

STATE OF MINNESOTA  
COUNTY OF LYON

DISTRICT COURT  
FIFTH JUDICIAL DISTRICT  
Case Type: Other Civil

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Energy Policy Advocates,  
Plaintiff,

v.

**COMPLAINT**

Keith Ellison, in his official capacity  
as Attorney General of Minnesota, and

The Office of the Attorney General, and

The State of Minnesota,

Defendants.

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Plaintiff Energy Policy Advocates (hereinafter “Plaintiff” or “EPA”), by and through undersigned counsel, files this Complaint against Defendant, Attorney General Keith Ellison, in his official capacity, and the Minnesota Office of the Attorney General (hereinafter “OAG”), and the State of Minnesota, pursuant to Minn. Stat. § 13.08. EPA is seeking the release of improperly withheld government data under the Minnesota Government Data Practices Act (“MGDPA”), Minn. Stat. § 13. Plaintiff states and alleges as follows:

**PARTIES**

1. Plaintiff Energy Policy Advocates (EPA) is a nonprofit organization incorporated in the State of Washington and dedicated to transparency and open government. EPA uses state and federal open records laws to shed light on—and thereby educate the public on—private influences on government policymaking and the use of public office, and otherwise the operations of government. Part of EPA’s effort has been the record request at issue in this matter

and similar requests in attorneys general offices nationwide.

2. Defendant Keith Ellison is the Attorney General of the State of Minnesota and is sued in his official capacity as such. He, his office, and/or employees who report to him are in possession of the records that are at issue in this case.

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

4. The State of Minnesota is a proper defendant in this matter because it employs Defendant Ellison, because the Office of the Attorney General is a constituent part of the State Government, and because Minn. Stat. § 13.08, Subd. 3 contemplates that actions of this nature may be brought against the State.

### **JURISDICTION AND VENUE**

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

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

### **BACKGROUND**

7. On June 24, 2020, the State of Minnesota filed suit against the American Petroleum Institute, Exxon Mobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend, alleging, *inter alia*, violations of Minnesota's consumer fraud, deceptive trade practices, and false statements in advertising statutes.<sup>1</sup> The suit seeks, *inter alia*,

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<sup>1</sup> [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200624\\_docket-62-CV-20-3837\\_complaint.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200624_docket-62-CV-20-3837_complaint.pdf)

restitution for asserted harm and injury caused to the State, and disgorgement of all profits made as a result of the alleged unlawful conduct. The case was removed to the Federal District Court for the District of Minnesota on July 27, 2020.

8. The State did not seek a specific dollar amount of damages, but Attorney General Ellison has asserted the damages may be akin to Minnesota's \$7 billion dollar tobacco settlement.<sup>2</sup>

9. Other sources also cite the Master Tobacco Settlement (\$200 billion, in 1998 dollars) as the starting point for settlement of this litigation campaign.<sup>3</sup>

10. On December 18, 2020, the Office of the Attorney General filed motions for admission *pro hac vice*, seeking to admit Vic Sher and Matt Edling of the law firm Sher Edling LLP as counsel for the Office and the State of Minnesota. The motions were granted on December 21, 2020.

11. The Attorney General may not enter into legal services contracts in which the fees and expenses payable by the state exceed, or may be reasonably expected to exceed, \$1,000,000 unless the attorney general first submits the proposed contract to the Legislative Advisory Commission and waits at least 20 days to receive possible recommendation. Minn. Stat. §8.065.

12. Available information suggests that the Attorney General's Office has not submitted a contract for legal services including Sher Edling, LLP as a party for review with the Legislative Advisory Commission.

13. By contrast, the Attorney General's Office has submitted a contract for legal services to the Legislative Advisory Commission related to the State's statutory and common-law claims against JUUL and other Electronic Nicotine Delivery Systems companies in October 2019.<sup>4</sup>

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<sup>2</sup> <https://www.startribune.com/minn-files-climate-change-lawsuit-against-oil-companies-including-koch-exxon-mobil/571466182/>

<sup>3</sup> See, e.g., "Could \$200 Billion Tobacco-Type Settlement Be Coming Over 'Climate Change?'," Bloomberg Law, June 14, 2016, <https://news.bloomberglaw.com/business-and-practice/could-200-billion-tobacco-type-settlement-be-coming-over-climate-change>.

14. The Attorney General filed suit against JUUL Labs in December 2019, alleging, *inter alia*, violations of consumer fraud, deceptive trade practices, and false statements in advertising. Of particular relevance here, that suit seeks, *inter alia*, restitution for the alleged harm and injury caused to the State, and disgorgement of all profits received as a result of alleged unlawful conduct.

15. Sher Edling, LLP’s contract in other “climate” litigation filed on behalf of a governmental entity, released under California’s public records law, suggests that the firm would receive \$546,250,000 in fees if the State of Minnesota receives the \$7 billion in damages AG Ellison suggests Minnesota has suffered.<sup>5</sup>

## **THE GOVERNMENT DATA PRACTICES ACT REQUEST**

### **The July 17, 2020 Request**

16. On July 17, 2020, EPA requested any contingency fee or other fee agreement(s) and/or retainer agreement(s) and/or engagement agreement(s) entered into by the Minnesota Office of the Attorney General with, or otherwise including as a party, Sher Edling LLP, dated June 19, 2019 through the date OAG processed the request, inclusive, and certain described correspondence, by letter emailed to [datapracitices@ag.mn.state.us](mailto:datapracitices@ag.mn.state.us), which is an address that the defendant OAG has established for the specific purpose of receiving MGDPA requests. See

#### **EXHIBIT A.**

17. The request specifically sought two categories of records: (1) all electronic correspondence of Attorney General Ellison and three senior employees that included “@sheredling.com” dated from October 1, 2019 through the date the request was processed; and

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<sup>4</sup> <https://mn.gov/mmb-stat/documents/budget/lac/legal-services-contract-review-11-15-2019.pdf>

<sup>5</sup> See, e.g., paragraph 4.2 of Agreement Between City and County of San Francisco and Sher Edling LLP and Altshuler Berzon LLP; For Professional Legal Services, <https://climatelitigationwatch.org/wp-content/uploads/2018/12/SF-CC-2018-11-20-Legal-Services-Agreement-SF-SE-AB-FINAL-EXECUTED.pdf>.

(2) any contingency fee or other fee, retainer, or engagement agreements entered into by the Minnesota Office of the Attorney General with or including Sher Edling LLP, dated from June 19, 2019 through the date the request was processed.

18. To date, the Office of the Attorney General has not acknowledged receipt of, or otherwise responded to, this request.

19. The Office of the Attorney General has stated, in correspondence related to a separate action, that it processes requests in the order in which they arrive. See **EXHIBIT B**.

20. On January 8, 2021, the Office of the Attorney General provided a response to a September 4, 2020 request submitted by the Plaintiff.

21. The September 4, 2020 request was the subject of a separate MGDPA action filed by the Plaintiff, resulting from a similar failure to acknowledge or provide any timeline for responding to the request.

22. According to Defendant OAG's own representations in other matters, it is treating Plaintiff's request for the Sher Edling agreement, and related records, outside of its normal practices.

23. The Office of the Attorney General's failure to acknowledge or provide a timeline for response to the request at issue demonstrates a failure to adhere to the statutory requirement that policies and procedures be in place ensuring "requests for government data are received and complied with in an appropriate and prompt manner." Minn. Stat. §13.03 Subd. 2(a).

24. Coupled with the Attorney General's failure to respond to the MGDPA request at issue here, the Office of the Attorney General's apparent failure to submit the contract to the Legislative Advisory Commission in the same way that other contracts have been submitted,

suggests OAG is hiding the existence and nature of its agreement with a private firm that stands to profit from Minnesota litigation to the tune of hundreds of millions of dollars.

## **STATEMENT OF CLAIMS**

### **Count I**

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

25. Plaintiff realleges and incorporates by reference the allegations above.
26. The MGDPA “establishes a presumption that all government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01, Subd. 3.
27. OAG has ignored the request in violation of MGDPA.
28. State contracts and the records otherwise sought by Plaintiff in its request are public records barring some showing to the contrary.
29. Plaintiff is entitled to disclosure of the requested data pursuant to Minn. Stat. §§ 13.03, Subd. 1, and 13.08, Subd. 4.
30. Defendants have constructively denied Plaintiff access to requested records in violation of the MGDPA.
31. Defendants’ denial of access was willful.
32. Plaintiff was harmed as a result of Defendants’ willful violation of the MGDPA.
33. For these reasons, Plaintiff has standing to challenge Defendants’ response.
34. Defendants’ willful, constructive violation of the MGDPA entitles Plaintiff to its costs and disbursements, including reasonable attorneys’ fees. Minn. Stat. § 13.08, Subd. 4.
35. Defendants’ willful, constructive denial of Plaintiff’s request justifies assessment of a civil penalty under Minn. Stat. § 13.08, Subd. 4.

36. Plaintiff is entitled to an immediate injunction preventing continuation of Defendants' willful and continued violation of the MGDPA. Minn. Stat. § 13.08, Subd. 2.

**PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff respectfully prays that this Court:

- a) Issue a declaratory judgment that the information requested is public information within the meaning of the Minnesota Government Data Practices Act, and that the OAG has improperly failed to produce such information;
- b) Enter a permanent injunction directing Defendants to comply fully with the MGDPA, and without further delay, to furnish Plaintiff the government data at issue in this matter, in the native format requested, subject only to legally-allowable withholdings justified by sufficient identification of the reasons for withholding;
- c) Assess a civil penalty as authorized in Minn. Stat. § 13.08, Subd. 4;
- d) Alternately, perform an *in camera* review of the information sought to be redacted by OAG and compel OAG to release all information for which the OAG is unable to carry its burden to prove each withholding is privileged or otherwise not subject to disclosure;
- e) Award Plaintiff fees, costs, and disbursements, including reasonable attorneys' fees, as authorized in Minn. Stat. § 13.08, Subd. 4; and
- f) Order such additional relief as the Court may deem just and proper.

Respectfully submitted this the 21st day of January 2021,

ENERGY POLICY ADVOCATES  
By Counsel

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