

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
Civil Action No. 19-1753

---

ENERGY POLICY ADVOCATES,

Plaintiff,

v.

OFFICE OF THE ATTORNEY GENERAL  
OF MASSACHUSETTS, MAURA HEALEY,  
in her official capacity as Attorney General,  
Defendants.

---

**PLAINTIFF'S MEMORANDUM OF LAW ADDRESSING EXEMPTIONS INVOKED  
BY DEFENDANT AND IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

Plaintiff Energy Policy Advocates ("EPA") submits this supplemental Memorandum of Law to address the unredacted versions of records containing information withheld by Defendant, the Massachusetts Office of Attorney General ("OAG"), under invocation of Public Records Law exemptions, and in further support of its Motion for Summary Judgment against Defendant. Plaintiff incorporates by reference herein, rather than re-stating, its previous briefing related to the burden of proof in this matter and the OAG's failure to carry that burden with respect to the records at issue in this case.

**Introduction**

This lawsuit seeks to enforce the right to inspect public records pursuant to two requests pursuant to the Massachusetts Public Records Law, M.G.L. c. 66, § 10A and c. 4, § 7, Twenty-sixth, the Declaratory Judgment Act, M.G.L. c. 231A, § 1, and M.G.L. c. 249, § 4. It is a matter in which Defendant declared every word of every record responsive to not one but two of

Plaintiff's requests exempt from disclosure, until Plaintiff filed this action. Thereafter, Defendant relented, in stages and over more than four years, bringing us to the point where we stand today.

In short, the few remaining records sought, which this Court must now analyze and rule upon, pertain to a scenario that Plaintiff has theorized throughout this litigation had come to pass: the Attorney General was renting her (the public's) Office and its powers to a special interest group which sought for the Massachusetts General Court to attempt to use this Office to create law or policy platforms satisfying the special interest's agenda. This conclusion is further and dramatically supported in certain records that this Court now has before it. Specifically, Plaintiff highlights that in the first withheld sentence of Record 2 — "we may have some say in who we 'hire'" — the Office of the Attorney General reflects that very described relationship between the state and a private donor. This is not *advice*, but does surely illuminate why the OAG was so secretive about its machinations with the activist organization to which it let its services and authorities. Other withheld information is is mostly basic and factual, and not privileged.

#### **Unredacted Records and What They Reveal About the Challenged Redactions**

**Record 1:** Defendants' claims that the nearly two paragraphs constituting most of this August 25, 2017, email is exempt as Attorney-Client Privileged material, Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment ("Defendants' Opposition"), at 13, is not supported by the impounded, unredacted version, of which the first unredacted sentence of ¶1 is an opinion, about how OAG might treat "Fellows" provided by the outside activist group to pursue its priorities. After this, the rest of the redacted information represents pure statements of fact, specifically fact about how OAG handled such other "Fellows." The record does not appear to reflect any legal advice being given to any identifiable client, let alone that the client was seeking such advice. See, *Suffolk Constr. Co. v. Div. of*



Capital Asset Mgmt., 449 Mass. 444, 448, 870 N.E.2d 33 (2007). See also Comm'r of Revenue v. Comcast, 453 Mass. 293, 303 (2009), Plaintiff's Memorandum of Law in Support of Motion for Summary Judgement, at pp. 16-17. Plaintiff respectfully submits there is no evidence, and OAG has not demonstrated, that any identified client was seeking legal advice in the identified record. Notably, the second redacted paragraph opens with a statement surely responsible for the OAG's tenaciously clinging to claims of attorney-client privilege for this record: it reveals that to

[REDACTED]

This highly informative assertion of fact would be of great use to those in the public curious how their Office came to be used in this way. However, it would direct the public to examine the

[REDACTED]

**Record 2:** Defendant's claims the parts of three paragraphs constituting a little over half of this September 1, 2017 email is exempt as Attorney-Client Privileged material, Defendants' Opposition at p. 18, are particularly difficult to credit regarding any of the three redactions, and inconceivable regarding that latter redaction which information Defendant already unredacted and released to Plaintiff in June (in its "Response to Challenged Redactions (#s 3 and 9)" (at page 6 of 8). OAG should be held to its prior position to the extent it has itself has judicially admitted the lack of privilege for this information (*General Elec. Co. v. Assessors of Lynn*, 393 Mass. 591, 603 n.8, 472 N.E.2d 1329 (1984)), or waived any claim that the information is


---

<sup>2</sup> <https://www.mass.gov/service-details/state-ethics-commission-public-resolutions-and-rulings> ("\* No Formal Legal Opinions or Advisories were issued in 2016 or 2017", "\* No Formal Legal Opinions or Advisories were issued in 2018")(bold in original).

exempt from production through its earlier productions, including during the course of this litigation (*Neitlich v. Peterson*, 15 Mass. App. Ct. 622, 626-27, 447 N.E.2d 671, 673 (1983)).

**Record 3:** Defendant withholds this information on the same bases cited to withhold Record # 2 (Opposition at 18). As this Court can now see, sentence 1 reflects the General Counsel stating to the Attorney General and numerous colleagues that “we may have some say in who we ‘hire.’” Although such an admission may be embarrassing about the progression and reality of this relationship with a major political donor’s outside, activist organization, the Attorney General cannot credibly argue that it is privileged within the meaning of *Comm’r of Revenue v. Comcast*, 453 Mass. 293, 303 (2009) or constitutes work product material within the meaning of *McCarthy v. Slade Assocs.*, 463 Mass. 181, 972 N.E.2d 1037 (2012).

**Record 6:** Defendants claim that parts of three paragraphs constituting a little over half of this October 25, 2017 email is exempt as Attorney-Client Privileged material, Opposition, at 18, and legal advice, *Id.*, at 14, yet this information is precisely the kind the public would want to

  
are tenuous. The attorney client privilege is inapplicable for the same reasons set forth above.

**Record 7:** Defendant claims the “Agenda” portion of this October 31, 2017 email — which portion is pasted in and forwarded (by the email’s terms) from an outside party is exempt from production as Attorney-Client Privileged material. *Id.*, at 18. However, contrary to OAG’s assertions, a “Draft agenda for meeting with David Hayes and Liz Klein on NYU fellows,” for the call with an outside party, provided by (pasted in from) the outside party, showing what the outside party would like to discuss with OAG, including its introduction about itself, and how that party thinks it can work with the people’s lawyer’s office is not privileged. To the extent that



this document facially was shared with outside parties, it cannot constitute attorney client material or work product material, or any protection was waived by such sharing. *Neitlich v. Peterson*, 15 Mass. App. Ct. 622, 626-27, 447 N.E.2d 671, 673 (1983) (a privilege against disclosure is waived if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the privileged matter.").

**Records ## 4, 9:** The unredacted versions confirm that these records are verbatim versions of partner documents released by other Offices of Attorney general, as Plaintiff has argued was likely throughout the pendency of this action (for example, respectively, Illinois' OAG and Oregon's Department of Justice). OAG appears to admit with respect to Record # 9. Any privilege that ever may have attached to these documents was waived when they were voluntarily revealed by other recipients, *Neitlich*, 15 Mass. App. Ct. at 626-27, 447 N.E.2d at 673, which release by sister states confirms those states' recognition about the non-privileged nature of the correspondence, as well as a waiver of any privilege that may have otherwise been claimed. Massachusetts' decision to withhold correspondence released by other states (and its continued litigation in this matter despite Plaintiff making it aware of such releases by sister states) demonstrates OAG's heavy-handed approach in this matter.

### **Conclusion**

Plaintiff requests that after *in camera* review this Court order OAG to release all but properly exempt information therein, and to award costs and attorneys' fees as provided in M.G.L. Ch. 66, § 10A(d)(2)<sup>4</sup>. Plaintiff incorporates by reference herein its previous arguments in earlier briefing, and asks that the Court enter judgment in its favor.

---

<sup>4</sup> Plaintiff substantially prevailed when Defendant OAG reversed its thoroughly unsupportable withholding in full of all records responsive to this request and to one other, once Plaintiff

The Plaintiff,

Energy Policy Advocates,

by its attorney,



---

Robert N. Meltzer (BBO #564745)  
The Mountain States Law Group  
Wheelhouse at the Bradford Mill  
33 Bradford Street  
Concord, MA 01742  
(978) 254 6289  
r.meltzer@mountainstateslawgroup.com


February 28, 2023

#### CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing by first class mail, postage prepaid, on:

Amy Spector, Esq.  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

February 28, 2023



---

---

incurred the time, effort and expense to file suit. Plaintiff requests costs and fees throughout the course of the litigation that followed OAG's reversal, as OAG further relented in stages and is still improperly withholding non-exempt public information, as described, *infra*. Fees are further appropriate because of the disclosures of records in whole and in part that have ensued since this litigation was filed.