Sarl v. Sprint Nextel Corp* 120 WL 234024 *15.

[2] Exhibit 4.Timothy Puko, "States Explored Litigation to Challenge U.S. Policy on Climate Change," Wall Street Journal, November 28, 2020, https://www.wsj.com/articles/states-explored-litigation-to-challenge-u-s-policy-on-climate-change-11606559400?mod=mhp.

The privilege log must demonstrate with details, an objectively reasonable basis for asserting privilege as to each communication. *Pina v Espinoza*, 2001-NMCA-055, ¶¶ 21, 25. See also *Id.* at ¶ 24. Meaning that, first comes the question as to whether any of the public documents can be withheld at all.

a. THE WITHHELD DOCUMENTS ARE NOT ATTORNEY WORK PRODUCT

The threshold inquiry is whether the materials withheld are attorney work product. Attorney work product is not a privilege, but an immunity found in Rule 1-026(B)(5). The immunity is nearly absolute for "opinion" work product – documents reflecting an attorney's mental impressions, conclusions, opinions or legal theories – and qualified for all other "non-opinion" work product. *Hartman v. Texaco, Inc.*, 937 P.2d 979, 984 (N.M.App. 1997). Again, Defendant's own Guide to the Inspection of Public Records states clearly that merely declaring documents to be exempt is not sufficient. A party asserting the work product immunity bears the burden of demonstrating the rules applies to each document and may do so by submitting detailed affidavits establishing the specific facts to support the immunity claim. *Hartman*, at 984 (citations omitted). If a party demonstrates the rule applies, the discovering party may only obtain the information upon a showing of substantial need and that the party is unable to obtain the substantial equivalent of the materials by other means. Rule 1-026(B)(5).

The operative clause of Rule 1-026(B)(5) is that the material was prepared "in anticipation of litigation." The party asserting a claim of attorney work product "must demonstrate that litigation was 'the driving force' behind the preparation of each challenged document." *Hartman*, at 985. The "in anticipation of litigation" requirement is crucial as those documents prepared in the regular course of business are not immune from discovery as attorney work product.

The withheld records here – the purported common interest agreements, emails relating to the drafting and execution of those agreements, emails providing notice of public records requests and discussing and coordinating responses to those requests, and an email adding additional party to a distribution list – cannot credibly be claimed to have been created, obtained, or shared in anticipation of litigation. The Attorney General of New York, the author of the purported Common Interest Agreement, has publicly confirmed the records cannot be pursuant to the purported Common Interest Agreement as there is no pending litigation. *See* Exhibit 4. The bare recitation of a privilege does not supply the precise facts necessary to make that showing. "New Mexico's policy of open government is intended to protect the public from having to rely solely on the representation of public officials that they acted appropriately." *City of Farmington v Daily Times*, 2009-NMCA-057, ¶ 17, overruled in part on other grounds by *Republican Party v. NM Taxation & Revenue Dept*., 2012-NMSC-026.

Further, the emails themselves, particularly those providing notice of, discussing and coordinating responses to public records requests, and adding additional parties to a distribution list, could not have been made in anticipation of litigation as there is no identifiable litigation possible.

As to the purported common interest agreements and emails directly related to the revision and execution of those agreements, there is again no demonstration that they were prepared in anticipation of any particular litigation, as confessed by New York Attorney General Letitia James. To the contrary, the aforementioned and purportedly omnibus "CIA", in "Anticipation Of Judicial Or Administrative Actions To Require The Federal Government (Or Private Parties) To Take Action (Or To Defend The Federal Government's Authority To Take Action) To Reduce Or Limit Emissions Of Greenhouse Gases That Cause Climate Change"

indicts the defense effort to hide behind the common interest doctrine as an unadorned and unfounded attempt to keep the public in the dark about certain discussions.[3] Plaintiff's Request for Admission Exhibit # 1 is an unredacted purported common interest agreement, one released by the Defendant to the Plaintiff in response to an IPRA request, which Defendant now withholds as attorney work product.[4]

The agreement purports to memorialize an agreement to take judicial or administrative action to require the Federal Government or private parties to take action or defend the right to take action to reduce or limit greenhouse gases. More concisely, it is an agreement to share information that may be used to do something against some public or private entity or entities, under some authority and maybe the Clean Air Act or not, at some point in time, but most definitely regarding greenhouse gases. As such it is not only a parody of a common interest agreement but also a clumsy effort at a secrecy pact, implemented in this case as an instrument to provide allies notice of requests and a plausible means to delay or refuse releasing public records. There is no specific identifiable cause of action or even venue for the action as it is left undecided if it will be a judicial or administrative action. This is not a common interest agreement; this is an attempt to shield the workings of the New Mexico Attorney General from public scrutiny in violation of public policy.

Even assuming, *arguendo*, that the emails and agreements are attorney work product, the documents would still be discoverable as Plaintiff has substantial need for the materials which

[3] At best, these purported common interest agreements, by their ¶¶ 7-8, represent contractual agreements to provide notice and a highly questionable requirement of consent prior to releasing records requested by the public on certain subject matters. Farming out the right to keep public documents from the public in New Mexico to unknown dozens (hundreds?) of unnamed, unidentified (unqualified?) (uninformed?) lawyers (paralegals?) (Public relations interns?) (volunteer or paid activists?) runs afoul of both the letter and the spirit of IPRA and basic discovery rights.

[4] The agreement is titled "Common Interest Agreement Regarding the Sharing of Information in Anticipation of Judicial or Administrative Actions to Require the Federal Government (or Private Parties) to Take Action (or to Defend the Federal Government's Authority to Take Action) to Reduce or Limit Emissions of Greenhouse Gases that Cause Climate Change."

are directly relevant to claims that the Defendant is wrongly withholding records responsive to the Plaintiff's IPRA requests. These materials will demonstrate that the correspondence withheld is being withheld under dubious claims of common interest rule and that any privilege may have been waived by sharing with parties in states that do not recognize the common interest rule, such as Iowa, Minnesota, Vermont or other such states (as well as being shared with states which define the common interest privilege in a narrow manner and reject sweeping proclamation of "common interest", such as New York. See *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 57 N.E.3d 30, 36 N.Y.S.3d 838 (N.Y. 2016)). If the requesting party claims the privilege was waived due to disclosure to a third party, then the burden falls back on the resisting party and such party must show a "shared identical legal interest "with the third party to support secrecy. *Santa Fe Pacific Gold Corp. v. United Nuclear Corp*. 2007-NMCA-133, ¶¶ 25, 31. See also Rule 11-511 NMRA (Any privilege against disclosure of a confidential matter or communication may be waived if any significant part or the communication or matter is disclosed). As already described, there is no identified shared, identical interest, the purported common interest agreement by virtue of its own sweeping claim to coverage can be no such thing, and the Attorney General of New York denies there is any pending litigation thereunder.

There are few, if any, alternative means to obtain these records as nearly all participant states have adopted and are coordinating with OAG a similar stance regarding withholding, and the Plaintiff should not be expected to litigate the same claims in every state to obtain New Mexico public records.

b. THE REQUIREMENTS OF THE COMMON INTEREST DOCTRINE HAVE NOT BEEN MET

As argued, *supra*, the withheld materials are not attorney work product. Even if the materials could be construed as such, the common interest doctrine does not apply as the

documents were not shared between privileged parties and were not shared to serve an identical common legal interest. The OAG has not attempted whatsoever to list the persons who were listed as receiving the documents, let alone the unlimited (?) list of persons who then were forwarded or copied with the same documents.

A party's conclusory claim that disclosure of information sought in discovery would violate a privilege is insufficient; the party must provide sufficient information to clarify and explain its position. *See United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155 (1980). Here, the Defendant has merely stated that the withheld materials are attorney work product and since the materials were shared between several parties, who claim a common legal interest, they are subject to the common interest rule. The Defendant does not provide information sufficient to determine that the records were shared between privileged parties or that they material shared serves an identical legal purpose. To the contrary, all Defendant has provided – and now, tellingly, withholds – is an incriminatingly overbroad claim to a common legal interest in anything having to do with greenhouse gases, administrative or judicial, against a governmental entity or entities or possibly private parties, to compel action or cessation of action, some time.

Defendant's objections ignore the fact that material shared pursuant to the alleged common interest agreements has been shared with parties that do not recognize the common interest doctrine, again for example Minnesota, Vermont and Iowa.[5] There cannot be a common-interest privileged relationship between parties that do not recognize the common interest doctrine nor can there be an expectation of privacy. Defendant fails its burden in the face of

[5] *See Walmart Inc. v. Anoka County,* No. A19-1926, 2020 WL 5507884, at *2 (Minn. Ct. App. Sept. 14, 2020) "[t]he common-interest doctrine is an exception to work-product waiver that has been adopted in some jurisdictions, but not expressly in Minnesota); *Energy & Environment Legal Institute v. Attorney General of Vermont*, Vt. Super. Ct., Docket No. 558-9-16, at *3 ("[the common interest doctrine] has not been recognized as a privilege under Vermont law nor adopted in any reported decision."); *Belle of Sioux City LP v. Missouri River Historical Development, Inc.,* Iowa Dist. Ct., CL 126161 at *9.

apparent waiver. (*Santa Fe Pacific Gold Corp. v. United Nuclear Corp*. 2007-NMCA-133, ¶ 25, 31; also Rule 11-511 NMRA).

Defendant's objections also ignore that certainly some and likely all withheld documents were not made pursuant to an identical common legal interest, but rather in the course of ordinary business. Beginning with the email notices of public records requests, Defendant has presented no evidence that these were received to advance their identifiable, protectable common legal interest nor could Defendant present such evidence. Defendant has provided the opposite of such evidence, that being the contract to provide each other notice and a questionable requirement of consent prior to releasing New Mexico public records on certain, broad topics.

Further, many of the withheld emails are simply to provide notice per that agreement and there is no common legal interest in processing a New Mexico public records request. Nor can the purported common interest agreements themselves represent the pursuit of a shared identical legal interest as they do not represent any identifiable, legitimate legal goal. The agreements are merely an agreement to share information about a potential action against some party at some point and obtain consent from outside parties prior to doing so. The agreements have no specificity on any details and represent an attempt by the Defendant to contract its way out of, or provide legal cover to not respond fully to, IPRA requests.

This Court should order the Defendant to provide unredacted copies of all documents responsive to Requests for Production 37, 38, 39, 40, 41, 42, 44, 45, and 47. These documents are improperly withheld as attorney work product subject to the common interest rule. They are neither attorney work product nor properly withheld pursuant to the common interest rule.

4. INADEQUATE SEARCH

The final deficiency in the Defendant's responses is an inconsistent, if not intentional, approach to certain Requests for Production which, the evidence reasonably suggests, was triggered by Plaintiff homing in on certain matters with which these OAGs consulted with outside activists. In response to Request for Production No. 8, Defendant provides its by now routine, boilerplate objections while also denying it is in possession of the requested document, an attachment to an email which is a slide show titled "BachmannDoc.PPT." Nevertheless, Defendant admits Request for Admission No. 13, which asked if "OAG received an email containing an attachment from another state OAG or department of justice whose title included 'BachmannDoc.PPT.'" It is apparent from both responses that OAG is either providing inconsistent or even false answers, or not maintaining the very records that are so crucial to a *potential* proceeding that it had to withhold them from public scrutiny. Plaintiff asks this Court to order the Defendant to conduct another search for documents responsive to all Requests for Production to which it responded that it had no records, including but not limited to all attachments.

5. REASONABLE EXPENSES

New Mexico Rule 1-037(A) NMRA allows a discovering party to move the Court for an order compelling inspection in accordance with discovery requests. The rule further permits a court to award reasonable expenses, including attorney's fees, to a successful moving party. Plaintiff has afforded Defendant multiple opportunities to comply in a forthright manner with the discovery requests. Rather than provide Plaintiff with answers, Defendant has sought multiple extensions, stonewalled requests and provided incomplete responses after Plaintiff expended

great time and cost elaborating with specifics and authority on the impropriety of Defendant's approach. This failure to comply warrants an award of Plaintiff's fees and expenses.

6. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's Motion in its entirety and order Defendant to: 1) produce documents responsive to Requests for Production 37, 38, 39, 40, 41, 42, 44, 45, and 47; .2) produce documents responsive to Requests for Production 1, 2, 3, 4, 10, 21, 22, 23, 25, 27, 29, 30, 33, 34, 35, 36, 43, and 46; 3) perform another search for any Request for Production of Documents where no documents were found; and 4) pay Plaintiff's costs, including attorney's fees, in connection with this motion.

Respectfully submitted,

ENERGY POLICY ADVOCATES

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I certify that on the 8th day of December, 2020, the forgoing was electronically filed through the court's filing system which caused all parties of record to be served.

/s/ Patrick J. Rogers

Editorial: NM AG's staff must serve public, not special interests

By Albuquerque Journal Editorial Board

Friday, July 19th, 2019 at 12:02am

"Our Vision: We aspire to be an innovative leader in New Mexico, recognized for proactively finding solutions and responding to evolving needs by building partnerships with individuals, community organizations, government agencies and businesses."

– New Mexico Attorney General's Office website

"Building partnerships" sounds good, especially if it helps stretch every dollar you have for the public you serve – until it turns out one of the partners answers to a very different master. And so New Mexico Attorney General Hector Balderas – the state's top prosecutor and defender of everything from consumer rights to open, accountable government – has a very important question to answer:

Does his office serve the taxpayers of New Mexico? Or a special interest group out of New York?

According to a Journal article published Monday, the AG's Consumer and Environmental Protection Division has two outside attorneys employed through the State Energy and Environmental Impact Center at the NYU School of Law – an entity established two years ago with a grant from Bloomberg Philanthropies.

At first blush that might seem OK; after all, isn't everyone in favor of energy and the environment? But a second look should raise the concern that these attorneys have an agenda that puts something other than N.M. taxpayers first.

Remember, this is the same former New York Mayor Bloomberg who poured $1.13 million into a failed effort to impose a sin tax on sugary beverages sold in Santa Fe and $400,000 into New Mexico Democrats' campaigns with the (successful) goal of a universal background check on firearm purchases.

So there's little question that Bloomberg money often drives an agenda – agree with that agenda or not. Larry Behrens, spokesman of right-leaning Power the Future, brought the Bloomberg deal to light, and his group also has an agenda. So imagine if instead, two attorneys from a Koch Brothers pro-fossil fuels group were in the Consumer and Environmental Protection Division. How would that play?

The AG's Office says it has other employees paid for by settlements, it's not unusual to fund staffing with outside grants and that it – not NYU – supervises the two attorneys in question. But settlements are done deals awarded to the state for wrongs done to it; there is nobody in a home office with a specific agenda sending a check every month.

The top prosecutorial office in the state needs to be above reproach, and Balderas has to recognize this arrangement is not. While it added two attorneys to his staff, it did so at the expense of his office's independence and impartiality – even if it's in appearance only. It's essential Balderas takes a step back and remembers who elected him and whom he works for.

x *urnal. It was written by members of the editorial board and is per rather than the writers.*

EXHIBIT 1

Michael Bloomberg

"This arrangement raises a number of transparency and ethical issues because it clearly doesn't pass the smell test," he said in a written statement. "These attorneys are funded by out-of-state billionaire Michael Bloomberg and given power over the people of New Mexico yet they aren't accountable to taxpayers."

The lawyers are employed through the State Energy and Environmental Impact Center at the NYU School of Law. The center was established in 2017 with a $6 million grant from Bloomberg Philanthropies, according to The Washington Post.

The program is open to any attorney general throughout the country regardless of party affiliation. Interested attorneys general apply and describe their need for extra support on clean energy, climate and environmental matters.

Baca said the two lawyers in New Mexico are under the exclusive control and management of Balderas' office. They work in the Consumer and Environmental Protection Division.

A five-page agreement signed in 2018 says each of the NYU fellows will be commissioned as a special assistant attorney general and be assigned substantive work and responsibility, similar to other attorneys in the office. They are to work primarily on "clean energy, climate change and environmental matters of regional and national importance."

Under the agreement – between the Attorney General's Office and the NYU law school's state impact center – the lawyers' terms are expected to last two years.

Baca said the attorneys help handle environmental legal work, which includes conducting research and drafting correspondence and court pleadings.

He didn't mention any particular cases they had worked on. But under Balderas, New Mexico has filed lawsuits against the Air Force over water contamination and the Environmental Protection Agency over the suspension of a vehicle-pollution rule.

It isn't unusual, Baca said, for employees to be funded through outside sources. As with many state agencies, he said, the Attorney General's Office relies on grant funding, not just state appropriations.

ing that work on a wide range of issues from human trafficking tal protection," Baca said in a written statement. "This practice lecades."

Anti-money laundering employees, for example, are funded through a settlement with Western Union, he said, and a homeowner protection program is paid for through a national mortgage settlement.

A host of federal grants also pay for a variety of attorneys, Baca said. The Medicaid fraud division within the office is funded largely by the U.S. Centers for Medicare and Medicaid Services.

But the NYU agreement has come under scrutiny from outside groups.

The American Tort Reform Association issued a report in May slamming the practice of allowing NYU-funded environmental fellows to work in the offices of state attorneys general. It said seven states and the District of Columbia participated in 2018.

Tiger Joyce, president of the American Tort Reform Association, said the NYU program and similar "arrangements put government employees in a position in which they are serving two masters – and one will always win out."

Baca said Balderas has nothing to hide.

"The Attorney General has a strong and transparent record of prosecuting political and corporate corruption," Baca said, "and he makes no apologies to special interests who are afraid of increased accountability."

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Outside attorneys in AG's Office face criticism

By Dan McKay / Journal Staff Writer

Monday, July 15th, 2019 at 12:02am

SANTA FE – The state Attorney General's Office employs two lawyers funded by a New York University center established to promote clean energy and environmental laws – an arrangement slammed by a group supporting New Mexico's energy industry.

Attorney General Hector Balderas

Matt Baca, a spokesman and senior counsel for the attorney general, said the lawyers are managed exclusively by New Mexico officials, not by the NYU School of Law, which pays their salaries.

Dozens of employees in the office – headed by Attorney General Hector Balderas, a Democrat – are funded by outside sources, Baca said, including through federal grants or legal settlements.

But the practice has drawn criticism from Power the Future, an advocacy group for energy workers, and the American Tort Reform Association, which has described the arrangement nationally as an improper way for outside interests to embed attorneys in public offices.

Larry Behrens, a spokesman for Power the Future, a group that touts its opposition to radical environmental groups, said New Mexicans should be outraged.

Employing two outside-funded attorneys, he said, makes it look like "positions in our public offices are for sale." Furthermore, he said, it isn't clear which cases they've worked on or what they're doing.

EXHIBIT 2

Michael Bloomberg

"This arrangement raises a number of transparency and ethical issues because it clearly doesn't pass the smell test," he said in a written statement. "These attorneys are funded by out-of-state billionaire Michael Bloomberg and given power over the people of New Mexico yet they aren't accountable to taxpayers."

The lawyers are employed through the State Energy and Environmental Impact Center at the NYU School of Law. The center was established in 2017 with a $6 million grant from Bloomberg Philanthropies, according to The Washington Post.

The program is open to any attorney general throughout the country regardless of party affiliation. Interested attorneys general apply and describe their need for extra support on clean energy, climate and environmental matters.

Baca said the two lawyers in New Mexico are under the exclusive control and management of Balderas' office. They work in the Consumer and Environmental Protection Division.

A five-page agreement signed in 2018 says each of the NYU fellows will be commissioned as a special assistant attorney general and be assigned substantive work and responsibility, similar to other attorneys in the office. They are to work primarily on "clean energy, climate change and environmental matters of regional and national importance."

Under the agreement – between the Attorney General's Office and the NYU law school's state impact center – the lawyers' terms are expected to last two years.

Baca said the attorneys help handle environmental legal work, which includes conducting research and drafting correspondence and court pleadings.

He didn't mention any particular cases they had worked on. But under Balderas, New Mexico has filed lawsuits against the Air Force over water contamination and the Environmental Protection Agency over the suspension of a vehicle-pollution rule.

It isn't unusual, Baca said, for employees to be funded through outside sources. As with many state agencies, he said, the Attorney General's Office relies on grant funding, not just state appropriations.

ing that work on a wide range of issues from human trafficking tal protection," Baca said in a written statement. "This practice decades."

Anti-money laundering employees, for example, are funded through a settlement with Western Union, he said, and a homeowner protection program is paid for through a national mortgage settlement.

A host of federal grants also pay for a variety of attorneys, Baca said. The Medicaid fraud division within the office is funded largely by the U.S. Centers for Medicare and Medicaid Services.

But the NYU agreement has come under scrutiny from outside groups.

The American Tort Reform Association issued a report in May slamming the practice of allowing NYU-funded environmental fellows to work in the offices of state attorneys general. It said seven states and the District of Columbia participated in 2018.

Tiger Joyce, president of the American Tort Reform Association, said the NYU program and similar "arrangements put government employees in a position in which they are serving two masters – and one will always win out."

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patrick j. rogers, llc

October 12, 2020

Erin E. Lecocq
Joseph Dworak
Assistant Attorneys General
Attorney General of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

Via email: elecocq@nmag.gov; jdworak@nmag.gov

RE: No. D-202-CV-2020-03587; *Energy Policy Advocates v. Hector Balderas, Attorney General for the State of New Mexico*; Second Judicial District Court, Bernalillo County, New Mexico

Dear Ms. Lecocq and Mr. Dworak:

We are sending this letter in an additional good faith attempt to resolve the discovery disputes pursuant to Rule 1-037(A)(4) NMRA and to set out a clear record for an interim award of fees and sanctions. We appreciated your time on September 24 and the additional supplement on October 2, but the bottom line is that the bulk of our concerns, objections and requests were not addressed. The conversation on September 24th in many ways added to our concerns and objections. As we discussed, I have not seen these kinds of objections since pre-*United Nuclear* days. Given the obvious concerns about the private agenda of the billionaire funding the attorneys involved in many of the records responsive to the requests at issue, which the record already shows are pursuing issues and an agenda of concern to their funder, and the age-old problem of attempting to serve two masters – the billionaire and the New Mexico public – the continuing stonewalling is seriously problematic.

Considering the nature of OAG's objections, the discussion on the 24th, and your October 2 response, we are concerned that the discovery responses

EXHIBIT 3

are part of a delay strategy.[1] For these reasons, we are requesting a prompt response to this letter and documents and clear and complete responses or a commitment for a time certain for same no later than October 16th to attempt to avoid unnecessary motions and discovery disputes.

Your relevance objection and refusal to produce any document or answer any request for admission that requests the elements of a "common interest" privilege (assuming it applies), including questions beginning with the distribution of the document and obvious questions about waiver, appears totally devoid of a proper basis. This would mean that the public is not entitled to the agreements or any possible information about the basis and the legitimacy of keeping the agreements or any additional information secret. This "relevance" objection seems particularly ill-founded and unsupported.

I asked about any precedent for withholding documents based on a claim of common interest in an IPRA ("Inspection of Public Records Act") context and you acknowledged it may not exist.[2] Assuming such a privilege exists, if the documents are not confidential at the outset or if the confidentiality is waived, you simply cannot continue to keep the documents secret from the public in New Mexico.[3]

[1] Public records from other states now show that attorneys general offices are also coordinating efforts to withhold relevant records with AGO. As part of this coordinated effort, your office and other offices are now withholding or further redacting information previously released not only by other offices but by the same Office. If these same documents are being provided to the public in other states, or even previously disclosed here in New Mexico, your time and the taxpayers' money is being seriously wasted in this effort to now claim secrecy and a right to keep the information from the public.

[2] Whether "common interest" is applicable in IPRA cases is an immediate question. In addition, whether a purported "common interest" is applicable to policy pursuits and agendas without the AGO involved in a case as a party or amicus is also a serious and novel question in New Mexico. Presently, the Washington County Superior Court in Vermont commented on that state's participation in these far-ranging, purported "common interest" pursuits by noting that the "Attorney General's Office seems to think that it's got a right to take the lance and go joust at any – in any place that it wants. This is an Attorney General-made-policy decision as opposed to the Attorney General being, of necessity, a party."

[3] Further, AGO is withholding some records it previously released before. It seems obvious the coordinating AGOs decided upon a strategy of delay, and NM AGO initiated a new practice of also withholding the parties to correspondence which its past practice reveals to be inconsistent with IPRA. Again, we note the cost to the taxpayer from what appears to be a campaign of delay.

This, in turn, raised the issue of who is making the determination of secrecy. You indicated that another attorney in the AG's office ("Ms. Koury") receives documents that are already partially redacted, she makes additional redactions, and then you make additional redactions. You stated that you did not know who was making the "original" redactions, what those redactions included, or whether that person (persons?) was an attorney or familiar with the New Mexico Inspection of Public Records Act. At least as to this state and the Inspection of Public Records Act, this procedure presents concerns about additional violations of Section 14-2-11 (B) (2) which requires the names and titles of the persons withholding or redacting information. Records obtained from OAG and other Offices provide reason to believe that outside parties may have played a role in these redactions. The fact that the AGO has made no attempt to find out who is making the original redactions to keep the New Mexico public in the dark is not a basis to ignore the obligation to identify these persons as required in our public records law. [4]

Your defense of the withholding of information and documents in discovery because some of the information withheld related to "a very confidential matter" only adds to our concerns. We do not see that argument as a possible valid reason to keep the public in the dark and avoid discovery and IPRA obligations. While telling, that characterization is ultimately irrelevant to the central issues of this case and your discovery responses: Has the Attorney General's Office completed a thorough search for all responsive records to each IPRA request and did the Attorney General correctly apply the claimed exemptions to withhold and/or redact responsive records?

Other issues now include, can the Attorney General's Office disregard discovery requests by broadly and indiscriminately declaring them irrelevant or on the bases that a request purportedly seeks some records also sought in the underlying litigation, and because what is at issue here are those records and, well, the other discovery requests seek information other than those records (that is to say, an unspoken posture that AGO will only accede to discovery requests in IPRA cases that it wishes to dignify)? The discovery

[4] As an example, Amended 0000007 is totally redacted. Who is responsible? In addition, you are allowed to redact only the specific "exempt" information and provide the rest to the requester. How can a document include no public information whatsoever? *See, e.g.*, § 14-2-9 A, NMSA, 1978. A review of the redacted portion of many pages makes it clear that public information is being (improperly) withheld.

propounded by the plaintiff is tailored to gather information that will aid in answering those first questions and AGO appears insistent that the latter questions regarding discovery, while settled law in New Mexico, must be (re-)decided by the Court. This, too, implicates costing the taxpayer simply to delay release of public information.

We discussed the need for AGO to provide specific assertions as to whether the documents are withheld because of either (or both) the attorney-client privilege or work product. As you must know, the elements and AGO's burden regarding each is different. We requested that AGO identify the page range of the withheld documents. As discussed, this may allow us to confirm that the document that your office—or someone unknown to you—has withheld or redacted has already been produced, thus waiving any privilege that may have been applicable.

The Privilege Log is woefully inadequate in other regards because it most often fails to suggest a lawyer is responsible ("Author Unknown") or the nature of any alleged privileged information. Critically, to the lack of any proper "common interest" claim, if such a claim is proper in the IPRA context - the log makes no attempt to indicate intended or unintended recipients. Two entries list "unknown" for the date and the author and do not list intended or actual recipients. Discovery in other states makes it clear that any privilege attaching to these records is regularly, perhaps immediately waived by disclosure to persons beyond any possible common privilege claim. Who got the claimed secret documents and to whom have the documents been dispersed? I am greatly concerned, if not convinced, that you have no idea as to how widely the documents have been disseminated.

Rule 1-026(B)(1) NMRA states that all relevant, not privileged information is discoverable. "Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action." The general rule governing discovery in New Mexico is toward liberality rather than limitation. *Ruiz v. Southern Pac. Transp. Co.*, 97 N.M. 194 (1981). The purpose of the discovery rules is to "allow liberal pretrial discovery, such that the trial itself is 'a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Pincheira v. Allstate Ins. Co.*, 144 N.M. 601, 607 (2008) (citing *In re Estrada*, 140 N.M. 492 (2006)). This broad discovery mandate permits the discovery of information that may not be admissible under the rules of evidence. *United Nuclear Corp. v. General Atomic Co.* 96 N.M. 155, 170 (1980). The broad

discovery rule is balanced by the protection granted to privileged materials found Rule 1-026(B)(1).

The Requests for Production of Documents and the Attorney General's Response

The Attorney General has objected to all Requests for Production of Documents. The Attorney General's objections are divisible into two general categories. In the first category are materials the Attorney General asserts are overly broad, unduly burdensome, seek materials not related to either the claim or defense in the matter, and not reasonably calculated to lead to the discovery of admissible evidence. In the second category are materials the Attorney General asserts are privileged. Neither category of objections is proper or adequate in response to the discovery requests.

Of the forty-nine requests, twelve were answered with claims of the attorney work product privilege and an additional six were alleged to be privileged though the Attorney General does not possess any such records. OAG objected to the remaining thirty one records as being unrelated to any claim or defense in the present action, not reasonably calculated to lead to the discovery of admissible evidence, overly broad, unduly burdensome, and/or outside of the scope of the six IPRA requests.

Privilege Claims are Not Properly Stated or Supported

A party resisting discovery on the basis of privilege must provide more than a bald assertion of the privilege to meet the burden of proving the privilege. *Albuquerque Journal v. Board of Education of Albuquerque Public Schools*, 436 P.3d 1,10 (N.M. App. 2018). "[T]he party shall make the claim expressly and shall describe the nature of the... communications ...not...disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege." Rule 1-026(B)(7)(a). A party asserting a privilege may support such assertion "through a variety of mechanisms, including the submissions of a privilege log or an affidavit, in camera interview, or other means 'as required by the circumstances of a particular case.'" *Albuquerque Journal*, at 10 (citing *Pina v. Espinoza*, 130 N.M. 661 (2001)). "Failure to adequately support a claim of privilege thwarts both the adversarial process and meaningful independent judicial review and *justifies denial of the claim of privilege*." *Pina,* at 668 (emphasis added). The party asserting the privilege bears the burden of establishing that the privilege applies. *Pina v. Espinoza*, 130 N.M.

661, 668 (2001). The New Mexico Supreme Court "expressly disapprove[s] of the practice of permitting the proponent of a privilege to rely on an initial conclusory assertion of a privilege and to gradually unveil the basis for her claims of privilege . . . This practice delays resolution of privilege issues and is unfair to the opponent of the privilege, who *should not be forced to engage in costly motion practice* in order to obtain basic information necessary to assess claims of privilege." *Id.* (emphasis added).

The attorney work product doctrine protects documents and tangible things prepared in anticipation of litigation by or for a party or its representative. There are two categories of attorney work product; ordinary or non-opinion work product is factual and opinion work product is "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Rule 1-026(B)(4). Non-opinion work product has a qualified immunity, while opinion work product has a near total immunity. The Attorney General's Response does not provide any answer as to what exactly it is withholding as work product, when it was contemplated, or even whose work product it is. Rather, the Responses merely state a privilege. Nothing on our September 24, 2020 phone call altered this – quite to the contrary, see, supra – nor did the October 2, 2020 response materially change this.

The Attorney General's assertions of attorney work product privilege and accompanying privilege log are inadequate justifications to withhold the requested material. The Attorney General "bears the burden of establishing that the rule applies for *each* document by showing the existence of precise facts in support of the claim of immunity." *Santa Fe Pacific Gold Corp. v. United Nuclear Corp.*, 175 P.3d 309, 324 (N.M.App. 2007). The description of the privilege is limited to mere recitation and the privilege log entries lack the detail necessary to demonstrate any privilege. We ask that your Office provide, at a minimum, the required and overdue thorough description of each document withheld, the authors of the document, and a description of when the document was received or created, the Bates pages associated with each, the number of pages withheld and most importantly, the intended recipients as well as all others who received the documents that have been withheld.

General and Rote Objections are Improper

The Attorney General objects to thirty-one of the forty-nine Requests for the Production of Documents on generalized grounds of irrelevancy, overbreadth, burden, and/or being outside of the scope of the underlying IPRA requests. Rule 1-026(B)(1) permits parties to "obtain discovery of any information, not privileged,

which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In *United Nuclear*, the Court provides an extended discussion on relevancy stating "[the rule] is subject to a broad interpretation… '[o]bjections based on alleged irrelevancy must, therefore, be viewed in light of the broad and liberal discovery principle consciously built into' the rules of civil procedure…courts have said that discovery will be permitted unless the matters inquired into can have 'no possible bearing upon,' or are 'clearly irrelevant' to the subject matter of the action." *United Nuclear*, at 174. Later in its opinion, the Court quotes *Beler v. Savarona Ship Corporation*, 26 F.Supp. 599 (E.D.N.Y. 1939), "[t]he requirement of materiality does not…compel the person seeking discovery definitely to prove materiality before being entitled to a discovery. Such an interpretation of the rule would place upon it a narrow construction which would severely limit the bounds of the discovery procedure. It might compel a party to know what was in the documents before he had seen them. One of the basic purposes of the new Rules is to enable a full disclosure of the facts so that justice might not move blindly."

The Attorney General's generalized objections are meritless. It is irrelevant to the inquiry whether or not the items requested are outside the scope of the original IPRA requests – though AGO also then objects to discovery with the opposite argument that the information *is* the subject of the IPRA requests. Discovery in IPRA actions is not limited to material within the IPRA requests; discovery is limited only by the limitations found in the New Mexico Rules.

The Request for Admissions and the Attorney General's Response

The Attorney General answered only twenty-five of one-hundred-eight Requests for Admissions with a firm admission or denial. The remaining responses are either conditional admissions and/or objections based on claimed vagueness, irrelevance, the discovery requests seeking materials not related to either the claim or defense in the matter, and not reasonably calculated to lead to the discovery of admissible evidence, the requests are outside the scope of the six IPRA, and/or that they are privileged.

Privilege Claims Are Not Properly Stated or Supported

The Attorney General's privilege objections to the Requests for Admission are inadequate. The privilege supporting the objection(s) is not identified. If the Attorney General wishes to assert a privilege, we ask, as we did on the September 24, 2020 telephone call, that the specific privilege be stated. Furthermore, and as

stated in the preceding discussion of privilege claims, a party resisting discovery on the basis of privilege must provide more than a bald assertion of the privilege to meet the burden of proving the privilege. *Albuquerque Journal*, 436 P.3d 1,10 (N.M. App. 2018). "[T]he party shall make the claim expressly and shall describe the nature of the …communications …not…disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege." Rule 1-026(B)(7)(a). A party asserting a privilege may support such assertion "through a variety of mechanisms, including the submissions of a privilege log or an affidavit, in camera interview, or other means 'as required by the circumstances of a particular case.'" *Albuquerque Journal*, at 10 (citing *Pina v. Espinoza*, 130 N.M. 661 (2001)). "Failure to adequately support a claim of privilege thwarts both the adversarial process and meaningful independent judicial review and *justifies denial of the claim of privilege. Pina,* at 668 (emphasis added).

General and Rote Objections to the Requests for Admissions are Also Improper

The Attorney General's generalized objections are also inadequate and thwart the purpose of the broad rule of liberal discovery in New Mexico. The Requests for Admissions propounded by Energy Policy Advocates have direct bearing on the underlying claims and defenses in this case. The Attorney General relies on broad claims of privilege to withhold records responsive to the six IPRA requests at issue. The Requests for Admission all pertain to the Attorney General's use of the generalized claims of privilege to withhold responsive records. The Requests for Admission are relevant to developing the facts of this defense. In response to the Requests for Admission, the Attorney General has presented nothing other than bald assertions to demonstrate that they are "clearly irrelevant" to the case.

To illustrate the deficiency of these objections, consider the line of questioning beginning with Request No. 13, in which the Attorney General admits it received an email containing an attachment with a title including "BachmannDoc.PPT." In Request No. 14, which seeks an admission that the Attorney General consulted with other states about the "BachmannDoc.PPT", the Attorney General objects on the basis that the Request is unrelated to a claim or defense and is not reasonably calculated to lead to the discovery of admissible evidence as well as the Request being outside of the scope of the complaint and does not address anything that was requested in the six IPRA requests.

These objections are meritless. This Request is directly related to the claim underlying the Attorney General's defense, that the records requested are

privileged pursuant to a common interest agreement(s). Furthermore, this Request originates from the directly from the complaint and the March 27, 2020 IPRA request that specifically included the search term "Bachmann" in it. Finally, the objection that the request is not reasonably calculated to lead to the discovery of admissible evidence is nothing more than boilerplate (except to the extent that it is plainly untrue boilerplate). Rule 1-026(B)(1) expressly permits broad discovery and Request No. 14 is clearly designed to establish facts relevant to the claims and defenses underlying this case.

The prior example is illustrative of a widespread practice throughout the Responses to the Requests for Admissions. These generalized Responses are deficient and unless they are cured, will necessitate a costly and time-intensive discovery battle. Again, for these reasons, the most reasonable conclusion is that lengthy battles are what AGO's response and objections to discovery described herein are about. We ask that your Office please respond to the Requests for Admission with definitive answers rather than boilerplate objections and where objections are warranted, please provide a thorough description of the basis for the objection(s).

Conclusion

For the reasons stated herein, Defendant's Responses to Plaintiff's Requests for Admission and Requests for Documents are not in good faith and do not comply with the New Mexico Rules of Civil Procedure.

We have spent substantial time seeking to make progress without avail, and both the September 24 and October 2, 2020 events affirmed AGO's unwillingness to go further. Accordingly, delaying matters beyond next week seems to be without merit and Plaintiff requests again that you supplement your answers to aforementioned Responses and that you provide those Responses on or before October 16, 2020. Please do not hesitate to contact me later this week, if before the 16th, should you have any questions or concerns. For the reasons stated and discussed in detail on our September phone conference, AGO's failure to comply with this request leaves Plaintiff without choice but to file a motion to compel pursuant to Rule 1-037(A). Please note, as already discussed, that if Plaintiff is forced to file a motion to compel, we will seek sanctions for costs incurred addressing these deficiencies.

Yours truly,

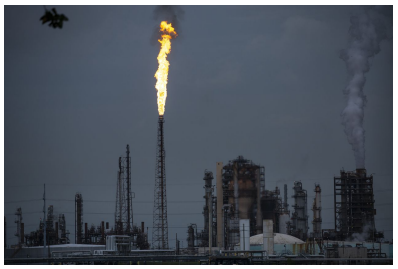
PATRICK J. ROGERS, LLC

Patrick J. Rogers

◆ WSJ NEWS EXCLUSIVE | POLITICS

States Explored Litigation to Challenge U.S. Policy on Climate Change

Options included getting courts to require federal action to reduce emissions of greenhouse gases, documents show



A petroleum refinery in Norco, La., in 2019.
PHOTO: DREW ANGERER/GETTY IMAGES

By Timothy Puko
Nov. 28, 2020 5:30 am ET

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7 minutes

WASHINGTON—Nearly two dozen Democratic-led states at odds with the Trump administration on climate-change policy joined forces last year to explore using the courts to secure federal mandates on greenhouse-gas emissions, according to records and interviews.

The coalition agreed to cooperate in planning litigation against the federal government and consulted with former Environmental Protection Agency officials as part of the discussions, according to documents reviewed by The Wall Street Journal and people involved in the effort.

The initiative lost momentum in recent months, some of these people said, amid fears of an uphill fight in federal court and because state leaders wanted to await results of the Nov. 3 election, which saw Democrat Joe Biden defeat President Trump. Some lawyers and people involved expect that these states are now more likely to focus on advancing their own policies rather than launching federal litigation.

Even so, the plans speak to how aggressive state governments have become in their efforts to sway Washington. Presidents have faced increasing opposition

from state attorneys general from the opposite political party, and many expect Republican-led states to continue the trend with challenges to President-elect Biden's agenda.

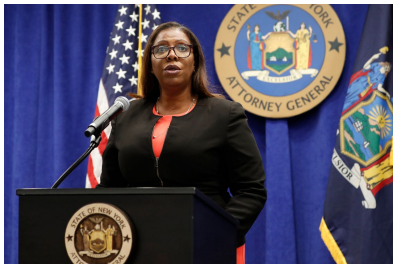
The groundwork laid by the coalition of Democratic-led states could also come into play if Mr. Biden should fail to advance his platform aimed at slowing climate change.

"Climate change remains one of the greatest threats facing the people of our

nation and around the world," said New York Attorney General Letitia James. "If we are to address this challenge, then all options must be on the table. With that said, we have no plans at this time to bring litigation seeking to promote one particular approach."

A White House spokesman said the Trump administration's deregulation efforts supported economic growth without sacrificing environmental protection.

"Partisan Democrat attorneys general appear to want to use litigation to push their preferred policy agendas instead of protecting their citizens based on the rule of law and actual facts," said the spokesman Judd Deere.



New York State Attorney General Letitia James at a news conference in August.
PHOTO: KATHY WILLENS/ASSOCIATED PRESS

Mr. Biden has promised to push power plants, auto makers, and oil and gas producers toward eliminating or vastly reducing greenhouse-gas emissions, but many of his policies could face resistance.

EXHIBIT 4

Environmental groups and, to a lesser degree, states, have sometimes filed lawsuits against friendly administrations, aiming to lock federal agencies into settlements.

"With this climate threat growing worse every day, we've had to spend years in court trying to force the federal government to do its job and regulate greenhouse-gas emissions," said a spokeswoman for Massachusetts Attorney General Maura Healey.

The documents reviewed by the Journal, dating back to 2019, were obtained under open-records requests filed by Energy Policy Advocates, a nonprofit group that researches government lawsuits against the energy industry. The group says it receives funding from conservative groups but declined to identify specific donors, nor is it legally required to do so.

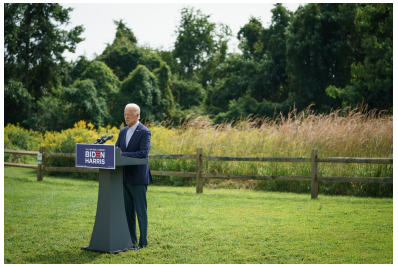
The records show that 21 states, including New York, California, Illinois and Massachusetts, were involved in the discussions, along with the District of Columbia. The Journal confirmed the discussions revealed in these documents with several people involved in or familiar with the states' efforts.

"The plan appears to be for activists, attorneys general and bureaucrats to team up...to avoid democracy and political accountability for a major, costly economic restructuring," said Rob Schilling, the group's executive director.

One person familiar with the states' efforts called them "academic discussions." But even with the Trump administration leaving office, Mr. Schilling's group said the states could use the tactics outlined in the documents to seek court rulings to mandate change from the Biden administration.

Jeffrey Wood, who oversaw environmental cases at the Justice Department early in the Trump administration, said such attempts face high barriers to success, in part because corporate opponents are on guard for settlements between federal agencies and outside parties such as states and environmental advocates.

"Blue states may be enticed...now that they have an ally in the White House, but the spotlight is on," said Mr. Wood, now a partner at Baker Botts LLP. He added that conservative appointees by Mr. Trump in the federal judiciary have also raised the level of difficulty.



Democrat Joe Biden speaking about climate change in Wilmington, Del., in September.
PHOTO: DREW ANGERER/GETTY IMAGES

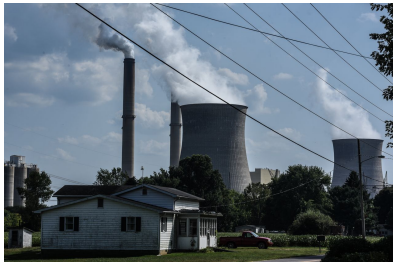
The documents show a coordinated research effort as part of a larger state-led endeavor to fight Trump administration environmental deregulation.

In the summer of 2019, documents obtained from New Mexico show, 21 states and D.C. signed a "common interest agreement" allowing them to share information and plan confidentially on climate litigation. The document's title says it is to require federal action "to reduce or limit emissions of greenhouse gases that cause climate change," and the participants joined it between June 25 and July 11.

Those states "anticipate participating as litigants or counsel for litigants in judicial or administrative actions under state or federal law, including but not limited to the Clean Air Act, to require the federal government and/or private parties to take action to reduce or limit the emissions," the agreement says.

Other documents obtained from Michigan dated from July and August 2019 show that the coalition had created a working group devoted to "Climate Change -- Affirm. Litigation," or affirmative litigation. A spokeswoman for Michigan's Attorney General's Office confirmed their authenticity.

The legal initiative was led by lawyers from New York and Oregon, the documents show. They included Michael Myers, the New York attorney general's senior counsel for air pollution and climate change litigation, and Steve Novick, a special assistant attorney general in Oregon.



A power plant in Cheshire, Ohio, in 2019.
PHOTO: GETTY IMAGES

Oregon Justice Department officials declined to comment on the specific litigation effort. But they did release a response from Attorney General Ellen Rosenblum thanking other states for working together to fight Mr. Trump's environmental rollbacks.

"The effort required to counter a constant barrage of illegal and wrongheaded executive actions has fostered a remarkable degree of cooperation among the states," she said.

By the autumn, attorneys for the states began searching for former EPA officials. Emails released by New York show they consulted with John Bachmann, a science policy director on EPA's air-quality staff who retired in 2007.

The state attorneys focused heavily on one of the most powerful sections of the Clean Air Act—rules for national ambient air-quality standards. Mr. Bachmann warned of challenges in defining what businesses might be subject to these regulations and potentially widespread inability to meet them.

"I continue to feel that new legislation requiring specific actions would be much better," he wrote to Mr. Myers on Nov. 17, 2019, "yet I'm mindful of the obvious problem of how to get such legislation even with a new administration."

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