07/24/2020

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES,

A Washington nonprofit corporation,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

/

Docket No. 20-000098-MZ

Hon. Christopher Murray

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

There is no other pending or resolved civil action arising out of the transition or occurrence alleged in this Complaint

Plaintiff Energy Policy Advocates, by and through its attorneys, Eric Neal Cornett, and Charles A. Lawler and Zachary C. Larsen of Clark Hill PLC, hereby bring this Complaint and state as follows in support:

INTRODUCTION

1. This action under the Michigan Freedom of Information Act ("FOIA"), MCL 15.231 *et seq*., seeks to remedy a state agency invoking FOIA's exemptions to shield from the public the agency's involvement with outside pressure groups and plaintiffs'-side tort attorneys.

2. The Plaintiff in the instant matter, Energy Policy Advocates ("EPA"), is a nonprofit corporation dedicated to transparency relating to environmental and energy policy and how policymakers use public resources. EPA regularly uses state and federal public records laws to obtain documents from government bodies to educate the public on the interaction between private interests and public office.

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3. EPA made several requests for electronic correspondence of certain Department of Attorney General ("DAG") staff members and one contractor, time sheets and billing records of that contractor, and purported common interest agreements entered into by Defendant DAG during 2019.

4. Defendant DAG has asserted that most records responsive to these requests are exempt from disclosure as attorney work product and/or privileged attorney-client communications.

5. This Complaint demonstrates three troubling developments in the Department of Attorney General, the further record of which the public has a strong interest in seeing.

6. *First*, at some point in the process of responding to EPA's records requests, Defendant DAG began a practice of broadly applying statutory exemptions to withhold even previously-released records, the previously released versions of which show that they clearly are not subject to the statutory or other exemptions now asserted.

7. *Second*, that practice reflects the behavior of Defendant DAG and other state offices of attorneys general, which EPA has now documented, of coordinating responses to EPA's requests for public records.

8. *Finally*, the purported common interest agreements Defendant DAG has joined related and responsive to EPA's requests at issue here place an affirmative obligation on Defendant DAG to litigate FOIA requests absent the consent of all parties. Through these purported agreements, Defendant DAG claims to have effectively contracted away not only its discretion on what it can and cannot disclose to the public, but also its ability to independently decide what record requests will and will not require litigation to resolve.

9. Defendant DAG's expansive interpretation of Michigan's FOIA exemptions, and involvement of outside parties in applying them, prevents the public from obtaining the "full and

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complete information regarding the affairs of government" that is the purpose of the FOIA. MCL 15.231.

10. The lack of demonstrated attorney-client relationships with some parties in certain withheld correspondence, inconsistent and even haphazard application of privileges, and expansive definition of attorney work product makes plain that Defendant DAG is applying FOIA not as a transparency statute but as a means to shield the agency from public oversight.

PARTIES AND JURISDICTION

11. Plaintiff Energy Policy Advocates is a nonprofit research and public policy organization incorporated in Washington State. Its programs include a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.

12. Defendant the Michigan Department of Attorney General ("DAG") is a principal department of the State of Michigan as defined under Article V, Section 2 and Section 3 of the Michigan Constitution of 1963, headed by Attorney General Dana Nessel, and the DAG is a "public body" as defined in MCL 15.232(h)(*i*), which creates and maintains "public records" as defined in MCL 15.232(i).

13. The Court of Claims has jurisdiction over this matter pursuant to MCL 15.240(1)(b) and MCL 600.6419(1)(a).

14. Venue is proper in this Court pursuant to MCL 15.240(1)(b).

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THE FOIA REQUESTS

The August 2019 Requests

15. On August 28, 2019, EPA submitted a FOIA request to Defendant DAG for correspondence between Attorney General Dana Nessel, Deputy Attorney General Kelly Keenan, and ENRA Division Chief Peter Manning, which included individuals associated with the New York University (NYU) School of Law's State Energy and Environmental Impact Center ("SEEIC") **(EXHIBIT A)**. SEEIC is a group created by former New York City Mayor and current "climate" policy activist Michael Bloomberg to place privately-hired attorneys in state attorneys general offices, as "Special Assistant Attorneys General", to pursue particular energy and environmental enforcement and policy issues of concern to Mr. Bloomberg.[1] [2]

16. The same request also sought correspondence of the same individuals with and/or Stanley "Skip" Pruss. Mr. Pruss is currently a "Special Assistant Attorney General" or SAAG retained under contract for "specialized expertise and experience in a particular area of law." While not apparently an SEEIC SAAG, Mr. Pruss did serve as a liaison between Defendant DAG and Mr. Bloomberg's group for the purpose of placing other, privately-hired attorneys in DAG.

17. On August 29, 2019, EPA submitted a FOIA request to Defendant DAG for correspondence between Assistant Attorney General Neil Gordon and individuals associated with the SEEIC and/or Stanley "Skip" Pruss. **(EXHIBIT B)**.

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[1] For this request, as for each of the requests identified in this complaint, EPA asked for records in native format and were not provided with those documents. Per MCL 15.234(1)(c), EPA may request and Defendant DAG is required to provide the documents in such format.

[2] See, e.g., Juliet Eilperin, "NYU Law launches new center to help state AGs fight environmental rollbacks," Washington Post, August 16, 2017, www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html.

18. Public records obtained from Defendant DAG show that, in that capacity, Mr. Pruss also serves a liaison function between DAG and tort lawyers, activist groups and others seeking DAG to use its authorities in particular ways.

19. On September 19, 2019, Defendant DAG provided EPA a detailed itemization fee form assessing $3,956.22 to process both requests. **(EXHIBIT C)**. As requested, EPA mailed a check for half of the total amount as a deposit.

20. On December 4, 2019, Defendant DAG provided a partial grant and partial denial to the request and sought the balance of the assessed fee. The partial denial cited MCL 15.243(1)(g) and (h), which allow nondisclosure of information or records subject to attorney-client privilege and nondisclosure of information or records subject to privileges recognized by statute or court rule, in this case the attorney work product doctrine. **(EXHIBIT D)**. EPA mailed a check for the remaining balance for the fee assessed to process the requests.

21. On December 19, 2019, by U.S. Mail, Defendant DAG provided a physical cover letter and electronic copies of records it claimed were subject to disclosure in non-native format.

22. On January 7, 2020, EPA submitted an administrative appeal to Defendant DAG challenging its use of statutory exemptions to withhold an unstated number of records in full, including entirely factual information such as the identities of senders and recipients, dates/times, subject fields and the title of any attachments. **(EXHIBIT E)**.

23. On January 23, 2020, Defendant DAG responded to this appeal by agreeing to provide privilege logs of records withheld in full. **(EXHIBIT F)**.

24. Defendant DAG provided five (5) pages of privilege logs on February 11, 2020, eighty-four (84) pages on March 25, and forty-one (41) pages on March 30, 2020. The privilege logs identified withheld records, authors, subject field, recipients, date/time, privilege asserted and a privilege description. (**EXHIBITS G, H, & I**).

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25. These logs suggest that DAG is improperly withholding certain records.

26. These logs further suggest that certain records are subject to legitimate claims of privilege or otherwise are exempt under FOIA. However, DAG has not met its burden to demonstrate the propriety of each withholding. For this reason, on information and belief, EPA alleges that DAG continues to unlawfully withhold records and portions of records subject to EPA's August 2019 requests.

The November 13, 2019 FOIA Request

27. On November 13, 2019, EPA submitted a FOIA request to DAG for any employment contracts with "Skip" Pruss, applications to participate in the SEEIC's Fellows program, and any common interest agreements, contingency or other fee agreements, secondment agreements, retainer agreements, and engagement agreements entered into by DAG in 2019. **(EXHBIT J)**.

28. On December 9, 2019, Defendant DAG responded to the request with a detailed itemization fee form requesting $156.62. EPA mailed a check for that amount on December 19, 2019.

29. On January 10, 2020, Defendant DAG provided notice that it located no responsive records pertaining to the SEEIC and provided copies of both Mr. Pruss' initial contract with DAG and an amendment to that contract.

30. On January 17, 2020, Defendant DAG provided redacted copies of several records purporting to be common interest and/or joint defense and confidentiality agreements, withholding substantial portions as attorney work product pursuant to MCL 15.243(1)(h). **(EXHIBITS K)**. Defendant DAG redacted, *inter alia*, the purpose and subject matter of the common interest agreements. The records largely appear to be drafted from the same template. Comparing records,

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it appears DAG redacted uniform, boilerplate provisions in some, while those same provisions were released in others.

31. On March 20, 2020, EPA appealed DAG's redaction of the agreements, challenging the claim that the subject matter of such agreements constitutes attorney work product as defined in MCR 2.302(B)(3)(a). **(EXHIBIT L)**.

32. On April 6, 2020, Defendant DAG upheld the redactions for the majority of the agreements, but agreed to provide copies of two agreements, asserting that, in the interim, "circumstances changed with regard to the partially-redacted common interest agreements included at pages 63-71 and 142-158 of the disclosed records. . . . Certain information redacted in those parts has been made public." **(EXHIBIT M)**.

33. On April 13, 2020, Defendant DAG provided a copy of a less redacted version of the agreement found on pages 142–158 of the disclosed records. **(EXHIBIT N)**.

34. Defendant DAG did not in fact produce pages 63–71.

35. On information and belief, EPA asserts that the entirety of the common interest agreement redactions and/or withholdings are improper under FOIA and that DAG continues to withhold from EPA records to which it is statutorily entitled.

36. Further, on information and belief, DAG's production also improperly withheld in full and did not acknowledge the existence of at least one responsive agreement.

37. Among the records provided in response to EPA's March 27, 2020 request for certain records (see, *infra*), was a March 20, 2020 email from David Hoffmann of the Office of the Attorney General for the District of Columbia providing one of the notices described, *supra*, pursuant to a common interest agreement, of a public records request that Office received. **(EXHIBIT W)**.

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38. The "common interest agreement" DC OAG provided notice under is a 2019 "Amendment To Confidentiality Agreement Regarding Participation In Climate Change Public Nuisance Litigation."

39. According to a *Vaughn* Index provided to EPA by the Vermont Office of Attorney General, as of June 6, 2020, all parties to that agreement had entered it in 2019 ("on various dates from November to December 2019").

40. DAG concluded its response to EPA's request for, *inter alia,* any common interest agreements entered into by DAG in 2019, on January 17, 2020.

41. As such, this agreement, if DAG is a party as DC OAG believes it is, is responsive to EPA's request for any common interest agreements into by DAG at any time in 2019.

42. Although DAG's response to EPA's request for all common interest agreements entered into by DAG in 2019 was heavily redacted, by reconciling those records and the "Amendment To Confidentiality Agreement Regarding Participation In Climate Change Public Nuisance Litigation", EPA states on information and belief that DAG did not provide that agreement in its response to this request, which DAG concluded on January 17, 2020.

The January 7, 2020 FOIA Request

43. On January 7, 2020, EPA requested all billing records and invoices submitted by Stanley "Skip" Pruss to Kelly Keenan and/or Susan Bannister at DAG. **(EXHIBIT O)**.

44. On January 15, 2020, Defendant DAG provided heavily-redacted copies of these invoices, withholding substantial portions as attorney work product pursuant to MCL 15.243(1)(h). **(EXHIBIT P)**.

45. On January 27, 2020, EPA administratively appealed these denials. **(EXHIBIT Q)**.

46. On February 11, 2020, Defendant DAG provided a partial reversal of the initial decision.

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47. On February 17, 2020, Defendant DAG provided a revised version of the redacted billing summaries, revealing substantially more information including, e.g., the names of individuals participating in telephone calls, while still withholding significant portions of the contractor's itemized bills. **(EXHIBIT R)**.

48. On information and belief, certain of these withholdings are improper under FOIA.

The January 10, 2020 FOIA Request

49. On January 10, 2020, EPA submitted a request for correspondence of DAG's Kelly Keenan and Peter Manning related to certain climate litigation which, other public records show, outside activists are recruiting attorneys general to file against private parties. The request also sought any correspondence with Mr. Manning containing the word "Hayes." **(EXHIBIT S)**. Hayes is the last name of SEEIC's director.

50. On January 21, 2020, Defendant DAG responded with a detailed itemization fee form and a request for $892.85. EPA mailed a check for the requested deposit.

51. On March 12, 2020, Defendant DAG provided a final fee notice for the balance of the request and a partial denial of records as either attorney work product or privileged attorney-client communications pursuant to MCL 15.243(1)(g) & (h). EPA mailed a check for the balance of the assessed fee to process the request.

52. On March 26, 2020, Defendant DAG provided a final response with copies of nonexempt records and one hundred-twenty-four (124) pages of privilege logs. **(EXHIBIT T)**.

53. Among the many records identified in the privilege logs as withheld as attorney work product were numerous records DAG had previously released in full. These include five (5) emails between DAG staff and plaintiffs' "climate nuisance" tort law firm Sher Edling, LLP, five (5) emails involving Michigan League of Conservation Voters' desire that DAG file suit against Exxon Mobil corporation, one (1) email about Rhode Island's climate nuisance litigation filed by

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Sher Edling, and two (2) emails about multi-state Attorney General coordination call subgroups and Mr. Pruss's possible role therein, all of which DAG had released in full in response to the August 28 & 29, 2019 requests.

54. In the intervening period, public records show, various state offices of attorney general provided notice to each other of EPA's requests, invoking purported common interest agreements whose (typically) paragraph 8 agrees to a default position that a state's public records on certain topics, when requested, will only be released if other states consent. This coordinated opposition—an opposition in which DAG is participating—to the release of public records has forced EPA to either drop or pay to litigate its requests.

55. On information and belief, EPA asserts that certain of these withholdings are improper under FOIA.

The March 27, 2020 Request

56. On March 27, 2020, EPA submitted a request seeking correspondence of Mr. Pruss and Elizabeth Morrisseau containing the words "Bachmann" and/or "Goffman." **(EXHIBIT U)**.

57. On April 6, 2020, Defendant DAG responded to the request providing responsive records and claiming to withhold a single email in full as attorney work product pursuant to MCL 15.243(1)(h), providing a privilege log for it. **(EXHIBIT V)**.

58. Among the records provided was a March 20, 2020 email from David Hoffmann of the Office of the Attorney General for the District of Columbia providing one of the notices described, *supra*, pursuant to a common interest agreement, of a public records request that Office received. (**EXHIBIT W**).

59. On information and belief, EPA asserts that the record(s) at issue is properly subject to disclosure under FOIA and was unlawfully withheld.

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The April 17, 2020 Request

60. In its March 26, 2020 privilege log, Defendant DAG identified three emails with the Subject field "RE: Multi-state group discussing CO2 as a criteria pollutant," all among Ms. Morrisseau, Mr. Manning, and Mr. Gordon and all dated October 7, 2019. By virtue of being responsive to the January 10, 2020 request, each email contains one or more of four search terms.

61. Typical email "subject" practice, which public records indicate Defendant DAG follows, suggests that all three emails were replies in an email "thread" whose original subject field is "Multi-state group discussing CO2 as a criteria pollutant." Conceivably, the original email(s) to which these correspondence responded did not contain one or more of those key phrases and were not responsive to EPA's request.

62. Therefore, on April 17, 2020, EPA submitted a request seeking all correspondence of Ms. Morrisseau, Mr. Manning, Ms. Keenan, and/or Mr. Gordon with "CO2 as a criteria pollutant" in the subject line. **(EXHIBIT X)**. The request sought such records dated from October 1, 2019 through the date the request was processed, but also clearly stated, "We request entire 'threads' of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter."

63. On May 11, 2020, Defendant DAG responded to that request for all such correspondence from October 1, 2019 onward as well as any earlier parts of the "thread," e.g., the original email that they replied to. **(EXHIBIT Y)**. Defendant DAG again identified only the three October 7, 2019 emails among Ms. Morrisseau, Mr. Manning, and Mr. Gordon replying to an earlier email(s), withholding all three in full, claiming attorney work product in a privilege log. Defendant DAG's privilege log also did not acknowledge the original email to which these emails responded, which, like all elements of the thread, were specifically covered by EPA's request. In a departure, this privilege log omitted the subject field information.

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64. Public records obtained by EPA show that, by this point, the coordinating attorneys general had notified each other of EPA's requests on that topic.

65. On information and belief, EPA asserts that the withheld information is properly subject to disclosure under FOIA and that it is withheld unlawfully.

The May 1, 2020 Request

66. On May 1, 2020, EPA submitted a request for all purported common interest agreements entered into by DAG at any time in 2020. **(EXHIBIT Z)**.

67. On May 11, 2020, Defendant DAG notified EPA of an extension to May 26, 2020 to respond to the request.

68. On May 26, 2020 Defendant demanded $565.56 to process whatever purported common interest agreements it had entered in the first few months of 2020. **(EXHIBIT AA)**.

69. EPA asserts that this is *prima facie* proof of a groundless fee-as-barrier in violation of Michigan law, and arbitrary and capricious application of FOIA.[3]

70. EPA also asserts that this reflects Defendant DAG's punitive application of FOIA, and is part of its coordinated resistance to EPA's information requests as agreed in the (typically) ¶ 8 of its purported common interest agreements with other state attorneys general.

71. On information and belief, EPA further asserts that the withheld information is properly subject to disclosure under FOIA and that it is withheld unlawfully.

FIRST CLAIM FOR RELIEF

Duty to Produce Records Under the FOIA
Declaratory Judgment

72. Plaintiff EPA re-alleges paragraphs 1–71 as if fully set out herein.

[3] Prior to the parties to these agreements coordinating their responses to EPA's various records requests, Defendant DAG charged EPA $156.62 to review all purported common interest agreements entered into in the entire year of 2019. See ¶, *supra*.

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73. EPA has sought and been denied access to responsive records reflecting the conduct of official business, including correspondence of DAG officials with outside parties, the billing records of a DAG contractor, and contracts DAG entered on behalf of the State of Michigan.

74. EPA asks this Court, upon reviewing the records at issue in this matter or mutually-agreed upon exemplars of such records, to enter a judgment declaring:

A. The records specifically described in EPA's FOIA requests identified above are public records as defined in MCL 15.232(i) and, as such, are subject to release under the Michigan FOIA barring a specific, applicable exemption;

B. The exemptions and privileges Defendant DAG asserts do not exempt the records from disclosure, or, in the alternative, Defendant DAG's interpretation of the exemptions is overly-expansive and Defendant DAG must release the records subject only to narrow application of statutory exemptions;

C. Defendant DAG is unlawfully withholding these records.

SECOND CLAIM FOR RELIEF

Duty to Produce Records Under FOIA
Injunctive Relief

75. Plaintiff EPA re-alleges paragraphs 1–74 as if fully set out herein.

76. EPA is entitled to injunctive relief compelling Defendant DAG to produce all records in its possession responsive to EPA's FOIA requests described, *supra*, without fees, and subject only to legitimate withholdings.

77. EPA asks the Court to order the Defendant DAG to produce to EPA, within 5 business days of the date of the order, the requested records described in EPA's requests, and any attachments thereto, subject only to legitimate withholdings.

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78. EPA asks the Court to order Defendant DAG to submit the withheld documents, or mutually-selected exemplars of such records, to the Court for *in camera* review of whether and to what extent any exemptions found in MCL 15.243 apply.

79. Alternatively, EPA asks the Court to allow counsel for the parties to review the documents under seal, pending further order of the Court, and to make arguments relating to whether the exemptions found in MCL 15.243 apply.

80. Alternatively, and if necessary to reduce the number of documents that must be reviewed *in camera*, EPA asks the Court to allow counsel for the parties to meet and confer to reach an agreement for a reduced number of withheld records subject to challenge.

THIRD CLAIM FOR RELIEF

Costs and Fees

81. Plaintiff EPA re-alleges paragraphs 1–80 as if fully set out herein.

82. Pursuant to MCL 15.240(6), the Court shall award reasonable attorney fees and other litigation costs to any party prevailing in a FOIA action.

83. EPA is statutorily entitled to recover fees and costs incurred as a result of bringing this action.

84. EPA asks the Court to order the Defendant DAG to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

85. EPA asks the Court to award punitive damages for the arbitrary and capricious withholding of records pursuant to MCL 15.240(7).

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CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Plaintiff EPA requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 24th day of July, 2020.

ENERGY POLICY ADVOCATES
By Counsel

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VERIFICATION

Per the requirements of MCL 600.6434(2), I, Matthew D. Hardin, being first duly sworn, depose and say the following:

1. I am a member of the Board of Directors of Energy Policy Advocates, and was formerly Executive Director of Energy Policy Advocates. I am duly authorized to sign this Verification for and on behalf of Plaintiffs in this matter.

2. Pursuant to MCR 1.109(D)(3)(b), I declare under the penalties of perjury that this Verified Complaint has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Energy Policy Advocates

Matt D Hardin

By: Matthew D. Hardin
Its: Board Member

Dated: July 21, 2020

Subscribed and sworn to before me
this 21 day of July, 2020.

Nicole M. Shirell Notary Public
Ingham County, Michigan
My Commission expires: 02-19-2027
Acting in the county of Ingham
Notarized Using Electronic/
Remote Technology

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REQUEST UNDER MICHIGAN FREEDOM OF INFORMATION ACT

August 28, 2019

Department of Attorney General
Attn: FOIA Coordinator
P.O. Box 30754
Lansing, MI 48909

By Electronic Mail: AG-FOIA@michigan.gov
Re: Certain Correspondence; Scheduling Requests

Dear Sir or Madam:

On behalf of the public policy group Energy Policy Advocates (EPA), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, and pursuant to the Michigan Freedom of Information Act, M.C.L. §15.231, *et seq.*, please provide copies of the following records:

1) all correspondence a) sent to or from or copying (whether as cc: or bcc:) i) keenank@michigan.gov, ii) Peter Manning, and/or iii) Dana Nessel (whether at NesselD34@michigan.gov (or otherwise), that b) is also sent to or from or copying (again whether as cc: or bcc:) i) djh466@nyu.edu, ii) davidjhayes0l@gmail.com, iii) david.hayes@nyu.edu, iv) ek3041@nyu.edu, v) elizabeth.klein@nyu.edu, and/or vi) pruss@5lakesenergy.com, and is c) dated between January 2, 2019 and the date you process this request, inclusive.

2) all scheduling requests a) sent to your office, whether provided by email, regular mail, courier, hand delivery, facsimile, or otherwise including, e.g. UPS, Fedex, Dropbox, etc., which also b) are from and/or mention anywhere i) David Hayes, ii) Elizabeth (Liz) Klein, iii) New York University, iv) the State Energy and

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Environment Impact Center, and/or v) Skip Pruss that are **dated from June 15, 2019** through the date you process this request, inclusive.

We request entire threads of which any responsive correspondence is a part, regardless whether any portion falls outside of the above time parameter. To narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards press clippings, such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting"). Additionally, please consider all published or docketed materials, including pleadings and/or news articles, as non-responsive.

We understand that a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs. Given EPA's non-profit and public interest nature and intention to broadly disseminate relevant findings, EPA requests a waiver or reduction of any applicable fees.

Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and

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Exchange Commission Data Delivery Standards.[1] The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. ***(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)***" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is

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[1] https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

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associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We look forward to your response. If you have any questions, do not hesitate to contact me by email at MatthewDHardin@protonmail.com.

Sincerely,

Matthew D. Hardin
Executive Director
Energy Policy Advocates

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REQUEST UNDER MICHIGAN FREEDOM OF INFORMATION ACT

August 29, 2019

Department of Attorney General
Attn: FOIA Coordinator
P.O. Box 30754
Lansing, MI 48909

By Electronic Mail: AG-FOIA@michigan.gov
Re: Certain Correspondence

Dear Sir or Madam:

On behalf of the public policy group Energy Policy Advocates (EPA), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, and pursuant to the Michigan Freedom of Information Act, M.C.L § 15.231, *et seq.*, please provide copies of the following records, and any accompanying information[1], including also any attachments:

1. all correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) is also sent to or from or copying (again whether as cc: or bcc:), i) djh466@nyu.edu, ii) davidjhayes0l@gmail.com, iii) david.hayes@nyu.edu, iv) ek3041@nyu.edu, v) elizabeth.klein@nyu.edu, and/or vi) pruss@5lakesenergy.com, and is c) dated between January 2, 2019 and the date you process this request, inclusive;
2. all correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) includes bi-weekly, biweekly, michael.myers@oag.state.ny.us, and/or

[1] See discussion of SEC Data Delivery Standards, *infra.*

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DANA NESSEL

michael.myers@ag.ny.gov anywhere in the email, and is c) dated between January 2, 2019 and the date you process this request, inclusive; and

3. all correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) contains the following terms, "ethic" (in any use, be it ethics, ethical, or other) *and* "Impact Center", and is dated from May 1, 2019 through the date you process this request, inclusive.

We request entire threads of which any responsive correspondence is a part, regardless whether any portion falls outside of the above time parameter. To narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards press clippings, such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting"). Additionally, please consider all published or docketed materials, including pleadings and/or news articles, as non-responsive.

We understand that a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs. Given EPA's non-profit and public interest nature and intention to broadly disseminate relevant findings, EPA requests a waiver or reduction of any applicable fees.

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Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.[2] The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. ***(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)***" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

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[2] https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

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In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We look forward to your response. If you have any questions, do not hesitate to contact me by email at MatthewDHardin@protonmail.com.

Sincerely,

Matthew D. Hardin
Executive Director
Energy Policy Advocates

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

September 19, 2019

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
matthewdhardin@gmail.com

Dear Mr. Hardin:

This notice responds to your request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, submitted in two-parts on August 28, and 29, 2019, which the Department of Attorney General (Department) received on August 29, and 30, 2019, respectively. You requested information as described in the attached request.

A statutorily permitted extension of time to respond was taken through September 20, 2019.

Your request is granted as to any nonexempt records in the Department's possession that fall within the scope of the request.

Section 4(4) of the FOIA, MCL 15.234(4), provides that a public body must provide a detailed itemization that clearly lists and explains the allowable charges, where applicable, for the necessary copying of a public record for inspection; actual mailing costs; actual incremental cost of duplication or publication, including labor; and the cost of search, examination, review, and deletion and separation of exempt from nonexempt information, which compose the total fee used for estimating and charging purposes.

The Department has determined that a voluminous amount of records falls within the scope of your request. To limit the processing fee, the Department is charging at the hourly rate of the lowest paid staff persons capable of searching for and retrieving responsive records, reviewing and examining the records, and separating exempt and nonexempt material, if necessary. If you would like to discuss whether the request can be refined to further lower the costs and shorten the processing period, please contact the undersigned in writing at this time.

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To commence the processing of the request, under section 4(8) of the FOIA, MCL 15.234(8), the Department requires a one-half good faith deposit of $1,978.11 based on an estimated total cost of $3,956.22. Failure to charge would result in an unreasonably high cost to the Department in this particular instance because employees must be taken away from pending work to process the large number of documents and expend additional time to complete regularly assigned Departmental work. Please refer to the attached Detailed Itemization Fee Form for a breakdown of the fees assessed.

As set forth under section 4(14) of the FOIA, MCL 15.234(14), if a fee appeal has not been filed under section 10a of the FOIA, MCL 15.240a, the Department must receive the required deposit within 45 days after your statutorily-determined receipt of this notice, which is November 7, 2019; otherwise, the FOIA request will be considered abandoned and the Department will not be required to fulfill the request.

After receipt of the $1,978.11 deposit check, made payable to the State of Michigan and sent to the FOIA Coordinator, Department of Attorney General, P.O. Box 30754, Lansing, MI 48909, the Department will complete the processing of the request within an estimated 45 business days. Section 4(8) of the FOIA, MCL 15.234(8), provides that the time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate, and provide the public records in a manner based on this state's public policy set forth in section 1(2) of the FOIA, MCL 15.231(2), and the nature of the request in the particular instance.

The Department will notify you in writing of the balance due, the statutory basis for exemptions, if any, and the statutory remedial rights, if applicable. After receipt of the fee balance, copies of the records will be provided.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

December 4, 2019

Sent by email
matthewdhardin@gmail.com

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Dear Mr. Hardin:

This notice supplements the Department of Attorney General's (Department) September 6, and 19, 2019 notices issued in response to your August 28, and 29, 2019 request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. (Copies of the FOIA request and the Department's notices are attached.)

In its September 19, 2019 notice, the Department stated that it would complete the processing of the request after receiving the deposit and would notify you in writing of the balance due, the statutory basis for exemptions, if any, and the statutory remedial rights, if applicable.

The Department received your deposit in the amount of $1,978.11 and your FOIA request is granted in part and denied in part.

As to the partial grant, upon receipt of the $1,978.11 balance, by check payable to the State of Michigan and sent to the FOIA Coordinator, Department of Attorney General, P.O. Box 30754, Lansing, MI 48909, copies of the nonexempt records will be provided to you.

As to the partial denial, written communications between the Department and its client, the Department of Environment, Great Lakes, and Energy, and written communications between and among Department legal staff are being withheld from public disclosure under section 13(1)(g) and (h) of the FOIA, MCL 15.243(1)(g) and (h), respectively.

The exemption under MCL 15.243(1)(g) provides for the nondisclosure of "[i]nformation or records subject to the attorney-client privilege." The exemption under MCL 15.243(1)(h) provides for the nondisclosure of "[i]nformation or records subject to [ ] privilege recognized by statute or court rule," including the privilege

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encompassed by the attorney work product doctrine. See Michigan Court Rule 2.302(B)(3)(a), and *Messenger v Ingham County Prosecutor*, 232 Mich App 633; 591 NW2d 393 (1998). The written communications of legal advice to the Department's client agency and the Department's internal written communications composed of attorney work product comprise a large number of emails, including email threads, dated from February 19, 2019 through October 7, 2019.

As to the partial denial of your request, under section 10 of the FOIA, MCL 15.240, the Department is obligated to inform you that you may do the following:

1) Appeal this decision in writing to the Attorney General, Department of Attorney General, 525 W. Ottawa, P.O. Box 30754, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the partial denial should be reversed. The head of the Department or her designee must respond to your appeal within 10 business days after its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

2) Commence an action in the Court of Claims within 180 days after the date of the final determination to partially deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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GAO GOVERNMENT ACCOUNTABILITY & OVERSIGHT

FREEDOM OF INFORMATION ACT APPEAL

January 7, 2020

State of Michigan
Department of Attorney General
P.O. Box 30754
Lansing, MI 48909

Dear Ms. Nessel:

On behalf of the non-profit policy organization Energy Policy Advocates (EPA), which I represent with Government Accountability & Oversight, P.C. (GAO), a nonprofit public interest law firm, we appeal the Department of Attorney General's (DAG) withholding of certain records responsive to EPA's August 28, 2019 and August 29, 2019 Freedom of Information Act (FOIA) requests.

The first FOIA request sought:

1. all correspondence a) sent to or from or copying (whether as cc: or bcc:) i) keenank@michigan.gov, ii) Peter Manning, and/or iii) Dana Nessel (whether at NesselD34@michigan.gov (or otherwise), that b) is also sent to or from or copying (again whether as cc: or bcc:) i) djh466@nyu.edu, ii) davidjhayes0l@gmail.com, iii) david.hayes@nyu.edu, iv) ek3041@nyu.edu, v) elizabeth.klein@nyu.edu, and/or vi) pruss@5lakesenergy.com, and is c) dated between January 2, 2019 and the date you process this request, inclusive.
2. all scheduling requests a) sent to your office, whether provided by email, regular mail, courier, hand delivery, facsimile, or otherwise including, e.g. UPS, Fedex, Dropbox, etc., which also b) are from and/or mention anywhere i) David Hayes, ii) Elizabeth (Liz) Klein, iii) New York University, iv) the State Energy and Environment Impact Center, and/or v) Skip Pruss that are **dated from June 15, 2019** through the date you process this request, inclusive.

The second FOIA request sought:

1. all correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) is also sent to or from or copying (again whether as cc: or bcc:), i) djh466@nyu.edu, ii) davidjhayes0l@gmail.com, iii) david.hayes@nyu.edu, iv) ek3041@nyu.edu, v) elizabeth.klein@nyu.edu, and/or vi) pruss@5lakesenergy.com,

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DANA NESSEL

and is c) dated between January 2, 2019 and the date you process this request, inclusive;

2. all correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) includes bi-weekly, biweekly, michael.myers@oag.state.ny.us, and/or michael.myers@ag.ny.gov anywhere in the email, and is c) dated between January 2, 2019 and the date you process this request, inclusive; and
3. all correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) contains the following terms, "ethic" (in any use, be it ethics, ethical, or other) *and* "Impact Center", and is dated from May 1, 2019 through the date you process this request, inclusive.

DAG responded to these requests on September 19, 2019 with a fee demand of $1,978.11 as a good faith, one-half deposit. EPA paid the deposit by check, which check cleared on October 7, 2019. DAG included in this initial response a partial denial covering written communications between DAG and its client, the Department of Environment, Great Lakes, and Energy, and written communications between and among DAG legal staff. These communications were withheld in full under claims MCL 15.243(1)(g) (records subject to attorney-client privilege) and/or MCL 15.243(1)(h) (records subject to privilege recognized by statute or court rule, in this case attorney work product doctrine). On December 4, 2019, DAG provided a final fee notice seeking an additional $1,978.11 and reiterating the above exemptions, which EPA also paid.

DAG provided the records responsive to this request on December 19, 2019. In its accompanying letter, DAG asserted two new exemptions for redactions, MCL 15.243(1)(a) (records that are of personal nature) and MCL 15.243(1)(u) (records related to a public body's security measures). EPA does not challenge either of those asserted exemptions.

MCL 15.235(5) requires that a denial of a request contain:

> (a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request…
>
> (c) A description of a public record or information on a public record that is separated or deleted…if a separation or deletion is made.

DAG's response exempted some unstated number of records in full claiming MCL 15.243(1)(g) & (1)(h). While a public body may exempt an entire class of records, "any category must be clearly described and drawn with sufficient precision so that all documents within a particular category are similar in nature." *Herald Co., Inc. v. Ann Arbor Public Schools*, 244 Mich. App. 266, 275 (Mich. Ct. App. 1997) (citing *Newark Morning Ledger Co. v. Saginaw County Sheriff*, 204 Mich. App. 215, 225-226 (Mich. Ct. App. 1994). DAG's response does neither. Instead, DAG relies upon a statutory exemption to justify withholding an unstated number of records with no limiting principle to ensure let alone establish the records are similar in nature.

Given the scope of EPA's requests, seeking correspondence of multiple individuals which contain one or more of several individual search terms, and with DAG providing no description

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beyond the exemption itself, DAG's response makes it impossible to make any reasonable assessment of the propriety of these withholdings, other than the absence of a sufficiently described class.

Further, DAG's response withholds even purely factual and easily segregable information such as the From. To, Sent, and Subject fields, the content of which could in no way be considered either attorney work product or subject to attorney-client privilege. DAG's decision to exclude two categories of records in their entirety, by merely reciting an exemption as if the exemption itself is the class of records, rather than precisely defining the class of records to ensure similarity leads to the absurd conclusion that declaring records as falling under the same exemption creates a "class".

In addition to the categories being neither "clearly described" nor "drawn with sufficient precision", DAG's reliance on the attorney-client privilege and the attorney work product doctrine as methods to withhold entire categories is improper. The *Herald Co., Inc.* court recognized the attorney-client privilege to be "narrow: it attaches only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice." 244 Mich. App. 266, 280. DAG's use of the privilege is broad, applying to every word of every line of every responsive record it declares to be subject to attorney-client privilege and/or the attorney work product doctrine.

In conclusion, DAG's use of attorney-client privilege and attorney work product doctrine to withhold some unknown number and undescribed class of records in their entirety is an overly broad application of both doctrines and is contrary to case law limiting the practice.

The FOIA recognizes that "all persons…are entitled to full and complete information regarding the affairs of government and the official acts of those represent them…" MCL 15.231(2). Withholding entire categories of records, particularly records potentially reflecting DAG's relationship with outside interests to pursue litigation against private parties, is contrary to the letter and spirit of FOIA as well as judicial precedent. EPA requests that your office reconsider your earlier determination or, at a minimum, provide a more thorough accounting of the records withheld under the claimed exemptions.

Sincerely,

Neal Cornett

Neal Cornett
Counsel,
Government Accountability &
Oversight, P.C.

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EXHIBIT F

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

January 23, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
matthewdhardin@gmail.com

Dear Mr. Hardin:

This notice responds to your January 7, 2020 emailed letter, which you identify as an "appeal" of the Department's December 4, and 19, 2019 written notices, which partially granted and partially denied your request for records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Your letter states that you are appealing, "DAG's use of attorney-client privilege and attorney work product doctrine to withhold some unknown number and undescribed class of records in their entirety is an overly broad application of both doctrines and is contrary to case law limiting the practice." (Copies of your FOIA request and appeal, and the Department's September 6, 19, December 4, and 19, 2019 written notices are attached.)

The Department must uphold its partial denial under section 13(1)(g) and (h) of the FOIA, MCL 15.243(1)(g) and (h), as to written communications between the Department and its client, the Department of Environment, Great Lakes, and Energy, and written communications between and among Department legal staff, respectively.

The Department's aforementioned notices informed you that the exemption under MCL 15.243(1)(g) provides for the nondisclosure of "[i]nformation or records subject to the attorney-client privilege." The exemption under MCL 15.243(1)(h) provides for the nondisclosure of "[i]nformation or records subject to [ ] privilege recognized by statute or court rule," including the privilege encompassed by the attorney work product doctrine. See Michigan Court Rule 2.302(B)(3)(a), and *Messenger v Ingham County Prosecutor*, 232 Mich App 633; 591 NW2d 393 (1998), where the Court ruled that MCL 15.243(1)(h) provides for the nondisclosure of both factual and deliberative attorney work product.

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The Department also informed you that the written communications of legal advice to the Department's client agency and the Department's internal written communications composed of attorney work product comprise a large number of emails, including email threads, dated from February 19, 2019 through October 7, 2019.

However, as to that part of your appeal disputing the adequacy of the explanations provided in support of the exemptions, the matter is being remanded to the FOIA coordinator for the preparation of a privilege log detailing the records withheld under the attorney client and attorney work product privileges. You will receive a written response from the FOIA coordinator within seven business days.

Because this notice upholds the initial partial denial, under section 10(1)(b) of the FOIA, MCL 15.240(1)(b), the Department is obligated to inform you that you may file an action in the Court of Claims within 180 days after the date of the final determination to deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Jessica McGivney
Division Chief
State Operations Division
Department of Attorney General
517-335-7573

Encs.

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EXHIBIT G

REQUEST UNDER THE MICHIGAN FREEDOM OF INFORMATION ACT

January 10, 2020

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
P.O. Box 30754
Lansing, MI 48909

By Electronic Mail: AG-FOIA@michigan.gov
Re: Certain Correspondence

Dear Ms. Wendling-Richards:

On behalf of the Energy Policy Advocates (EPA), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Michigan Freedom of Information Act, MCL §15.231, *et seq.,* I hereby request copies of the following records:

1. all correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) Kelly Keenan and/or Peter Manning that b) includes anywhere, whether sent to or from or copying (again whether as cc: or bcc:), or otherwise, a) "climate litigation", b) "climate change litigation" (for a and b, quotation marks merely indicate the phrases covered) and/or c) Exxon, and is c) dated from May 22, 2019 through the date you process this request, inclusive; and
2. all correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) Peter Manning that b) includes anywhere, whether

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sent to or from or copying (again whether as cc: or bcc:), or otherwise, the word Hayes, whether freestanding or as part of an email address, and is c) dated from June 13, 2019 through the date you process this request, inclusive.[1]

We request entire "threads" of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter. The search terms included in both parts of this request are not case sensitive.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, EPA is a non-profit public policy organization dedicated to informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. EPA's ability to obtain fee waivers is essential to this work. EPA intends to use any responsive information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how regulatory, policy and enforcement decisions are reached. EPA ensures the public is

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[1] To narrow these requests, please consider as non-responsive electronic correspondence that merely receives or forwards press clippings, such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting"). Additionally, please consider all published or docketed materials, including pleadings and/or news articles, as non-responsive.

made aware of its work and findings via its partnership with the non-profit public interest law firm Government Accountability & Oversight, P.C., and the ClimateLitigationWatch.org project dedicated to broadly disseminating energy and environmental policy news and developments. The public information obtained by EPA and published on ClimateLitigationWatch.org have been relied upon by established media outlets, including the Washington Times and Wall Street Journal editorial page.[2]

Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.[3] The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather

[2] See, e.g., The Editorial Board, "State AGs' Climate Cover-Up" Wall Street Journal, June 7, 2019, https://www.wsj.com/articles/state-ags-climate-cover-up-11559945410. Valerie Richardson, "Motivated or manipulated? Rise of youth climate activism fuels alarms over exploitation" Washington Times, March 15, 2019, https://www.washingtontimes.com/news/2019/mar/13/youth-climate-strike-sparks-debate-use-students-pr/, see also "Climate Strike Sparks Debate on Use of Students as Props", https://www.realclearpolicy.com/2019/03/15/climate_strike_sparks_debate_on_use_of_students_as_props_41180.html. Valerie Richardson, "Democratic AGs team up with George Soros-funded group on anti-Trump lawsuit" Washington Times, August 1, 2019, https://www.washingtontimes.com/news/2019/aug/1/george-soros-funded-group-democratic-ags-partner-a/. Anthony Watts, "Emails reveals how children become pawns of climate alarmism", Watts Up With That (two-time Science Website of the Year), March 13, 2019, https://wattsupwiththat.com/2019/03/13/emails-reveal-how-children-become-pawns-of-climate-alarmism/.

[3] https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

than an image of a spreadsheet. ***(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)***" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We look forward to your response. If you have any questions, do not hesitate to contact me by email at MatthewDHardin@protonmail.com.

Sincerely,

Matthew D. Hardin

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

April 6, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
MatthewDHardin@protonmail.com

Dear Mr. Hardin:

This notice responds to your March 27, 2020 emailed letter (copy attached), received by the Department of Attorney General (Department) on March 30, 2020, requesting information, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, which you describe, with emphasis omitted, as follows:

> [C]opies of the following records:
>
> 1. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morriseau and/or ii) Stanley "Skip" Pruss, that b) includes, *anywhere*, whether in an email address, in the sent, to, from, cc, bcc fields, or the Subject fields or body of an email or email "thread", including also in any attachments, i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request, inclusive;
>
> 2. all electronic correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morriseau and/or ii) Stanley "Skip" Pruss, that b) was sent from michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive *and* November 17, 2019, and

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3. any invitation sent or received from michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call.

Regarding ## 1 & 2 above, we request entire "threads" of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.

Also for ## 1 & 2, to narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or 'clippings', such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting").

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices, news articles, and/or newsletters, as non-responsive, unless forwarded to or from the named persons with substantive commentary added by the sender.

Your request is granted in part and denied in part.

As to the partial grant, to the best of the Department's knowledge, information, and belief, the enclosed copied records represent the only nonexempt records in the Department's possession that fall within the scope of your request.

Because the processing of your request took minimal time and involved duplicating a limited number of pages, there is no fee.

As to the partial denial, a January 6, 2020 email composed of attorney work product is being withheld from public disclosure under section 13(1)(h) of the FOIA, MCL 15.243(1)(h), which provides for the, "nondisclosure of "[i]nformation or records subject to . . . privilege recognized by statute or court rule." The privilege, based on the attorney work product doctrine, is recognized under Michigan Court Rule 2.302(B)(3)(a) and discussed in the FOIA case, *Messenger v Ingham County Prosecutor*, 232 Mich App 633 (1998). A privilege log is provided below.

Doc Type	Subject Line	Date	Author	Recipients (To)	Privilege Description	Privilege Asserted
Email	RE: Affirmative Climate Litigation - call tomorrow	1/6/2020	Steve.Novick@doj.state.or.us	paul.garrahan@doj.state.or.us; Michael.Myers@ag.ny.gov; Elaine.Meckenstock@doj.ca.gov; gSchultz@riag.ri.gov; PKugelman@oag.state.va.us; nick.persampieri@vermont.gov; Jameson.Tweedie@delaware.gov; Valerie.Edge@state.de.us; Laura.Jensen@maine.gov; Mary.Sauer@maine.gov; MorrisseauE@michigan.gov; GordonN1@michigan.gov; SchumakerK@michigan.gov; Daniel.Resler@law.njoag.gov; Lisa.Morelli@law.njoag.gov; Aaron.Love@law.njoag.gov; Daniel.Salton@ct.gov; jdemjanick@pa.gov; Craig.Segall@arb.ca.gov; rreiley@state.pa.us; ajohnston@attorneygeneral.gov; mfischer@attorneygeneral.gov; Jacob.Larson@ag.iowa.gov; DRottenberg@atg.state.il.us; JJames@atg.state.il.us; wgrantham@nmag.gov;	Discussion of work product	Attorney-work product

As to the partial denial of your request, under section 10 of the FOIA, MCL 15.240, the Department is obligated to inform you that you may do the following:

1) Appeal this decision in writing to the Attorney General, Department of Attorney General, 525 W. Ottawa, P.O. Box 30754, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the partial denial should be reversed. The head of the Department or her designee must respond to your appeal within 10 business days after its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

2) Commence an action in the Court of Claims within 180 days after the date of the final determination to partially deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

EXHIBIT X

April 17, 2020

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
P.O. Box 30754
Lansing, MI 48909

By Electronic Mail: AG-FOIA@michigan.gov
Re: Certain Correspondence

Dear Ms. Wendling-Richards:

On behalf of Energy Policy Advocates (EPA), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, pursuant to the Michigan Freedom of Information Act, MCL §15.231, *et seq.,* I hereby request copies of the following records: all correspondence, and any accompanying information (see discussion of SEC Data Delivery Standards, *infra*), including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morrisseau, ii) Peter Manning, iii) Kelly Keenan, and/or iv) Neil Gordon, that b) includes in the subject line "CO2 as a criteria pollutant", and is c) dated from October 1, 2019 through the date you process this request, inclusive.

We request entire "threads" of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.

To narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or 'clippings', such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that

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DANA NESSEL
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includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting").

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices, news articles, and/or newsletters, as non-responsive, unless forwarded to or from the named persons with substantive commentary added by the sender.

As regards any records containing both exempt and non-exempt information, EPA asks your Office to not withhold any public record or portion thereof on the grounds that some portion of the public record is excluded from disclosure, but to withhold only those portions of the public record containing information subject to an exclusion, releasing all purely factual and otherwise disclosable or non-exempt material.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, EPA is a non-profit public policy organization dedicated to informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. EPA's ability to obtain fee waivers is essential to this work. EPA intends to use any responsive information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to

than an image of a spreadsheet. ***(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)***" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

We look forward to your response. If you have any questions, do not hesitate to contact me by email at MatthewDHardin@protonmail.com.

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DANA NESSEL
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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

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deBearA@michigan.gov

DEFENDANT'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT AND AFFIRMATIVE DEFENSES

Defendant, the Michigan Department of Attorney General (referred to as Defendant or the Department), through counsel, states as follows for its Answer and Affirmative Defenses to Plaintiff's First Amended Complaint:

Introduction

1. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant lacks knowledges and information sufficient to form a belief as to Plaintiff's motivations in bringing the instant action and denies the remainder of the allegation as untrue.

2. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

3. Defendant admits the allegation.

4. Defendant states that its responses to Plaintiff's requests for records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., speak for themselves and it denies the remainder of the allegation to the extent that it is inconsistent with its responses.

5. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

6. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

7. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

8. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

9. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

10. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

Parties and Jurisdiction

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

12. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant admits that it is a public body under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, that Attorney General Dana Nessel is the head of the Department, and that it maintains public records as defined under the FOIA.

13. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant admits that the Court of Claims has jurisdiction over claims against state public bodies under the FOIA.

14. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant admits the allegation.

The FOIA requests

The two-part August 2019 request

15. Defendant admits that Plaintiff emailed a FOIA request to the Department's FOIA coordinator on August 28, 2019. Defendant further admits that Exhibit A to Plaintiff's First Amended Complaint is a copy of its August 28, 2019 request and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

16. Defendant admits that Plaintiff emailed a FOIA request to the Department's FOIA coordinator on August 28, 2019. Defendant further admits that Exhibit A to Plaintiff's complaint is a copy of its August 28, 2019 request and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

17. Defendant admits that Plaintiff emailed a FOIA request to the Department's FOIA coordinator on August 29, 2019. Defendant further admits that Exhibit B to Plaintiff's First Amended Complaint is a copy of the August 29, 2019 request and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

18. Because the allegation is unclear as to which "public records" are being referenced, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

19. Defendant admits that Exhibit C to Plaintiff's First Amended Complaint is a copy of the written notice the Department emailed on September 19, 2019 in which it required a $1,978.11 deposit to commence processing Plaintiff's FOIA request and that Plaintiff paid the deposit.

20. Defendant admits that Exhibit D to Plaintiff's First Amended Complaint is a copy of the Department's written notice in which it granted in part and denied in part Plaintiff's FOIA request and states that the written notice speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the written notice.

21. Defendant admits that the Department sent Plaintiff copies of responsive, non-exempt records via US mail on December 19, 2019 but lacks information sufficient to form a belief with respect to the truth of the remainder of the allegation and leaves Plaintiff to its proofs.

22. Defendant admits that Exhibit E to Plaintiff's First Amended Complaint is a copy of a written appeal of the Department's final determination to partially deny Plaintiff's FOIA request and states that the written appeal speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the written appeal.

23. Defendant admits that Exhibit F to Plaintiff's First Amended Complaint is a copy of a January 23, 2020 written notice in which Plaintiff was informed that "the matter [was] being remanded to the FOIA coordinator for the preparation of a privilege log detailing the records withheld under the attorney client and attorney work product privileges" and states that the notice speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the written notice.

24. Defendant admits upon information and belief that Exhibits G, H, and I to Plaintiff's First Amended Complaint are copies of the privilege logs that the Department provided in response to Plaintiff's FOIA request and states that the privilege logs speak for themselves. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the privilege logs.

25. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

26. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

The November 13, 2019 FOIA request

27. Defendant admits that Exhibit J to Plaintiff's First Amended Complaint is a copy of a FOIA request that Plaintiff emailed to the Department on

November 13, 2019 and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

28. Defendant admits that on December 9, 2019 the Department emailed a written notice in which it informed Plaintiff that a $156.62 deposit was required to commence the processing of the request. Defendant further admits upon information and belief that Plaintiff paid the deposit.

29. Defendant admits the allegation.

30. Defendant admits that Exhibit K to Plaintiff's First Amended Complaint is a copy of partially redacted records, responsive to the November 13, 2019 request, that were emailed to Plaintiff on January 17, 2020 and states that the records speak for themselves. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the records.

31. Defendant admits that Exhibit L to Plaintiff's First Amended Complaint is a copy of a written appeal that it submitted in response to the Department's final determination to partially deny Plaintiff's November 13, 2019 request and states that the written appeal speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the written appeal.

32. Defendant admits that Exhibit M to Plaintiff's First Amended Complaint is a copy of an April 6, 2020 written notice in which Plaintiff was informed that the partial denial was being reversed in part and upheld in part and

states that the written notice speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the written notice.

33. Defendant admits that Exhibit N to Plaintiff's First Amended Complaint is a partially redacted copy of the common interest agreement found in pages 142 to 158 of Exhibit K and that Exhibit N contains less redactions than it did when it was originally produced on January 17, 2020.

34. Defendant admits the allegation.

35. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

36. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

37. Defendant admits that on April 6, 2020, the Department provided Plaintiff with a copy of a March 20, 2020 email from David Hoffman in which multiple Departments of Attorney General were informed of a March 7, 2020 FOIA request submitted by Plaintiff to the Office of the Attorney General for the District of Columbia.

38. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

39. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

40. Defendant admits that on January 17, 2020, it provided Plaintiff with partially exempted records responsive to the fifth enumerated item on its November 13, 2019 FOIA request which is attached as Exhibit J to Plaintiff's First Amended Complaint. Defendant denies the remainder of the allegation to the extent that it is inconsistent with its January 17, 2020, written notice.

41. Defendant lacks knowledge and information sufficient to form a belief with respect to Plaintiff's beliefs regarding the Department's participation in any particular common interest agreement. Defendant states that the remainder of the paragraph does not contain an allegation against Defendant which is capable of being admitted to denied, and that, as such, no answer is required. But to the extent an answer may be required, Defendant denies the remainder of the allegation for the reason that it did not wrongfully exempt any public record from disclosure under the FOIA.

42. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the portion of the allegation concerning Plaintiff's "reconciling" of any previously provided records. Defendants deny the remainder of the allegation for the reason that it did not wrongfully exempt any public record from disclosure under the FOIA.

The January 7, 2020 FOIA request

43. Defendant admits that Exhibit O to Plaintiff's First Amended Complaint is a copy of a FOIA request that Plaintiff emailed to the Department on January 7, 2020 and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

44. Defendant admits that Exhibit P to Plaintiff's First Amended Complaint is a copy of partially redacted records, responsive to the January 7, 2020 request, that were emailed to Plaintiff on January 15, 2020 and states that the records speak for themselves. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the records.

45. Defendant admits that Exhibit Q to Plaintiff's First Amended Complaint is a copy of a written appeal that it submitted in response to the Department's final determination to partially deny Plaintiff's November 13, 2019 request and states that the written appeal speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the written appeal.

46. Defendant admits that the Department's partial denial of Plaintiff's January 7, 2020 FOIA request was partially reversed.

47. Defendant admits that Exhibit R to Plaintiff's First Amended Complaint is a partially redacted copy of the billing statements that were originally produced on January 15, 2020 and that Exhibit R contains less redactions than the

copy that was originally produced. Defendant further states that the partially redacted billing statements speak for themselves and denies the remainder of the allegation to the extent that it is inconsistent with Exhibits P and R.

48. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

The January 10, 2020 FOIA request

49. Defendant admits that Exhibit S to Plaintiff's First Amended Complaint is a copy of a FOIA request that Plaintiff emailed to the Department on January 10, 2020 and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

50. Defendant admits that on January 21, 2020 the Department emailed a written notice in which it informed Plaintiff that a $446.42 deposit was required to commence the processing of the request. Defendant further admits upon information and belief that Plaintiff paid the deposit. Defendant denies the remainder of the allegation as untrue.

51. Defendant admits that on March 12, 2020, the Department granted in part and denied in part Plaintiff's January 10, 2020 request, informed Plaintiff that nonexempt records would be provided upon payment in full, and explained certain emails were being exempted in their entirety under MCL 15.243(1)(g) and (h).

52. Defendant admits that on March 26, 2020 the Department emailed Plaintiff a copy of nonexempt records and privilege log detailing the nature of the records that were exempted in their entirety. Defendant further admits that Exhibit T to Plaintiff's First Amended Complaint is a copy of this privilege log and states that the privilege log speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the privilege log.

53. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

54. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the first sentence of this paragraph, and leaves Plaintiff to its proofs. Defendant denies the remainder of the allegation as untrue.

55. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

The March 27, 2020 FOIA request

56. Defendant admits that Exhibit U to Plaintiff's First Amended Complaint is a copy of a FOIA request that Plaintiff emailed to the Department on March 27, 2020 and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

57. Defendant admits that Exhibit V to Plaintiff's First Amended Complaint is a copy of the Department's written notice in which it granted in part and denied in part Plaintiff's March 27, 2020 FOIA request and states that the written notice speaks for itself. Defendant denies remainder of the allegation to the extent that it is inconsistent with the plain language of the written notice.

58. Defendant admits that on April 6, 2020, the Department provided Plaintiff with a copy of a March 20, 2020 email from David Hoffman in which multiple Departments of Attorney General were informed of a March 7, 2020 FOIA request submitted by Plaintiff to the Office of the Attorney General for the District of Columbia.

59. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

The April 17, 2020 FOIA request

60. Defendant admits that the Department's March 26, 2020 privilege log identified three emails among three assistant attorneys general with the subject line identified in the allegation. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remainder of the allegation, and leaves Plaintiff to its proofs.

61. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

62. Defendant admits that Exhibit X to Plaintiff's First Amended Complaint is a copy of a FOIA request that Plaintiff emailed to the Department on April 17, 2020 and states that the request speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

63. Defendant admits that on May 11, 2020, the Department emailed Plaintiff a written notice in which it granted in part and denied in part the April 17, 2020 request. Defendant further admits that Exhibit Y to Plaintiff's First Amended Complaint is a copy of a privilege log that was provided to Plaintiff along with the Department's May 11, 2020 written notice. Defendant further states that the privilege log speaks for itself and denies the allegation to the extent that it is inconsistent with the plain language of the privilege log.

64. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

65. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

The May 1, 2020 FOIA request

66. Defendant admits that Exhibit Z to Plaintiff's First Amended Complaint is a copy of a FOIA request that Plaintiff emailed to the Department on May 1, 2020 and states that the request speaks for itself. Defendant denies the

remainder of the allegation to the extent that it is inconsistent with the plain language of the request.

67. Defendant admits the allegation.

68. Defendant admits that Exhibit AA to Plaintiff's First Amended Complaint is a copy of the written notice the Department emailed on May 26, 2020 in which it required a $282.78 deposit to commence processing Plaintiff's FOIA request and states that the notice speaks for itself. Defendant denies the remainder of the allegation to the extent that it is inconsistent with the plain language of the notice.

69. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department's notice constitutes a violation of the FOIA.

70. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

71. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies that the Department unlawfully exempted any records or portions of records from disclosure.

Response to Plaintiff's First Claim for Relief

Duty to produce records under the FOIA; declaratory judgment

72. Defendant incorporates by reference its responses to paragraphs 1 through 71 as if fully stated herein.

73. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue.

74. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation and all of its subparts as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

Response to Plaintiff's second claim for relief

Duty to produce records under the FOIA; injunctive relief

75. Defendant incorporates by reference its responses to paragraphs 1 through 74 as if fully stated herein.

76. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA

requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

77. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

78. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

79. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

80. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be

required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief. Further, Defendant states that it is exclusively Plaintiff's responsibility to identify the particular exempted or partially exempted records that it claims were wrongfully withheld from disclosure.

Response to Plaintiff's third claim for relief

Costs and Fees

81. Defendant incorporates by reference its responses to paragraphs 1 through 80 as if fully stated herein.

82. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant states that the statute speaks for itself.

83. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

84. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading,

Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

85. Defendant states that the allegation represents a legal conclusion which, by law, requires no answer. But to the extent that an answer may be required, Defendant denies the allegation as untrue. By way of further pleading, Defendant states that the Department's partial denials of each of Plaintiff's FOIA requests were consistent with the FOIA and that Plaintiff is not entitled to any relief.

Response to Relief Requested

Defendant states that the allegations composing Plaintiff's prayer for relief represent legal conclusions, which by law require no answer. To the extent that an answer may be required, Defendant denies that Plaintiff is entitled to any relief. In support of this denial, Defendant states that the Department complied with the FOIA in responding to Plaintiff's FOIA request. Defendant further incorporates by reference the above numbered paragraphs of its Answer and its Affirmative Defenses.

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to present any genuine issues as to material facts, which should result in a judgment in favor of Defendant as a matter of law.

2. Some or all of Plaintiff's claims may be barred by the statute of limitations.

3. The Department complied with the FOIA in responding to each of Plaintiff's FOIA requests and its processing of Plaintiff's FOIA request was not arbitrary or capricious.

4. Plaintiff has failed to state a claim for relief against the Department with respect to certain of its FOIA requests. Plaintiff has failed because it acknowledges that "certain [exempted] records are subject to legitimate claims of . . . privilege or are otherwise exempt under FOIA[,]" (see Compl, ¶ 15), but, at the same time, fails to identify which particular records it claims were wrongfully exempted from disclosure. In other words, Plaintiff has failed to identify the particular public records that it seeks to compel the disclosure of and, thus, has failed to adequately inform Defendant of the nature of its claims. Dismissal of the corresponding portions of Plaintiff's complaint is therefore required.

5. Certain portions of the records responsive to Plaintiff's FOIA requests at issue in this lawsuit are exempt from disclosure under MCL 15.243(1)(g) for the reason that they are "subject to the attorney client privilege."

6. Certain portions of the records responsive to Plaintiff's FOIA requests at issue in this lawsuit are exempt from disclosure under MCL 15.243(1)(h) for the

reason that they are "subject to . . . privilege[s] recognized by statute or court rule" including the attorney work product doctrine.

7. Certain portions of the records responsive to Plaintiff's FOIA requests at issue in this lawsuit are exempt from disclosure under MCL 15.243(1)(m) for the reason that they are "[c]ommunications and notes within a public body or between public bodies of an advisory nature[,]" "cover other than purely factual materials[,]" "are preliminary to a final agency determination of policy or action[,]" and "the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure" in this particular instance.

8. Plaintiff has failed to state a claim for relief to the extent it seeks an order compelling the production of any records that were in its possession at the time it filed the instant complaint. *Densmore v Dep't of Corrections*, 203 Mich App 363 (1994).

Defendant reserves the right to add additional affirmative defenses as they become known through discovery.

RELIEF REQUESTED

WHEREFORE, Defendant Michigan Department of Attorney General asks that this Court:

A. Deny Plaintiff the relief it seeks in its complaint;

B. Determine that Plaintiff is not entitled to attorneys' fees or costs;

C. Dismiss Plaintiff's complaint with prejudice;

D. Award costs to Defendant, including reasonable attorney fees; and

E. Grant Defendant such other relief as provided by law.

Respectfully submitted,

/s/ *Adam R. de Bear*
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Dated: August 14, 2020

AG# 2020-0292052-A

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

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DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

Defendant Michigan Department of Attorney General (hereinafter, "the Department)" moves the Court, under MCR 2.116(C)(10) for an order dismissing the instant complaint. In support of its motion, the Department states as follows:

1. The instant action arises out of several records requests, submitted by Plaintiff Energy Policy Advocates, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The requests at issue in this action are dated August 28, 2019, August 29, 2019, November 13, 2019, January 7, 2020, January 10, 2020, March 27, 2020, April 17, 2020, and May 1, 2020.

2. By way of written notices, the Department granted in part and denied in part each of the August 28, August 29, November 13, 2019, January 7, 2020, January 10, 2020, March 27, 2020, and April 17, 2020 requests. In its complaint, Plaintiff alleges that "certain of these withholdings are improper under FOIA." (See, e.g., Am Compl, ¶¶ 48, 55.)

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3. Additionally, in response Plaintiff's May 1, 2020 request, the Department determined that failure to charge a fee would result in an unreasonably high cost to the Department and requested a one-half good faith deposit of an estimated $565.65. Prior to paying the one-half good faith deposit, Plaintiff filed the instant lawsuit and alleged that the cost estimate is *prima facie* proof of a groundless fee-as-barrier in violation of Michigan law, and [an] arbitrary and capricious application of FOIA." (Am Compl, ¶ 69.)

4. In its complaint, Plaintiff seeks declaratory relief with respect to the records that the Department exempted or partially exempted from disclosure, injunctive relief with respect to the same records, punitive damages, and attorneys' fees and costs.

5. For the reasons set forth in its brief, the Department did not violate the FOIA and, therefore, it is entitled to summary disposition.

6. Consistent with LCR 2.119(A)(2), discussed the parties' respective intentions of filing dispositive motions and discussed the nature of those motions. Neither party agreed to provide concurrence with the opposing party's dispositive motion. Accordingly, it is necessary to present the instant motion for filing with the Court.

Wherefore, Defendant Michigan Department of Attorney General respectfully requests that this Court enter an order dismissing Plaintiff's complaint in its entirety.

Respectfully submitted,

/s/ *Adam R. de Bear*
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DATED: November 30, 2021

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DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

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DEFENDANTS' BRIEF IN SUPPORT

INTRODUCTION

Since the beginning of 2019, Plaintiff Energy Policy Advocates has submitted approximately 28 requests for records to the Department of Attorney General under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. At issue here are five requests, dating between August 28, 2019 and May 1, 2020, and the Department's nondisclosure of certain records that are protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common interest doctrine, and the FOIA's deliberative process exemption. For the reasons set forth below, the Department requests that this Court enter an order granting the instant motion for summary disposition and dismissing Plaintiff's complaint.

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STATEMENT OF FACTS

Since 2019, Plaintiff Energy Policy Advocates has submitted to Defendant Michigan Department of Attorney General 28 requests for records under the FOIA. (Ex 1, Wendling-Richards Decl, ¶ 2.) At issue here are five of those requests and responsive records that the Department exempted or partially exempted from disclosure. Each of these requests and the Department's responses are discussed below along with a summary of this case's procedural history.

The August 28 and 29, 2019 requests.

Plaintiff's August 28 and 29, 2019 requests sought communication between several of the Department's managing attorneys, Stanley Pruss (a special assistant attorney general at the time of the requests), Neil Gordon (an assistant attorney general), and an environmental law and policy nonprofit group. (Am Compl, ¶¶ 15–17.) Specifically, the requests sought the following categories of information.

1. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bcc:) i) keenank@michigan.gov, ii) Peter Manning, and/or iii) Dana Nessel . . . that b) is also sent to or from or copying (again whether as cc: or bcc:) i) djh466@nyu.edu, ii) davidjhayesOl@gmail.com, iii) david.hayes@nyu.edu, iv) ek304l@nyu.edu, v) elizabeth.klein@nyu.edu, and/or vi) pruss@5lakesenergy.com, and is c) dated between January 2, 2019 and the date you process this request[.]"

2. "[A]ll scheduling requests a) sent to your office . . . which also b) are from and/or mention anywhere i) David Hayes, ii) Elizabeth (Liz) Klein, iii) New York University, iv) the State Energy and Environment Impact Center, and/or v) Skip Pruss that are **dated from June 15, 2019** through the date you process this request[.]"

3. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) is also sent to or from or copying (again whether as cc: or bee:), i) djh466@nyu.edu, ii) davidjhayesOl@gmail.com, iii) david.hayes@nyu.edu, iv) ek304l@nyu.edu, v) elizabeth.klein.@nyu.edu, and/or vi) pruss@5lakesenergy.corn, and is c) dated between January 2, 2019 and the date you process this request[.]"

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4. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) includes bi-weekly, biweekly, michael.myers@oag.state.ny.us, and/or mailto:michael.myers@ag.ny.gov anywhere in the email, and is c) dated between January 2, 2019 and the date you process this request[.]"

5. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bee:) Neil Gordon that b) contains the following terms, "ethic" (in any use, be it ethics, ethical, or other) *and "Impact* Center", and is dated from May 1, 2019 through the date you process this request[.]" [See Am Compl, Exs A & B.]

In a December 4, 2019 written notice, the Department granted in part and denied in part Plaintiff's request. As to the partial denial, the Department relied on MCL 15.243(1)(g) which provides for the nondisclosure of "[i]nformation or records subject to the attorney-client privilege[,]" and MCL 15.243(1)(h) which provides for the nondisclosure of "[i]nformation or records subject to . . . privilege recognized by statute or court rule" such as the attorney work product privilege. (Am Compl, Ex D.)

After an administrative appeal under MCL 15.240(1)(a), the Department provided several exemption logs regarding the particular records it exempted from disclosure. (See Am Compl, Exs G–I.) In its complaint, Plaintiff asserts that while "[t]he logs further suggest that certain records are subject to legitimate claims of privilege or otherwise are exempt under FOIA[,]" the Department "has not met its burden to demonstrate the propriety of each withholding." (Am Compl, ¶ 26.)

The November 13, 2019 request.

In Plaintiff's November 13, 2019 request, it sought five categories of records, but only one category is relevant here. In particular, Plaintiff requested copies of "[a]ny common interest agreement . . . entered into by your Office at any time in 2019." (Am Compl, Ex J.) The Department partially denied Plaintiff's request on January 17, 2020 and provided redacted copies of responsive common interest agreements. (See Ex 2, final determination re November 13

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request; Am Compl, Ex K.) The Department informed Plaintiff that the redacted information was exempt from disclosure under the attorney work product doctrine by way of MCL 15.243(1)(h). (Ex 2.) And after an administrative appeal, the Department provided lesser redacted versions of certain, previously exempted agreements because "[c]ertain information redacted in those [agreements] has been made public." (Am Compl, Exs M–N.)

In its complaint, Plaintiff asserts that the Department improperly redacted the agreements. (Am Compl, ¶ 35.) Further, Plaintiff claimed that, given certain information it had obtained from FOIA requests submitted to other offices of attorneys general, the Department did not produce certain responsive records in its possession. (*Id.*, ¶¶ 38–42.)

The January 7, 2020 request.

In its January 7, 2020 request, Plaintiff requested "all bills and/or invoices" submitted by Mr. Pruss to the Department since March 1, 2019. (Am Compl, Ex O.) The Department, on January 15, partially denied Plaintiff's request under MCL 15.243(1)(h) and produced redacted copies of Mr. Pruss' invoices. (Ex 3, final determination re January 7 request; Am Compl, Ex P.) Again, after an administrative appeal where it partially reversed its final determination, the Department produced lesser redacted copies of Mr. Pruss' invoices. (Ex 4, appeal notice re January 7 request; Am Compl, Exs Q–R.) Plaintiff claims that the redacted information in the later disclosed invoices was improperly exempted from disclosure. (Am Compl, ¶ 48.)

The January 10, 2020 request.

On January 10, 2020, Plaintiff submitted a "request for correspondence of . . . Kelly Keenan and Peter Manning related to certain climate litigation [.]" (Am Compl, ¶ 48.) Specifically, Plaintiff requested the following:

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1. [A]ll correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bee:) Kelly Keenan and/or Peter Manning that b) includes anywhere, whether sent to or from or copying (again whether as cc: or bcc:), or otherwise, a) "climate litigation", b) "climate change litigation" . . . and/or c) Exxon, and is c) dated from May 22, 2019 through the date you process this request, inclusive; and

2. [A]ll correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) Peter Manning that b) includes anywhere, whether sent to or from or copying (again whether as cc: or bcc:), or otherwise, the word Hayes, whether freestanding or as part of an email address, and is c) dated from June 13, 2019 through the date you process this request, inclusive. [Am Compl, Ex S.]

On March 12, 2020, after receiving payment to process the request, the Department partially denied Plaintiff's request under MCL 15.243(1)(g) and (h), (Ex 5, final determination re January 10 request), and the Department provided an exemption log with respect to the records and information it exempted from disclosure, (Am Compl, Ex T).

In its complaint, Plaintiff alleges that the Department previously produced, without redactions, approximately 13 of the records that it exempted from disclosure in its March 12 final determination. (Am Compl, ¶ 54.) For this reason, Plaintiff "asserts that certain of these withholdings are improper under FOIA." (*Id.*, ¶ 55.)

The March 27, 2020 request.

In its March 27, 2020 request, Plaintiff requested communication involving Mr. Pruss and Assistant Attorney General Elizabeth Morrisseau that mentioned the word "Goffman" or "Bachmann" or that was sent to or from "michael.myers@ag.ny.gov." (Am Compl, Ex U.) In response, the Department granted in part and denied in part the request, and as to its partial denial, it exempted a single record under MCL 15.243(1)(h). (Am Compl, Ex V.) Plaintiff maintains this record was improperly exempted from disclosure. (Am Compl, ¶ 59.)

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The April 17, 2020 request.

On April 17, 2020, Plaintiff submitted a request for "all correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morrisseau, ii) Peter Manning, iii) Kelly Keenan, and/or iv) Neil Gordon, that b) includes in the subject line "CO2 as a criteria pollutant", and is c) dated from October 1, 2019 through the date you process this request[.]" (Am Compl, Ex X.) On May 11, 2020, the Department, in its final determination, denied the request and, under MCL 15.243(1)(h), exempted three emails that constituted attorney work product. (Ex 6, final determination re April 17 request.) The Department also provided an exemption log identifying the three records that were not disclosed. (Am Compl, Ex Y.)

In its complaint, Plaintiff points out that three emails with "CO2 as a criteria pollutant" in the subject line were identified on the exemption log provided in response to its January 10, 2020 request. (Am Compl, ¶ 60.) Plaintiff insists, however, that because the exemption log indicated that those three emails were all replies, the original email was not included.[1] (*Id.*, ¶ 61.) Thus, according to Plaintiff, the purpose of its April 17, 2020 request was to obtain the original email along with any other email in the thread. (*Id.*, ¶ 62.) And the absence of the original email in the Department's response caused Plaintiff to believe that the Department was wrongly withholding it. (*Id.*, ¶ 63.)

The May 1, 2020 request.

Unlike with previous requests, Plaintiff is not alleging that the Department wrongfully withheld any information. Instead, it claims that the Department, by estimating a total cost of

[1] Curiously, Plaintiff does not consider the possibility that the original email is contained in one of those three identified emails.

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$565.56 to process its request for "any common interest agreement entered into by the Department . . . in 2020" constitutes "*prima facie* proof of a groundless fee-as barrier in violation of Michigan law" when compared to the Department's $156.62 cost to process Plaintiff's previous request for 2019 agreements. (Am Compl, ¶¶ 68–69; Am Compl, Exs Z–AA.)

The instant lawsuit.

On May 27, 2020, Plaintiff commenced an action arising out of the above requests against Attorney General Nessel. After AG Nessel filed an answer and affirmative defenses, Plaintiff filed an amended complaint on July 24, 2020 which substituted the Department as the defendant in place of AG Nessel. Apart from the change in parties, the claims remained substantially the same.

In its amended complaint, Plaintiff raised three claims for relief. First, it seeks a judgment declaring that the Department is unlawfully withholding the records it exempted from disclosure in response to the above FOIA requests. (Am Compl, ¶ 74.) Second, it seeks an order compelling the Department "to produce all records in its possession responsive to [Plaintiff's] FOIA requests . . . subject to only legitimate withholdings." (*Id.*, ¶ 77.) As it relates to its second claim for relief, Plaintiff also requested, in the alternative, for "the Court to allow counsel for the parties to meet and confer to reach an agreement for a reduced number of withheld records subject to challenge." (*Id.*, ¶ 80.) Third, and finally, Plaintiff requests that the Court order the Department to pay attorneys' fees and costs under MCL 15.240(6) and to award punitive damages under MCL 15.240(7).

The records subject to challenge.

During discovery, and consistent with Plaintiff's request for the Court to allow the parties to "reach an agreement for a reduced number of withheld records subject to challenge," (Am

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Compl, ¶ 77), the parties endeavored to narrow the list of challenged records. In particular, on April 5, 2021, the parties notified the court by way of stipulation that the Department "agreed to provide an exemption log that adds further support and detail regarding the exemption or partial exemption of *certain identified records*." (4/5/2021 Stipulation and Order, ¶ 4, emphasis added.) Further, in response to the Department's requests for admissioin, Plaintiff stated that the parties "have previously discussed that not all documents identified on [the Department's] privilege logs are at issue and have worked to develop a common understanding of the documents that are at issue in this dispute." (Pl's 7/13/2021 Resp to Defs' Requests for Admission, p 3.)

Consistent with these discussions, the Department provided updated exemption logs for certain identified records to Plaintiff on June 25, 2021. In these updated exemption logs, the Department provided a more thorough explanation for the basis of exemptions than it did at the administrative level. (See Ex 7, Bock Decl, ex 1; Ex 8, Manning Decl, ex 1.)[2] In addition providing more thorough justifications, the Department ultimately produced certain records it previously exempted from disclosure. (See *id.*) But notwithstanding its production of revised exemption logs and the efforts to narrow the list of challenged records, the Department is still not sure of the exact nature and scope of the withheld records at issue here. Thus, the Department must focus its arguments on categories of exempted records as opposed to the specific records at issue in this case.

[2] Should the Court relieve Plaintiff from its admission that "not all documents identified on [the Department's] privilege logs are at issue," (Pl's 7/13/2021 admissions), and permit Plaintiff to challenge the entire nondisclosure of records, attached as Exhibit 9 is an exemption log comprised of all withheld records identified in exhibits G, H, I, and T to Plaintiff's amended complaint with a few substantive changes: For example, the records identified in the Department's June 2021 logs are omitted and the records are arranged in order by date and numbered starting at 230 (The final record identified in the Department's June 2021 exempt logs is document 229).

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Plaintiff's possession of the challenged records.

Also during discovery, and relevant to Plaintiff's claim for attorneys' fees, the Department learned that Plaintiff was already in possession of certain records that is purportedly seeking in the instant action. For example, Plaintiff is challenging the Departments' nondisclosure of certain records responsive to its January 10 request that it claims to have received in response to its August 28 and 29 requestions. (See Am. Compl, ¶ 53.) Additionally, Plaintiff appears to have obtained possession of a number of the disputed records from sources outside the instant litigation. For example, Plaintiff attached to its November 23, 2020 requests for admission an unredacted copy of a common interest agreement that the Department exempted from disclosure.[3] In fact, its complaint contains several references to "other public records" received, presumably through separate FOIA requests to other offices of attorneys general. (See, e.g., Am Compl, ¶¶ 7, 49, 54, 64.)

Given the fact that Plaintiff appeared to already be in possession of certain records that are the subject of its claim for injunctive relief here, the Department issued discovery to ascertain whether and to what extent Plaintiff was in possession of the records at issue in this action. In response to the Department's discovery, Plaintiff provided the following relevant responses:

- Plaintiff admits that it has obtained certain public records responsive to the FOIA requests that are the subject of this action from sources other than [the Department.]

- Plaintiff admits that it has obtained unredacted or lesser redacted copies of certain public records responsive to the FOIA requests that are the subject of this action from sources other than [the Department.] [Pl's 7/13/2021 Responses to Defs' Requests for Admission, p 4.]

[3] Plaintiff's requests for admission were filed with the Court on November 23, 2020 and the unredacted agreement is attached as Exhibit A those admissions.

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Additionally, in response to the Department's interrogatories, Plaintiff identified "several" common interest agreements and "numerous" email communications, as examples, of at-issue records that it already possessed. (Ex 10, Pl's Resp to Def's Interrogs, p 4.) But it did not identify each such record in its possession in part because it claimed the request was "not proportional to the needs of the case in light of the significant number of documents at issue, the numerous other sources from which Plaintiff regularly seeks information, and the relative access of the parties to such information[.]" (*Id.*)

STANDARD OF REVIEW

Summary disposition is available under MCR 2.116(C)(10) when "the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5–6 (2016). In the FOIA context, when moving for summary disposition, the public body bears the burden of demonstrating that certain records are exempt from disclosure. *Evening News Ass'n v City of Troy*, 417 Mich 481 (1983). To do so, it must provide a particularized justification that "indicate[s] factually how a particular document, or category of documents" fits within a particular exemption. *Id.* at 503.

To grant summary disposition to a public body in a FOIA action, the trial court "must give particularized findings of fact indicating why the claimed exemptions are appropriate." *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218 (1994). And in cases where the public body's particularized justification supporting the nondisclosure is not, by itself, sufficient, a trial court may review the records in camera to make such particularized findings of fact. *Evening News Ass'n*, 417 Mich at 503.

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ARGUMENT

I. Because it did not violate the FOIA, the Department is entitled to summary disposition.

In response to the FOIA requests discussed above, the Department exempted or partially exempted approximately 426 records from disclosure. But as discussed above, because it is not clear whether Plaintiff is challenging all 426 instances of nondisclosure, the Department will address the justification for the nondisclosure of the following categories of information: The redacted portions of the common interest agreements; the communications between the signatories of those agreements; the communications within the Department; and the partial redaction of Mr. Pruss' billing statements. Additionally, the Department will address the justification for its initial fee estimate to process Plaintiff's May 1, 2020, FOIA request.

Further, because Plaintiff's third claim for relief seeks attorneys' fees and punitive damages, the Department will demonstrate why attorneys' fees and punitive damages are inappropriate in this particular instance.

A. The redacted portions of the common interest agreements are exempt from disclosure under MCL 15.243(1)(h) by way of the work product doctrine and common interest privilege.

At both the administrative and the trial court level, the Department has maintained that the redaction portions of the common interest agreements are exempt from disclosure under MCL 15.243(1)(h) by way of the work product privilege and common interest doctrine. Accordingly, to demonstrate that this exemption applies here, it is necessary to review the work product doctrine as well as the common interest privilege before applying the law to the agreements at issue here.

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1. The common interest and work product privileges apply to protect materials prepared in anticipation of litigation by parties who share a common legal interest.

MCL 15.243(1)(h) provides for the nondisclosure of "[i]nformation or records subject to . . . privilege recognized by statute or court rule." The relevant privilege that applies here is the work product privilege or doctrine which the Court of Appeals has explained "is the product of various decisions and court rules" and protects from discovery "any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation[.]" *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637–638 (1998), quoting Black's Law Dictionary (6th ed., 1990); see also *Leibel v Gen Motors Corp*, 250 Mich App 229, 245 (2002) (noting that "[i]t is generally understood that litigation need not have actually been commenced, or threatened, before it may be stated that materials were prepared in anticipation of litigation"). Because work product is a common law privilege, its applicability is recognized by MRE 501 (noting that "[p]rivilege is governed by the common law"), and also "reflected by MCR 2.302(B)(3)(a)." *Id.* at 639. And MCR 2.302(B)(3)(a) prevents the discovery of work product absent "a showing that the party seeking discovery has substantial need" and an inability to obtain the work product "without undue hardship."

The Court of Appeals has further described the work product privilege by noting that "[i]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Messenger*, 232 Mich App at 638, quoting *Powers v City of Troy,* 28 Mich App 24, 29 (1970). Further, while a litigant may obtain work product in discovery upon making the showing discussed above, see MCR 2.302(B)(3)(a), such a showing is inapplicable in the FOIA context where "generally neither the identity of the requester nor the requester's need for the information is a relevant consideration." *Messenger*, 232 Mich App at 644. To the contrary, because MCL 15.243(1)(h) employs no balancing test like other

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exemptions, "[t]he assertion of a valid and apposite privilege as authorized by [MCL 15.243(1)(h)] ends the inquiry under the FOIA." *Id.* at 646–647.

With respect to the common interest doctrine, it "is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other." *Waymo LLC v Uber Techs., Inc*, 870 F3d 1350, 1359 (CA Fed, 2017). "[T]o invoke the common interest doctrine, a party first must demonstrate the elements of privilege and then must demonstrate that the communication was made in pursuit of common legal claims including common defenses." *Id.* Michigan courts have also determined "that disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor . . . and the recipient[.]" *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 82 (2014). In other words, "the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest." *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 600 (2017), quoting *United States v BDO Seidman, LLP*, 492 F3d 806, 816 (CA 7, 2007).

Thus, the corollary from these two bodies of case law is that where multiple parties undertake a joint effort with respect to a common legal interest and there is a reasonable expectation of privacy between the parties, privilege is not waived when the parties share work product. See *D'Alessandro*, 308 Mich App at 82; *Nash Estate*, 321 Mich App at 600.

2. The portions of the common interest agreements that identify areas of anticipated litigation and the scope of the parties' relationship is work product that is not disclosable in discovery or FOIA.

Starting first with the applicability of the common interest doctrine, the common interest agreements themselves identify the common legal interest or strategy that the parties share as well as the promise of confidentiality. (Ex 7, Bock Decl, ¶ 6.) This alone demonstrates a

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common interest sufficient to invoke the doctrine. See *D'Alessandro*, 308 Mich App at 82. Accordingly, the only remaining step is to determine whether a privilege applies to these records. See *Waymo LLC*, 870 F3d at 1359.

To this end, as is clear from AAG Bock's declaration, the redacted portions of the common interest agreements specifically identify the area in which the signatories are preparing for litigation. (Ex 7, ¶ 9.) Bock further explained that "complete disclosure of these agreements would be violative of the signatories' agreements to maintain confidentiality of privileged material . . . , frustrate the signatories' efforts to challenge the various regulatory decisions that the respective governmental agencies' determined were harmful to the environment, and be contrary to the privacy and freedom from unwarranted intrusion within which attorneys are permitted to work when in anticipation of litigation." (*Id.*, ¶ 10.) But, consistent with the FOIA's pro-disclosure purpose, Bock further noted that when "when the planned actions referenced in the respective agreements had taken place and were no longer confidential (e.g., when the lawsuits were filed or the administrative actions were initiated), the Department subsequently disclosed unredacted or lesser redacted versions[.]" (*Id.*, ¶ 11.) And in addition to his testimony, Bock further assisted in providing particularized justifications for each agreement that was withheld in whole or in part. (*Id.*, ¶ 12.)

In sum, in light of the above law and the particularized justification provided by AAG Bock, the Department has carried its burden of proving the applicability of MCL 15.243(1)(h) as applied to the redacted portions of the common interest agreements. Summary disposition is warranted.

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B. The communications between signatories to the common interest agreements are similarly exempt from disclosure under MCL 1.243(1)(h).

For the same reasons discussed above in Part IA, the common interest agreements themselves demonstrate the applicability of the common interest doctrine to the communications between the signatories of those agreements (i.e., the agreements identify the common legal interest and contain promises of confidentiality). Accordingly, the next step is to determine whether any independent privilege applies. *Waymo LLC*, 870 F3d at 1359. And a review of the records demonstrates that the communications are protected by the work product doctrine.

In his declaration, AAG Manning noted that because of the common interest agreements, these communications were made with the expectation of confidentiality. (Ex 8, Manning Decl, ¶ 8.) Manning further noted that in many of these records, "the attorneys shared potential litigation strategy and legal research, identified strengths and weaknesses of potential legal challenges, and coordinated works assignments relevant to the potential legal action relevant to the common interest agreement." (*Id.*) As for the remainder of these communications, Manning stated they involved attorneys seeking "feedback on draft common interest agreements and transmitted finalized agreements[,]" and he concluded that, "for the same reasons discussed in the Bock declaration, nondisclosure of the entirety of such records is supported by the common interest privilege." (*Id.*, ¶¶ 8, 9.)

Accordingly, in light of the law discussed above and the particularized justification provided by AAG Manning, the Department has carried its burden in demonstrating the applicability of MCL 15.243(1)(h) to the communications among the signatories to common interest agreements. Summary disposition is therefore appropriate.

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C. The communications within the Department are exempt from disclosure under MCL 15.243(1)(g) by way of the attorney-client privilege, by MCL 15.243(1)(h), by way of the work product doctrine, and by MCL 15.243(1)(m).

At the administrative level, the Department relied upon the attorney-client privilege and the work product doctrine to support the nondisclosure of the records identified in the exemption logs. And in its answer and affirmative defenses, the Department additionally relied on the deliberative-process exemption to support its nondisclosure of the same records. To demonstrate the applicability of MCL 15.243(1)(g), (h), and (m) to the Department's nondisclosure of its internal communications, it is necessary to first set forth the law regarding each exemption and second apply that law to these exempted records.

1. The attorney-client privilege, work product doctrine, and the deliberative process exemption can all protect a public body's internal deliberations from public disclosure.

Under MCL 15.243(1)(g), a public body may exempt from disclosure "[i]nformation or records subject to the attorney-client privilege."[4] By way of background, the attorney-client privilege has been described as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co v United States*, 449 US 383, 389 (1981). The privilege's "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* In Michigan, our courts have further explained that "the attorney-client privilege attaches to direct communication between a client and his attorney" and that its scope is "narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App

[4] The Department has set forth the law regarding MCL 15.243(1)(h) and the work product privilege above in Part I.A.1.

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614, 618–19 (1998). Additionally, an attorney's "[o]pinions, conclusions, and recommendations based on facts are protected by the attorney-client privilege when the facts are confidentially disclosed to an attorney for the purpose of legal advice." *Leibel v Gen Motors Corp*, 250 Mich App 229, 239 (2002).

Under MCL 15.243(1)(m), public records are exempt from disclosure to the extent that the records constitute "communications and notes within a public body . . . of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." And this exemption applies when the "public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." MCL 15.243(1)(m). As for the meaning of the phrase "frank communications" as used in the exemption, the Supreme Court has explained that such communications are (1) "of an advisory nature [and] made within a public body[,]" (2) "cover[ ] other than purely factual material," and (3) "preliminary to a final agency determination of policy or action." *Bukowski v City of Detroit*, 478 Mich 268, 274-75 (2007). Importantly, the requirement that the communication or note be "preliminary" is in reference to the underlying policy decision or action, not the FOIA request. *Id.* at 270.

2. The Department's nondisclosure of its internal communications identified in the exemption logs is supported by one (or all) of the following: the work-product doctrine, the attorney-client privilege, and the deliberative process exemption.

With respect to those internal communications that are subject to the attorney-client privilege, AAG Manning explained that the communications either contained excerpts of instances where "the Department's attorneys were either providing legal advice to other state departments and agencies" or involved the Department's attorneys providing legal advice "to the

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Department's executive division which includes the Attorney General." (Ex 8, Manning Decl, ¶ 12.) Manning further noted that an "important aspect of the Department's attorneys' work is providing legal advice and research, both to other state departments and agencies that are represented by the attorney general and internally as well." (*Id.*, ¶ 12.) Because the Department is the State's legal adviser and "shall consult with and advise the governor and all other state officers and, when requested, give opinions . . . on all legal questions[,]" OAG, 1977-1978, No. 5156 (March 24, 1977), quoting *State ex rel Johnson v Baker*, 74 ND 244, 276 (ND, 1945), such communications that provide legal research and opinions are within the scope of the privilege.

With respect to those records that are subject to the work product privilege, Manning explained that "most communications related to anticipated litigation related to Line 5, discrepancies among ratepayers, Exxon Mobil, PFAS, and other environment and climate matters[,]" and that "[i]n these communications, the Department's attorneys shared their thoughts, impressions, and legal opinions regarding potential litigation." (Ex 8, ¶ 11.) Manning further explained that the Department prepared "exemption logs setting forth the applicable exemptions and the bases for those exemptions" during litigation, and those exemption logs provide further justification of the instances of nondisclosure of internal Department communications. (See *Id.*, ¶ 6; see also Exhibit 1 to Manning Decl.) Put simply, disclosure of such communication would be contrary to a lawyer's ability to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Messenger*, 232 Mich App at 638.

Finally, with respect to those communications that are subject to the deliberative process exemption, Manning explained that such communications "were internal, advisory in nature, and preliminary to final decisions[,]" just like most communications protected by the attorney-client privilege and the work product doctrine. (Ex 8, ¶ 13.) Manning further noted that "[p]ublic

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disclosure of such communications would have a chilling effect on the Department's employees to engage in open discussion" and that "employees would be less likely to provide their honest assessments of various issues in writing[.]" (*Id.*). This, he explained, would cause "the quality of preliminary staff input on departmental decision-making [to] suffer." In light of Manning's declaration, such communications constitute "frank communications" as defined by the Supreme Court in *Bukowski*, see 478 Mich at 274-75, and the detrimental effect that public disclosure of these communications would have on the operations of the Department clearly outweighs the public interest in disclosure. As such, the Department's nondisclosure of these internal communications is similarly supported by MCL 15.243(1)(m).

In short, for the reasons set forth above, the Department's internal communications are exempt from disclosure under either MCL 15.243(1)(g), (h), or (m). And summary disposition is therefore appropriate.

D. The redacted portions of Mr. Pruss' billing statements are exempt from disclosure under MCL 15.243(1)(g) by way of the attorney-client privilege and MCL 15.243(1)(h) by way of the work product doctrine.

As applied to an attorneys billing statements and invoices, there is not a sufficient body of Michigan law discussing whether portions of such records are, or may be, subject to the attorney-client and work product privileges. But as the Court of Appeals has explained, given "the similarity between state and federal rules regarding the work-product privilege . . . our courts routinely rely on federal cases for guidance in determining the scope of the work-product doctrine." *Nash Estate*, 321 Mich App at 598, quoting *D'Allesandro*, 308 Mich App at 82. And Michigan courts similarly "look[ ] to federal precedent for guidance in determining the scope of the attorney-client privilege when a particular issue has been addressed by a federal court." *Nash Estate*, 321 Mich App at 594.

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To this end, federal courts have explained that "bills, ledgers, statements, time records and the like which also reveal the nature of the services provided, such as researching particular areas of law, also should fall within the [attorney-client] privilege." *In re Grand Jury Witness*, 695 F2d 359, 362 (CA 9, 1982). And as it concerns Mr. Pruss' billing statements, AAG Manning explained that the redacted portions of those statements reveal "the particular areas of the law that [he] researched at the direction of the attorney general, topics of attorney-client privileged discussions [he] had with state officials, and areas of potential litigation[.]" (Ex 8, ¶ 14.) Accordingly, this information was exempted from disclosure and the remainder of the billing statements, including, for example, Mr. Pruss' hourly rate and the identities of those with whom he conversed, were produced without redaction. (*Id.*)

In short, because the redacted portions of the invoices reveal information that would otherwise be exempt from disclosure under the attorney-client and work product privileges, those portions of the invoices are exempt from disclosure under MCL 15.243(1)(g) and (h). As such, summary disposition as to Plaintiff's claims arising from these invoices is appropriate.

E. The Department's estimated fee to process Plaintiff's May 1, 2020 FOIA request was authorized under the FOIA and not intended as a penalty or barrier to access.

MCL 15.234(4) requires "[a] public body [to] establish procedures and guidelines to implement [the FOIA,]" and in order to charge a fee, the public body "establish[ ], make[ ] publicly available, and follow[ ] procedures and guidelines to implement [MCL 15.234]." MCL 15.234(1). To this end, the Department has established procedures and guidelines which provide that the Department may charge a fee for the processing of a FOIA request "only if the failure to charge a fee would result in unreasonably high costs to the Department because of the nature of the request in the particular instance, and the Department specifically identifies the nature of

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these unreasonably high costs." (See also Ex 1, Wendling-Richards Decl, ¶ 3.) Notably, this provision is identical to the requirement for assessing fees as set forth in MCL 15.234(3).

Under the FOIA, "[i]f a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or [MCL 15.234]," the FOIA allows a requesting person to "[c]ommence a civil action . . . for a fee reduction." MCL 15.240a(1)(b). Here, Plaintiff did not commence an action for a fee reduction. Instead, Plaintiff simply alleged in its complaint that the Department's $565 fee estimate to process its May 1, 2020 request constitutes "*prima facie* proof of a groundless fee-as barrier in violation of Michigan law" when compared to the Department's $156.62 cost to process Plaintiff's previous request for 2019 agreements. (Am Compl, ¶¶ 68–69.) But a review of the manner in which the Department processed this request demonstrates that no violation of the FOIA occurred.

In particular, the Department's FOIA coordinator testified that, after receiving Plaintiff's May 1, 2020 request, she submitted a fillable FOIA response sheet "to each of the Department's divisions as the request itself was broad in nature and potentially applicable to the entire Department." (Ex 1, ¶ 6.) Further, the FOIA coordinator explained that, in light of the information received back from the divisions, it was determined that the search and retrieval of responsive records would take approximately 4 hours, require approximately 11.75 hours by a non-attorney to review the responsive records and separate exempt from non-exempt material, and require approximately 4.25 hours by an attorney to review the responsive records and separate exempt from non-exempt material." (*Id.*, ¶ 7.) Using the hourly rate of the lowest paid staff persons capable of searching for and retrieving responsive records and separating exempt and nonexempt material, these estimates resulted in a fee estimate of $565.56. (*Id.*, see also the Department's May 26, 2020 written notice which is attached to the declaration as exhibit 2.)

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As required by the FOIA and the Department's procedures and guidelines, the Department also identified in its written notice that "[f]ailure to charge would result in an unreasonably high cost to the Department in this particular instance because employees must be taken away from pending work to process the large number of documents and expend additional time to complete regularly assigned Departmental work." (*Id.*, ¶ 8.) And that regularly assigned work is generally time sensitive in light of the Department's responsibilities. (*Id.*) Ultimately, the FOIA coordinator explained, the Department's "initial fee estimate . . . was the result of the labor the divisions with responsive records estimated would be necessary to process the request," and "as a penalty or as a barrier to accessing the records." (*Id.*, ¶ 10.)

In short, the FOIA coordinator's testimony demonstrates that the Department's processing of Plaintiff's May 1, 2020 request was consistent with the FOIA.[5] For this reason, Plaintiff's claims arising out of the initial fee estimate the Department provided in its May 26, 2020 written notice must be dismissed.

II. This Court should refrain from awarding attorneys' fees since Plaintiff only has the potential to be, at best, a partially prevailing party.

Assuming for the sake of argument that the Department is not successful in defending each application of privilege relevant to Plaintiff's FOIA requests, an award of attorneys' fees will nevertheless be inappropriate since Plaintiff would not be considered a prevailing party under Michigan case law.

To this end, when a court orders disclosure of records in a FOIA action, MCL 15.240(6) sets forth two avenues in which the requesting person may be entitled to an award of attorneys'

[5] The FOIA coordinator's testimony should be afforded deference as public officials "are presumed to have acted legally and not to have transcended their statutory powers." *Am La France & Foamite Indus v Vill of Clifford*, 267 Mich 326 (1934).

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fees: (1) if a requesting person "prevails in an action commenced under this section, the court *shall* award reasonable attorneys' fees[;]" or (2) "[i]f the [requesting] person or public body prevails *in part*, the court *may*, in its discretion, award all *or an appropriate portion* of reasonable attorneys' fees[.]" (Emphasis added). Thus, "attorney[s'] fees and costs must be awarded under the first sentence of MCL 15.240(6) only when a party prevails completely," and "whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court." *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 606 (2017), quoting *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 151 (2004).

Further, as a general matter, a plaintiff has prevailed in the FOIA context when "(1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff." *Local Area Watch*, 262 Mich App at 149. But here, as noted above, Plaintiff has admitted to being in possession of "several" common interest agreements and "numerous" email communications that are at-issue records that it already possessed. (Ex 10, p 4.) Even more, Plaintiff suggested that it would be too burdensome, relevant to the needs of this case, for it to identify each record at issue here that it already possesses. (*Id.*) Accordingly, it will not be possible for Plaintiff to be a prevailing party under the FOIA since the instant action cannot have had a "substantial causative effect" on the delivery of information Plaintiff independently possesses. *Id.* And even if the instant action does have a causative effect on the delivery of some information that Plaintiff does not independently possess, this Court should exercise its discretion and award no fees as Plaintiff

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will have only prevailed in small part considering the records it already possesses and the applicability of MCL 15.243(1)(g), (h), and (m) to the remaining, undisclosed records.[6]

In short, because most of the contested records are subject to privilege and because Plaintiff is independently in possession of numerous records at issue here, an award of attorneys' fees is not appropriate in the instant case. See also *Densmore v Dept of Corr*, 203 Mich App 363, 366 (1994) (explaining that "[w]here the records have already been furnished, it is abusive and a dissipation of agency and court resources to make and process a second claim").

III. Punitive damages are inappropriate here where the Department's processing of Plaintiff's FOIA requests was neither arbitrary nor capricious.

MCL 15.240(7) provides in relevant part that "[i]f the court determines . . . that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record," that, in addition to civil fines, "[t]he court shall award . . . punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record." As used in the FOIA, this Court has given the terms "arbitrary" and "capricious" their "generally accepted meanings." See *Williams v Martinucci*, 88 Mich App 198, 201 (1979). "Arbitrary" has been defined as "without adequate determining principle[,]" "[f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance," and "decisive but unreasoned." *Id.*, quoting *United States v Carmack*, 329 US 230, 243, (1946) (alterations in original omitted). Similarly, "capricious" has been defined to mean "apt to change suddenly[,]

[6] Should the Court determine that Plaintiff is a prevailing party and entitled to an award of attorneys' fees, the Department reserves its right to request an evidentiary hearing to dispute the reasonableness of any future fee award.

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freakish[,] whimsical[, or] humorsome." *Id.*, quoting *Carmack*, 329 US at 243 (alterations in original omitted).

Ultimately, Michigan courts do not award punitive damages, "[e]ven if [the] defendant's refusal to disclose or provide the requested materials was a statutory violation," so long as the "defendant's decision to act was based on consideration of principles or circumstances and was reasonable, rather than 'whimsical.'" *Meredith Corp v City of Flint*, 256 Mich App 703, 717 (2003). Here, the Department provided thorough exemption logs setting forth the justification for certain identified instances of nondisclosure and AAGs Manning and Bock have provided particularized justifications with respect to each category of records that were not disclosed. (See generally Exs 8–9.)

Put simply, these declarations and the Department's exemption logs demonstrate that its decision was based on the consideration of principles and was not whimsical or freakish. *Williams*, 88 Mich App at 201; *Meredith Corp*, 256 Mich App at 717. As such, this Court should deny Plaintiff's request for punitive damages.

RELIEF REQUESTED

For the reasons stated above, Defendant Michigan Department of Attorney General respectfully requests that this Court enter an order granting the instant motion and dismissing Plaintiff's complaint.

Respectfully submitted,

/s/ *Adam R. de Bear*
Adam R. de Bear (P80242)
Assistant Attorney General
Attorney for Defendants
State Operations Division
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Dated: November 30, 2021

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

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DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 1

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

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DECLARATION OF CHRISTY WENDLING-RICHARDS

I, Christy Wendling Richards, state as follows:

1. If sworn as a witness, I can testify competently and with personal knowledge to the facts contained within this declaration.

2. I am employed by the Michigan Department of Attorney General as a departmental analyst, and I serve as the Department's FOIA coordinator. In my experience, the Department receives approximately 550 to 600 FOIA requests each

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year. Since 2019, the Department has received approximately 28 FOIA requests from Energy Policy Advocates.

3. As required under MCL 15.234(4), MSP has adopted procedures and guidelines for assessing fees, and those guidelines provide that the Department may charge a fee for the processing of a FOIA request "only if the failure to charge a fee would result in unreasonably high costs to the Department because of the nature of the request in the particular instance, and the Department specifically identifies the nature of these unreasonably high costs." Those procedures and guidelines also provide that "[f]ees will be uniform and not dependent upon the identity of the requesting person." The Department's FOIA procedures and guidelines are available at the following website address: https://www.michigan.gov/ag/0,4534,7-359--356080--,00.html.

4. Additionally, the Department's procedures and guidelines state the following: "If the search, retrieval, examination, review, and separation and deletion of exempt from nonexempt material will take more than one hour, a fee will be charged in accordance with this procedure pursuant to section 4 of the FOIA, MCL 15.234."

5. In order to determine the extent of responsive records the Department may have, I provide a fillable FOIA response sheet to each of the Department's divisions that is likely to have responsive records. A copy of a FOIA response sheet is attached as exhibit 1.

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6. With respect to Plaintiff's May 1, 2020 FOIA request which sought "any common interest agreement entered into by the Department of the Attorney General at any time in 2020[,]" I sent a response sheet to each of the Department's divisions as the request itself was broad in nature and potentially applicable to the entire Department.

7. After receiving the responses from each of the divisions, several of which indicated that they possessed records responsive to Plaintiff's FOIA request, it was determined that the search and retrieval of responsive records would take approximately 4 hours, that approximately 11.75 hours by a non-attorney to review the responsive records and separate exempt from non-exempt material, and approximately 4.25 hours by an attorney to review the responsive records and separate exempt from non-exempt material. These numbers resulted in a total fee estimate of $565.56 with a required good faith deposit of $282.78. A copy of the Department's written notice and detailed fee-itemization is attached as Exhibit 2.

8. In the Department's May 26, 2020 written notice, it was explained to Plaintiff that "[f]ailure to charge would result in an unreasonably high cost to the Department in this particular instance because employees must be taken away from pending work to process the large number of documents and expend additional time to complete regularly assigned Departmental work." See Exhibit 2. Further, it should be noted that, as the Department is responsible for representing the state and its departments and officers in legal actions and administrative proceedings, the regularly assigned Departmental work is frequently time sensitive.

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9. Plaintiff ultimately paid the deposit, and the Department proceeded with processing the request. On June 16, 2020, the Department completed its review of Plaintiff's May 1, 2020 FOIA request and informed Plaintiff that upon receipt of a $119.14 balance (approximately $160 less than the originally estimated amount), copies of the non-exempt records would be provided. And after receiving payment of the balance, the Department provided Plaintiff with the responsive, non-exempt records on August 3, 2020.

10. The initial fee estimate referenced above was the result of the labor the divisions with responsive records estimated would be necessary to process the requests, and the final fee charged to Plaintiff was the result of the labor associated with the processing of its May 1, 2020 request. Contrary to Plaintiff's allegation in its complaint, neither the initial fee estimate nor the final fee charge were intended as a penalty or as a barrier to accessing the records; instead, both amounts were the result of the Department complying with MCL 15.234 and its own FOIA procedures and guidelines.

11. Declarant says nothing further.

I declare under the penalties of perjury that this declaration has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

/s/ Christy Wendling-Richards
Christy Wendling-Richards
FOIA Coordinator
Mich Dep't of Attorney General

Dated: November 28, 2021

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ENERGY POLICY ADVOCATES V

Michigan Department of Attorney General

FOIA Response Sheet Guidance [rev. 9-27-19]

Introduction

This guidance document and accompanying FOIA response sheet have been developed to assist the Department process FOIA requests. The Department is piloting the use of the response sheet for 6 months, after which it will be determined whether to adopt this process permanently, adopt it with modifications, or abandon it. Suggestions for improvement are encouraged. Submit suggestions to the FOIA Coordinator.

Background

The FOIA response sheet is to help document how a FOIA request is processed. It will assist the Department in determining the validity of FOIA appeals and in defending against FOIA litigation. It will also help staff meet legal requirements and utilize best practices for data collection. This supports the public policy of transparency in government operations, while encouraging awareness of data security and privacy concerns, as well as client confidentiality and professional responsibilities.

It is recognized that some Divisions routinely receive requests for the same or similar data, and that some requests are so simple or narrow that documentation is neither necessary nor valuable. If you think a situation like this applies to a particular FOIA request, Division Chiefs may contact the FOIA Coordinator to seek an exemption from the use of this form.

The word "**data**" in this form includes electronically stored information. "**Data**" also includes paper documents, to the extent that only a paper document exists (and not an electronic document), or that a responsive paper document constitutes a record separate and apart from the electronic version. For example, a paper document with handwritten notes on the margin is a separate record from the electronic version. Likewise, a manually signed copy of a contract is separate from the native file (in Microsoft Word).

FOIA requires a "**reasonable**" inquiry into data that satisfies the FOIA request. FOIA case law has determined that a public body must be prepared to offer detailed affidavits to establish the adequacy of the search for responsive documents. The FOIA response sheet is not intended to enlarge the Department's legal requirements under FOIA.

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How to Complete the FOIA Response Sheet

The form is intended to harmonize with the FOIA Internal Operation Procedure stored at S:\COMMON\All Department Share\FOIA IOP\ FOIA IOP revised 7-3-19.

1. **FOIA Coordinator** fills out section A and emails it in Microsoft Word format to appropriate FOIA Liaisons, along with a copy of the underlying FOIA request. Upon receipt of FOIA request, please advise the FOIA Coordinator immediately if you believe other divisions or business units may have responsive material.

2. **FOIA Liaison** fills out section C (and the search parameters in section B, if applicable) and emails it in Microsoft Word format to appropriate staff members.

    a. The FOIA Liaison may need to consult with management and others to ascertain appropriate custodians and search terms.

    b. The FOIA Liaison must specify to staff members whether we are in the estimate phase or collection phase.

    c. The FOIA Liaison must sign section E of the response sheet and include it in the bundle of information sent to the FOIA Coordinator.

3. **Staff** fill out section D of the form as applicable, signs section E, and emails the response sheet as a PDF to their FOIA Liaison. **Note**:

    a. If we are in the labor estimate phase, skip the data collection phase unless you can collect and redact responsive data in 10 minutes or less.

    b. If we are in the data collection phase, staff members must complete the data collection and exemption sections and forward the signed form and responsive data to the FOIA Liaison. If redactions are required, the staff member must also identify the exemptions and submit both a clean and redacted version of the responsive data to the FOIA Liaison.

    c. Staff members, including the FOIA Liaison, must also include with their response a copy of all data documenting decision-making and approach used to estimate labor and collect data (e.g., internal emails discussing where to look, who to send the form to, and what search parameters to use).

4. **FOIA Liaison** collects all staff forms, responsive data (if in the collection phase), and all data documenting decision-making around the FOIA request

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and forwards the information as attachments to the FOIA Coordinator's notification email.

5. **FOIA Coordinator** handles the FOIA request from there in accordance with the FOIA IOP and direction from management.

6. **About retention**. The FOIA Coordinator is the Department's records custodian for each FOIA file. The FOIA Coordinator will save forms, responsive data, and internal staff correspondence about the FOIA matter in Legal Files. The latter includes internal emails exchanged between staff members on how to handle the FOIA request at issue. Thus, Divisions and business units must include as part of their response to the FOIA Coordinator a separate bundle of emails and other communications relative to the handling of the request. In addition, if the Department denies a FOIA request in whole or in part, the Department will preserve the data at issue for one year from the date of the written notice of denial to the FOIA requester, or as otherwise required by the FOIA Coordinator.

7. **Communications with FOIA requester**. All communications with the FOIA requester must be performed by the FOIA Coordinator. Staff members should not communicate with FOIA requesters.

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Michigan Department of Attorney General
FOIA Response Sheet [rev. 9-11-19]

A. General Information. Section A is completed by the FOIA Coordinator.
FOIA requester name:
AG#:
Date FOIA request rec'd by DAG:
Date FOIA notice due:
Brief description of data sought in FOIA request:

The business units below were sent this form and accompanying FOIA request:

	Division/Business Unit	FOIA Liaison	Division Chief or Director	Bureau Chief or Other
☐	AGED	Bethany McCune	Donald McGehee	Joseph Potchen
☐	Civil Rights	Diana Hanks	Ron Robinson	Ron Robinson
☐	CLEE	Lisa Albro	Heather Meingast	Ron Robinson
☐	Communications	Courtney Covington	Kelly Rossman-McKinney	Kelly Keenan
☐	Consumer Protection	Rotation	Chad Canfield	Joseph Potchen
☐	Corporate Oversight	Mary Gee	Joseph Potchen	Joseph Potchen
☐	Criminal	Bryant Osikowicz	David Tanay	Veneshia Cezil
☐	Criminal Appellate	Andrea Christensen-Brown	David Tanay	Veneshia Cezil
☐	CYS	Clarisse Ramey	Veneshia Cezil	Veneshia Cezil
☐	ENRA	Kelly Schumaker	Peter Manning	Peter Manning
☐	Executive (AG, Chief Legal Counsel, Deputy AG, Chief of Operations)	Amy Stafford	N/A	Kelly Keenan Christina Grossi
☐	Finance	Sara Haase	Molly Jason	Ray Howd
☐	Financial Crimes	Kate Tooman	Scott Teter	Veneshia Cezil
☐	Fiscal Mgt.		James Selleck	Christina Grossi
☐	Health Care Fraud	Trinidad Pehlivonoglu	Jason Evans	Joseph Potchen
☐	HEFS	Melissa Jenson	Ray Howd	Ray Howd
☐	Human Resources	Julie Campbell	Mary Beth Seppala	Christina Grossi
☐	Labor	Susan Bannister	Debbie Taylor	Ron Robinson

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☐	Legislative Affairs	vacant	vacant	Kelly Keenan
☐	Licensing & Reg	Timothy Erickson	Michelle Brya	Joseph Potchen
☐	MDOC	Wendy Todd	Lisa Geminick	Ray Howd
☐	Opinions Review Board	Jessie Kanady	Josh Booth	Kelly Keenan
☐	PACC	Dianna Collins	Cheri Bruinsma	Veneshia Cezil
☐	Public Administration	Renee Bartlett	Kathryn Barron	Peter Manning
☐	Public Service	Pam Pung	Steven Hughey	Joseph Potchen
☐	Revenue & Tax	Kim Wilcox	Brad Morton	Ray Howd
☐	SCFRA & Collections	Heather Donald	Margaret Bartindale	Ron Robinson
☐	Solicitor General	Holly Gustafson Pier King-Piepenbrok	Fadwa Hammoud	Kelly Keenan
☐	Special Litigation	Amanda Churchill	Michael Moody	Peter Manning
☐	State Operations	Shelene Fasnaugh	Jessica McGivney	Ray Howd
☐	Transportation	Kathleen Gleeson Mike Dittenber		Ray Howd

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B. Search Parameters. Section B is completed by the FOIA Coordinator or FOIA Liaison as appropriate.

Search parameters are (check all that apply):

☐ Expressly stated in the FOIA request. **Note**: If this box is checked, the FOIA Coordinator inserts the remaining information in this section B.

☐ Determined by the FOIA Coordinator. **Note**: If this box is checked, the FOIA Coordinator inserts the remaining information in this section B.

☐ To be determined at the Division or business unit level. **Note**: If this box is checked, the FOIA Liaison inserts the remaining information in section B.

Date restrictions: _____ to _____

Search terms and connectors, and other parameters (e.g., searches restricted to a specific custodian or file):

Data sources (check as applicable):

☐ H drive
☐ S drive
☐ C drive (a user's local computer storage)
☐ Computer desktop
☐ AG SharePoint
☐ Legal Files
☐ Outlook
☐ Removable media (e.g., flash drive, external hard drive, CD, DVD)
☐ Software system (e.g., Relativity, Westlaw)
☐ DTMB-Records Center
☐ Onsite physical storage (in a Division's file room or office)
☐ Other (identify) _____

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C. FOIA Liaison Response. Section C is completed by the FOIA Liaison.

1. FOIA Liaison name:

2. Division or business unit name: Choose a Division

3. Check this box if you think a Division or business unit not included in section A above may have records responsive to this FOIA request. ☐

4. If you checked the above box, state the Division name or business unit here: _____

   Note: If you checked the box, notify the FOIA Coordinator about this as soon as possible.

5. I sent the following staff members in my Division or business unit this form and the FOIA request:

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D. Staff Response. Section D is completed by a person asked by the FOIA Coordinator or their FOIA Liaison to search or review their records for potentially responsive data. FOIA Liaison or FOIA Coordinator must instruct staff whether we are in the labor estimate or data collection phase.

Labor estimate phase

1. I've conducted my search in accordance with section B above.

   ☐ Yes
   ☐ No. If you check no, state why here:

   ☐ Not applicable. If you check N/A, state why here:

2. Date initial search conducted (to prepare labor estimate):

3. I believe additional or different search terms from that specified in section B above are necessary to conduct a reasonable search for data responsive to this FOIA request. Only check "not applicable" if search parameters were not specified. If you answer yes, contact your FOIA Liaison as soon as possible.

   ☐ Yes ☐ No ☐ Not applicable

4. In order to search for and retrieve responsive data; review and examine any responsive data; and separate exempt from non-exempt material, I **estimate** that it will take me _____ total hours and that _____ of those hours is work that can only be performed by an attorney. After any required payments are received, I estimate that it will take me _____ business days to produce the requested data.

Note: If the time estimate is 10 minutes or less, you must collect the responsive data (if any), complete the exemptions section below, then forward the signed response sheet and responsive data to your FOIA Liaison. If the time estimate is more than 10 minutes, don't collect data, skip the data collection section below, and forward the signed response sheet to your FOIA Liaison.

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Data collection phase (only complete if instructed by the FOIA Coordinator or FOIA Liaison)

I've completed my search for data responsive to the FOIA request and:

☐ No, I don't have data responsive to the FOIA request. If this box is checked, forward this signed response sheet to your FOIA Liaison.

☐ Yes, I have data responsive to the FOIA request. If this box is checked, go to the Exemptions section below.

Exemptions

If you answered yes to the prior section—that you have data responsive to the FOIA request—check the appropriate box below:

☐ No FOIA exemptions apply to the data
☐ The following exemptions apply to the data: [provide statutory citations below]

Note: Staff members are responsible for ascertaining applicable exemptions. The main list of FOIA exemptions is found at MCL 15.243. However, client agencies often have their own FOIA exemptions under separate statutes, e.g., the Management & Budget Act at MCL 18.1261 exempts certain bid materials prior to contract award as well as vendor proprietary data, and the Public Employee Retirement System Investment Act at MCL 38.1140l exempts financial and proprietary portfolio information.

Common FOIA exemptions

- Personal information if disclosure constitutes unwarranted invasion of person's privacy, MCL 15.243(1)(a)
- Attorney work product, MCL 15.243(1)(h)
- Attorney-client privilege, MCL 15.243(1)(g)
- Deliberative process, MCL 15.243(1)(m)

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Under cover of this form, I am sending to my FOIA Liaison all the data I have responsive to the FOIA request and state (check one box):

☐ The data is not redacted
☐ The data has redactions, and I've included both clean and redacted versions of it.

Hint: When transmitting Outlook data to your FOIA Liaison, render the emails in PDF format. When transmitting data stored elsewhere, create a zip file of your responsive data. To create a zip file, select the records you want to share, right click and select "send to," then "compressed (zipped) folder," then email the zip file.

Additional comments (optional):

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E. Certification. Section E is completed by (1) the FOIA Liaison and (2) all staff members asked to search or collect records for potentially responsive data.

Certification

I reviewed the FOIA request at issue, and state that the information I provided in this form is correct to the best of my knowledge, information, and belief:

_____

Type employee name here

/s/ Type first and last name here

Notes:

Staff: Upon completion, render this form in PDF and email it your FOIA Liaison. If in the labor estimate phase, include responsive data if you can collect and redact it in 10 minutes or less. If in the data collection phase, include clean and redacted versions of the responsive data. Include internal communications on the handling of the FOIA request to the extent your FOIA Liaison is not on the messaging.

FOIA Liaisons: Upon completion, render this form in PDF and email it to the FOIA Coordinator. Also attach: (1) all internal communications on the handling of the FOIA request and (2) responsive data (both clean and redacted).

LEGAL HOLD REMINDER: Data sought by a FOIA requester is automatically on legal hold. This means, even if you could have disposed of the data in compliance with the applicable retention and disposal schedule, the data must be retained until otherwise advised by the FOIA Coordinator. Contact the FOIA Coordinator with questions.

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

May 26, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
matthewdhardin@gmail.com

Dear Mr. Hardin:

This notice responds to your May 1, 2020 emailed letter (copy attached), received by the Department of Attorney General (Department) on May 4, 2020, requesting information, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, that you describe as, "any common interest agreement entered into by the Department of the Attorney General at any time in 2020."

A statutorily permitted extension of time to respond was taken through May 26, 2020.

Your request is granted as to any nonexempt records in the Department's possession that fall within the scope of your request.

Section 4(4) of the FOIA, MCL 15.234(4), provides that a public body must provide a detailed itemization that clearly lists and explains the allowable charges, where applicable, for the necessary copying of a public record for inspection; actual mailing costs; actual incremental cost of duplication or publication, including labor; and the cost of search, examination, review, and the separation and deletion of any exempt information from nonexempt information, which compose the total fee used for estimating and charging purposes.

The Department has determined that a voluminous amount of records falls within the scope of your request. To limit the processing fee, the Department is charging at the hourly rate of the lowest paid staff persons capable of searching for and retrieving responsive records, reviewing and examining the records, and separating exempt and nonexempt material, if applicable.

If you would like to discuss whether the request can be refined to further lower the costs and shorten the processing period, please contact the undersigned in writing at this time.

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To commence the processing of the request, under section 4(8) of the FOIA, MCL 15.234(8), the Department requires a one-half good faith deposit of $282.78 based on an estimated total cost of $565.56. Failure to charge would result in an unreasonably high cost to the Department in this particular instance because employees must be taken away from pending work to process the large number of documents and expend additional time to complete regularly assigned Departmental work. Please refer to the attached Detailed Itemization Fee Form for a breakdown of the fees assessed.

As set forth under section 4(14) of the FOIA, MCL 15.234(14), if a fee appeal has not been filed under section 10a of the FOIA, MCL 15.240a, the Department must receive the required deposit within 45 days after your statutorily-determined receipt of this notice, which is July 13, 2020; otherwise, the FOIA request will be considered abandoned and the Department will not be required to fulfill the request.

After receipt of the $282.78 deposit check, made payable to the State of Michigan and sent to the FOIA Coordinator, Department of Attorney General, P.O. Box 30754, Lansing, MI 48909, the Department will complete the processing of the request within an estimated 15 business days. Section 4(8) of the FOIA, MCL 15.234(8), provides that the time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate, and provide the public records in a manner based on this state's public policy set forth in section 1(2) of the FOIA, MCL 15.231(2), and the nature of the request in the particular instance.

The Department will notify you in writing of the balance due, the statutory basis for exemptions, if any, and the statutory remedial rights, if applicable. After receipt of the fee balance, copies of the records will be provided.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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20-000098-MZ
ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
Attorneys for Plaintiff
212 East Cesar E. Chavez Avenue
Lansing, MI 48906
(517) 318-3053
zlarsen@clarkhill.com

Adam R. de Bear (P80242)
Assistant Attorneys General
Michigan Department of Attorney General
Attorney for Defendant
P.O. Box 30754
Lansing, MI 48909
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deBearA@michigan.gov

DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 2

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ENERGY POLICY ADVOCATES V

DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

January 17, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
matthewdhardin@gmail.com

Dear Mr. Hardin:

This notice supplements the Department of Attorney General's (Department) November 21, December 9, and 30, 2019, and January 10, 2020 notices issued in response to your November 13, 2019 request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. (Copies of the FOIA request and the Department's notices are attached.)

As part of its January 10, 2020 notice, the Department informed you that it required an extension of time through January 17, 2020 to complete processing item No. 5 of your FOIA request for information that you described as, "[a]ny common interest agreement, contingency fee or other fee agreement, secondment agreement, and/or retainer agreement and/or engagement agreements, entered into by your Office at any time in 2019." (Emphasis omitted.)

This part of your request is granted in part and denied in part.

As to the partial grant, to the best of the Department's knowledge, information, and belief, the enclosed copied records represent the only nonexempt records, in the possession of the Department's Environment, Natural Resources & Agriculture Division, that are responsive to the above-quoted description of records.

As to the partial denial, those parts of the enclosed records containing attorney work product have been redacted under section 13(1)(h) of the FOIA, MCL 15.243(1)(h), which provides for the nondisclosure of "[i]nformation or records subject to . . . privilege recognized by statute or court rule." The privilege that is based on the attorney work product doctrine is recognized under Michigan Court Rule 2.302(B)(3)(a); see also, *Messenger v Ingham County Prosecutor*, 232 Mich App 633 (1998).

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As to the partial denial of your request, under section 10 of the FOIA, MCL 15.240, the Department is obligated to inform you that you may do the following:

1) Appeal this decision in writing to the Attorney General, Department of Attorney General, 525 W. Ottawa, P.O. Box 30754, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the partial denial should be reversed. The head of the Department or her designee must respond to your appeal within 10 business days after its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

2) Commence an action in the Court of Claims within 180 days after the date of the final determination to partially deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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20-000098-MZ
ENERGY POLICY ADVOCATES V

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
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212 East Cesar E. Chavez Avenue
Lansing, MI 48906
(517) 318-3053
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Adam R. de Bear (P80242)
Assistant Attorneys General
Michigan Department of Attorney General
Attorney for Defendant
P.O. Box 30754
Lansing, MI 48909
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deBearA@michigan.gov

DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 3

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

January 15, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
matthewdhardin@gmail.com

Dear Mr. Hardin:

This notice responds to your January 7, 2020 emailed letter (copy attached), received by the Department of Attorney General (Department) on January 8, 2020, requesting information, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, that you describe as, "all bills and/or invoices, including e.g., time sheets, submitted to (or through) Susan Bannister and/or Kelly Keenan by Stanley 'Skip' Pruss from March 1, 2019 through the date you process this request, inclusive [ ] we request that any production of those records be provided on a rolling basis."

Your request is granted in part and denied in part.

As to the partial grant, to the best of the Department's knowledge, information, and belief, the enclosed copied records represent the only nonexempt records in the Department's possession that fall within the scope of your request.

Because the processing of the request took minimal time and involved duplicating a limited number of pages, there is no fee.

As to the partial denial, those parts of the enclosed records composed of personal information have been redacted under section 13(1)(a) of the FOIA, MCL 15.243(1)(a), which provides for the nondisclosure of "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."

In this particular instance, an individual's address has been redacted.

In raising this exemption, the Department relies on *Mager v Dep't of State Police*, 460 Mich 134, 145-146; 595 NW2d 142 (1999), where the Michigan Supreme Court noted that "[the core] purpose [of the FOIA] is not fostered by disclosure of

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information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct."

Further as to the partial denial, parts of the enclosed records have been redacted under section 13(1)(h) of the FOIA, MCL 15.243(1)(h), which provides for the nondisclosure of "[i]nformation or records subject to . . . privilege recognized by statute or court rule." The privilege that is based on the attorney work product doctrine is recognized under Michigan Court Rule 2.302(B)(3)(a) and discussed in the FOIA case, *Messenger v Ingham County Prosecutor*, 232 Mich App 633 (1998).

Finally, as to your request that the Department produce records under what you call, "a rolling basis," please be informed that the type of record you have requested does not qualify for a subscription under section 3(1) of the FOIA, MCL 15.233(1), which provides that, "[a] person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis."

Invoices that Special Assistant Attorneys General prepare for their contracted legal services are not created by the Department nor do the attorneys provide invoices to the Department on a steady or regular basis or otherwise in accordance with a predesignated schedule. You may wish to make periodic FOIA requests for any such records that may be in the Department's possession at the time of the requests.

As to the partial denial of your request, under section 10 of the FOIA, MCL 15.240, the Department is obligated to inform you that you may do the following:

1) Appeal this decision in writing to the Attorney General, Department of Attorney General, 525 W. Ottawa, P.O. Box 30754, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the partial denial should be reversed. The head of the Department or her designee must respond to your appeal within 10 business days after its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

2) Commence an action in the Court of Claims within 180 days after the date of the final determination to partially deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

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The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
Attorneys for Plaintiff
212 East Cesar E. Chavez Avenue
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(517) 318-3053
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Adam R. de Bear (P80242)
Assistant Attorneys General
Michigan Department of Attorney General
Attorney for Defendant
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
deBearA@michigan.gov

DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 4

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P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

February 11, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
matthewdhardin@gmail.com

Dear Mr. Hardin:

This notice responds to your January 27, 2020 emailed letter, received by the Department of Attorney General (Department) on January 28, 2020, which you identify as an "appeal" of the Department's January 15, 2020 written notice, which partially granted and partially denied your request for records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. (Copies of your FOIA request and appeal, and the Department's January 15, 2020 written notice are attached.)

Your letter states that you are appealing, "the Department of Attorney General's (DAG) withholding of certain records responsive to EPA's January 7, 2020 Freedom of Information Act (FOIA) request."

You further state as follows:

DAG's response provides no explanation for withholding these participants other than the claim that they are somehow attorney work product. There is no claim that these are confidential informants, whose identities are protected by MCL 15.243(1)(b)(iv). Nor does the response assert any of the other twenty-six (26) statutory exemptions listed in MCL 15.243. DAG's prior responses to requests for correspondence did not withheld the identities of parties to that correspondence. Any attempt to do so would be contrary to the purpose and language of the FOIA just as it is here.

The public interest in knowing what it is paying for, particularly in an unusual arrangement such as this, is difficult to overstate. Public records clearly demonstrate that Mr. Pruss is an active correspondent with the executive director of the New York University School of Law's State Energy and Environmental Impact Center and has corresponded at length about placing a privately hired attorney in DAG. The fact that the State Impact Center is an entity funded by a presidential candidate certainly heightens

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ENERGY POLICY ADVOCATES V
DANA NESSEL

public interest in this arrangement. If, as correspondence suggests, the public is paying under this arrangement for a conduit for activists into DAG, the public is entitled to know that. DAG must provide unreacted copies of these records.

After a review of the redacted documents, the Department has decided to partially uphold and partially reverse the initial partial denial. As to that part of your appeal disputing the adequacy of the explanation provided in support of the attorney work product exemption, the matter is being remanded to the FOIA coordinator for further review and response. You will receive a written response from the FOIA coordinator within five business days.

In the meantime, because this notice partially upholds the initial partial denial, under section 10(1)(b) of the FOIA, MCL 15.240(1)(b), the Department is obligated to inform you that you may file an action in the Court of Claims within 180 days after the date of the final determination to deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Jessica McGivney/SE

Jessica McGivney
Division Chief
Department of Attorney General
517-335-7573

Encs.

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20-000098-MZ
ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
Attorneys for Plaintiff
212 East Cesar E. Chavez Avenue
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Adam R. de Bear (P80242)
Assistant Attorneys General
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DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 5

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20-000098-MZ
ENERGY POLICY ADVOCATES V

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

March 12, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
MatthewDHardin@protonmail.com

Dear Mr. Hardin:

This notice supplements the Department of Attorney General's (Department) January 21, and February 20, 2020 notices issued in response to your January 10, 2020 request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* (Copies of the FOIA request and the Department's notices are attached.)

In its January 21, 2020 notice, the Department stated that it would complete the processing of the request after receiving the deposit and would notify you in writing of the balance due, the statutory basis for exemptions, if any, and the statutory remedial rights, if applicable.

The Department received your deposit in the amount of $446.42 and your request is granted in part and denied in part.

As to the partial grant, upon receipt of the $446.42 balance, by check payable to the State of Michigan and sent to the FOIA Coordinator, Department of Attorney General, P.O. Box 30754, Lansing, MI 48909, copies of the nonexempt records will be provided.

As to the partial denial, 414 emails between the Department and its client, the Department of Environment, Great Lakes, and Energy, and written communications between and among Department legal staff dated May 21, 2019 through January 10, 2020 are being withheld from public disclosure under section 13(1)(g) and (h) of the FOIA, MCL 15.243(1)(g) and (h), respectively, and are enumerated in a privilege log that will be provided.

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POLICY ADVOCATES V

The exemption under MCL 15.243(1)(g) provides for the nondisclosure of "[i]nformation or records subject to the attorney-client privilege." The exemption under MCL 15.243(1)(h) provides for the nondisclosure of "[i]nformation or records subject to [ ] privilege recognized by statute or court rule," including the privilege encompassed by the attorney work product doctrine. See Michigan Court Rule 2.302(B)(3)(a), and *Messenger v Ingham County Prosecutor*, 232 Mich App 633; 591 NW2d 393 (1998).

As to the partial denial of your request, under section 10 of the FOIA, MCL 15.240, the Department is obligated to inform you that you may do the following:

1) Appeal this decision in writing to the Attorney General, Department of Attorney General, 525 W. Ottawa, P.O. Box 30754, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the partial denial should be reversed. The head of the Department or her designee must respond to your appeal within 10 business days after its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

2) Commence an action in the Court of Claims within 180 days after the date of the final determination to partially deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

May 11, 2020

Matthew D. Hardin
Executive Director
Energy Policy Advocates
324 Logtrac Road
Stanardsville, VA 22973

Sent by email
MatthewDHardin@protonmail.com

Dear Mr. Hardin:

This notice responds to your April 17, 2020 email (copy attached), received by the Department of Attorney General (Department) on April 20, 2020, requesting information, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, that you describe as follows:

> [A]ll correspondence, and any accompanying information [ ] including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morrisseau, ii) Peter Manning, iii) Kelly Keenan, and/or iv) Neil Gordon, that b) includes in the subject line 'CO2 as a criteria pollutant', [sic] and is c) dated from October 1, 2019 through the date you process this request, inclusive.

A statutorily permitted extension of time to respond was taken through May 11, 2020.

Your request is denied for the following reasons:

As to that part of your request for what you describe as, "all correspondence, and any accompanying information [ ] including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morrisseau, ii) Peter Manning, [ ] and/or iv) Neil Gordon, that b) includes in the subject line 'CO2 as a criteria pollutant', [sic] and is c) dated from October 1, 2019 through the date you process this request, inclusive:"

Three October 7, 2019 emails between and among Department staff are withheld from public disclosure under section 13(1)(h) of the FOIA, MCL 15.243(1)(h), which provides for the nondisclosure of "[i]nformation or records subject to . . . privilege recognized by statute or court rule." Among the covered privileges, is that based on the attorney work product doctrine recognized under

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ADVOCATES V

Michigan Court Rule 2.302(B)(3)(a). See also, *Messenger v Ingham County Prosecutor*, 232 Mich App 633 (1998). In this instance, the aforementioned emails are composed of attorney work product. Please see the attached privilege log.

As to that part of your request for what you describe as, "all correspondence, and any accompanying information [ ] including also any attachments, a) sent to or from or copying (whether as cc: or bcc:) [ ] Kelly Keenan[ ] includes in the subject line 'CO2 as a criteria pollutant', [sic] and is c) dated from October 1, 2019 through the date you process this request, inclusive:"

After a search for records, to the best of the Department's knowledge, information, and belief, the Department does not possess records that are responsive to the immediate above-quoted description or by another description reasonably known to the Department.

As to the denial of your request, under section 10 of the FOIA, MCL 15.240, the Department is obligated to inform you that you may do the following:

1) Appeal this decision in writing to the Attorney General, Department of Attorney General, 525 W. Ottawa, P.O. Box 30754, Lansing, MI 48909. The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the denial should be reversed. The head of the Department or her designee must respond to your appeal within 10 business days after its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

2) Commence an action in the Court of Claims within 180 days after the date of the final determination to deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

The Department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/foia-ag.

Sincerely,

Christy Wendling-Richards

Christy Wendling-Richards
FOIA Coordinator
Department of Attorney General
517-335-7573

Encs.

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
Attorneys for Plaintiff
212 East Cesar E. Chavez Avenue
Lansing, MI 48906
(517) 318-3053
zlarsen@clarkhill.com

Adam R. de Bear (P80242)
Assistant Attorneys General
Michigan Department of Attorney General
Attorney for Defendant
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Lansing, MI 48909
(517) 335-7573
deBearA@michigan.gov

DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 7

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
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212 East Cesar E. Chavez Avenue
Lansing, MI 48906
(517) 318-3053
zlarsen@clarkhill.com

Adam R. de Bear (P80242)
Thomas Quasarano (P27982)
Assistant Attorneys General
Michigan Department of Attorney General
Attorneys for Defendant
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
deBearA@michigan.gov

DECLARATION OF DANIEL P. BOCK

I, Daniel P. Bock, state as follows:

1. If sworn as a witness, I can testify competently and with personal knowledge to the facts contained within this declaration.

2. Currently, as well as during the time period in which the FOIA requests at issue in this lawsuit were received, I work as an assistant attorney general in the Michigan Department of Attorney General. More specifically, I work

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as managing attorney in the Department's Environment, Natural Resources, and Agriculture (or "ENRA") division.

3. Within the ENRA division, I am the section head for the Natural Resources and Agriculture section, and attorneys within the Natural Resources and Agriculture section have responsibilities which include, for example, participating in litigation with other state offices of attorneys general and local governmental units (collectively, "governmental agencies"). When the Department decides to participate in such litigation, it often enters into agreements with the other governmental agencies.

4. Because regulations from the United States Environmental Protection Agency and other federal agencies necessarily affect the environmental concerns of multiple states and municipalities, litigation challenging such regulations, as well as discussions regarding potential legal challenges, is commonplace. And litigation where multiple governmental agencies challenge such regulations is accordingly commonplace as well.

5. Considering that multiple governmental agencies are involved in these litigation efforts, it is important for the involved agencies to establish agreements covering the exchange and sharing of confidential information to protect against the waiver of the attorney client privilege and the attorney work product doctrine where applicable.

6. To adequately protect against waiver of these privileges, the governmental agencies participating in the litigation enter into a common interest

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ENERGY POLICY ADVOCATES V
DANA NESSEL
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agreement which sets forth, among other items, the following: The purpose of the agreement (i.e., the nature and scope of the ongoing or potential litigation); the common interest of each signatory that is being advanced through the ongoing or potential litigation; and a promise of confidentiality (i.e., a promise not to share confidential information to entities or individuals that are not signatories to the particular agreement).

7. With respect to the underlying FOIA requests at issue in this case, I was involved in reviewing records responsive to Plaintiff's November 13, 2019 request which sought, among other things, "[*a*]*ny* common interest agreement . . . entered into by [the Department] at any time in 2019." Specifically, I reviewed the responsive records within the ENRA Division's possession, i.e., the common interest agreements entered into by the Department during 2019, for applicability of the FOIA's exemptions, and determined that portions of the agreements were exempt from disclosure under the attorney work product doctrine as established by both case law and court rule.

8. With respect to the portions of the common interest agreements I determined to be exempt from disclosure in light of the work product doctrine, the portions of the agreements that set forth future or potential litigation or administrative actions were redacted using Adobe software and not disclosed to Plaintiff.

9. This withheld information, i.e., the information identifying the areas in which the signatories are planning or contemplating future litigation or

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ENERGY POLICY ADVOCATES V
DANA NESSEL

administrative action, is consistent with the description of "working papers, memoranda or similar materials were prepared in anticipation of litigation" that has been identified by our courts as being protected from disclosure under the work product doctrine. Furthermore, not only were the common interest agreements themselves prepared in anticipation of litigation or administrative actions, but the withheld portions of those agreements identify particular rules, regulatory definitions, and agency actions to which the signatories were anticipating bring legal challenges and they also identify the likely entities that would be the subject of the future challenge.

10. It was determined that complete disclosure of these agreements would be violative of the signatories' agreements to maintain confidentiality of privileged material (a necessary component of the common interest privilege), frustrate the signatories' efforts to challenge the various regulatory decisions that the respective governmental agencies determined were potentially harmful to the environment, and be contrary to the privacy and freedom from unwarranted intrusion within which attorneys are permitted to work when in anticipation of litigation. More specifically, early and public disclosure of certain portions of the agreements which identified planned or potential legal challenges would enable the federal agencies responsible for the subject regulatory actions to frustrate the signatories' efforts with respect to the potential legal challenges.

11. However, when the planned actions referenced in the respective agreements had taken place and were no longer confidential (e.g., when the

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lawsuits were filed or the administrative actions were initiated), the Department subsequently disclosed unredacted or lesser redacted versions in the interest of this state's public policy set forth in the FOIA.

12. Additionally, during the course of the instant litigation and in coordination with defense counsel, I provided explanations justifying the partial withholding of information in the agreements that were responsive to Plaintiff's November 13, 2019 FOIA request. Each explanation identifies litigation, the "preparation of litigation," or "pre-litigation efforts" as the basis for nondisclosure and further identifies the federal statute and/or relevant federal rules that are at issue in those efforts. A copy of the exemption log within which these explanations are contained is attached as exhibit 1.

13. Declarant says nothing further.

I declare under the penalties of perjury that this declaration has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

/s/ Daniel P. Bock
Daniel P. Bock
Assistant Attorney General
Mich Dep't of Attorney General

Dated: November 30, 2021

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Doc Number	Doc Type	Page Range in Pl's Ex K	Execution Date	Exemption	Basis for Exemption
215	Common Interest Agreement	pp 1-27	20-Oct-17	Attorney Work Product (MCL 15.243(1)(h)); Common Interest Privilege (MCL 15.243(1)(g) and (h))	A written document setting forth the agreement between multiple offices of attorney general (or general counsel for other governmental entities) for regarding the preparation of litigation and/or prelitigation efforts involving issues related to the federal Clean Air Act and the administrative rules promulgated thereunder.
216	Common Interest Agreement	pp 29-48	15-Aug-17	Attorney Work Product (MCL 15.243(1)(h)); Common Interest Privilege (MCL 15.243(1)(g) and (h))	A written document setting forth the agreement between multiple offices of attorney general (or general counsel for other governmental entities) regarding the preparation of litigation and/or prelitigation efforts involving issues related to the federal Clean Water Act and the administrative rules promulgated thereunder.
217	Common Interest Agreement	pp 50-61	7-Feb-19	Attorney Work Product (MCL 15.243(1)(h)); Common Interest	A written document setting forth the agreement between multiple offices of attorney general (or general counsel for other governmental entities) regarding the preparation of litigation and/or prelitigation efforts involving issues related to the National Environmental Policy
218	Common Interest Agreement	pp 73-105	2-Jan-19	Attorney Work Product (MCL 15.243(1)(h)); Common Interest Privilege (MCL 15.243(1)(g) and (h))	A written document setting forth the agreement between multiple offices of attorney general (or general counsel for other governmental entities) regarding the preparation of litigation and/or prelitigation efforts involving issues related to the federal Clean Air Act and the administrative rules promulgated thereunder.
219	Common Interest Agreement	pp 107-140	12-Dec-17	Attorney Work Product (MCL 15.243(1)(h)); Common Interest Privilege (MCL 15.243(1)(g) and (h))	A written document setting forth the agreement between multiple offices of attorney general (or general counsel for other governmental entities) regarding the preparation of litigation and/or prelitigation efforts involving issues related to the federal Clean Air Act and the administrative rules promulgated thereunder.
220	Common Interest Agreement	pp 142-158	27-Sep-17	Attorney Work Product (MCL 15.243(1)(h)); Common Interest Privilege (MCL 15.243(1)(g) and (h))	A written document setting forth the agreement between multiple offices of attorney general (or general counsel for other governmental entities) regarding the preparation of litigation and/or prelitigation efforts involving issues related to the federal Clean Air Act and the administrative rules promulgated thereunder.

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
Attorneys for Plaintiff
212 East Cesar E. Chavez Avenue
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Adam R. de Bear (P80242)
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Michigan Department of Attorney General
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DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 8

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
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Adam R. de Bear (P80242)
Thomas Quasarano (P27982)
Assistant Attorneys General
Michigan Department of Attorney General
Attorneys for Defendant
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
deBearA@michigan.gov

DECLARATION OF S. PETER MANNING

I, S. Peter Manning, state as follows:

1. If sworn as a witness, I can testify competently and with personal knowledge to the facts contained within this declaration.

2. I am an assistant attorney general employed by the Michigan Department of Attorney General. More specifically, I am one of the Department's two bureau chiefs and I oversee the operations of half of the Department's divisions including its Environment, Natural Resources, and Agriculture (or "ENRA")

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division. At the time of the FOIA requests at issue in this lawsuit, I was ENRA's division chief.

3. With respect to the underlying FOIA requests at issue in this case, I was involved in reviewing records (largely email records) responsive to several of Plaintiff's FOIA requests. In particular, attorneys in the Department's ENRA division and I reviewed the following records:

a. From Plaintiff's August 28 and 29, 2019 requests, attorneys in the Departments' ENRA division and I reviewed the records responsive to the following that are relevant to this lawsuit:

i. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bcc:) i) keenank@michigan.gov, ii) Peter Manning, and/or iii) Dana Nessel . . . that b) is also sent to or from or copying (again whether as cc: or bcc:) i) djh466@nyu.edu, ii) davidjhayesOl@gmail.com, iii) david.hayes@nyu.edu, iv) ek304l@nyu.edu, v) elizabeth.klein@nyu.edu, and/or vi) pruss@5lakesenergy.com, and is c) dated between January 2, 2019 and the date you process this request[.]"

ii. "[A]ll scheduling requests a) sent to your office . . . which also b) are from and/or mention anywhere i) David Hayes, ii) Elizabeth (Liz) Klein, iii) New York University, iv) the State Energy and Environment Impact Center, and/or v) Skip Pruss that are

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dated from June 15, 2019 through the date you process this request[.]"

iii. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) is also sent to or from or copying (again whether as cc: or bee:), i) djh466@nyu.edu, ii) davidjhayesOl@gmail.com, iii) david.hayes@nyu.edu, iv) ek304l@nyu.edu, v) elizabeth.klein.@nyu.edu, and/or vi) pruss@5lakesenergy.corn, and is c) dated between January 2, 2019 and the date you process this request[.]"

iv. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bcc:) Neil Gordon that b) includes bi-weekly, biweekly, michael.myers@oag.state.ny.us, and/ormichael.myers@ag.ny.gov anywhere in the email, and is c) dated between January 2, 2019 and the date you process this request[.]"

v. "[A]ll correspondence a) sent to or from or copying (whether as cc: or bee:) Neil Gordon that b) contains the following terms, "ethic" (in any use, be it ethics, ethical, or other) *and "Impact* Center", and is dated from May 1, 2019 through the date you process this request[.]"

b. From Plaintiff's January 7, 2020 FOIA request I reviewed the records responsive to the following that are relevant to this lawsuit: "[A]ll bills and/or invoices . . . submitted to . . . Susan Bannister and/or

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ENERGY POLICY ADVOCATES V

Kelly Keenan by Stanley "Skip" Pruss from March 1, 2019 through the date you process this request[.]"

c. From Plaintiff's January 10, 2020 FOIA request, attorneys in the Department's ENRA division and I reviewed the records responsive to the following that are relevant to this lawsuit:

i. "[A]ll correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) Kelly Keenan and/or Peter Manning that b) includes anywhere, whether sent to or from or copying (again whether as cc: or bcc:), or otherwise, a) "climate litigation", b) "climate change litigation" . . . and/or c) Exxon, and is c) dated from May 22, 2019 through the date you process this request[.]"

ii. "[A]ll correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) Peter Manning that b) includes anywhere, whether sent to or from or copying (again whether as cc: or bcc:), or otherwise, the word Hayes, whether freestanding or as part of an email address, and is c) dated from June 13, 2019 through the date you process this request[.]"

d. From Plaintiff's March 27, 2020 FOIA request, I reviewed the records responsive to the following that are relevant to this lawsuit:

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i. "[A]ll electronic correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morriseau and/or ii) Stanley "Skip" Pruss, that b) includes, anywhere . . . i) Bachmann, and/or ii) Goffman, and c) is dated from November 1, 2019 through the date you process this request[.]"

ii. "[A]ll electronic correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morris[s]eau and/or ii) Stanley "Skip" Pruss, that b) was sent from michael.myers@ag.ny.gov, and c) is dated from November 4, 2019 through November 8, 2019, inclusive and November 17, 2019[.]"

iii. "[A]ny invitation sent or received from michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call."

e. From Plaintiff's April 17, 2020 FOIA request, attorneys in the Department's ENRA division and I reviewed the records responsive to the following that are relevant to this lawsuit: "[A]ll correspondence, and any accompanying information . . . a) sent to or from or copying (whether as cc: or bcc:) i) Elizabeth Morrisseau, ii) Peter Manning, iii) Kelly Keenan, and/or iv) Neil Gordon, that b) includes in the subject

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line "CO2 as a criteria pollutant", and is c) dated from October 1, 2019 through the date you process this request[.]"

4. Most of the responsive records consisted of email communications. The records responsive to Plaintiff's January 7, 2020 request, which sought bills and invoices submitted by former special assistant attorney general (or "SAAG") Stanley Pruss were contained in .pdf files or word documents.

5. The responsive email communications that were exempted or partially exempted from disclosure can be separated into two categories: (1) communications between attorneys for the signatories to the common interest agreements discussed in Daniel Bock's declaration; and (2) communication between members of the Department, including, for example, the Attorney General and former Deputy Attorney General Kelly Keenan.

6. During the instant litigation and in coordination with defense counsel, I completed a second review of certain records falling within each of the above three categories that were identified by Plaintiff. During this second review, it was determined that certain records which were previously exempted from disclosure should be produced. And for those records which were not subsequently produced, exemption logs setting forth the applicable exemptions and the bases for those exemptions was provided to Plaintiff. A copy of those exemption logs is attached as exhibit 1.

7. With respect to the first category of exempted or partially exempted email communications, I determined that the attorney work product doctrine and

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the common interest privilege applied. In particular, these email communications were between the signatories to the various common interest agreements that are discussed in the Bock declaration. And in those communications, the attorneys shared potential litigation strategy and legal research, identified strengths and weaknesses of potential legal challenges, and coordinated works assignments relevant to the potential legal action relevant to the common interest agreement.

8. Further, because of the promises of confidentiality contained in the common interest agreements, even though the work product was exchanged between different offices of attorneys general, the email communications were still made with the expectation of confidentiality. In light of the above, the communications were consistent with my understanding of what is protected by the attorney work product doctrine and the common interest privilege; i.e., attorneys' conclusions, opinions, research, and legal theories made in anticipation of litigation or other legal action.

9. In addition to the communications that exchanged conclusions, opinions, research, and theories, the exempted records further contained communication in which attorneys from different offices of attorney general sought feedback on draft common interest agreements and transmitted finalized agreements. And for the same reasons discussed in the Bock declaration, nondisclosure of the entirety of such records is supported by the common interest privilege.

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10. With respect to the second category of exempted or partially exempted email communications, I determined that the attorney work product doctrine and the attorney-client communications applied.

11. For instances where the attorney work product doctrine applied, most communications related to anticipated litigation related to Line 5, discrepancies among ratepayers, Exxon Mobil, PFAS, and other environment and climate matters. In these communications, the Department's attorneys shared their thoughts, impressions, and legal opinions regarding potential litigation.

12. Additionally, for the instances where the attorney client privilege applied, the Department's attorneys were either providing legal advice to other state departments and agencies or to the Department's executive division which includes the Attorney General. One important aspect of the Department's attorneys' work is providing legal advice and research, both to other state departments and agencies that are represented by the attorney general and internally as well. And those communications where such advice or research was provided were withheld (either in full or in part depending on the context of the communication).

13. In addition to the attorney-client privilege and the attorney work product doctrine, the Department, as an affirmative defense, cited FOIA's deliberative process exemption as a basis for nondisclosure. This exemption applies to the second category of exempted records which consisted of internal communications that were advisory in nature and preliminary to final decisions, as

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are most communications protected by the attorney-client privilege and the attorney work product doctrine. Further, the Department's attorneys and other employees are expected to provide their candid and frank opinions and assessments when deliberating on a particular decision, and such candid and frank opinions are valuable to the Department. Public disclosure of such communications would have a chilling effect on the Department's employees to engage in open discussion. In other words, employees would be less likely to provide their honest assessments of various issues in writing, and the quality of preliminary staff input on departmental decision-making would suffer. For these reasons, the Departments' nondisclosure of such records is supported by the deliberative process exemption in addition to the attorney-client privilege and the attorney work product doctrine.

14. Finally, in addition to the email communications discussed above, I reviewed the invoices submitted by former special assistant attorney general Stanley Pruss that were responsive to Plaintiff's January 7, 2020 FOIA request. In February of 2020, lesser redacted copies were provided to Plaintiff after an administrative appeal that partially reversed the Department's final determination. With respect to those lesser redacted copies, the redacted information includes the particular areas of the law that Mr. Pruss researched at the direction of the attorney general, topics of attorney-client privileged discussions Mr. Pruss had with state officials, and areas of potential litigation; all information that would be protected under the attorney-client privilege or the attorney work product doctrine. On the other hand, information related to Mr. Pruss' hourly rate, the identities of

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those with Mr. Pruss conversed, and the nature of Mr. Pruss' work which did not reveal otherwise privileged information was disclosed without redaction.

15. Declarant says nothing further.

I declare under the penalties of perjury that this declaration has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

/s/ S. Peter Manning
S. Peter Manning
Assistant Attorney General
Mich Dep't of Attorney General

Dated: November 30, 2021

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ENERGY POLICY ADVOCATES V
DANA NESSEL

Doc Numb	Doc Type	Subject/Title	Date	Sender	Recipient(s)	Exemption	Basis of Exemption
29	Email	Re [External] Re Multistate AG Coordination Call	4/16/2019	Nels Taber, Pennsylvania DEP	Michael Myers, New York AG, et al	N/A	To be produced.
30	Email	Draft Common Interest Agreement/GHG Emissions Affirmative Litigation	6/17/2019	Michael Myers, New York AG	Aaron Love (NJ) <Aaron.Love@law.njoag.gov>; Aimee Thomson (PA AG) <athomson@attorneygeneral.gov>; Alison Hoffman (RI) <AHoffman@riag.ri.gov>; Amy Beatie (CO) <Amy.Beatie@coag.gov>; Amy Bircher (NC) <abircher@ncdoj.gov>; Andrea Baker <Andrea.Baker@maryland.gov>; Andy Goldberg <andy.goldberg@state.ma.us>; Ann Johnston (PA) <ajohnston@attorneygeneral.gov>; Anne Minard (NM) <aminard@nmag.gov>; Arsenio Mataka (CA) <Arsenio.Mataka@doj.ca.gov>; Asher Spiller <Aspiller@ncdoj.gov>; Aurora Janke <AuroraJ@ATG.WA.GOV>; Beth Mullin (DC)' <beth.mullin@dc.gov>; 'Bill F. Cooper (Hi)' <Bill.F.Cooper@hawaii.gov>; Bill Sherman -- WA AG's office <BillS5@ATG.WA.GOV>; Blake Thomas (NC) <bthomas@ncdoj.gov>; Bo Reiley <rreiley@state.pa.us>; Bobby Schena (PA DEP) <roschena@pa.gov>; Brian Caldwell (DC) <brian.caldwell@dc.gov>; Burianek, Lisa <Lisa.Burianek@ag.ny.gov>; Carrie Noteboom (CO) <Carrie.Noteboom@coag.gov>; Cheerful Catuano (WA AG) <CheerfulC@ATG.WA.GOV>; Chris Ryder (PA DEP) <chriryder@pa.gov>; Christopher Courchesne <christophe.courchesne@state.ma.us>; Costello, Morgan <Morgan.Costello@ag.ny.gov>; Dan Nubel (NV) <Dnubel@ag.nv.gov>; Daniel Rottenberg (IL) <DRottenberg@atg.state.il.us>; David Apy (NJ) <David.Apy@law.njoag.gov>; David Hoffman (DC) <David.Hoffmann@dc.gov>; 'David Steward (Ia)' <David.Steward@iowa.gov>; David Zaft (CA) <david.zaft@doj.ca.gov>; 'David Zonana (Ca)' <David.Zonana@doj.ca.gov>; Dennis Beck (CA) <Dennis.Beck@doj.ca.gov>; Dennis Ragen <dennis.ragen@doj.ca.gov>; Dirth, Eric <eric.dirth@ag.iowa.gov>; 'Elaine Meckenstock (Ca)' <Elaine.Meckenstock@doj.ca.gov>; Elizabeth Davis (PA DEP) <elidavis@pa.gov>; Morrisseau, Elizabeth (AG) <MorrisseauE@michigan.gov>; Emily Nelson (WA)	Attorney Work Product (MCL 15.243(1)(h)); Common Interest Privilege (MCL 15.243(1)(g) and (h));	Email soliciting feedback regarding draft common interest regarding future greenhouse gas litigation.

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

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DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

EXHIBIT 9

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Doc Number	DocType	Subject Line	Date	Author	Recipients	Exemption	Basis for Exemption
230	Email	Re Arctic Refuge - CIA with signatures	3/5/2019	Peggy Bensinger, Maine AG	Aurora Janke, Maine AG, et al	Issues re Arctic Refuge Common Interest Agreement	Attorney Work Product, Common Interest Privilege
231	Email	Comments on the Coastal Plain Leasing Program	3/12/2019	Aurora Janke, Washington AG	Gregory Schultz, et al	Issues re Coastal Plain Leasing Program DEIS	Attorney Work Product, Common Interest Privilege
232	Email	Re PADEP submits letter to Army Corps regarding States Timeframe for	3/14/2019	Jesse Walk, Pennsylvania DEP	Aaron Love, NJ et al	Issues re CWA 401 WQC Requests	Attorney Work Product, Common Interest Privilege
233	Email	Portland Pipe Line Corp. V City of South Portland - Amicus Brief	3/15/2019	Turner Smith, Massachusetts AG	Michael Myers, New York AG et al	Issues re Portland Pipe case	Attorney Work Product, Common Interest Privilege
234	Email	Follow up re Army Corps' Guidance on State 401	3/21/2019	Michael Myers, New York AG	Aaron Love, New Jersey AG et al	Issues re 401 Water Quality Certifications	Attorney Work Product, Common Interest Privilege
235	Email	MATS Finding Reconsideration Comments - Draft	4/6/2019	Megan Herzog, Massachusetts AG	Benna Solomon, City of Chicago, et al	Issues re MATS Finding Reconsideration	Attorney Work Product, Common Interest Privilege
236	Email	Draft IEc Report on MATS and Recreational and Commercial Fishing	4/10/2019	Jillian Riley, Massachusetts AG	Jared Policicchia et al	Issues re MATS Finding Reconsideration	Attorney Work Product, Common Interest Privilege
237	Email	Re MATS Finding Reconsideration Comments - Draft	4/10/2019	Megan Herzog, Massachusetts AG	Benna Solomon, City of Chicago, et al	Issues re MATS Finding Reconsideration	Attorney Work Product, Common Interest Privilege
238	Email	Re Updated Draft -MATS Finding Reconsideration Comments (due 4/17) - Privileged & Confidential	4/16/2019	Stephanie Safdi, Office of the County Counsel, Santa Clara County	Gregory L. Zunino, Nevada AG, et al	Issues re MATS Finding Reconsideration	Attorney Work Product, Common Interest Privilege
239	Email	Re Updated Draft - MATS Finding Reconsideration Comments (due 4/17) -	4/16/2019	Paul Gerrahan, Oregon DOJ	Valerie Edge, Delaware DOJ et al	Issues re MATS Finding Reconsideration	Attorney Work Product, Common Interest Privilege

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ENERGY POLICY ADVOCATES V DANA NESSEL
20-000098-MZ

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

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DEFENDANT'S RESPONSES TO PLAINTIFF'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

In its objections to the Special Master's Report and Recommendation, Plaintiff offers essentially three categories of objections. Specifically, Plaintiff argues the following: (1) internal Departmental communications require a higher level of scrutiny where the attorney-client privilege is invoked; (2) the Special Master did not sufficiently justify his recommendations; and (3) attorney's-eyes-only review of the disputed records is required. None of these arguments warrant the rejection of the Special Master's recommendations.

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I. So long as the communication meets the relevant requirements, intra-departmental communications with the Attorney General still enjoy the protections provided by the attorney-client privilege.

In its brief, Plaintiff writes, without offering any support, that a "claim of intra-organizational attorney-client privilege should be subjected to a higher level of scrutiny than a traditional claim of the attorney-client privilege as between an outside client and its counsel." (Pl's Objs, p 2.) Plaintiff's unsupported legal opinion is not grounds to reject the Special Master's conclusions. And as is clear through the relevant case law, so long as they meet the relevant requirements, intradepartmental communications are protected by the attorney-client privilege.

To this end, it is well-established the Attorney General is a constitutional officer and is responsible for representing the state of Michigan as its chief legal counsel. *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 243 Mich App 487, 504 (2000). In fact, "[t]he Attorney General is the State of Michigan's only attorney" and that "[n]o other agency, department or person may represent the State[.]" OAG, 1977-1978, No. 5156 (March 24, 1977). Moreover, the Attorney General (and her duly appointed assistants) "[c]onsult[s] with and advise[s] the governor and *all other state officers*" and "give[s] opinions not only on all legal questions but also on all constitutional questions relating to the duties of such officers." *Id.*, quoting *State v Baker*, 74 ND 244 (1946) (emphasis added).

Clearly, the elected attorney general is a state official to whom the Department's attorneys are authorized to provide privileged legal advice. Said another way, the Attorney General cannot be the only state official with whom the Department's attorneys cannot communicate under the protection of the attorney-

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client privilege. For these reasons, the Department submits that so long as the elements of the attorney-client privilege have been satisfied—i.e., the communications are confidential in nature and made for the purpose of seeking or providing legal advice, see *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614 (1998), and *Leibel v Gen Motors Corp*, 250 Mich App 229, 239 (2002)—those communications are properly exempt from disclosure under MCL 15.243(1)(g)..

II. The Special Master, in carrying out the role of assisting the Court with an in-camera review of the at-issue records, is under no obligation to complete a particularized justification supporting its disclosure-related recommendations.

In its brief, Plaintiff implores this Court to reject the Special Master's recommendations with respect to the common interest agreements (Records 215–19) because the Special Master's so-called "bare veneer of an explanation does not demonstrate how the DAG has satisfied its burden in asserting these privileges on these documents." (Pl's Objs, p 6.) Similarly, Plaintiff writes that the Special Master's recommendations with respect to applicability of the attorney-client privilege or work-product doctrine are not sufficiently detailed so as to enable it to raise informed objections. (*Id.* pp 3–4.) Plaintiff misunderstands the relevant procedure in FOIA actions.

With respect to carrying the burden of nondisclosure, the first step of the *Evening News* analysis plainly requires the public body—not the trial court—to provide a particularized justification in support of the claimed exemptions. See *Nicita v City of Detroit*, 194 Mich App 657, 662 (1992). And in the second step,

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assuming "the matter is relatively clear and not too complex, the [trial] court, or ***the court with a master, may***, within acceptable expenditure of judicial energy, be able to resolve the matter *in camera*." *Evening News Ass'n v City of Troy*, 417 Mich 481, 516 (1983) (emphasis in bold added). The Department submits that deciding the applicability of the claimed exemptions in this particular instance, though perhaps tedious and time consuming, is not at all complex. And considering that this Court "derives its powers from the Legislature[,]" see *Okrie v State of Michigan*, 306 Mich App 445, 456 (2014), the decision to employ a special master to determine the appropriateness of the Department's claimed exemptions is appropriate in light of MCL 600.6419(1)(c).[1]

In short, neither this Court nor the Special Master is required to provide a particularized justification with respect to the applicability of the claimed exemptions. This burden belongs to the public body, and here, the Department has carried the burden by submitting exemption logs and detailed declarations from AAGs Manning and Bock. (See Exs 7 and 8 to Def's 11/30/2021 Mot for Summ Disp and Exs 14 and 15 to Def's Reply Br.) All that the trial court (and special master) is required to do under *Evening News* is to review the records and the Department's particularized justifications and determine whether the at-issue records were properly exempted from disclosure. *Evening News*, 417 Mich at 616. The Special Master has done just that here.

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[1] Further, the decision to appoint a special master is also consistent with the Supreme Court's instructions in *Evening News* which specifically uses the language, "the court, or the court with a master." See 417 Mich at 516.

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III. An attorney's-eyes-only review by Plaintiff's counsel is both unwarranted and inappropriate under the circumstances.

In its brief, Plaintiff writes that "[g]iven the above ambiguity and lack of information available to Plaintiff EPA, this Court should permit an 'attorneys'-eyes-only' review" and that "[d]oing so will facilitate 'the normal common-law tradition of adversarial resolution of matters' rather than a 'hampered' and one-sided argument." (Pl's Objs, p 6, quoting *Evening News*, 417 Mich at 514.) Plaintiff is wrong. An attorney's-eyes-only review here is both unnecessary and inappropriate.

As explained above, because the disclosure determinations at issue here are not overly complex, the Court can resolve the ongoing dispute between the parties at the second step in the *Evening News* analysis. However, even if the disclosure determinations were somewhat complicated, the Supreme Court's description of step three in *Evening News* shows that the step is not a required one. Specifically, the Supreme Court explained that, on the third step, "the [trial] court **can** consider allowing plaintiff[s'] counsel to have access to the contested documents *in camera* **under special agreement whenever possible**." *Evening News*, 417 Mich at 517 (emphasis in bold added).

First, as a threshold matter, and no matter the limitations, the Department strongly objects to providing Plaintiffs' counsel in-camera access to the at-issue records. Second, with respect *Evening News'* use of the word "can," the Court of Appeals has explained that "the Michigan Supreme Court did not mandate application of each step of the three-step procedure" and that "the use of step three, allowing a plaintiff's counsel to have access in camera to contested documents,

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should be strictly limited." *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 391 (1998). Put simply, this case is not an appropriate candidate for the third step. Granting Plaintiffs' counsel, over the Department's objections, in camera access to records that are protected by the attorney-client privilege and the attorney-work-product doctrine merely to assess the applicability of straightforward claims of privilege would fall outside the range of principled outcomes. For this reason, the Court should reject Plaintiff's request for an attorney's-eyes-only review.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in its dispositive motion briefing, the Department submits that through its exemption logs and the Manning and Bock declarations, it has caried its burden of demonstrating the propriety of its claimed exemptions and accordingly requests that this Court enter an order overruling Plaintiff's objections to the Special Master's report and recommendation.

Respectfully submitted,

/s/ *Adam R. de Bear*
Adam R. de Bear (P80242)
Assistant Attorney General
Attorney for Defendant
(517) 335-7573

Dated: October 11, 2022

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ENERGY POLICY ADVOCATES V
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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES,
a Washington Nonprofit Corporation,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
_____/

No. 20-000098-MZ

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PLAINTIFF EPA'S RESPONSE TO DEFENDANT DAG'S OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATION

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ARGUMENT

I. DAG's objection concerning Records 33 and 35 does not object to the Special Master's ruling itself. And it highlights that any privilege concerning the common-interest agreements has been waived.

DAG lodges an objection to the Special Master's recommendation on Records 33 and 35. But DAG clarifies that it does not object to those documents—only to the production of common-interest agreements without redaction. That is not at issue in these two recommendations.

Regardless, DAG's response here, which notes its objection to production of common-interest agreements "notwithstanding that Plaintiff may independently be in possession of these CIAs," merely highlights the waiver of any common interest protection. The common-interest doctrine is not a privilege itself but "is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." *Estate of Nash v City of Grand Haven*, 321 Mich App 587, 596; 909 NW2d 862 (2017), quoting *United States v BDO Seidman, LLP*, 492 F3d 806, 814–17 (CA7, 2007). As an exception, "the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise." *Id.* But, to apply in the first instance, the document must be attorney-client privilege material. *Id.* Like with attorney-client privilege, disclosure of a document can result in a waiver of the underlying attorney-client privilege. *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 83–84; 862 NW2d 466 (2014). Disclosure to a third party does not waive the privilege only "if there is a reasonable expectation of confidentiality between the transferor . . . and the recipient." *Id.* at 82–83.

Here, EPA *has* received these documents from DAG's counterparts on the common-interest agreements at issue. In particular, ostensibly the same document that DAG claims is privileged here—an identically titled "affirmative climate litigation" CIA among the same parties

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and of the same date—was provided to EPA as part of a FOIA request in another state. (Ex. A.) That production would not be based on a "reasonable expectation of confidentiality" and thus demonstrates waiver. Because of that waiver, this Court should reject the Special Master's recommendations concerning the CIAs. (Supplemental Recommendations on Exemption Log, ##215–229.)

II. The Special Master's omission on Records 55 and 421 requires this Court's full, independent review. And Record 55 appears to be non-exempt.

DAG rightly observes that the Special Master omitted review of Record 55 and appeared not to receive Record 421. This simply means that the Court needs to conduct a full, independent review. Following review, the Court should hold that Record 55 is not exempt from disclosure.[1]

In particular, DAG notes on Record 55 that it is "a communication between the former Deputy Attorney General and a Special Assistant Attorney General in which the two attorneys discuss a potential response by the Department to Line 5 related polling being released by Enbridge." (DAG Obj., p. 4.) DAG claims that responding to public opinion/political polling falls within attorney-client privilege, the attorney work product doctrine and deliberative process.

On the first, the questions must be asked: *First*, who is the client? *Second*, what *legal* advice is being sought here? *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618–19; 576 NW2d 709 (1998). This is an *intra*-office communication among the upper echelon of the Department about the public perception of certain litigation. And, as argued in EPA's objection, not everything that an AAG discusses within the Department constitutes *legal* advice. Some is policy; some political. Public perception polling leans much more to that latter. But only

[1] EPA does not contest the DAG's characterization of Record 42. But in doing so, it relies on DAG's summary of the document, and EPA still asks this Court for an independent review of that document.

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communications soliciting *legal* advice is protected by the attorney-client privilege. *Reed Dairy Farm*, 227 Mich App at 618–19; *Energy Policy Advocates v Ellison*, __ NW2d __ (Minn 2022), issued September 28, 2022, 2022 WL 4488489 at *4 (observing that the common-interest doctrine, an extension of attorney-client privilege, applies only to "common *legal* interests . . . But a purely commercial, political, or policy interest is insufficient for the common-interest doctrine to apply.").

Likewise, concerning DAG's claim of work-product privilege, it is unclear from this description how disclosure of such a "polling" related discussion would betray "attorney work product." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393 (1998). Again, the distinction between *legal* and "political or policy" discussion is significant. *Ellison*, *supra* at *4.

Finally, DAG has not met its burden in invoking deliberative process privilege to "show[] that in the particular instance the public interest in encouraging frank communication" "clearly outweighs the public interest in disclosure." MCL 15.243(1)(m). On matters so clearly political—how the upper echelons of DAG are responding to polling about a topic—the public right to know substantially outweighs any need to protect government employees' evaluations of public perception.

III. EPA does not object to the Special Master's conclusions on Records 59 and 60.

DAG notes an error in the Special Master's report in referencing the author of Records 59 & 60. EPA agrees this misnomer error is immaterial. Although EPA is unaware of the contents of these documents and it does not affirmatively waive any arguments regarding these records, it has no basis to contest these claims of privilege.

IV. DAG has not met its burden to sustain a claim of deliberative-process privilege for Record 97.

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DAG objects to the Special Master's conclusion on Record 97 contending both that the Special Master missed something and that the deliberative-process privilege applies.

First, it is not apparent that the Special Master missed anything. The log recites the fact that DAG clamed "*deliberative process* (MCL 15.243(1)(m))" and states as the basis for exemption "*internal and pre-decisional deliberation* regarding the selection of special assistant attorneys general for future actions regarding PFAS." (Supplemental Recommendations on Exemption Log) (emphasis added). In other words, a reading of the log in full demonstrates that the DAG clearly claimed the exemption, and although *all* of the Special Master's "review" comments are sparse, it should be presumed that he considered the claim twice stated in the next columns over.

Second, as noted above, deliberative process is a narrow and "qualified" privilege. *Truel v City of Dearborn*, 291 Mich App 125, 136; 804 NW2d 744 (2010). It is limited to *evaluative* matter, not simply factual matter. MCL 15.243(1)(m); *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334, 337; 471 NW2d 666 (1991). In particular, a court must sort out within each record the "evaluative" versus the factual matter. *Id.* ("[T]he trial court abused its discretion in failing to conduct an *in camera* examination . . . *or to allow disclosure of the factual elements of the record*.") (emphasis added).

Moreover, DAG bears the burden of showing that the scales are fully on its side. In particular, DAG's interest in "frank communications" must "clearly outweigh[h] the public interest in disclosure." MCL 15.243(1)(m). And "[t]he Legislature's requirement that the public interest in disclosure must be clearly outweighed demonstrates the importance it has attached to disclosing frank communications *absent significant, countervailing reasons to withhold the*

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document." *Herald Co v E Michigan Univ Bd of Regents*, 475 Mich 463, 473; 719 NW2d 19, 25 (2006) (emphasis added).

That burden has not been met here. In particular, Record 97 purports to relate to discussions about "the selection of special assistant attorneys general for future actions regarding PFAS." (Supplemental Recommendations on Exemption Log, #97.) The alleged SAAG contract at issue involves handing over the State's significant powers to sue private parties—including the right to demand "reasonable attorney fees of the attorney general" under MCL 324.20101(1)(n). The State has in fact demanded payment of attorneys' fees to the SAAG chosen under this contract using this statutory provision. Therefore, the public right to know the concerns that factored into DAG's decision making in awarding so significant a contract strongly outweighs any "frank communications" rationale in withholding disclosure. Certainly, DAG has not met its burden of showing the opposite. The Special Master correctly recommended that this record be disclosed.

V. An "email scheduling a meeting" (Record 206) is not privileged.

DAG further contends that the Special Master's recommendation on Record 206 represents a mistake given an apparent recommendation to affirm privilege in the "review" column and a competing recommendation to release the document in the Report. This is easily reconciled: Record 206 is an "email" and, specifically, one designated as "scheduling a meeting" for further discussion. (Supplemental Recommendations on Exemption Log, #206.) The notes from the Log further explain "[i]nformation regarding the [claimed privileged] subject matter and potential litigation is contained in a PowerPoint presentation *attached* to the email." (*Id.*) Thus, it seems that the Special Master's affirmance of any privilege is limited to the attachment. That makes sense because it is hard to see how an "email scheduling a meeting" is attorney-client, work-product, or deliberative process protected.

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VI. EPA does not object to the withholding of the draft Dybdahl report.

Finally, DAG lodges an objection that is, again, more about the attachment than to the document reviewed. Record 319 relates to an "email" from Robert Reichel on October 4, 2019. (Supplemental Recommendations on Exemption Log, #319.) The Special Master's review column notes the email is not privileged. DAG objects "to the extent it is read as recommending the production of the draft report." EPA does not contest any claim of privilege regarding the draft report.

CONCLUSION AND RELIEF REQUESTED

For those reasons, and with respect to those records addressed in DAG's Objection *only*, this Court should reject DAG's objections on Records 33, 35, 55, 97, 206, and 421.

Respectfully Submitted,

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Dated: October 11, 2022

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. THOMAS C. CAMERON

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DEFENDANT'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

STATEMENT OF FACTS AND LAW

The relevant facts and law have been set forth in the Department's 11/30/2021 Motion for Summary Disposition, its response to Plaintiff's 11/30/2021 Motion for Summary Disposition, and its Reply Brief in support of its 11/30/2021 Motion for Summary Disposition. To avoid unnecessary duplication of the record, the Department incorporates by reference the facts and law set forth in these filings.

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With respect to the disposition of the parties' respective dispositive motions, this Court, after beginning an in camera review of the "voluminous nature" of the at-issue records, entered an order, under MCL 600.6419(1)(c), appointing Jeffrey Schroeder as special master to "review the documents at issue and related privilege log[s]" and prepare a "report with his findings and recommendations[.]" (05/19/2022 Order Appointing Special Master.) On Tuesday, September 20, 2022, the Special Master completed his review of the at-issue records and completed a supplemental report and recommendation. (See Supplemental Report and Recommendation & related comments on the exemption log.)

Accordingly, and consistent with the timeline set forth in the August 15, 2022 stipulated order, the Department submits the below objections to the Special Master's Report and Recommendations.

OBJECTIONS

On the whole, the Special Master approved of the Department's justifications in support of the continued withholding of the majority of records outlined in the exemption logs submitted with dispositive motion briefing. However, the Special Master ruled in Plaintiff's favor with respect to several records it already possesses (See, e.g., Records 95, 98, 99, 100, 103–105 and 107; see also Pl's Mot for Summ Disp, p 16.) Similarly, the Special Master also determined that several transmittal emails (many of which have been previously produced) should also be produced. (See, e.g., Records 1, 12, 26, 28, 56, 62–64, 111–112, 206, 236, 280, 343, and 364.) But the Department is not objecting to the recommendations to produce mere

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transmittal emails or records that Plaintiff otherwise independently possesses. Rather, the Department will focus its objections on the limited instances where the Special Master either did consider the entirety of Department's asserted exemptions or did not make a recommendation as to the entirety of a particular record. More specifically, the Department is objecting to the Special Master's Recommendations on Records 33, 35, 55, 59–60, 97, 206, 319, and 421.

I. Objection 1: Records 33 and 35.

In the Special Master Review column on the submitted excel spreadsheet (hereafter "the review column"), the Special included the following statement for Records 33 and 35: "This email does not contain the opinions, judgments, or thought processes of counsel and the email should be produced." (Excel Spreadsheet, Exhibit G (June 22, 2021 log) worksheet.) However, upon review, it is clear that these records are mere transmittal emails to which common interest agreements (or "CIAs") are attached. (See Unredacted Records 33 and 35.) And the Special Master's recommendation contains no mention of the attached CIAs.

Even though the attached CIAs are not discussed in the review column, the Special Master agreed elsewhere that the Department's redactions to the CIAs were appropriate. (See Excel Spreadsheet, CIAs (June 22, 2021 log) worksheet where the Special Master concluded that "[t]he redacted communication[s] contain[ ] information subject to the common interest doctrine and [are] privileged under the work-product doctrine.") Accordingly, for the same reasons the Special Master concluded the Department's redactions to the CIAs were appropriate, and

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notwithstanding that Plaintiff may independently be in possession of these CIAs, the Department maintains that the CIAs attached to Records 33 and 35 (which were previously produced to Plaintiff with redactions in response to its FOIA request) be permitted to have the same redactions applied.

II. Objection 2: Records 55 and 421.

In the Report and Recommendation, the Special Master inadvertently omitted a recommendation on Record 55 and stated that he did not receive Record 421; both understandable oversights in light of the voluminous nature of the at-issue records. Accordingly, for the avoidance of doubt and to preserve its arguments that these records are properly exempt under the FOIA, the Department objects.

In support of its objection, the Department states that Record 55 is exempt from disclosure as it is protected by the attorney-client privilege, the attorney-work-product doctrine, and the deliberative-process exemption, see MCL 15. 243(1)(g), MCL 15.243(1)(h), and MCL 15.243(1)(m). The email is a communication between the former Deputy Attorney General and a Special Assistant Attorney General in which the two attorneys discuss a potential response by the Department to Line 5 related polling being released by Enbridge. (See Unredacted Record No. 55.) More specifically, in the email communication, the two attorneys discuss several rebuttal arguments to polling being released by Enbridge. (*Id.*) Thus, under the law set forth in the Department's dispositive motion briefing, this email communication meets the requirements of MCL 15.243(1)(g), (h), and (m), and is properly exempt from disclosure.

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With respect to Record 421, the Department states Record 421 is merely a draft version of Record 58 which the Special Master concluded "is subject to the attorney-work-product doctrine." (Compare Unredacted Record 58 and 421; see also Excel Spreadsheet, Exhibit I (June 22, 2021 log) and Exhibit T (Jan 7, 2022 log) worksheets.) Accordingly, under the law set forth in the Department's dispositive motion briefing and exemption logs and for the same reason the Special Master arrived at his conclusion for Record 58, the Department asserts that Record 421 is properly exempt from disclosure under MCL 15.243(1)(h), by way of the attorney-work-product doctrine.

III. Objection 3: Records 59 and 60.

In the review column, the Special Master provided the following comment with respect to Records 59 and 60: "The three emails regarding [scheduling] are not subject to the attorney-client privilege or work product doctrine, but Peter Manning's [August 10, 2019] and July 26, 2019 [emails] to Moody, Rossman-McKinney and [the Attorney General], etc. [are] privileged." (Excel Spreadsheet, Exhibit I (June 22, 2021 log) worksheet.) Upon review of these records, it is clear that Michael Moody, Chief of the Department's Special Litigation Division, authored the July 26, 2019. (See Unredacted Records 59 and 60.)

The Department agrees that both Manning's August 10, 2019 email and Moody's July 26, 2019 emails are privileged (under the attorney-client privilege, the attorney-work-product doctrine, and the deliberative-process exemption), but, for

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the avoidance of doubt, objects to the extent the Report and Recommendation is read as concluding that Moody's July 26, 2019 emails are not privileged.

IV. Objection 4: Record 97

In the review column, the Special Master provided the following comment with respect to Record 97: "This email does not contain the actual revisions and therefore production of this email does not disclose the opinions, judgments, or thought processes of counsel and the email should be produced." (Excel Spreadsheet, Exhibit T (June 22, 2021 log) worksheet.) The Department objects to this conclusion in two respects.

First, the language the Special Master uses in his conclusion (i.e., discussing disclosure of "the opinions, judgments, or thought processes of counsel") suggests that the exemption was only evaluated with respect to the attorney-work-product doctrine. See, e.g., *Franzel v Kerr Mfg Co*, 234 Mich App 600, 621 (1999) (discussing disclosure of information protected under this doctrine as potentially "betray[ing] those thoughts, mental impressions, formulations of litigation strategy, and legal theories of the attorney"). However, the Department asserted the deliberative-process exemption as a basis for non-disclosure and that exemption applies to "[c]ommunications and notes within a public body . . . of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." See MCL 15.243(1)(m). Upon comparing the exemption with Record 97, it is clear that Manning's email meets the language of the exemption.

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Accordingly, for the reasons set forth in the Department's dispositive motion briefing (see Def's 11/30/2021 Motion for Summ Disp, pp 20–21, explaining that the public interest in encouraging frank communication outweighs the public interest in disclosure given that "disclosure of such communications would have a chilling effect on the Department's employees to engage in open discussion" and that "employees would be less likely to provide their honest assessments of various issues in writing"), the Department objects the Special Master's recommendation with respect to Record 97 and maintains that it is protected from disclosure under MCL 15.243(1)(m).

Second, the Special Master's recommendation with respect to Record 97 makes no explicit reference to the attached record. Upon review of the attached record, it is clear that it is a part of an intra-departmental and frank communication in which attorneys discuss their assessment of separate law firms (including the strengths and weaknesses of each firm's proposed strategies) that responded to requests for proposal to work as Special Assistant Attorneys General (or SAAGs) in PFAS related litigation and that the purpose of the document was to provide a recommendation to the Attorney General regarding future PFAS litigation. As such, for the reasons set forth in its dispositive motion briefing and exemption logs, and for the avoidance of doubt, the Department objects to the extent

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the Special Master's recommendation is read as requiring the production of the attachment in Record 97.[1]

V. Objection 5: Record 206.

In the review column, the Special Master recommended the partial nondisclosure of this record on the grounds that "[t]he redacted communication is subject to the attorney-client privilege and work-product doctrine." (Excel Spreadsheet, Exhibit T (June 22, 2021 log) worksheet.) However, in the Special Master's first Report and Recommendation that was provided in PDF format, Record 206 was identified as a record that was to be produced without redaction.

The Department agrees with the Special Master's recommendation contained in the excel spreadsheet—particularly considering that disclosure of the withheld information would reveal the contents of a communication regarding potential climate-change litigation between the Attorney General and high-ranking Departmental attorneys. (See Unredacted Record No. 206.) Accordingly, for the reasons set forth in its dispositive motion briefing and exemption logs, the Department objects to the extent that the Special Master's Report is read as requiring the production of Record 206 without redactions.

[1] It is also worth noting that the Special Master has recommended that similar records not be produced. (See, e.g., Record 43.)

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VI. Objection 6: Record 319.

In the review column, the Special Master provided the following comment with respect to Record 319: "The 10/4/2019 email from Reichel to Dybdahl does not contain the opinions, thoughts, or judgments of counsel and should be produced." Excel Spreadsheet, Exhibit I (Jan 7, 2022 log) worksheet.) However, unlike with his recommendations on Records 316 and 364, for example, the Special Master does not specify that the attached comments on the expert report are subject to the attorney-work-product doctrine and should not be produced. (*Id.*) For the reasons set forth in its dispositive motion briefing and exemption logs, the Department maintains that the expert's draft report and associated comments are protected under the attorney-work-product doctrine and may be properly exempted from disclosure under MCL 15.243(1)(h). See also MCR 2.302(B)(4)(f) (explaining that the work-product doctrine as set forth in the Court Rules "protects communications between the party's attorney and any expert witness under subrule (B)(4), regardless of the form of the communications").

In short, the Department objects to the Special Master's recommendation on Record 319 to the extent it is read as recommending the production of the draft report attached to the email.

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CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Department requests that this Court enter an order rejecting the Special Master's recommendations that are outlined above.

Respectfully submitted,

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Dated: October 4, 2022

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES,
a Washington Nonprofit Corporation,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
_____/

No. 20-000098-MZ

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PLAINTIFF EPA'S 10/04/2022 OBJECTIONS TO RECOMMENDATIONS OF SPECIAL MASTER AND BRIEF IN SUPPORT

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INTRODUCTION

The two reports of the Special Master[1] following review of the disputed documents in this case are long in their recitation of general standards but short in their analysis or details of the disputed records. Thus, while the reports rightly recommend the release of 31 of the still-disputed documents—bringing the total to 218 documents and leaving no doubt that Plaintiff Energy Policy Advocates ("EPA") has substantially prevailed in this matter[2]—for those documents where the Special Master recommended the Department of Attorney General's ("DAG") claim of privilege be upheld, EPA has little factual understanding of the basis for the recommendation, rendering it difficult to lodge any intelligible objection other than those grounded in context available from other records previously released in this matter. Fortunately, the latter is substantial and strongly suggests waiver of any privilege that might have existed for certain of these records. But that offers no support for the inherent, remaining void which underscores the insufficiency of the Vaughn Index for certain documents in this matter. And it illustrates the need for a further, "attorneys'-eyes-only" review on a subsection of those still-withheld documents in order to test DAG's claims of privilege properly.

This Court should thus reject the recommendation of the Special Master for Items ##132–36, 140–41 & 144–49, 165–66, 171, 175, & 215–29, hold that the Attorney General has not carried its burden of proof on these documents, and permit Plaintiff's attorneys an "attorneys'-eyes-only" review on that limited set of documents for further argument.

---

[1] Plaintiff EPA maintains its earlier objection to the appointment of the Special Master and does not intend to waive that position by filing this document.

[2] Plaintiff EPA reserves its right to attorney fees under MCL 15.240(6), and it intends to make such a request at an appropriate juncture.

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ARGUMENT

I. The Special Master's recommendation to withhold certain documents as attorney-client or work-product privileged is not sufficiently supported. This Court should allow EPA an "attorneys'-eyes-only" review of those documents.

Many of the DAG's still-withheld documents are withheld on the basis of claimed attorney-client privilege. But a basic aspect of attorney-client privilege was omitted both from the DAG's initial Vaughn Index and the Special Master's recommendation upholding those claims of privilege: who is the client? *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 279; 568 NW2d 411 (1997) (observing the privilege attaches "only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice"). Often in environmental litigation (like that DAG argues is at issue in the underlying documents), DAG files suit based on *parens patriae* authority. (See, e.g., Ex. A, Excerpt of Complaint in PFAS Litigation); MCL 14.28; see also *Hawaii v Standard Oil Co*, 405 US 251, 258 n 12 & 258–60 (1972). Thus, it appears that some claims of privilege may be based on the AG asserting that *she* is the "client" and her deputies are her advisors in those settings.

If so, that claim of intra-organizational attorney-client privilege should be subjected to a higher level of scrutiny than a traditional claim of the attorney-client privilege as between an outside client and its counsel. Certainly, not everything that Assistant Attorneys General advise the elected Attorney General about constitutes legal advice: some is department policy, some is political advice, and some is legal. Because such claims of privilege live in shades of gray while an ordinary attorney-client privilege claim is much more black-and-white, they deserve the scrutiny provided by the traditional role of an adversarial litigant. *Evening News Ass'n v City of Troy*, 417 Mich 481, 514; 330 NW2d 481 (1983) ("Where one party is cognizant of the subject matter of litigation and the other is not, the normal common-law tradition of adversarial resolution of matters is decidedly hampered . . .").

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Similarly, the withholdings based on claims of work-product privilege have not demonstrated a basic aspect of that privilege: which case does the document purport to relate to? Even when litigation is contemplated at an extremely high, department-policy level, that is not enough to invoke the work product doctrine in the absence of particular litigation then existing or that later materializes. That is especially true where, as here, Plaintiff EPA has documents strongly suggesting that these same subjects were discussed with third parties external to DAG, thus waiving any claim to protection. *Liebel v General Motors Corp*, 250 Mich App 229, 243; 646 NW2d 179 (2002) ("Once otherwise privileged information is disclosed to a third party by the person who holds the privilege . . . the privilege disappears" unless the disclosure is shown to be inadvertent, fraudulent, or otherwise in bad faith). Therefore, an "attorneys'-eyes-only" review is warranted to further scrutinize these claims of privilege.

a. For a subset of the documents upheld by the Special Master, the claim of attorney-client privilege is ambiguous at best.

As this Court knows, FOIA exemptions "must be narrowly construed, and the burden rests on the party asserting an exemption" to sustain the basis for its withholding. *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116, 123–24 (2014); MCL 15.240(4). Moreover, each claim of exemption requires a "particularized justification" tailored to the portion of each document that is claimed to be exempt. *Evening News Ass'n v City of Troy*, 417 Mich at 503.

The report and supplemental report of the Special Master recommends against the disclosure of certain documents on the basis that the basis that they are attorney-client privileged and/or protected by the work-product doctrine. (See Recommendations on Exemption Log, Items ## 132–36, 140–41 & 144–49, 165–66, 171 & 175.) Unfortunately, the basic elements of attorney-client privilege are not evident from either the Vaughn Index or the Special Master's report, such that EPA has no basis to conclude let alone concede that this is established in the records

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themselves. (*Id.*); *Herald Co, Inc*, 224 Mich App at 279. Indeed, even the identity of the client is unclear. While the listed email addresses include DAG personnel only, it is not evident whether the DAG is claiming this privilege strictly on its own behalf or based on behalf of a state agency client whose request has been forwarded. Assuming the former, not all DAG internal communications can be considered *legal* advice; policy and politics also enter into consideration in intra-departmental discussions among staff and the elected Attorney General. The bottom line is that not enough information is present in the Vaughn Index or the Special Master's Report to confirm that the privilege applies, and a more complete adversarial review is warranted.

b. Similarly, the work-product doctrine claims have not been adequately supported.

Additionally, the Special Master's report does not provide sufficient basis to evaluate the recommendations to uphold DAG's claims of work-product doctrine. Further, other documents released by DAG raise the strong possibility of waiver due to third-party communications on the same topic.

"The touchstone of the work-product doctrine is whether 'notes, working papers, memoranda or similar materials' were prepared in anticipation of litigation." *D'Alessandro Contracting Grp, LLC v Wright*, 308 Mich App 71, 77; 862 NW2d 466, 470 (2014). Although "[t]he doctrine 'does not require that an attorney prepare the disputed document only after a specific claim has arisen,'" it "does require, however, that the materials subject to the privilege pertain to more than just 'objective facts.'" *Id.* at 78, quoting *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 654, n 2; 385 NW2d 296 (1986).

Little is evident or disclosed about the nature of the claimed "climate litigation" from the DAG's privilege log. There is no indication in the Vaughn Index or the recommendations whether litigation existed at the time of the documents, whether any litigation materialized sometime later

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that related to these documents, or whether the DAG was only engaged in high-level policy or political discussions on possible "climate litigation." Indeed, the privilege log suggests the latter—that these were high-level policy or political discussions since the privilege log notes "internal and pre-decisional communication regarding *potential areas* of affirmative litigation." (See, e.g., Recommendations ## 140 & 141) (emphasis added). The DAG has not even vaguely identified a subsequent case that was *actually* filed as the topic of these discussions (as it has, for example, with some other claims of privilege like # 181). And its previously revealed documents indicate that this likely related to meetings of the DAG with outside political groups, and shows that the possibility of such litigation was discussed with these groups, including the League of Conservation Voters. (Ex. B, Emails Referencing Conversations with Third Parties.)

Moreover, any work-product privilege that was otherwise applicable may have been waived here. The subject-matter revealed in the subject line of these emails entitled "climate litigation" (or some variation thereof) is precisely the subject that, other documents demonstrate, the same parties within DAG contemporaneously discussed with external, third parties. (See Ex. B; Ex. C, Pruss Invoice.) In particular, the invoices from Special Assistant Attorney General ("SAAG") Skip Pruss show billing DAG for phone calls with "L. Wozniak." (Ex. C.) And emails already released by DAG reveal that the discussions about "climate litigation" likely refer to contemplated "lawsuits against Exxon for failure to disclose the impacts of its activities on climate change." (Ex. B.) Those were similarly discussed with "Liza Wozniak" during a "meeting with the League of Conservation Voters." (*Id.*)

In other words, the DAG was actively discussing *this* "potential litigation" with third parties who are external to the DAG, then internally discussing the very effort being lobbied for by these outside advocates in its withheld emails. There is reason to believe that any claimed

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privilege based on the work product doctrine that might have existed has been thereby waived. Because other records show that the same DAG parties had discussions with third parties on the same subject, this Court should allow Plaintiff's attorney to conduct an *in camera* review of these limited documents in order to facilitate an adversarial argument regarding DAG's waiver of any applicable privilege.

c. That ambiguity warrants further scrutiny in the form of an "attorneys'-eyes-only" review.

Given the above ambiguity and lack of information available to Plaintiff EPA, this Court should permit an "attorneys'-eyes-only" review. Doing so will facilitate "the normal common-law tradition of adversarial resolution of matters" rather than a "hampered" and one-sided argument. *Evening News Ass'n*, 417 Mich at 514. And it is well within this Court's power to "consider *'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement 'whenever possible.'*" *Id.* at 516 (emphasis added).

II. The Special Master's report does not adequately explain how DAG has met its burden to establish the existence of a common interest protecting the withheld common-interest agreements.

Additionally, this Court should reject the Special Master's recommendation concerning the common-interest agreements. Those documents are ## 215–29 in the exemption logs. For the reasons previously argued, DAG has not met its burden to establish that these documents are exempt. (See Plaintiff's Resp. to 11/30/2021 MSD, pp. 6–9.) The report and supplemental report offer no further detail as to the basis for this recommendation, stating summarily: "The redacted communication contains information subject to the common interest doctrine and is privileged under the work-product doctrine." (Recommendations ##215–29.) That bare veneer of an explanation does not demonstrate how the DAG has satisfied its burden in asserting these privileges on these documents. DAG has not established the elements of this privilege, and the

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documents provided by EPA on its motion for summary disposition show a waiver. See, e.g., *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 596; 909 NW2d 862 (2017); (Pl.'s MSD, Ex. F.)

CONCLUSION AND RELIEF REQUESTED

For those reasons, this Court should reject the recommendations of the Special Master's Report with regards to Items ##132–36, 140–41 & 144–49, 165–66, 171, 175, & 215–29, and hold that the Attorney General has not carried its burden of proof on these documents. This Court should instead permit Plaintiffs' attorney an "attorneys'-eyes-only" review on that limited set of documents and receive further argument regarding these documents based on that review. Additionally, this Court should reject the Special Master's recommendation concerning the common-interest agreements for the reasons spelled out in Plaintiff EPA's November 30, 2021 motion for summary disposition.

Respectfully Submitted,

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Dated: October 4, 2022

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ENERGY POLICY ADVOCATES V
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PLUNKETT COONEY

September 20, 2022

Sent via UPS Next Day Air

Court of Claims
Cadillac Place
3020 West Grand Boulevard
Suite 14-300
Detroit, MI 48202-6020

RECEIVED
SEP 23 2022
COURT OF CLAIMS

Re: Energy Policy Advocates, Inc. v. Michigan Department of Attorney General
Case No. 20-000098-MZ
Documents for filing Under Seal

Dear Clerk of the Court:

Enclosed for filing under seal are the following documents with respect to the above-referenced case:

- Report and Recommendation of Special Master with Recommendations on Exemption Log
- Supplemental Report and Recommendation of Special Master with Supplemental Recommendations on Exemption Log

After discussion with the Defendant's counsel, there was a misunderstanding regarding the scope of the initial report and recommendation which resulted in a supplemental report and recommendation. Per the Court's order appointing the special master, any objections to the findings or recommendations must be filed by Defendant within 7 days of receipt of the report.

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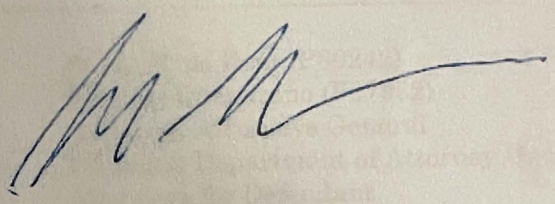
We have provided two copies of these materials; one for the court and one for the Judge. We would appreciate your forwarding a copy to the Judge. Also enclosed is an encrypted flash drive for the Court/Judge with the same documents and the password will be sent in separate correspondence.

We would appreciate your returning a time-stamped copy to us in the envelope which is provided.

Thank you for your cooperation and assistance.

Very truly yours,

PLUNKETT COONEY



(signed electronically)
Jeffrey M. Schroder
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Direct dial: (248) 594-2796

JMS/nw
Encl.

cc: Adam R. de Bear (w/encl.)
Judge's copy (w/encl.)

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. THOMAS C. CAMERON

Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
Attorneys for Plaintiff
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Thomas Quasarano (P27982)
Assistant Attorneys General
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ORDER SETTING DEADLINES FOR THE PARTIES TO FILE OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

At a session of said Court, held in the City of Lansing, State of Michigan, on August 15, 2022.

PRESENT: HON. THOMAS C. CAMERON

In accordance with the foregoing stipulation of the parties, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED as follows:

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DANA NESSEL

1. The parties may file objections to the special master's report and recommendation within 14 days after the special master submits a supplemental report and recommendation.

2. The parties may file responses to any objections to the special master's report and recommendation within 7 days after being served with a copy of the opposing party's objections.

IT IS SO ORDERED.

Date: August 15, 2022

Hon. Thomas C. Cameron
Court of Claims Judge

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

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No. 20-000098-MZ

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STIPULATION TO SET DEADLINES FOR THE PARTIES TO FILE OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

The parties, by and through their respective counsel, stipulate and agree as follows:

1. On July 27, 2022, the special master appointed by this Court submitted a report and recommendation regarding Defendant's continued withholding of certain records responsive to Plaintiffs' FOIA requests that are at

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issue in this action. Under this Court's May 19, 2022 order, Defendant's deadline to file objections to the report and recommendations is August 3, 2022.

2. Upon review and a subsequent conference with the special master, the parties confirmed that there remain at-issue records which, under this Court's May 19, 2022 order, still require the special master's review. Counsel for Defendant has identified for the special master the remaining records that still require review, and it is the parties' understanding that the special master will review these identified records and submit a supplemental report and recommendation to the Court.

3. The parties agree that both Plaintiff and Defendant should be permitted to file their own objections to the special master's report and recommendations and respond to the other party's objections.

4. Accordingly, to permit Plaintiff to assert its own objections and to provide both parties with sufficient time to review the special master's report and recommendations, Plaintiff and Defendant agree that both parties may file objections to the special master's report and recommendation and respond to any objections filed. The parties also agree that the deadline to file objections shall be 14 days after the special master submits its supplemental report, and their deadline to file responses shall be 7 days after receipt of the opposing party's objections.

Stipulated and agreed to:

/s/ Zachary C. Larsen w/ permission
Zachary C. Larsen (P72189)
Attorney for Plaintiff
zlarsen@clarkhill.com

/s/ Adam R. de Bear
Adam R. de Bear (P80242)
Attorney for Defendant
deBearA@michigan.gov

Dated: August 3, 2022

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ENERGY POLICY ADVOCATES V
DANA NESSEL

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

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ORDER SETTING DEADLINES FOR THE PARTIES TO FILE OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

At a session of said Court, held in the City of Lansing, State of Michigan, on August _____, 2022.

PRESENT: _____
HON. THOMAS C. CAMERON

In accordance with the foregoing stipulation of the parties, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED as follows:

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1. The parties may file objections to the special master's report and recommendation within 14 days after the special master submits a supplemental report and recommendation.

2. The parties may file responses to any objections to the special master's report and recommendation within 7 days after being served with a copy of the opposing party's objections.

IT IS SO ORDERED.

_____
Date

_____
Hon. Thomas C. Cameron
Court of Claims Judge

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ENERGY POLICY ADVOCATES V

STATE OF MICHIGAN

COURT OF CLAIMS

ENERGY POLICY ADVOCATES, a Washington Nonprofit Corporation,

Plaintiff,

v

Case No. 20-000098-MZ

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Hon. Thomas C. Cameron

Defendant.
_____/

ORDER DENYING PLAINTIFF EPA'S 06/02/2022 MOTION FOR RECONSIDERATION OF THE COURT'S MAY 19, 2022 ORDER APPOINTING A SPECIAL MASTER

Plaintiff's motion to reconsider this Court's May 19, 2022 order appointing a special master is DENIED for failure to demonstrate that a palpable error occurred. MCR 2.119(F)(3).

I. BACKGROUND

Plaintiff filed this action under the Freedom of Information Act (FOIA) after Defendant exempted or partially exempted approximately 426 records from disclosure. Defendant asserted work product or attorney client privilege as its basis for exempting most of the records it withheld from plaintiff.

On November 30, 2021, Defendant moved for summary disposition reasserting the merit of its exemptions. Plaintiff opposed the motion and later moved for summary disposition in which it disputed the propriety of defendant's claims of privilege. Indeed, plaintiff argued that at the very least this Court "should conduct an *in camera* review regarding the remaining records to scrutinize [defendant's] claims of privilege." This Court agreed with plaintiff, and on February 25, 2022, this Court ordered defendant to produce an unredacted copy of the records and related exemption log to the Court in order to conduct an *in camera* review of the disputed records.

After receipt of the records, the Court discovered that the 426 records were actually comprised of over 10,000 sheets of paper that must be reviewed by the Court to respond to the parties' competing motions for summary disposition. A scheduling conference was then held on April 29, 2022, at which this Court explained that, unless the parties could agree within two weeks to significantly narrow the scope

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of the disputed documents to be reviewed, a special master would be appointed under MCL 600.6419(1)(c) to assist this Court in its *in camera* review. Although the parties expressed some concern over potential costs, neither party objected to the appointment of a special master.

On May 19, 2022, this Court appointed attorney Jeffrey M. Schroder (P63172) to serve as special master in this case because the parties had not indicated to the Court that they had reached an agreement to significantly narrow the scope of the *in camera* review. Plaintiff now seeks reconsideration of the Court's appointment of a special master.

II. Analysis

On reconsideration of this Court's May 19, 2022 order, plaintiff asserts that this Court lacks the constitutional authority to appoint a special master.[1] Specifically, plaintiff argues that because there is no express constitutional provision allowing for the judicial appointment of a special master, the Court lacks the authority to do so, unless the parties consent. The Court disagrees.

Plaintiff fails to adequately address the Legislature's express appointment authority under MCL 600.6419(1)(c). The Legislature provided the Court of Claims with broad authority to appoint a special master "as the court considers necessary." MCL 600.6419(1)(c). Plaintiff argues that this broad grant of authority must be construed narrowly such that the authority to appoint only exists with the parties' consent, a condition that is not found anywhere in the statute. Plaintiff further argues that in the absence of consent, the appointment of a special master is "wholly unconstitutional." Plaintiff's objection to this Court's May 19, 2022 order lacks merit and fails to demonstrate that the Court palpably erred.

Wherefore, plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

Date: June 6, 2022

Thomas C. Cameron
Judge, Court of Claims

[1] Plaintiff cryptically notes in a footnote that the special master may have a conflict of interest but provides no legal analysis nor further explanation regarding this potential conflict or impact on this matter.

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
_____/

No. 20-000098-MZ

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PLAINTIFF EPA'S 06/02/2022 COMBINED MOTION FOR RECONSIDERATION OF THE COURT'S MAY 19, 2022 ORDER APPOINTING A SPECIAL MASTER AND BRIEF IN SUPPORT

INTRODUCTION

This is a Freedom of Information Act ("FOIA") matter under MCL 15.231, *et seq* seeking certain admittedly public records withheld by the Department of Attorney General ("DAG") under claims of privilege. This Court correctly determined in its February 25, 2022 order that the still-withheld documents submitted to the Court warrant an *in camera* review. Plaintiff EPA is sensitive to the fact that an *in camera* review is a relatively time-intensive process. To that end, EPA's counsel has worked cooperatively with DAG's counsel in an attempt to significantly limit the

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ENERGY POLICY ADVOCATES V

number of pages that must be reviewed. And those efforts have been fruitful: the parties have reduced the overall page count for any review by an estimated 40–50% and this Court would need to review just over 300 discrete records.

But, even while sensitive to the time burden on this Court, Plaintiff EPA nonetheless respectfully objects to the delegation of this important task to a Special Master. Michigan's constitution vests all judicial authority in one court of justice and limits the power of its courts to make appointments. Const 1963, art 6, § 27. That limitation applies as much to this court of limited jurisdiction as it does to the general jurisdiction of the trial court. And while the Court of Claims Act facially allows the Court to appoint a special master, that statutory grant of authority to a court of limited jurisdiction must be viewed through the lens of the overarching constitutional limitation. In other words, this Court holds the same power as that held by the circuit court (i.e., to appoint special masters on the consent of both parties). Because this Court's power is thus constitutionally limited, Plaintiff EPA respectfully requests that this Court reconsider its May 19, 2022 Order Appointing a Special Master.[1]

STANDARD OF REVIEW

Pursuant to MCR 2.119(F)(3), a party moving for reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." A "palpable" error is an error "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Stamp v Mill Street Inn*, 152 Mich App 290, 294; 393 NW2d 614 (1986), quoting *Black's Law Dictionary* (5th ed). Nonetheless, MCR 2.119(F)(3) does not prevent a court from revisiting an issue on which

[1] Though Plaintiff EPA's objection here is constitutional in nature, Plaintiff also notes that the firm selected may have conflicts due to current service as a Special Assistant Attorney General for Defendant DAG.

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the court previously ruled in order to correct a mistake. See *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014). Moreover, "the rule does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes." *Id.*

ARGUMENT

I. Article 6, Section 27 of Michigan's constitution limits the appointment of a special master.

By the Michigan constitution, "the judicial power of the state is vested exclusively in one court of justice" including in such "courts of limited jurisdiction that the legislature may establish . . . ." Art 6, Sect 1. This is one such court. MCL 600.6401 *et seq*. The constitution likewise limits a judge's exercise of "*any* power of appointment to public office *except as provided* ***in this constitution***." Const 1963, art 6, § 27 (applicable to "judges" of "the court of appeals") (emphasis added); MCL 600.6404(1) (noting that "the court of claims consists of 4 *court of appeals judges*") (emphasis added).

Judges are provided certain appointment powers "in this constitution." *Id.* For example, the Supreme Court may "appoint an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state." Const 1963, art 6, § 27. The Supreme Court may appoint its staff. *Id.* Circuit court judges may appoint persons to fill vacancies in the office of county clerk or prosecuting attorney in their jurisdictions. Const 1963, art 6, § 14. Judges may select among themselves members to the Judicial Tenure Commission. Const 1963, art 6, § 30(1). And a former elected judge may "perform judicial duties for limited periods or specific assignments" on authorization by the Michigan Supreme Court. Const 1963,

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art 6, § 23. But there is no *constitutional* provision allowing for the judicial appointment of a special master.

That limitation has been held on several occasions to prevent a trial court from appointing any special master, expert witness, or otherwise enlisting the assistance of an attorney in the performance of the court's duties without the consent of the parties to the particular case. For example, in *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116; 559 NW2d 54 (1996), the Court of Appeals held that the appointment of an expert witness with the power to make findings of fact, conclusions of law, and provide a "final recommendation and proposed judgment" on the disposition of the matter subject to all parties' filing objections violated Michigan's 1963 Constitution at art 6, § 27. *Id.* at 120–121. The Court of Appeal in that matter noted that "there is no constitutional authority for the trial court to delegate specific judicial functions to an 'expert witness'" and it "is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens and to construe and apply the laws." *Id.* at 121. Indeed, the Court of Appeals had determined even earlier that a circuit court judge did not have the authority to appoint or give such authority. *Brockman v Brockman*, 113 Mich App 233; 317 NW2d 327 (1982). And at least one Supreme Court justice has endorsed this reading of Article 6, § 7. See *Caudill v State Farm Mutual Auto Ins Co*, 485 Mich 1107, 1109; 779 NW2d 83 (2010) (Corrigan, J. dissenting from denial of application) (noting that "the trial court lacked th[e] authority" to appoint a discovery master to review 77,000 pages of documents and make recommendations to the court).

This Court's May 19, 2022 order appointing a special master similarly runs afoul of this constitutional provision. Though the Court relied on MCL 600.6419(1)(c) in making its appointment, that provision either: (a) must be understood as limited to those circumstances where appointment of a special master is permissible (e.g., by consent of the parties); or (b) is wholly

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unconstitutional. Subsection 6419(1)(c) was added by 2013 P.A. 164. It did not exist in the Court of Claims Act prior to that amendment and did not exist at the time of the adoption of the 1963 Constitution. See Senate Bill 652 of 2013 (available at legislature.mi.gov/documents/2013-2014/billintroduced/Senate/pdf/2013-SIB-0652.pdf). But since the Constitution provides an exception to the prohibition on judicial appointments only "*as provided* ***in this constitution***," Const 1963, art 6, § 27 (emphasis added), this *statutory* provision is no help to this question and does not differentiate the Court of Claims from the Circuit Court. The allowable exceptions are *only* those explicitly noted "in this constitution," Const 1963, art 6, § 27—such as those appointment-power provisions addressed above.

The Legislature's grant of this power must be held within its constitutional scope, and it must be considered against the backdrop of the Court of Claims as a court of limited jurisdiction. In other words, this Court has only the *same* authority to appoint special masters that a circuit court would have. It certainly does not have *more* authority (as a court of limited jurisdiction) than the circuit court has (as a constitutionally provided-for court). Accordingly, the exercise of power under MCL 600.6419(1)(c) is at least limited to appointment by both parties' consent—or, alternatively, is unconstitutional in total. Const 1963, art 6, § 27; *Carson Fischer Potts and Hyman*, 220 Mich App at 120–121.

This limitation is particularly important within the context of a FOIA suit brought by a non-profit. FOIA actions are affected with the public policy of permitting "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2). The act is "a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and

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the need that public officials be held accountable for the manner in which they perform their duties." *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116, 123–24 (2014), quoting *Manning v City of East Tawas*, 234 Mich App 244, 593 NW2d 649 (1999). Because "FOIA is a pro-disclosure statute," *Herald Co v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873, 877 (2000), the act in some ways encourages the litigation of withholdings by, for example, its attorney fees and penalty provisions, see MCL 15.240(6) & (7); MCL 15.240a(6) & (7); MCL 15.240b, and its requirement of expedited judicial review. MCL 15.240(5).

This suit embodies those public purposes. Like many others brought in the FOIA context, it is brought by a non-profit entity. And it involves records concerning the actions of DAG that may be of public interest. In light of that public purpose, Plaintiff EPA's counsel has significantly discounted their fees below standard market rates. The appointment of a special master in this context adds significant cost to FOIA litigation, which in this and other similar matters will discourage the pursuit and accomplishment of those public purposes. Thus, the constitutional limitation on judicial appointments is even more significant to this particular action.

For those reasons, the Court's appointment of a special master in this case is constitutionally infirm. Though Plaintiff EPA appreciates the burden of this Court's review, it has striven to limit the documents submitted for *in camera* review so that review may be conducted as efficiently as possible. This Court should reconsider its entry of the May 19, 2022 Order Appointing a Special Master.

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CONCLUSION AND RELIEF REQUESTED

The 1963 Michigan Constitution limits judges' exercise of "*any* power of appointment to public office *except as provided* ***in this constitution***." Const 1963, art 6, § 27 (applicable to judges of the court of appeals) (emphases added). Although a Special Master may be appointed with the consent of the parties, such consent does not exist in this case. Thus, the May 19, 2022 Order Appointing a Special Master is in violation of the 1963 Michigan Constitution. Plaintiff EPA respectfully requests that this Court reconsider its entry of that Order.

Respectfully Submitted,

CLARK HILL PLC

/s/ *Zachary C. Larsen*
Zachary C. Larsen (P72189)
Charles A. Lawler (P65164)
Clark Hill PLC
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Dated: June 2, 2022

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CONCLUSION AND RELIEF REQUESTED

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Respectfully Submitted,

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Dated: June 2, 2022

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STATE OF MICHIGAN

COURT OF CLAIMS

ENERGY POLICY ADVOCATES, a Washington Nonprofit Corporation,

Plaintiff,

v

Case No. 20-000098-MZ

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Hon. Thomas C. Cameron

Defendant.
_____/

ORDER APPOINTING SPECIAL MASTER

Pending before this Court in this action filed under the Freedom of Information Act (FOIA) are the parties competing motions of summary disposition. On February 25, 2022, the Court ordered an in camera review of the exempted records in order to determine the parties' motions. See *Evening News Ass'n v Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983). Defendant has subsequently provided the Court with thousands of documents that must be reviewed. Considering the voluminous nature of the records to be examined:

IT IS HEREBY ORDERED that the Court appoints attorney Jeffrey M. Schroder (P63172) to serve as special master in this case. MCL 600.6419(1)(c). The special master shall review the documents at issue and related privilege log. The special master will deliver a report with his findings and recommendations to the Court and Defendant by July 22, 2022. Any objections to the special master's findings or recommendations must be filed by Defendant within 7 days of receipt of the report. The cost of the special master shall be born equally by the parties at the rate of $350 per hour.

IT IS SO ORDERED.

Date: May 19, 2022

Thomas C. Cameron
Judge, Court of Claims

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ENERGY POLICY ADVOCATES V

STATE OF MICHIGAN

COURT OF CLAIMS

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Plaintiff,

v

Case No. 20-000098-MZ

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Hon. Thomas C. Cameron

Defendant.
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IT IS HEREBY ORDERED that the Court appoints attorney Jeffrey M. Schroder (P63172) to serve as special master in this case. MCL 600.6419(1)(c). The special master shall review the documents at issue and related privilege log. The special master will deliver a report with his findings and recommendations to the Court and Defendant by July 22, 2022. Any objections to the special master's findings or recommendations must be filed by Defendant within 7 days of receipt of the report. The cost of the special master shall be born equally by the parties at the rate of $350 per hour.

IT IS SO ORDERED.

Date: May 19, 2022

Thomas C. Cameron
Judge, Court of Claims

In an effort to avoid the effect of the FOB term inserted in the invoices in 2018, defendant postulates that perhaps plaintiff's customers did not agree to the term, and that the Court should give the term no credence. Defendant was required to support its motion for summary disposition with evidence, however, not speculation. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009); *Bennett v Detroit Police Chief*, 274 Mich App 307, 318-319; 732 NW2d 164 (2006). Furthermore, the customers' acceptance of the term and a meeting of the minds can be found in the customers' performance, i.e., paying for the aggregate. See *In re Certified Question*, 432 Mich 438, 446; 443 NW2d 112 (1989).

The Court also finds unpersuasive defendant's contention that plaintiff should be liable for the assessments because of plaintiff's failure to maintain adequate records. Defendant's argument invokes MCL 205.23(3), which provides that, when a person engaged in making taxable sales at retail also makes non-exempt sales, that person must maintain adequate records. And if "the person fails to keep separate books, there shall be levied upon him or her the tax . . . equal to 6% of the entire gross proceeds of both or all of his or her businesses." *Id.* Here, plaintiff provided adequate records, as is apparent from plaintiff's invoices that contain separate entries for delivery charges and sales. In addition, plaintiff has submitted in response to defendant's motion as Exhibit J some of its accounting records that show revenue derived from delivery and revenue derived from aggregate sales. Furthermore, the auditor does not appear to have had trouble distinguishing between delivery charges and aggregate sales when issuing the assessments at issue. The notion that plaintiff failed to keep adequate records is not supported by the evidence before the Court.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED in part as it concerns the final assessments issued for the 2016-2017 tax years.

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ENERGY POLICY ADVOCATES V
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III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED in part as it concerns the final assessments issued for the 2016-2017 tax years.

IT IS HEREBY FURTHER ORDERED that defendant's motion is DENIED in part as it concerns the 2018 tax year, and that summary disposition is GRANTED to plaintiff as the nonmoving party under MCR 2.116(I)(2) as it concerns the 2018 tax year. As a result, Final Assessment No. VA4YW5M shall be cancelled.

This is a final order that resolves the last pending claim and closes the case.

May 20, 2022

Hon. Brock A. Swartzle
Judge, Court of Claims

20-000098-MZ
ENERGY POLICY ADVOCATES V
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STATE OF MICHIGAN

COURT OF CLAIMS

ENERGY POLICY ADVOCATES, a Washington Nonprofit Corporation,

Plaintiff,

v

Case No. 20-000098-MZ

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Hon. Thomas C. Cameron

Defendant.
_____/

ORDER FOR PRODUCTION FOR *IN CAMERA* REVIEW

Pending before the Court in this action filed under the Freedom of Information Act are the parties' competing motions for summary disposition. Having reviewed the parties' briefing and arguments, the Court concludes that an *in camera* review of the records is warranted. See *Evening News Ass'n v Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983). As a result, defendant is hereby ordered to produce for the Court's review:

An unredacted copy of the public records identified in defendant's January 7, 2022 supplemental exemption log with the redacted material(s) and cited exemptions clearly identified. In addition, defendant shall note any of the documents that, to its knowledge, plaintiff already possesses.

Defendant shall produce the requested materials within twenty-eight (28) days of the entry of this order. The records shall be sealed and will only be accessible by the Court. See MCR 8.119(I).

No further briefing will be allowed, unless otherwise ordered by the Court.

It is so ordered.

Date: February 25, 2022

Thomas C. Cameron
Judge, Court of Claims

STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
_____/

No. 20-000098-MZ

HON. THOMAS CAMERON

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PLAINTIFF ENERGY POLICY ADVOCATES' SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT'S 1/7/22 SUPPLEMENTAL EXEMPTION LOG

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ARGUMENT

I. DAG has failed to meet its burden and establish particularized justifications for exemption of the public records identified in the January 7, 2022 supplemental exemption logs. The Court should order disclosure or conduct an *in camera* review.

DAG has not provided a particularized justification for the categories of public records identified in its January 7, 2022 Supplemental Exemption Log ("Supplemental Exemption Log"). (Def.'s Reply Br., Ex. 14.) As with its prior privilege log, DAG offers in its Supplemental Exemption Log only vague, generic justifications that provide insufficient basis to sustain their exemption claims. But merely labeling a document with a claim of privilege is insufficient. This Court should therefore either order disclosure or, at a minimum, conduct an *in camera* review.

A. DAG has not offered particularized justification for withholding the public records identified in the Supplemental Exemption Log.

Governments have a significant advantage in Freedom of Information Act ("FOIA") litigation. *Evening News Ass'n v City of Troy*, 417 Mich 481, 514; 330 NW2d 481 (1983). They know exactly what is in a document; a party challenging the claimed exemption does not. *Id.* Thus, "the normal common-law tradition of adversarial resolution of matters is decidedly hampered, if not brought to a complete impasse." *Id.*

Because of that procedural disadvantage and "the natural tendency of bureaucracies to protect themselves," courts must "find some way to compensate . . ." *Id.* at 514–515. The solution is that courts must, in their discretion: (1) require "a complete particularized justification as set forth in the six rules above"; (2) "conduct a hearing in camera based on a de novo review to determine whether complete particularized justification pursuant to the six rules exists"; or (3) "consider 'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement 'whenever possible.'" *Id.* at 516 (emphasis supplied). Because DAG has failed to provide "complete particularized justification" in accordance with *Evening News*, more is

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required here: at least an *in camera* review and preferably with an opportunity for EPA's counsel to participate with adversarial argument.

DAG's Supplemental Exemption Log again fails to provide an adequate particularized justification here. Consequently, this Court must either: (1) grant summary disposition and order disclosure; or (2) move to the other alternatives. "Justification of exemption must be more than 'conclusory,' i.e., simple repetition of statutory language. A bill of particulars is in order. [For example, j]ustification must indicate factually how a . . . category of documents, interferes with law enforcement proceedings." *Evening News Ass'n*, 417 Mich at 503 (articulating rules in context of law-enforcement investigation exemption), citing *Campbell v Dep't of Health & Human Services*, 221 US App DC 1, 4–6, 10–11; 682 F2d 256 (1982); *Vaughn v Rosen*, 157 US App DC 347; 484 F2d 820. Further, though a category of documents may be exempt from FOIA disclosure, "any category must be clearly described and drawn with sufficient precision so that all documents within a particular category are similar in nature." *Herald Co v Ann Arbor Pub Sch*, 224 Mich App 266, 275; 568 NW2d 411, 415 (1997), quoting *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 225–226; 514 NW2d 213 (1994). In determining if there is particularized justification for a category of documents, a court may "conduct a hearing in camera based on *de novo* review to determine whether complete particularized justification . . . exists[.]" *Nicita v City of Detroit*, 194 Mich App 657, 663; 487 NW2d 814, 818 (1992).

DAG has identified four separate classes of documents in the Supplemental Exemption Log that it seeks to exempt from disclosure. The Manning Declaration states that, "[f]or the most part, the same categories of records that I identified in my November 30, 2021 declaration are present in body of records described in this additional exemption log." (Def.'s 1/7/22 Reply, Ex. 14 at ¶ 3). And it claims that "the justification provided in [the November 30, 2021 exemption log]

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DANA NESSEL

applies with the same weight to the exempted records described in the [Supplemental Exemption Log]. (Def.'s 1/7/22 Reply, Ex. 14 at ¶ 4.) Because *the same* categories are described and *the same* justifications are given for this Supplemental Exemption Log as for the prior log, those claims fail ***for the same reasons*** discussed in EPA's prior briefing. (EPA's Br. in Support of MSD, pp. 16-17; EPA's Br, in Reply, pp. 1-2) (noting DAG's arguments regarding particularized justification lack credibility based on its prior practice of overbroad and unsupported assertions of privilege demonstrated in a review of the disclosed documents.)

More particularly, DAG did not meet its requirement to particularly describe the substance of the withheld public records identified in the Supplemental Exemption Log. DAG's Supplemental Exemption Log offers no more than one-sentence descriptions of exemption claims—often drawing on generic descriptors. For example, the "basis for exemption" on Document No. 254 states: "Communication between state attorney general offices with a common legal interest that outlines ongoing and likely legal actions as well as related next steps in those ongoing and likely actions." (Def.'s Reply Br., Ex. 14. p. 8.) The "basis for exemption" on Document No. 255 likewise states: "Communication between state attorney general offices with a common legal interest that circulates a draft complaint and discusses potential benefits of certain legal strategies." (*Id.*; see also Doc. No. 257.)

More generic descriptions could hardly be summoned. Nor is the circular, talismanic reference to States "with ***a common legal interest***" helpful. DAG cannot justify withholding based on "common interest privilege" by saying that it has "a common legal interest." DAG must ***identify*** and ***describe*** "with sufficient precision" a "particularized" basis for its exemption claims. *Herald Co*, 224 Mich App at 275; *Evening News Ass'n*, 417 Mich at 503. Bureaucratic double speak is insufficient. That means explaining not only the subject matter of the common interest but also the

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justification for finding a common legal interest rising to the level of recognized privilege. Thus, even where DAG has identified the ***subject*** of a claimed "common legal interest," that in itself does not necessarily justify the existence of a common interest. (See, e.g., Doc. Nos. 260, 266, & 269.)

EPA highlights these examples only as illustrative of DAG's withholdings. As the saying goes, there is much more where that comes from, (Def.'s Reply Br., Ex. 14)—most of it equally sparse in explanation and equally heavy on circular justification. EPA is by no means attempting to litigate the records of which there has already been a full disclosure by DAG. But, for those continued withholdings, DAG has failed to meet its burden of a particularized justification for the exemption. This Court should grant summary disposition in EPA's favor and order disclosure.

B. As an alternative to disclosure, the Court should conduct an *in camera* review and allow EPA's counsel to participate.

If the Court does not grant summary disposition and order disclosure because DAG has failed to meet its burden, then this Court should conduct an *in camera* review on both the Supplemental Exemption Log, as well as the previously identified documents DAG continues to wrongfully withhold.

DAG has acknowledged the need for an *in camera* review here. When EPA first proposed *in camera* review, DAG did not object. (Def.'s Resp. to Pltf.'s 11/30/21 Mot. for Summ. Disp., p. 16). DAG now appears to be trying to walk that concession back. DAG now claims that its "exemption logs and declarations, and ***perhaps*** **in camera *review*** of certain records, show that Plaintiff's arguments regarding the remaining at-issue records lack merit." (Def.'s 1/7/22 Reply, p. 4). If summary disposition is not granted in EPA's favor, then an *in camera* review is necessary.

As discussed before, DAG's claims of exemption of the remaining public records at issue strongly suggest the need for an *in camera* review of any still-withheld documents that are not

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otherwise ordered to be released. (Pltf.'s MSD, p. 18). Moreover, DAG's previous unjustified claims of privilege illustrate the benefit of "'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement'" in order to sharpen this Court's review through the adversarial process of argumentation. *Id.* at 516. For that reason, this Court should allow EPA's counsel the opportunity to participate in any necessary *in camera* review.

To compensate for not meeting its burden, DAG also seemingly attempts to place the blame on EPA asserting its rights under FOIA. DAG argues that it "should not be faulted for Plaintiff's continued challenge of such a large volume or records . . . ." (Def.'s 1/7/22 Reply, p. 2). The problem here is not EPA's assertion of rights under FOIA; the problem is DAG's withholding of voluminous amounts of public records. DAG's late attempt to prevent *in camera* review is remarkable. This Court should, at a minimum, look behind DAG's terse justifications and thoroughly review DAG's withholdings. *Evening News Ass'n*, 417 Mich at 516.

II. DAG's further disclosure of 60 additional documents warrants an award of attorney's fees to EPA as a substantially prevailing party. EPA's possession of a handful of documents obtained from other states is irrelevant.

Lastly, there should be no debate now that EPA has already at least substantially prevailed. EPA has obtained **187** documents either in full or with partial redactions from DAG out of a total of approximately **425** contested documents since the filing of this suit. (And that does not include whatever this Court may order DAG to disclose.) Moreover, this suit had a substantial causative effect on the release of those documents: DAG refused to give up any of the challenged documents before EPA's suit. Therefore, EPA is entitled to an award of attorney fees and costs pursuant to MCL 15.240(6) regardless of what this Court does in an *in camera* review.

"A party has 'prevailed' under FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents." *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992). When a party completely prevails

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"attorney fees and costs must be awarded under the first sentence of MCL 15.240(6)[.]" *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). When a party prevails partially, an award of attorney fees and costs is discretionary. *Id.* A party completely prevails even if "the victory may not be total, [but] it is still a very substantial one[.]" *Int'l Union, United Plant Guard Workers of America v Dep't of State Police*, 422 Mich 432, 455; 373 NW2d 713 (1985). In other words, a party prevails when it obtains access to the documents central to its FOIA claim. *Id.* As discussed in earlier briefing, prevailing does not require an order compelling production. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150. A party has "prevailed in part" for purposes of FOIA if "plaintiff's FOIA action was reasonably necessary to and substantially caused defendants to produce the late-disclosed items." *Id.*

EPA has substantially prevailed and is entitled to reasonable attorneys' fees. DAG initially withheld numerous documents from EPA in response to EPA's FOIA requests. Through discovery, EPA obtained DAG's late disclosure of **187** documents initially withheld on indefensible claims of privilege. (See, e.g., Pltf.'s 11/30/21 MSD, Ex. E.) Of those, **127** documents were disclosed in June 2021; another **60** documents were disclosed in January 2022 along with the Supplemental Exemption Log.[1] That disclosure occurred only after discovery requests were issued by EPA and the parties reached an agreement to ward off a discovery fight. This action has thus undoubtedly been "necessary to" and had "a substantial causative effect on" DAG's disclosure.

DAG admits this. DAG concedes it has directly disclosed these documents to EPA as a result of this litigation. (Def's. Resp. to Pltf's MSD, p. 2.) And DAG "agrees that, under binding case law, the instant litigation did have "substantial causative effect" on the delivery of the records

[1] Plaintiff EPA arrives at the 127-document number from 114 discrete documents produced in June 2021—of which, approximately 13 additional document numbers are identified noting that they were duplicates but had been counted separately towards the withholding of over 425 documents.

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it disclosed in June of 2021[.]" *Id.* at p. 13 (emphasis added). That is even more true now than it was when DAG filed its response given DAG's further disclosure of 60 documents along with the Supplemental Exemption Log.

DAG's focus on a handful of documents that EPA obtained from other sources is irrelevant. *First*, "the documents" pertinent in FOIA are those possessed by DAG not by some other out-of-state body. *Second*, those documents are few in number compared to those released by DAG here.

On the first, DAG incorrectly argues that EPA cannot prevail with respect to any document EPA allegedly independently possess because this FOIA action did not have a causative effect on EPA's possession. Yet the issue is whether the suit has the causative effect of delivering "the information" held by DAG, *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150—not whatever documents might exist elsewhere. The statutory language is in accord with this understanding. FOIA defines a "[p]ublic record" as a "**writing** prepared, owned, used, **in the possession, or retained by a public body** in the performance of an official function, from the time it is created." MCL 15.232(i) (emphasis supplied). The case of *Competitive Enterprise Institute v Attorney General of New York*, 161 App Div 3d 1283, 1286; 76 NYS3d 640 (2018) ("*CEI*") reinforces and illustrates this principle. What is dispositive is if the "writing . . . in the possession" of DAG—not whatever EPA may obtain elsewhere. And, contrary to DAG's reading of *CEI*, the standard applied there is not less strict. The issue is the same: did this suit cause DAG to release the "writing . . . in the possession [of]" the "public body," MCL 15.232(i)—regardless of whether similar documents were obtained elsewhere? The suit certainly did.

On the second, the documents DAG focuses on account for a minuscule amount of the withheld documents. For example, DAG highlights 10 documents obtained from the Minnesota AG. (Def.'s Reply Br., p. 3, n. 2.) But DAG initially withheld over 400 documents. (*Id.*, Ex. 14.)

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And DAG has now produced approximately **187** documents through this litigation. Therefore, even if these few documents obtained by EPA from other sources[2] are not counted towards those that EPA has obtained as a result of this litigation, EPA has still substantially prevailed. An award of attorney fees is appropriate. *Wilson*, 196 Mich App at 673.

Thus, EPA has established that it has partially prevailed even prior to any ruling by this Court ordering further documents to be released. The Court should award EPA attorney fees and pursuant to MCL 15.240(6).

CONCLUSION AND RELIEF REQUESTED

For the reasons explained herein and in its previous filings, this Court should grant judgment in Plaintiff EPA's favor and order the release of the still-withheld documents at issue or, alternatively, require an *in camera* review and allow Plaintiff EPA to participate. Additionally, this Court should hold that Plaintiff EPA was a substantially prevailing party, or alternatively a partly prevailing party, and award attorney fees in an amount to be determined following further supplemental briefing.

Respectfully Submitted,

CLARK HILL PLC

Dated: January 28, 2022

/s/ *Zachary C. Larsen*
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[2] The axiomatic truth in FOIA litigation is that a party seeking documents never knows what it does not know. *Evening News Ass'n*, 417 Mich at 514. So, it is perverse for DAG to fault a FOIA requestor for seeking records from one governmental body even where it has obtained those precise documents from another. Until the FOIA requestor sees the documents, they cannot know if there are differences between the two.

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
_____/

No. 20-000098-MZ

HON. THOMAS CAMERON

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_____/

STIPULATION FOR FILING OF SUPPLEMENTAL EXEMPTION LOG AND SUPPLEMENTAL BRIEF IN RESPONSE

The parties, by and through their respective counsel, state as follows:

1. In accordance with the Order Amending Scheduling Order dated November 2, 2021, the deadline for the parties to file motions for summary disposition was November 30, 2021.

2. Both parties have filed motions for summary disposition.

3. For the reasons explained in Defendant DAG's response to Plaintiff EPA's motion for summary disposition, Defendant DAG will be filing a supplemental exemption log on Friday, January 7, 2022.

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4. In light of Defendant's supplemental exemption log filing, the parties have agreed that Plaintiff shall be allowed to file a supplemental brief in response to said supplemental exemption log on or before Friday, January 28, 2022.

5. Plaintiff's supplemental brief may not exceed 10 pages, double spaced, exclusive of attachments and exhibits.

WHEREFORE, the Parties respectfully request that this Court enter the attached Order.

Stipulated and agreed to:

/s/ *Zachary C. Larsen*
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Dated: January 7, 2022

/s/ *Adam R. de Bear*
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Dated: January 7, 2022

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ORDER GRANTING THE PARTIES STIPULATION FOR FILING OF SUPPLEMENTAL EXEMPTION LOG AND SUPPLEMENTAL BRIEF IN RESPONSE

At a session of said Court held in the Court of
Claims Courtrooms, Wayne County,
Detroit, Michigan,
on the 21 st day of January 2022.

PRESENT: Hon. Thomas Cameron
Judge of the Court of Claims

This matter having come before the Court on the Parties' stipulation for Defendant to file a supplemental exemption log and for Plaintiff to file a brief in response to the same, the Court having reviewed the Parties' stipulation and being otherwise fully advised:

IT IS HEREBY ORDERED that Defendant shall be allowed to file its supplemental exemption log on January 7, 2022;

IT IS FURTHER ORDERED that Plaintiff shall be allowed to file a supplemental brief in response to said supplemental exemption log on or before Friday, January 28, 2022, which is not to exceed 10 pages, double spaced, exclusive of attachments and exhibits.

IT IS SO ORDERED.

Hon. Thomas Cameron
Judge of the Court of Claims

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. THOMAS C. CAMERON

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DEFENDANT'S REPLY BRIEF

I. The Department has carried its burden of justifying the nondisclosure of records that are at issue in this litigation.

In its brief, Plaintiff argues that the Department, "[r]ather than offering a particularized justification for each of the documents, . . . has instead asserted generic and overly broad claims of exemption that fail to meet its burden under FOIA." (Pl's Br, p 4.) In making this argument, Plaintiff does cite the *Evening News* three-step procedure (*id.*, p 6), but it misses its purpose.

Specifically, *Evening News* provides that "the following three-step procedure should be followed by Michigan trial courts:" (1) "The court should receive a complete particularized justification [regarding the exempted records]"; or (2) "the court should conduct a hearing *in camera* based on *de novo* review to determine whether complete particularized justification pursuant to the six rules exists . . . ; or (3) the court can consider "allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement 'whenever

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possible[.]'" *Evening News Ass'n v City of Troy*, 417 Mich 481, 515–516 (1983). And while Plaintiff does request that its counsel be allowed access to the records, it largely ignores the first two steps' purpose. Specifically, the Court explained that "the matter should normally be resolved under the first step[,]" but if "the court is in doubt, . . . [it] may have to proceed to the second step" where "[i]f the matter is relatively clear and not too complex, the court . . . may, within acceptable expenditure of judicial energy, be able to resolve the matter *in camera*." *Id.*

Put simply, this matter should be resolved under the first step as the Department has provided exemption logs for the still-withheld records (see Exs 7-1, 8-1; see also Ex 14-1, Supplemental Exemption Log[1]) along with the particularized justifications detailed in AAGs Bock and Manning's declarations. (See Exs 7, 8; see also Ex 14, Supp Manning Declaration.) But even if "the court is in doubt" as to the Department's justifications, it can "proceed to the second step" and conduct an *in camera* review of the disputed records. *Evening News*, 417 Mich at 516. And while the Department acknowledges that in camera review will require an "expenditure of judicial energy," *id.*, it should not be faulted for Plaintiff's continued challenge of such a large volume or records, including emails addressed from the Department's attorneys to the Attorney General titled "Legal Strategies and Options on Line 5," (see Ex 14-1, No. 275). Further, more so than the law enforcement records at issue in *Evening News*, providing Plaintiff's counsel with access to these communications is improper considering the well-established protections provided by the attorney client and work product privileges, see, e.g., *United States v Jicarilla Apache Nation*, 564 US 162, 165 (2011) (describing "the attorney-client privilege [as] among the oldest and most established evidentiary privileges known to our

[1] Exhibit 14 is a supplemental exemption log with respect to the records Plaintiff did not specifically identify as being at issue in June of 2021.

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law") and *United States v Nobles*, 422 US 225, 238 n 11 (1975) (noting that "the work-product doctrine is distinct from and broader than the attorney-client privilege").

Moreover, a review of Plaintiff's arguments regarding the categories of records exempted from disclosure highlights the flaws in its own reasoning. First, for its arguments regarding the redactions to the common interest agreements (or "CIAs" which Plaintiff likely already possesses[2]), Plaintiff suggests that because it "identifies no immediate litigation" or "ongoing legal enterprise[,]" the Department has failed to carry its burden of justifying the nondisclosure. (Pl's Br, p 8.) But an *in camera* review, should Court be inclined to conduct one, will show that the redacted portions of the CIAs reveal the anticipated legal challenges as well as the common legal interests that the signatories share. And the same is true for the withheld communications between the signatories to the CIAs; the contents of the communication identify both the legal interests shared by the parties as well as the purpose of their communications (e.g., preparing joint comment letters to federal regulatory agencies, filing petitions for review of certain administrative actions, or commencing civil actions).[3]

The justification is even more apparent from the face of the exemption logs with respect to the Department's internal communications. For example multiple emails were withheld between the Department's attorneys and David Dybdahl (a retained expert witness) who ultimately prepared a report regarding Enbridge's ability to pay in the event of major spill in its

[2] The Department has now determined that, through litigation with Minnesota, Plaintiff independently possesses at least 10 of the at-issue CIAs. (See Ex 15, Supplemental Bock Decl, ¶¶ 2–3.) And as for the records it did not receive from Minnesota (i.e., Nos. 218, 220, 226, 228, 229), Vermont is a party to each of those five CIAs, and Plaintiff successfully litigated the nondisclosure of CIAs in Vermont. (See Ex 12.)

[3] Further, for Pruss' invoices, the Department has explained that such records may fall within the attorney client privileges as they can "also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law[.]" *Chaudhry v Gallerizzo*, 174 F3d 394, 402 (CA 4, 1999).

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Line 5 oil pipeline. (See, e.g., Ex 14-1, Nos. 352, 354, 356, 360). In these emails, the Departments attorneys and Dybdahl share draft versions of the report and provide comments on particular concerns in the drafts. (*Id.*) Clearly this is protected work product as the Court Rules "protect[ ] communications between the party's attorney and any expert witness under . . . regardless of the form of the communications" unless those communications reveal compensation or fact and assumptions relied upon by the experts. See MCR 2.302(B)(4)(f); see also *Backiel v Sinai Hosp of Detroit*, 163 Mich App 774, 779 (1987) (commenting that "written communications between the expert and the attorney [can] intrude upon those mental impressions of the attorney . . . [that] are protected by the work-product doctrine").

Other examples of records that are plainly exempt based on the descriptions in the exemption logs and declarations include AAG Reichel's June 13, 2019 submission of a draft complaint to the Attorney General and other managing attorneys for the purpose of soliciting feedback (see Ex 14-1, No. 283) and SAAG Pruss' memoranda that "detail recommendations regarding potential legal action on climate litigation and concentrated animal feeding operations[,]" (*id.*, No. 372). Further, within this internal category of records, a subcategory of communications exists in which the Department's attorneys prepare recommendations for the Attorney General regarding requests to join amicus briefs or participate with other states as a Plaintiff in certain litigation or administrative actions. (See, e.g., *id.*, Nos. 298, 315, 374, 401, 403.) Simply put, given the justification provided in the exemption logs for the nondisclosure of these records, the Department has satisfied *Evening News'* first step.

In short, the Department's exemption logs and declarations, and perhaps *in camera* review of certain records, show that Plaintiff's arguments regarding the remaining at-issue records lack merit.

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II. Plaintiff's independent possession of at-issue records makes it impossible for this litigation to have had "a substantial causative effect on the delivery of information."

Lastly, Plaintiff's arguments that it can still be considered a prevailing party with respect to the challenged records that it independently possesses make little sense. Specifically, Plaintiff relies on a New York case which appears to stand for the proposition that there is no exemption for records that are publicly available. (Pl's Br, p 15), citing *Competitive Enterprise Institute v Attorney General of New York*, 161 App Div 3d 1283, 1286; 76 NYS3d 640 (2018). But this case reveals that, under New York Law, a requester "substantially prevails" when it "receive[s] all the information that it requested and to which it was entitled in response to the underlying FOI[A] litigation." *Id.* at 1286. Michigan law, however, is different. Specifically, "[a] party prevails in the context of a[ ] FOIA action when the action was reasonably necessary to compel the disclosure, *and the action had a substantial causative effect on the delivery of the information to the plaintiff.*" *Thomas v City of New Baltimore*, 254 Mich App 196, 202 (2002). Here, axiomatically, Plaintiff cannot prevail with respect to any records it independently possesses (including the CIAs and related multi-state communications) as this lawsuit will have had no "causative effect on the delivery of the information" contained in such records. *Id.*

CONCLUSION AND RELIEF REQUESTED

For these reasons and those stated in its principal brief and response to Plaintiff's motion for summary disposition, the Department requests that this Court enter an order granting summary disposition in its favor and dismissing Plaintiff's complaint.

Respectfully submitted,

/s/ *Adam R. de Bear*
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Dated: January 7, 2022

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
_____/

No. 20-000098-MZ

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PLAINTIFF ENERGY POLICY ADVOCATES' BRIEF IN REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S 11/30/21 MOTION FOR SUMMARY DISPOSITION

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ARGUMENT

I. DAG has failed to meet its burden and establish particularized justifications for exemption. The Court should order disclosure or conduct an *in camera* review.

DAG has not provided a particularized justification for the categories of public records it continues to withhold. "Justification of exemption must be more than 'conclusory,' i.e., simple repetition of statutory language. A bill of particulars is in order. [For example, j]ustification must indicate factually how a . . . category of documents, interferes with law enforcement proceedings." *Evening News Ass'n v City of Troy*, 417 Mich 481, 503; 330 NW2d 481 (1983) (articulating rules in context of law-enforcement investigation exemption), citing *Campbell v Dep't of Health & Human Services*, 221 US App DC 1, 4–6, 10–11; 682 F2d 256 (1982); *Vaughn v Rosen*, 157 US App DC 347; 484 F2d 820. Although a category of documents may be exempt from FOIA disclosure, "any category must be clearly described and drawn with sufficient precision so that all documents within a particular category are similar in nature." *Herald Co v Ann Arbor Pub Sch*, 224 Mich App 266, 275; 568 NW2d 411, 415 (1997), quoting *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 225–226; 514 NW2d 213 (1994). In determining if there is particularized justification for a category of documents, a court may "conduct a hearing in camera based on *de novo* review to determine whether complete particularized justification . . . exists[.]" *Nicita v City of Detroit*, 194 Mich App 657, 663; 487 NW2d 814, 818 (1992).

DAG has identified four separate classes of documents that it seeks to exempt from disclosure. (Def.'s Resp. to Pltf.'s 11/30/21 Mot. for Summ. Disp., pp. 6–7.) Despite the uncontroverted requirement of particularly describing the substance of the withheld public records and why that actual substance within these categories are exempt, DAG's claims and supporting affidavits do not do so. As discussed in EPA's Brief in Support of its Motion for Summary Disposition on pages 16-17, the records released by DAG also disprove certain claims of privilege,

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demonstrate a practice of overbroad and unsupported assertions of privilege, and suggest that other redactions and documents fully withheld are not privileged. Because of the breadth of public records at issue and DAG's prior practice of unjustifiably exempting public records from disclosure, DAG has failed to meet its burden. In the alternative, this Court should conduct an *in camera* review process to the extent necessary to scrutinize DAG's justifications for withholding.

DAG erroneously asserts that EPA's illustrative examples detailing how the records released by DAG were unjustifiably initially withheld (1) shows that EPA "is choosing to litigate over the disclosure of the records it already possesses" or (2) demonstrates that DAG is properly protected by its claims of privilege. (Def.'s Resp. to Pltf.'s 11/30/21 Mot. for Summ. Disp., pp 10–11). As to the first, EPA highlighted these examples as illustrating DAG's unjustifiable withholding of the nearly 300 public records still at issue. EPA is by no means attempting to litigate the records of which there has already been a full disclosure by DAG. As to the second, DAG contends that these documents were lawfully redacted because "a review of the redacted information shows that Plaintiff is mistaken." (Def.'s Br., p. 10.) But arguing from "a review of the redacted information" only further illustrates the need for this Court to conduct an *in camera* review process to look behind the redactions—i.e., to scrutinize DAG's justifications for withholding or redacting those remaining public records still at issue. The Court should do so.

II. EPA should be awarded attorney's fees as a partially prevailing party. EPA's possession of some of the public records DAG claims are exempt is irrelevant to determining whether EPA substantially prevailed.

Because EPA has already at least partially prevailed, it is entitled to an award of attorney fees and costs pursuant to MCL 15.240(6). A party has 'prevailed' under FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents." *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992). That does not require an order compelling production. For example, in *Local Area Watch*, the Court of

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Appeals held that a municipality's disclosure of documents via discovery meant that the FOIA action had the causative effect on the delivery of the information sought. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). This was true even though all of the documents in the initial FOIA request were not produced. *Id.* The Court noted that a defendant's good faith was immaterial when its initial action was a denial and the litigation resulted in the production of documents. *Id.* Under those circumstances, the plaintiff had "prevailed in part" for purposes of FOIA because "plaintiff's FOIA action was reasonably necessary to and substantially caused defendants to produce the late-disclosed items." *Id.*

EPA has likewise already prevailed at least in part here, and this Court should award reasonable attorneys' fees. DAG initially withheld numerous documents from EPA in response to EPA's FOIA requests. Through discovery, EPA obtained DAG's late disclosure of multiple documents initially withheld on indefensible claims of privilege. (Pltf.'s 11/30/21 MSD, Ex. E.) That disclosure occurred only after discovery requests were issued by EPA and the parties reached an agreement to ward off a discovery fight. This action has thus undoubtedly been "necessary to" and had "a substantial causative effect on" DAG's disclosure.

DAG admits this. DAG concedes it has directly disclosed over 100 documents to EPA as a result of this litigation. (Defendant's Response to Plaintiff's 11/30/21 Motion for Summary Disposition, p. 2.) And DAG "agrees that, under binding case law, the instant litigation did have "substantial causative effect" on the delivery of the records it disclosed in June of 2021[.]" *Id.* at p. 13. DAG attempts to downplay the extent of EPA's status of a prevailing party by understating this number because it subtracted certain duplicate documents that were previously produced. (See *Id.*, p. 14, fn. 7.) And DAG further tries to downplay EPA's having prevailed on those withholdings on the basis that EPA independently possesses 13 of the 300 public records still in dispute.

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Those responses are unavailing. Contrary to DAG's contention, EPA's independent possession of documents it requested under FOIA is not relevant to this issue. Whether EPA has received a copy of *another party's* document from a source outside of this litigation is not material to DAG's FOIA obligations. FOIA defines a "[p]ublic record" as a "**writing** prepared, owned, used, **in the possession, or retained by a public body** in the performance of an official function, from the time it is created." MCL 15.232(i) (emphasis supplied). Thus, what matters is the "writing . . . in the possession" of DAG—not whatever EPA may obtain elsewhere. See also *Competitive Enterprise Institute v Attorney General of New York*, 161 AD3d 1283, 1286; 76 NYS3d 640 (New York Sup Ct 2018). Moreover, whatever the availability of 13 documents, it does not minimize Plaintiff EPA's victory in obtaining over 100 initially withheld documents to date through this litigation—as well as whatever this Court may order released after an *in camera* review.

III. Counsel for EPA should be permitted to participate in any *in camera* review.

While DAG does not object to this Court conducting an *in camera* review of the remaining public records in dispute, it objects to EPA's request to participate. (Def.'s Resp. to Pltf.'s 11/30/21 Mot. for Summ. Disp., p. 16.) In FOIA litigation, the government is placed at a significant advantage because it knows exactly what is in a document whereas the party challenging the claim of exemption does not. *Evening News Ass'n*, 417 Mich at 514. As the Michigan Supreme Court explained in *Evening News Association*:

> Where one party is cognizant of the subject matter of litigation and the other is not, the normal common-law tradition of adversarial resolution of matters is decidedly hampered, if not brought to a complete impasse. If one adds to this the natural tendency of bureaucracies to protect themselves by revealing no more information than they absolutely have to, it is clear that disclosure becomes neither automatic nor functionally obtainable through traditional methods. [*Id.*]

Thus, courts must "find some way to compensate the inherent problems of (1) only the government knowing what is in the requested documents, (2) the natural reluctance of the government to reveal

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anything it does not have to, and (3) the fact that courts normally look to two equally situated adversarial parties to focus and illuminate the facts and the law." *Id.* at 515. The solution is that courts must, as their discretion deems fit, require: (1) "a complete particularized justification as set forth in the six rules above"; (2) "conduct a hearing in camera based on a de novo review to determine whether complete particularized justification pursuant to the six rules exists"; or (3) "*consider 'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement 'whenever possible*.'" *Id.* at 516 (emphasis supplied).

DAG's claims of exemption of the remaining public records at issue strongly suggest the need for an *in camera* review of any still-withheld documents that are not otherwise ordered to be released. Moreover, DAG's previous unjustified claims of privilege illustrate the benefit of "'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement'" in order to sharpen this Court's review through the adversarial process of argumentation. *Id.* at 516. For that reason, this Court should allow EPA's counsel the opportunity to participate in any necessary *in camera* review.

CONCLUSION AND RELIEF REQUESTED

For the reasons explained in this Reply Brief and EPA's motion for summary disposition, this Court should grant judgment in Plaintiff EPA's favor and order the release of the still-withheld documents at issue or, alternatively, require an *in camera* review and allow Plaintiff EPA to participate. Additionally, this Court should hold that Plaintiff EPA was a partly prevailing party and award attorney fees in an amount to be determined following further supplemental briefing.

Respectfully Submitted,

CLARK HILL PLC

Dated: January 7, 2022

/s/ Zachary C. Larsen
Zachary C. Larsen (P72189)

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ENERGY POLICY ADVOCATES V
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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

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DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

COUNTERSTATEMENT OF FACTS

The salient facts and procedural history are set forth in detail in the Department's brief in support of its own motion for summary disposition. Thus, to provide the Court with an accurate recitation of the scope and size of Plaintiff's FOIA requests that are at issue here (as well as the number of records it has obtained from sources outside the instant litigation), it incorporates by reference its previous statement of facts and presents the below counterstatement of facts.

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The number of records at issue with Plaintiff's FOIA requests.

Several of Plaintiff's FOIA requests were voluminous. As can be seen in the exemption logs attached to the Department's motion for summary disposition, there are approximately 426 records at issue in this lawsuit which were exempted (or partially exempted) from disclosure. (See Exs 7-1, 8-1, 9 to Def's Mot for Summ Disp.) Additionally, of the approximately 426 records that were exempted from disclosure, the Department, at Plaintiff's request, completed a second review of 212 email records and produced, without redaction, approximately 67 of those emails.[1] (See generally Ex 8-1.)

While this number of exempted records is high, it should also be noted that, in response to Plaintiff's FOIA requests and before the commencement of litigation, approximately 439 email records were produced in addition to redacted copies of the common interest agreements and the invoices of Special Assistant Attorney General Pruss. (Ex 11, Wendling-Richards Supp Decl, ¶ 3.)[2] Of these 439 records, the Department produced approximately 430 emails in response to Plaintiff's August 28 and 29, 2019 requests, which largely sought email communications between the Department and non-departmental attorneys. (*Id.*, ¶ 3a; Am Compl, Exs A & B.) The Department produced seven emails in response to Plaintiff's January 10, 2020

[1] Together with these 69 records, approximately 45 additional records were also produced with redactions to those portions of the records the Department maintains are exempt from disclosure. Further, the Department completed a second review of 15 common interest agreements that were exempted or partially exempted from disclosure. (See Ex 7-1.)

[2] All references to Exhibits 1 through 10 shall refer to those exhibits attached to the Department's 11/30/2021 motion for summary disposition.

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request which sought all emails from two high-ranking Departmental attorneys (AAG Manning and former Deputy AG Keenan) that contained the words "climate litigation," "climate change litigation," "Exxon," or "Hayes." (Ex 11, ¶ 3b; Am Compl, Ex S.) And in response to Plaintiff's narrow March 27, 2020 request, it produced two emails. (Ex 11, ¶ 3c.)

The number of at-issue records already in Plaintiff's possession.

As the Department explained in its motion for summary disposition, Plaintiff has admitted that it "obtained unredacted or lesser redacted copies of certain public records responsive to the FOIA requests that are the subject of this action from sources other than [the instant litigation]" and that it was in possession of "several" common interest agreements and "numerous" email communications. (Ex 10, Pl's Resp to Interrogs, p 4.) And although it refused to identify each at-issue record that it had already obtained, it appears as though Plaintiff is already in possession of each common interest agreement that the Department exempted from disclosure.

For example, at the outcome of litigation Plaintiff had filed against the Vermont Attorney General's office, the Vermont Superior Court ordered production of seven common interest agreements. (Ex 12, *Energy Policy Advocates v Attorney General's Office*, Vermont Superior Court No. 173-4-20, op & order, pp 3–4, 10.) Further, in addition to the Vermont litigation, Plaintiff also filed an open records suit against the Minnesota Attorney General. See *Energy Policy Advocates v*

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Ellison, 963 NW2d 485, 489 (Minn Ct App, 2021).[3] Accordingly, it is the Department's understanding that through the litigation with Minnesota and Vermont, that Plaintiff is in possession of at least a majority (if not all) of the common interest agreements at issue here.

The records at issue in the instant FOIA action.

There appears to be a dispute regarding the scope of the withheld records that are at issue in this lawsuit. From the outset, the parties worked to narrow the list of exempted or partially exempted records being challenged. To this end, the parties ultimately identified certain records for which the Department would provide a more detailed explanation of the particular exemptions (or partial exemptions) that it employed. And the Department, in June of 2021, did provide an updated exemption log with respect to 228 documents identified by Plaintiff. (See Exs 7-1 and 8-1.)

It was the Department's understanding that these identified records which are described in the revised exemption logs constituted the narrowed scope of the instant litigation. The Department's understanding was the result Plaintiff's allegation in its complaint that "logs further suggest that certain records are subject to legitimate claims of privilege or otherwise are exempt under FOIA[,]" (Am Comp, ¶26), its request for relief for "the Court to allow counsel for the parties to meet and

[3] The Minnesota Attorney General filed an application for the Minnesota Supreme Court to review the lower court's opinion and order, and review was granted on August 10, 2021.

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confer to reach an agreement for a reduced number of withheld records subject to challenge[,]" (*Id.*, ¶ 79), and its admission which came after the receipt of the revised exemption logs that the parties have "discussed that not all documents identified on [the Department's] privilege logs are at issue[,]" (Pl's Resp to Req for Admissions, p 3).

But in the days before the dispositive motion deadline and upon reviewing Plaintiff's dispositive motion, it became apparent that Plaintiff is in fact challenging nearly every record the Department exempted from disclosure. (See Pl's Br, p 15.) As such, the Department plans to produce, as a supplemental filing, a revised exemption log justifying the nondisclosure of those remaining records identified in Exhibit 9 to its motion for summary disposition. The Department's revised exemption log will be produced on January 7, 2022 along with its reply brief in support of its 11/30/2021 Motion for Summary Disposition.[4]

[4] Plaintiff does not object to the supplemental filing of revised exemption log. Additionally, the parties have agreed that Plaintiff, to the extent necessary, will be permitted to file a supplemental brief addressing the revised exemption log.

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ARGUMENT

I. By providing a particularized justification with respect to each category of records that has been withheld, the Department has satisfied its burden under the FOIA.

In its motion, Plaintiff argues that the Department has not met its burden of showing that the withheld records at issue in this lawsuit are exempt from disclosure under the FOIA. (See Pl's Br, pp 13–18.) Specifically, Plaintiff asserts that "[t]he exemption logs produced by [the Department] do not justify its claims of privilege in the manner required by the Michigan Supreme Court in *Evening News Association* [*v City of Troy*, 417 Mich 481, 503 (1983)], and that, therefore, "summary disposition should be granted in [its] favor in full under MCR 2.116(C)(10)[.]" Plaintiff misunderstands *Evening News* and is mistaken regarding the appropriate outcome of this FOIA action.

First, Plaintiff misunderstands *Evening News* because Michigan Courts do in fact permit a public body to carry its burden by submitting a particularized justification that applies to "a particular document, *or a category of documents*[.]" *Evening News Ass'n*, 417 Mich at 503. And when a public body carries its burden by justifying the exemption of a category of documents, the "categor[ies] must be clearly described and drawn with sufficient precision so that all documents within a particular category are similar in nature." *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 226 (1994) (internal quotation marks omitted). Here, the Department has done just that.

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Specifically, the Department identified four, clearly drawn categories of information that were exempted from disclosure: (1) the redacted portions of the common interest agreements; (2) the communications between the signatories of those agreements; (3) the communications within the Department; and (4) the partial redaction of Mr. Pruss' billing statements. (See Def's Mot for Summ Disp, p 13.) Further, the Department, in submitting detailed declarations by Assistant Attorneys General Bock and Manning, provided particularized justifications for each of these four categories of records. (See Exs 7, Bock Declaration; Ex 8, Manning Declaration.) Simply put, by submitting AAGs Bock and Manning's' declarations and providing the June 2021 exemption log, (see Exs 7-1, 8-1), the Department has carried its burden of justifying the nondisclosure of clearly drawn categories of records as permitted under *Evening News* and *Newark Morning Ledger*.[5]

Second, Plaintiff is mistaken regarding the appropriate outcome of this FOIA action because an in camera review of the disputed records (which the Department recognizes that the Court will likely conduct) will demonstrate the propriety of the exemptions. For example, a review of records number 37, 40, 41, and 42, among many others, will show attorneys with an established common legal interest discussing potential strengths and weaknesses of certain legal strategies and other

[5] In fact, because of the similarity of records, AAG Manning's declaration provides a sufficient justification as to the nondisclosure of the records identified in Exhibit 9. But, as discussed above, the Department will produce a revised exemption log that provides justification for the non-disclosure of records that were not identified in the June 2021 exemption log.

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topics for potential climate litigation—information that is clearly protected by the work product and common interest privileges. See *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 82 (2014) (explaining "that disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor . . . and the recipient"); *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 600 (2017) (providing that "the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest").

Additionally, as another example, review of record number 13 will show Deputy AG Keenan, on June 18, 2019, more than a week before the Department filed suit against Enbridge in Ingham County, providing candid advice to AG Nessel regarding the impact of litigation regarding the Line 5 pipeline.[6] Put simply, this sort of frank, pre-decisional advice that is protected by the attorney client and work product privileges as well as the FOIA's deliberative process exemption. See *Upjohn Co v United States*, 449 US 383, 389 (1981) (explaining that "[t]he attorney–client privilege is the oldest of the privileges for confidential communications known to the common law" and that "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); *Leibel v Gen Motors Corp*, 250 Mich App 229, 247 (2002) (stating that, under the work

[6] A copy of the June 27, 2019 lawsuit against Enbridge may be viewed at the following address: https://www.michigan.gov/documents/ag/Enbridge_SC_2019-6-27_659213_7.pdf.

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product privilege as codified in the rules, "even when a party demonstrates substantial need and undue hardship, the court 'shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories' of the attorney concerning the litigation"); *Bukowski v City of Detroit*, 478 Mich 268, 274-75 (2007) (providing that the FOIA's deliberative process exemptions applies to communications that are (1) "of an advisory nature [and] made within a public body[,]" (2) "cover[ ] other than purely factual material," and (3) "preliminary to a final agency determination of policy or action").

In short, contrary to Plaintiff's allegations, a review of the withheld records will show that the Department properly applied the exemptions at issue in this FOIA action.

II. Upon closer review, Plaintiff's claims that recently produced records show a practice of over-broad exemptions do not withstand scrutiny.

In its brief, Plaintiff asserts that, even after the June 2021 supplemental disclosure of records, the Department is still overbroad with its application of the FOIA's exemptions. (Pl's Br, p 16.) And in an attempt to provide support for this assertion, Plaintiff offers several examples of instances where the Department has improperly invoked exemptions to disclosure. (*Id.*, pp 16–17.) But just like a review of the records discussed above in Part I show proper application of the exemptions at issue here, a review of those examples Plaintiff cites in its brief does not show any violation of the FOIA.

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For its first example, Plaintiff references the following records as examples of instances where the Department had already provided certain records that were subsequently produced with minimal redactions: Nos. 73, 74, 95, 98, 99, 100, 103–105. (*Id.*, p 16.) Plaintiff maintains that the previous disclosure of these records demonstrates the Department's "internal inconsistency" and "vastly overbroad claims of privilege." (*Id.*) But instead, what this shows, is that Plaintiff is choosing to litigate over the disclosure of records it already possesses. Cf. *Densmore v Dept of Corr*, 203 Mich App 363, 366 (1994) (explaining that "[w]here the records have already been furnished, it is abusive and a dissipation of agency and court resources to make and process a second claim"). Moreover, Plaintiff's possession of these records (which occurred prior to litigation) merely reduces the number of records at issue in this lawsuit.

Second, Plaintiff claims that records 117 and 118 which redact a few words regarding a particular area of SAAG Pruss' work are improper because "the mere subject matter that a contractor for DAG is involved in is not protected work product." (*Id.*, pp 16–17.) But as the Department pointed out in its dispositive motion, the attorney client privilege protects the disclosure of "correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law[.]" *Chaudhry v Gallerizzo*, 174 F3d 394, 402 (CA 4, 1999), quoting *Clarke v Am Commerce Nat Bank*, 974 F2d 127, 129 (CA 9, 1992). And to this end, a review of the redacted portion of this record

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will show that Mr. Pruss references a particular legal strategy he was researching on behalf of the attorney general. Put another way, the redacted portion of this email communication "fall[s] within the [attorney client] privilege." *Chaudhry*, 174 F3d at 402.

Third, and finally, Plaintiff claims that a review of records 171, 175, 178, 179, and 180 shows that the redactions made to record 175 cannot be a legitimate claim of privilege as the Department is merely assembling information for a political purpose. (Pl's Br, p 17.) Once again, however, a review of the redacted information shows that Plaintiff is mistaken. Specifically, in the unredacted portion of the email communication, the Department's former legislative liaison seeks input from AAG Manning regarding whether the contents of a soon-to-be published "score card," which include summaries of AG Nessel's litigation efforts, were accurate. (Ex 13, Record Nos. 171 and 175, pp 1, 3–8.) And in the redacted portion of the email communication, AAG Manning reaches out to other managing attorneys within the department for the purpose of reviewing the proposed score card for accuracy and omissions. (*Id.*, p 1 [redacted portion].)

Plainly stated, this communication between AAG Manning and the other managing attorneys was not political in nature, as Plaintiff suggests. Instead, it merely amounted to a review of a soon-to-be-published description of the Department's litigation and other legal efforts during AG Nessel's tenure as attorney general. And when such a written summary of the Department's attorneys' legal efforts is to be published, an advance review by the Department's

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attorneys is certainly within the bailiwick of an attorney's services; particularly when those same attorneys worked on the legal efforts discussed in the publication. See, e.g., *Mohawk Indus, Inc v Carpenter*, 558 US 100, 108 (2009) (explaining that "[b]y assuring confidentiality, the [attorney-client] privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation").

In short, a review of the records provided during the course of litigation does not show that the Department is utilizing overbroad exemptions. To the contrary, it shows both that Plaintiff is needlessly challenging the nondisclosure of records it already possesses and that the Department's continued nondisclosure of the remaining redacted or withheld records is consistent with the FOIA.

III. Given the number of at-issue records Plaintiff already possesses and the number of records that are properly exempt from disclosure, Plaintiff cannot "substantially prevail" in this action.

In making its argument for attorneys' fees, Plaintiff does correctly acknowledge that when a requesting person prevails in part, whether to "award all or an appropriate portion of reasonable attorneys' fees" is within the trial court's discretion. (Pl's Br, p 19, quoting MCL 15.240(6).) But Plaintiff significantly overstates its case when it refers to its "victory" as "very substantial" and asserts that it is entitled to a full award of attorneys' fees. (Pl's Br, p 20, citing *Intl Union, United Plant Guard Workers of Am (UPGWA) v Dept of State Police*, 422 Mich 432, 455 (1985).)

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In deciding the extent of Plaintiff's status as a prevailing party, Plaintiff again correctly notes the legal standard: "A party has 'prevailed' under the FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents." (Pl's Br, pp 19–20, quoting *Wilson v Eaton Rapids*, 196 Mich App 671, 673 (1992).) And while the Department agrees that, under binding case law, the instant litigation did have "substantial causative effect" on the delivery of the records it disclosed in June of 2021, Plaintiff overlooks the fact that it cannot "prevail" in this action when it is already in possession of the records at issue in this lawsuit.

Specifically, as explained above, Plaintiff, through its litigation against the Minnesota and Vermont Attorneys General, appears to be in possession of the entirety of common interest agreements that at issue here. (See Ex 12.) What is more, Plaintiff made the following, relevant admissions during the course of discovery:

- "[I]t . . . obtained from sources other than DAG copies of certain public records which on their face indicate DAG also possesses copies of, DAG's copies of which are responsive to the FOIA requests that are the subject of this action[.]" [Ex 10, p 4.]

- "[I]t . . . received unredacted copies of several purported common interest agreements at issue in this matter from other parties to those agreements" and "unredacted or lesser redacted copies of numerous emails at issue in this matter . . . from other parties to the correspondence[.]" [*Id.*, p 5.]

Put simply, if Plaintiff received some of the at-issue records from sources outside the instant litigation, as it has admitted, it cannot be the case that the instant litigation "had a substantial causative effect on the delivery of or access to the

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documents." See *Wilson*, 196 Mich App at 673. Thus, the larger number of records that Plaintiff independently possesses, the smaller any so-called victory becomes for Plaintiff. But notwithstanding the relevance of these records to the issue of attorneys' fees, Plaintiff refused to identify every public record that the Department exempted from disclosure in its possession as well the source from which it obtained those public records. (Ex 10, pp 4–5.)

Lastly, an additional factor that will reduce the extent of Plaintiff's partial victory is the number of withheld records that this Court determines were properly exempted from disclosure. To date, Plaintiff can make a claim that it has partially prevailed by obtaining 69 unredacted copies of previously exempted records (see generally Ex 8-1) and 36 partially redacted copies of records that were previously exempted from disclosure.[7] But because there are still more than 300 instances of nondisclosure that Plaintiff is challenging, should the Department prevail on the majority of the remaining disputed records, Plaintiff's victory will be insignificant as opposed to "very substantial." As such, because the extent of Plaintiff's success depends on the Court's disposition of the remaining at-issue records and the number of at-issue records Plaintiff independently possesses, it is premature (if not entirely inaccurate) for Plaintiff to style its victory as "very substantial."

[7] The Department arrived at the number 36 partially redacted records by subtracting the 69 unredacted records and the 9 records identified in pages 16 and 17 of Plaintiff's brief in support of its motion for summary disposition from the 114 total records that were produced during discovery. Additionally, it should be noted that to the extent Plaintiff obtained any of these 69 unredacted records or 36 partially redacted records from sources outside this litigation, these numbers should be reduced further.

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IV. This Court should defer argument regarding attorneys' fees until after it rules on whether the remaining at-issue records are properly exempt from disclosure under the FOIA.

As it stated in its own dispositive motion, the Department requests that "this Court exercise its discretion and award no fees as Plaintiff will have only prevailed in small part considering the records it already possesses and the applicability of MCL 15.243(1)(g), (h), and (m) to the remaining, undisclosed records." (Defs' Mot for Summ Disp, pp 25–26.) But if the Court is inclined to award all or a portion of Plaintiff's reasonable attorneys' fees, it should defer such argument until after deciding whether the Department properly exempted the challenged records from disclosure.

Deferring argument is appropriate considering that, as mentioned above in Part III, the extent to which Plaintiff prevails can only be known at the conclusion of the merits portion of this action and the size of any victory is relevant in determining both the appropriate portion of a fee award and the reasonableness of any fee award. See, e.g., *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 282 (2016) (explaining that one of the eight factors in deciding whether a downward adjustment to a baseline fee is appropriate is "the amount in question and the results obtained" and that "the trial court may consider any additional relevant factors"). Accordingly, should the Court be inclined to award fees, the Department agrees with Plaintiff that "a short, supplemental filing will enable the parties to respond to the question of attorneys' fees when the matter is settled and . . . guide this Court in determining the amount[, if any,] to be awarded." (Pl's Br, p 22.) And the Department further requests that prior to any award of attorneys' fees, the

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Court convene an evidentiary hearing to dispute the reasonableness of any claimed fee award. (*Id.*, p 26 n 6.)

V. The Department does not object to the Court conducting an *in camera* review of the approximately 300 records which the Department has exempted or partially exempted from disclosure.

In its brief, Plaintiff requests, as an alternative to its request for an immediate order of disclosure, that this Court conduct an *in camera* review of the challenged records. (Pl's Br, p 18.) The Department does not object to this Court conducting an *in camera* review.

However, Plaintiff also contends, without really explaining how, that the Department's "unjustified claims of privilege illustrate the benefit of 'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement' in order to sharpen this Court's review through the adversarial process of argumentation." (*Id.*, quoting *Evening News*, 417 Mich at 516.) Simply put, allowing Plaintiff's counsel to review records the Department asserts are protected by the attorney-client, work-product, and deliberative process privileges is both unnecessary and harmful to those very privileges the Department is attempting to protect. In the end, because the Court is capable (without the assistance of Plaintiff's counsel) of reviewing the contested records together with the parties' briefing and deciding whether the Department's exemptions were appropriate, this Court should reject Plaintiff's request for its attorneys to have access to the challenged records at issue here.

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ENERGY POLICY ADVOCATES V

CONCLUSION AND RELIEF REQUESTED

For these reasons and those stated in the it's 11/30/2021 Motion for Summary Disposition, the Department requests that this Court enter an order denying Plaintiff's motion for summary disposition and granting judgment in the Department's favor under MCR 2.116(I)(2).

Respectfully submitted,

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Dated: December 29, 2021

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

No. 20-000098-MZ

HON. CHRISTOPHER MURRAY

INDEX OF EXHIBITS
TO DEFENDANT'S BRIEF IN RESPONSE TO
PLAINTIFF'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

Exhibit 11	Wendling-Richards Supplemental Declaration
Exhibit 12	Opinion & Order: *Energy Policy Advocates v Attorney General's Office*, Vermont Superior Court No. 173-4-20,
Exhibit 13	Records Nos. 171 and 175

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES,
A Washington Nonprofit corporation,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.

Case No. 20-000098-MZ

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PLAINTIFF ENERGY POLICY ADVOCATES' BRIEF IN RESPONSE TO DEFENDANT'S 11/30/2021 MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

Defendant DAG moves for summary disposition based on claims of exemption under attorney-client privilege, the attorney work product doctrine, the common interest doctrine, and FOIA's deliberative process exemption. Yet its claims and supporting affidavits do not provide a particularized description of the substance of the withheld public records (as is required), let alone a particularized justification for each of those withholdings. DAG's motion should be denied.

DAG has already acknowledged that many of its initial claims of privilege were indefensible. During litigation, it has reversed its claims of exemption for many of the withheld records and disclosed those documents. Those disclosures not only confirm that Plaintiff Energy Policy Advocates ("EPA") is a "prevailing party" and is thus entitled to attorney fees under MCL 15.240(6) and punitive damages under MCL 15.240(7), but they also provide context for DAG's continued claims of privilege on the still-withheld public records, which are not only highly suspect but also unproven.

Because the remaining records sought are "public records" of a "public body" under MCL 15.232(h) & (i) and DAG has not met its burden of establishing that the records are exempt from disclosure, this Court should deny DAG's motion for summary disposition. Instead, it should grant EPA's own motion for summary disposition under MCR 2.116(C)(10) and grant summary disposition in EPA's favor under MCR 2.116(I)(2). Alternatively, this Court should conduct an *in camera* review regarding the remaining records to scrutinize DAG's claims of privilege. Additionally, because Plaintiff EPA has already partly prevailed under MCL 15.240(6) by obtaining disclosure of many of the documents DAG initially and also wrongly withheld documents, this Court should award reasonable attorney fees and punitive damages or provide for further briefing on the amount such an award following the final disposition of this matter.

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STATEMENT OF FACTS

EPA incorporates by reference its version of the statement of facts as stated on pages 2-10 of its Brief in Support of its November 30, 2021 Motion for Summary Disposition.

STANDARD OF REVIEW

Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Lugo v Ameritech Corp,* 464 Mich 512, 520; 629 NW2d 384 (2001). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Oliver v Smith,* 269 Mich App 560, 564; 715 NW2d 314 (2006); MCR 2.116(G)(3) & (G)(4). The moving party may rely only on *admissible* evidence in doing so—and the reviewing court must review only admissible evidence. MCR 2.116(G)(6). If the moving party's initial burden is met, then "[t]he adverse party [must] set forth specific facts at the time of the motion," *Bernardoni v City of Saginaw*, 499 Mich 470, 473; 886 NW2d 109 (2016), by affidavits or other documentary evidence "showing that there are genuine issues for trial." MCR 2.116(G)(4). If it appears to the court that the party opposing a motion, rather than the moving party, is entitled to judgment, the court may render judgment in the opposing party's favor. MCR 2.116(I)(2).

ARGUMENT

I. The DAG has failed to meet its burden of establishing that the still-withheld documents are exempt from disclosure.

Defendant DAG has failed to meet its burden of proving a particularized justification for each of the still-withheld documents. Moreover, its vague, generalized justifications are themselves overbroad and problematic as illustrated by its invocation of the "common interest" doctrine without reference to the actual contours of the doctrine itself. Thus, this Court should

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deny its motion, and instead grant judgment in favor of Plaintiff EPA. Or, alternatively, the Court should conduct an *in camera* review and thereafter order the release of documents.

a. Public bodies must disclose all "public records" unless the body demonstrates that each record and portion of a record that is withheld is specifically exempted under the Act.

Michigan's Freedom of Information Act ("FOIA") declares that "[i]t is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2). Doing so allows the People to "be informed so that they may fully participate in the democratic process." *Id.* As Michigan courts have explained, "FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116, 123–24 (2014), quoting *Manning v City of East Tawas*, 234 Mich App 244, 593 NW2d 649 (1999), overruled on other grounds. "On its express terms, the FOIA is a pro-disclosure statute . . . ." *Herald Co, v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873, 877 (2000). Accordingly, FOIA must be interpreted "broadly to allow public access" *Prac Pol Consulting v Sec'y of State*, 287 Mich App 434, 465; 789 NW2d 178, 194 (2010), and "a public body must disclose all public records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011).

b. The documents at issue in this case are indisputably "public records" under MCL 15.232(i).

The documents at issue are indisputably "public records." Under FOIA, a "'[p]ublic record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the

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performance of an official function, from the time it is created." MCL 15.232(i). Neither DAG's status as a "public body" nor the fact that these documents were prepared, used, or held by DAG in the performance of an official function are in dispute nor addressed in DAG's motion for summary disposition. Summary disposition should be granted in EPA's favor on this issue.[1]

c. The DAG has not met its burden of establishing that the public records at issue are exempt.

DAG has failed to meet its burden to establish that the public records are exempt from disclosure. Rather than offering a particularized justification for each of the documents, DAG has instead asserted generic and overly broad claims of exemption that fail to meet its burden under FOIA. This Court reviews *de novo* a public body's claim that public records are exempt from FOIA disclosure. MCL 15.240(4). A government agency's generic claim of exemption is not sufficient. *King v Oakland Cty Prosecutor*, 303 Mich App 222, 227; 842 NW2d 403 (2013). Instead, MCL 15.243 codifies certain "particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant interest in nondisclosure." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). These specific exemptions to FOIA "must be narrowly construed, and the burden rests on the party asserting an exemption" to sustain the basis for its withholding. *Rataj*, 306 Mich App at 748; MCL 15.240(4).

i. Michigan law requires a particularized justification of exemption.

In analyzing a claim of exemption, Michigan courts must scrutinize the public body's claim with six rules in mind:

1. The burden of proof is on the party claiming exemption from disclosure. MCL 15.240(1).

[1] For a more thorough discussion, EPA incorporates by reference pages 11-13 of its Brief in Support of its 11/30/2021 Motion for Summary Disposition.

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2. Exemptions must be interpreted narrowly. *Vaughn v Rosen,* 157 US App DC 340, 343; 484 F2d 820 (1973).

3. '[T]he public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.' MCL 15.244(1); MSA 4.1801(14)(1); *Vaughn v. Rosen,* 157 US App DC 345; 484 F2d 820.

4. '[D]etailed affidavits describing the matters withheld' must be supplied by the agency. *Ray v Turner,* 190 US App DC 290, 317; 587 F2d 1187 (1978).

5. Justification of exemption must be more than 'conclusory,' *i.e.,* simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings. *Campbell v Dep't of Health & Human Services,* 221 US App DC 1, 4–6, 10–11; 682 F2d 256 (1982); *Vaughn v. Rosen,* 157 US App DC 347; 484 F2d 820.

6. The mere showing of a direct relationship between records sought and an investigation is inadequate. *Campbell v Dep't of Health & Human Services,* 221 US App DC 8–9; 682 F2d 256.

Evening News Ass'n v City of Troy, 417 Mich 481, 503; 330 NW2d 481 (1983) (articulating rules in context of law-enforcement investigation exemption); see also *Nicita v City of Detroit*, 194 Mich App 657; 487 NW2d 814 (1992) (applying same rules to a distinct FOIA exemption). Consistent with those rules, each claim of exemption requires a "particularized justification" tailored to the portion of each document that is claimed to be exempt. *Evening News Ass'n*, 417 Mich at 493–494; MCL 15.244(1) (requiring separation of exempt and non-exempt material in each public record).

Requiring, at a minimum, a particularized justification from the public body supported by record evidence is a response to the "inherent problems" in FOIA litigation. *Id.* at 514. In FOIA litigation, the government is placed at a significant advantage because it knows exactly what is in a document whereas the party challenging the claim of exemption does not. As the Michigan Supreme Court explained in *Evening News Association*:

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or may not pursue through litigation *or* administrative challenge. This does not amount to particularized justification. In fact, this does not even amount to "anticipating litigation" within its legal meaning. A party "anticipates litigation," in the context of privilege claims, "if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have already arisen." *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 654 n 2, 385 NW2d 296 (1986), quoting *United States v Davis*, 636 F2d 1028 (CA5 1981). Here, the only identifiable prospect of litigation offered by DAG is a reference to a broad statutory or regulatory scheme, *i.e.* the federal Clean Air Act and the administrative rules promulgated thereunder. See Defendant's Ex. 7, Decl. of Bock, ¶2. Defendant has not shown what sort of litigation it anticipates, what type of claims might be at issue in such litigation, or even whether it anticipates being a plaintiff or a defendant in litigation.

DAG has also failed to show that there is a common legal interest between its office and the other signatories to the purported common interest agreements. "[T]he common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing legal enterprise." *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 596; 909 NW2d 862 (2017), appeal denied, 503 Mich 870; 917 NW2d 404 (2018). Likewise, to justify its claimed common-interest withholdings, DAG must identify the specific interest in conjunction some kind of action or avenue of relief.

For example, in *Estate of Nash by Nash v City of Grand Haven*, the Court of Appeals held that the common-interest doctrine applied to render communications between the city and the attorney general as privileged attorney-client communications immune from disclosure under FOIA, where such communications concerned the common legal interest of ensuring that a

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charitable trust, which bequeathed a park to the city, was appropriately reformed. *Id.* In that case, there was a shared interest "because the city's attorneys were directly involved in negotiating the reformation of the Duncan Park Trust that was sought in the probate court and because the city's fiduciary duties to the people of Grand Haven were aligned with the Attorney General's interests relating to the Duncan Park Trust." *Id.* at 601. That immediate link of identifiable litigation pursued in common between two parties and common legal duties provided sufficient basis for the claim.

But, here, the supposed common legal interest claimed by the DAG is too broad to qualify as such. Defendant DAG asserts that there is a common legal interest between itself and other attorney general offices based on various statutory/regulatory schemes that encompass a vast range of potential legal interests. DAG identifies no immediate litigation or "ongoing legal enterprise" is directly identified. *Id.* at 596. This is not a particularized justification of a shared legal interest.

In addition, previously redacted documents that have since been released (and other documents previously released and now redacted) indicate that many such documents had nothing to do with litigation strategy, legal research, or identified strengths and weakness of potential litigation challenges and coordinated work assignments relevant common interest agreement, demonstrate a practice of overbroad and unsupported assertions of these privileges, and suggest that other redactions and documents fully withheld are not privileged. Defendant DAG redacted, *inter alia*, the title, purpose and subject matter of the common interest agreements from EPA's November 13, 2019 request. Ptfs' MSD, Ex. A, Aff. of Hardin, at ¶ 18. The records largely appeared to be drafted from the same template. *Id.* Yet DAG redacted uniform, boilerplate provisions in some, while releasing the same provisions in others. *Id.* Defendant DAG's inconsistent and unjustified redaction thus further indicates that it has not met its burden of establishing that the privilege applies in this case.

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iii. DAG has not met its burden to show that communications between signatories to the purported common interest agreements are exempt.

For the same flawed reasons offered for withholding the common interest agreements, DAG argues the communications between the signatories of those agreements are exempt by the work product privilege. This blanket assertion of work product privilege does not rise to a particularized justification.

DAG also has been revealed to have unjustifiably claimed work product privilege for other public records sought by EPA. For example, Documents 73 & 74, described on updated Privilege Log T were initially withheld on the basis of "deliberative process" and "attorney work-product" privilege and continue to be redacted on that basis. Ptfs' MSD Ex. E, Docs. 73 & 74. Yet the redacted portions of the e-mail that DAG continues to protect as "privileged" has already been released by DAG and states nothing more than a generic observation about DAG policy. Ptfs' MSD Ex. F, Released Docs. Likewise, in Documents 95, 98, 99, 100, & 103-105, DAG has redacted an AAG's statement as to which multistate work groups she participates in and then subsequently redacted an attached list indicating those assignments in the Department, again wrongly claiming work-product privilege. Ptfs' MSD Ex. E, Docs. 95, 98, 99, 100, & 103-105. Identifying which work groups an AAG participates in is not privileged "work product," and DAG has once again already released the redacted material. Ptfs' MSD Ex. F. DAG's internal inconsistency thus shows a practice of vastly overbroad claims of work product privilege.

iv. DAG has not met its burden to show communications within the Department are exempt from disclosure.

Defendant DAG has not met its burden to justify withholding internal communications. In addition to DAG's overly broad and unparticularized reasons for exemption, its prior practice shows that there is no merit to any sort of claim of privilege. For example, DAG redacted a whole

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e-mail and portions of an e-mail in Documents 171 & 175. The context shows that DAG's then legislative-liaison, David Knezek, served as a conduit to a third-party interest group for a "How Green is Your AG" scorecard. Ptfs' Ex. E, Docs. 171 & 175. Mr. Knezek asked attorneys to comment on whether "what is written is accurate" and "if there's anything missing" on the third-party scorecard. *Id.* In a forwarded email, context suggests that attorney Peter Manning asked subordinates to provide that information—but his e-mail is fully withheld. *Id.* DAG withheld this information as "attorney-client privilege," "work product," and "deliberative process," with the explanation it involves "institutional advice regarding the totality of the Department's climate-related litigation during the administration of AG Nessel." But the context of Mr. Knezek's e-mail again belies DAG's generic labels: this is information gathering for the political purpose of attaining a positive rating in an environmental interest group's scorecard. Relatedly, Documents 178, 179, & 180 affirm this clearly political purpose as DAG Communications personnel explains "[t]he AG is receiving an award at the Michigan League of Conservation Voters Gala" and was therefore assembling information for that purpose. Ptfs' Ex. E, Doc. 180. DAG's claims of "attorney-client privilege" and "work product" on records created for this political purpose are indefensible.

v. DAG has not met its burden to show that Mr. Pruss' billing statements are exempt from disclosure under the attorney-client privilege and the work product doctrine.

Lastly, DAG has not met its burden to withhold Mr. Pruss' billing statements because of the attorney-client privilege and the work product doctrine as it is defined by relevant precedent. Once again, DAG at first withheld entire records or entries only to prove such information was obviously non-privileged with subsequent releases, and its vague assertions are insufficient.

For example, in *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 279; 568 NW2d 411 (1997), the Court described the attorney client-privilege:

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> The attorney-client privilege attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice. The purpose of the privilege is to enable a client to confide in an attorney, secure in the knowledge that the communication will not be disclosed. The scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice. [Citations omitted.]

While attorney-client privilege may also encompass statements made by the attorney to the client, it only applies to confidential communications made for the purpose of obtaining legal advice. *Id.* Specific to attorney billing statements, the public body must "describe the substance of the withheld [billing statements] or redacted information in the billing statements as being exempted on the basis that the withheld information reflected confidential communications made to counsel for the purpose of obtaining legal advice." *Anklam v Delta College Dist No 317962,* unpublished per curiam opinion of the Court of Appeals, issued June 26, 2014 (Docket No 317962) p 3, Ex. A.

DAG has failed to show that the withheld Pruss billing statements qualify as communications for the purpose of obtaining legal advice. Indeed, the bills appear to post-date any relevant "advice," and it is hard to imagine that a bill itself reveals any particular advice to a client. Instead, DAG offers generic claims of privilege under the guise of "areas of the law that [he] researched" and "privileged discussions" about "areas of potential litigation[.]" Def's Ex. 8, ¶ 14. Even more troublesome is that some communications with Mr. Pruss that were initially redacted or withheld clearly are not privileged. Documents 117 & 118, released in the later-disclosed production, redact a statement from Skip Pruss reflecting, "I'm continuing to work on **[REDACTED]**." The mere subject matter that a contractor for DAG is involved in is not protected work product.

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II. The estimated fees to process EPA's May 1, 2020 FOIA request are not authorized under FOIA.

In addition to its unjustified withholdings, Defendant DAG's $565.00 fee to process EPA's May 1, 2020 request constitutes *prima facie* proof of a groundless fee-as barrier in violation of MCL 15.234 when compared to the DAG's $156.62 cost to process Plaintiff's previous, much broader request dated November 13, 2019. This Court should grant judgment in EPA's favor on that claim.

MCL 15.234 allows a FOIA requester to challenge a fee assessment if the public body's actions in processing the request were "explicitly or implicitly designed to block or otherwise prevent the disclosure of simple responsive documents that would fulfill Plaintiff's request through the imposition of unlawful and unreasonable charges and costs[.]" *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 395; 872 NW2d 223, 237 (2015); see also *Detroit Free Press, Inc v Dep't of Atty Gen*, 271 Mich App 418, 423; 722 NW2d 277, 280 (2006) and *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740–741, 550 NW2d 265, 267 (1996). For example, in *Arabo v Michigan Gaming Control Board,* a challenge to a public body's processing fee for a FOIA request was allowed to stand where the "plaintiff essentially challenged the reasonableness of the [public body's] assessed fee in light of the nature of his request[.]" 310 Mich App at 395.

Here, DAG's $565.00 fee estimate to process EPA's May 1, 2020 request was not reasonable in light of the nature of the request as affirmed by comparison with DAG's prior $156.62 fee cost to process EPA's previous request. The request dated November 13, 2019 sought the following public records: any employment contracts with Skip Pruss, applications to participate in the SEEIC's Fellows Program, and any common interest agreements, contingency or other fee agreements, secondment agreements, retainer agreements, and engagement agreements entered in by DAG at any time in 2019. The May 1, 2020 request only requested all purported common

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interest agreements entered into by DAG at any time in 2020. The November 13, 2019 request covered an additional six-month time period and included six additional categories of documents than the May 1, 2020 request. The May 1, 2020 request only requested common interest agreements in a five-month timespan. Yet the DAG's processing fee for the May 1, 2020 request was $565.00, and only $156.62 for the November 13, 2019 request.

DAG's justification for its apparently retaliatory, fee-as-barrier May 1, 2020 processing fee was unjustified and so generic that it could have been originally applied to the November 13, 2019 fee—or any other FOIA request for that matter. "Failure to charge would result in an unreasonably high cost to the Department in this particular instance because employees must be taken away from pending work to process the large number of documents and expend additional time to complete regularly assigned Departmental work." DAG's Ex. 1, ¶ 8. Because DAG $565.00 fee for EPA's May 1, 2020 request was designed to block or otherwise prevent the disclosure of EPA's requests, this is a typical fee-as-barrier issue under FOIA. EPA should prevail on its challenge under MCL 15.234.

III. This Court should award EPA attorney fees and costs and, if an *in camera* review is conducted, require supplemental briefing.

Next, because EPA has at least partially prevailed, it is entitled to an award of attorney fees and costs pursuant to MCL 15.240(6). This Court should grant summary disposition in Plaintiff EPA's favor and determine the amount of such fees at a later time.

FOIA provides that "[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court *shall award* reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6) (emphasis added). But "[i]f the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements." *Id.* Reading

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these two provisions together, Michigan courts explain that "attorney fees and costs must be awarded under the first sentence of MCL 15.240(6) only when a party prevails completely." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). Nonetheless, a court has discretion to award fees if a party partly prevails, *Id.* at 151, and the Michigan Supreme Court has permitted recovery even when "victory may not be total" but is nonetheless "a very substantial one." *Int'l Union UPGWA v Dep't of State Police*, 422 Mich 432, 455; 373 NW2d 713 (1985).

"A party has 'prevailed' under the FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents." *Wilson v Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992). That does not require an order compelling production. For example, in *Local Area Watch*, the Court of Appeals held that a municipality's disclosure of documents via discovery meant that the FOIA action had the causative effect on the delivery of the information sought. *Local Area Watch*, 262 Mich App at 150. The Court noted that a defendant's good faith was immaterial when its initial action was a denial and the litigation resulted in the production of documents. *Id.* Under those circumstances, the plaintiff had "prevailed in part" for purposes of FOIA because "plaintiff's FOIA action was reasonably necessary to and substantially caused defendants to produce the late-disclosed items." *Id.*

EPA has likewise prevailed at least in part here, and this Court should award reasonable attorneys' fees. Defendant DAG initially withheld numerous documents from EPA in response to EPA's FOIA requests. DAG has released information it previously withheld (and now withholds information it previously released). Through discovery, Plaintiff EPA obtained DAG's late disclosure of multiple documents initially withheld on indefensible claims of privilege. Pts' MSD Ex. E. That disclosure occurred only after discovery requests were issued by Plaintiff EPA and the

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parties reached an agreement to ward off a discovery fight. This action has thus undoubtedly been "necessary to" and had "a substantial causative effect on" DAG's disclosure. *Wilson*, 196 Mich App at 673. Whether EPA obtains "total" victory or only "a very substantial one," *Int'l Union UPGWA*, 422 Mich at 455, remains to be seen based on this Court's rulings on competing motions for summary disposition. Nonetheless, Plaintiff EPA's victory has been at least "very substantial," and this Court should award attorneys' fees. MCL 15.240(6).

Contrary to Defendant DAG's faulty contention, EPA's independent possession of documents it requested under FOIA is not relevant to this issue. Whether EPA has received a related or similar document from any source outside of this litigation is not material to DAG's FOIA obligations. FOIA defines a "[p]ublic record" as a "**writing** prepared, owned, used, **in the possession, or retained by a public body** in the performance of an official function, from the time it is created." MCL 15.232(i) (emphasis supplied). Thus, what matters is the "writing . . . in the possession" of DAG—not whatever Plaintiff may obtain elsewhere. Caselaw from other jurisdictions is in accord.

For example, in *Competitive Enterprise Institute v Attorney General of New York*, 161 AD3d 1283, 1286; 76 NYS3d 640 (New York Sup Ct 2018), the Appellate Division of the Supreme Court of New York rejected a similar argument that obtaining documents elsewhere is determinative of whether a party prevails under FOIA. There, in noting that the plaintiff sought the described record *in that AG's possession*, the Court remarked that "there is no exception for public records *per se*" under FOIA. *Id*. Further, there were documents in dispute other than those in Plaintiff's possession. *Id*. The same is true here. Michigan law provides no FOIA exception for records available (or obtained) elsewhere. Nor are the records Plaintiff has been able to obtain

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from other sources the sole documents in dispute. Plaintiff EPA has substantially prevailed having obtained numerous documents from DAG in this suit, and attorneys' fees are appropriate.

The guiding principle for an award of attorneys' fees is that it must be reasonable. *Michigan Tax Management Services Co v City of Warren*, 437 Mich 506, 509; 473 NW2d 263 (1991). "[T]here is no precise formula to determine a reasonable fee . . . ." *Prins v Michigan State Police*, 299 Mich App 634, 642; 831 NW2d 867 (2013). Factors courts should consider include: (1) the attorney's experience and professional standing; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the case's difficulty; (5) the expenses incurred; and (6) the length and nature of the professional relationship with the client." *Id.* at 642, citing *Woods v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 587–588; 321 NW2d 653 (1982).

Here, EPA had incurred approximately $19,775 in outside attorneys' fees and $282.60 in costs as of the time of filing its own motion for summary disposition; substantial work has been performed since that date.[2] Outside counsel has worked approximately 79 hours on this matter, principally in reviewing and finalizing filings as local counsel, conducting discovery, negotiating resolution of a discovery dispute, reviewing released documents, and preparing this motion. Ptfs' MSD Ex. G, Affidavit of Larsen, at ¶ 15. Significant costs for outside counsel have been avoided as Plaintiff EPA performed substantial amounts of legal work through in-house counsel. *Id.* at ¶ 16. Counsel's hourly rate in this matter is reasonable compared to average billed rates for similar practitioners. *Id.* at ¶ 19. The $250 hourly rate charged by outside counsel reflects a substantial discount on his standard $520 hourly fee, which has been provided in light of the significant public policy values served by FOIA actions. *Id.* at ¶ 18. The fee further reflects counsel's 13 years of

[2] Plaintiff EPA's counsel can provide an updated fee amount following this Court's ruling on the motion for summary disposition as part of any ordered supplemental filing regarding the appropriate amount of attorneys' fees.

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experience in litigation, including eight years with the Michigan Department of Attorney General, and two years with an international, Am Law 200 Law Firm. *Id.* at ¶¶ 2–14. Accordingly, because Plaintiff EPA has prevailed in part and the attorneys' fees incurred in this matter have been "reasonable" under the factors reviewed above, this Court should grant summary disposition and award attorneys' fees. *Prins*, 299 Mich App at 642.

To the extent necessary, this Court should order a short supplemental filing following disposition of the merits of this matter. Because of the possibility of *in camera* review, the amount of attorneys' fees actually incurred by Plaintiff EPA cannot now be known due to the ongoing nature of this action and whether Plaintiff EPA has prevailed in part or in full (and, if in part, how much) still remains to be determined pending this Court's ruling. Consequently, a short, supplemental filing will enable the parties to respond to the question of attorneys' fees when the matter is settled and can guide this Court in determining the amount to be awarded.

IV. Punitive damages are appropriate in this instance due to DAG's arbitrary and capricious processing of EPA's FOIA requests.

DAG's disclosure of initially withheld public records documents revealed that its initial claims of privilege were not merely unjustified but also arbitrary—like its subsequent withholding of previously released information. This Court should award statutorily permitted punitive damages.

Punitive damages such as civil fines and damages in the event "that the public body has arbitrarily and capriciously violated" FOIA by delaying or refusing to disclose certain records. MCL 15.240(7). To prevail under MCL 15.240(7), there must be both "a court-ordered disclosure and a finding that the defendant acted arbitrarily and capriciously in refusing to provide the requested information." *Local Area Watch*, 262 Mich App at 153 (quotation marks and citation omitted). A public body acts in an arbitrary or capricious fashion where its actions were based on

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"whimsical" principles. *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 126; 454 NW2d 171 (1990), quoting *Laracey v Financial Institutions Bureau*, 163 Mich App 437, 441; 414 NW2d 909 (1987). In *Meredith Corporation v City of Flint*, 256 Mich App 703, 718; 671 NW2d 101, 109 (2003), the Court awarded punitive damages because "[d]espite knowing that the tape was subject to disclosure, [the public body] pursued a strategy that delayed release of the tape for weeks after plaintiff submitted its FOIA request."

Based on DAG's previous failures to meet FOIA obligations, it is extremely likely that the information it continues to withhold are likewise not subject to any kind of disclosure exemption. For example, Documents 73 & 74, described on updated Privilege Log T were initially withheld on the basis of "deliberative process" and "attorney work-product" privilege and continue to be redacted on that basis. Ptfs' MSD Ex. E, Docs. 73 & 74. Yet the redacted portions of the e-mail that DAG continues to protect as "privileged" has already been released by DAG and states nothing more than a generic observation about DAG policy. Ptfs' MSD Ex. F, Released Docs. Likewise, in Documents 95, 98, 99, 100, & 103-105, DAG has redacted an AAG's statement as to which multistate work groups she participates in and then subsequently redacted an attached list indicating those assignments in the Department, again wrongly claiming work-product privilege. Ptfs' MSD Ex. E, Docs. 95, 98, 99, 100, & 103-105. Identifying which work groups an AAG participates in is not privileged "work product," and DAG has once again already released the redacted material. Ptfs' MSD Ex. F. DAG's internal inconsistency thus shows its vastly overbroad claims of privilege.

Similarly, the context surrounding redactions belies DAG's claims of privilege. As an example, Documents 117 & 118, released in the later-disclosed production, redact a statement from Skip Pruss reflecting "I'm continuing to work on [REDACTED]." The work-product

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privilege protects "notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery." *Messenger v Ingham Cty Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393, 396 (1998). But the mere subject matter that a contractor for DAG is involved in is not protected work product.

In this vein, DAG redacted a whole e-mail and portions of an e-mail in Documents 171 & 175. The context shows that DAG's then legislative-liaison, David Knezek, served as a conduit to a third-party interest group for a "How Green is Your AG" scorecard. Ptfs' MSD Ex. E, Docs. 171 & 175. Mr. Knezek asked attorneys to comment on whether "what is written is accurate" and "if there's anything missing" on the third-party scorecard. *Id.* In a forward, context suggests that attorney Peter Manning asked subordinates to provide that information—but his e-mail is fully withheld. *Id.* DAG withheld this information as "attorney-client privilege," "work product," and "deliberative process," with the explanation it involves "institutional advice regarding the totality of the Department's climate-related litigation during the administration of AG Nessel." But the context of Mr. Knezek's e-mail again belies DAG's generic labels: this is information gathering for the political purpose of attaining a positive rating in an environmental interest group's scorecard. Relatedly, Documents 178, 179, & 180 show this clearly political purpose as DAG Communications personnel explains "[t]he AG is receiving an award at the Michigan League of Conservation Voters Gala" and was therefore assembling information for that purpose. Ptfs' MSD Ex. E, Doc. 180. DAG's claims of "attorney-client privilege" and "work product" on records created for this political purpose are indefensible.

DAG also acted in an arbitrary and capricious way by demanding EPA pay $565.00 as a processing fee for its May 1, 2020 request. EPA's November 13, 2019 request covered a far greater range of documents and time period. Yet the processing fee for that request was substantially less

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than the May 1, 2020 request. By the time EPA made its May 1, 2020 request it had submitted six separate FOIA requests to DAG relevant to this litigation. Clearly, DAG's excessive fee for the May 1, 2020 was an attempt to punish EPA for seeking transparency that FOIA provides.

CONCLUSION AND RELIEF REQUESTED

The records sought by EPA are indisputably "public records," and DAG has failed to justify its claimed exemptions in withholding them. This Court should deny DAG's motion for summary disposition and grant EPA's motion for summary disposition under MCR 2.116(C)(10) and MCR 2.116(I)(2). Alternatively, the Court should conduct an *in camera* review process to the extent necessary to scrutinize DAG's claimed justifications for each withholding.

Further, this Court should grant judgment in Plaintiff EPA's favor on its fee-as-barrier claim. It should grant punitive damages for DAG's arbitrary and capricious withholdings per MCL 15.240(7), And it should grant reasonable attorneys' fees and require supplemental briefing regarding the exact amount of fees following its final decision on the merits in this matter.

Respectfully Submitted,

CLARK HILL PLC

Dated: December 29, 2022

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,
Plaintiff,
v

No. 20-000098-MZ

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,
Defendant.

HON. CHRISTOPHER MURRAY

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PLAINTIFF ENERGY POLICY ADVOCATES' 11/30/2021 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Plaintiff Energy Policy Advocates, through its counsel Clark Hill PLC, hereby moves for summary disposition under MCR 2.116(C)(10) and relies on the brief that follows in support of its request. Consistent with LCR 2.119(A)(2), the parties discussed their respective intentions of filing dispositive motions and discussed the nature of those motions. Neither party concurred with the opposing party's request. Accordingly, it is necessary to present the instant motion for filing with the Court.

Respectfully Submitted,
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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,
Plaintiff,

v.

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,
Defendant.
_____/

No. 20-000098-MZ

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11/30/2021 BRIEF IN SUPPORT OF PLAINTIFF ENERGY POLICY ADVOCATES' 11/30/2021 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

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INTRODUCTION

Michigan's Freedom of Information Act ("FOIA" or "the Act"), MCL 15.231 *et seq*., is a "pro-disclosure statute" enacted as a promise of transparent governance and with the goal of facilitating full participation by citizens in the democratic process. Yet that is not how Defendant the Michigan Department of Attorney General ("DAG") has used the Act here. Instead, DAG has transformed Michigan's sunshine statute into a shroud of darkness—withholding internal e-mails and other documents that qualify as "public records" on flimsy or indefensible claims of privilege, which its own releases in numerous cases prove were unfounded.

DAG has already acknowledged that many of its initial claims of privilege were indefensible: during litigation, it has reversed its claims of exemption for many of the withheld records and disclosed those documents. Those disclosures not only confirm that Plaintiff Energy Policy Advocates ("EPA") is a "prevailing party" and is thus entitled to attorney fees under MCL 15.240(6), but they also demonstrate that DAG's continued claims of privilege on the still-withheld public records are both unproven and highly suspect.

Because the remaining records sought are "public records" of a "public body" under MCL 15.232(h) & (i) and DAG has not met its burden of establishing that the records are exempt from disclosure, this Court should grant summary disposition to Plaintiff EPA under MCR 2.116(C)(10). Alternatively, this Court should conduct an *in camera* review regarding the remaining records to scrutinize DAG's claims of privilege. Additionally, because Plaintiff EPA has already partly prevailed under MCL 15.240(6) by obtaining disclosure of many of the initially withheld documents, this Court should award reasonable attorney fees or provide for further briefing on the amount such an award following the final disposition of this matter.

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STATEMENT OF FACTS

The August 2019 Requests

On August 28, 2019, EPA submitted a FOIA request to DAG for certain correspondence of Attorney General Dana Nessel, Deputy Attorney General Kelly Keenan, and ENRA Division Chief Peter Manning, which included individuals associated with the New York University (NYU) School of Law's State Energy and Environmental Impact Center ("SEEIC"). Ex. A.1, 08/28/2019 Request. SEEIC is a group created by former New York City Mayor and current "climate" policy activist Michael Bloomberg to place privately-hired attorneys in state attorneys general offices, as "Special Assistant Attorneys General," to pursue particular energy and environmental enforcement and policy issues of concern to Mr. Bloomberg.[1] That request also sought correspondence of the same individuals with and/or Stanley "Skip" Pruss. *Id.* Mr. Pruss is currently a "Special Assistant Attorney General" or SAAG retained under contract for "specialized expertise and experience in a particular area of law." Ex. A, Aff. of Hardin. While not apparently an SEEIC SAAG, Mr. Pruss did serve as a liaison between DAG and Mr. Bloomberg's group for the purpose of placing other, privately-hired attorneys in DAG. *Id.* at ¶ 4.

On August 29, 2019, EPA submitted a FOIA request to DAG for correspondence between Assistant Attorney General Neil Gordon and individuals associated with the SEEIC and/or Stanley "Skip" Pruss. Ex. A.2, 08/29/2019 Request. Public records obtained from DAG show that, in that capacity, Mr. Pruss also serves a liaison function between DAG and tort lawyers, activist groups, and others seeking DAG to use its authorities in particular ways. Hardin, at ¶ 6.

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[1] See, e.g., Juliet Eilperin, "NYU Law launches new center to help state AGs fight environmental rollbacks," Washington Post, August 16, 2017, www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html.

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In response, DAG provided EPA a detailed itemization fee form assessing $3,956.22 to process both requests. Ex. A.3, 09/19/2019 Request. As requested, EPA mailed a check for half of the total amount as a deposit. DAG partly granted and partly denied the request and sought the balance of the assessed fee. Hardin, at ¶ 7. The partial denial cited MCL 15.243(1)(g) and (h), which allow nondisclosure of information or records subject to attorney-client privilege and nondisclosure of information or records subject to privileges recognized by statute or court rule, in this case the attorney work product doctrine. Ex. A.4, Partial Denial. EPA mailed a check for the remaining balance for the fee assessed to process the requests. Hardin, at ¶ 8. On December 19, 2019, DAG mailed a physical cover letter and electronic copies of records it claimed were subject to disclosure in non-native format. *Id.* at ¶ 9.

On January 7, 2020, EPA submitted an administrative appeal to DAG challenging its use of statutory exemptions to withhold an unstated number of records in full, including entirely factual information such as the identities of senders and recipients, dates/times, subject fields and the title of any attachments. Ex. A.5, 01/07/2020 Appeal. DAG responded by upholding the entirety of its partial denial but agreeing to provide privilege logs of records withheld in full. Ex. A.6, 01/23/2020 Letter. DAG provided five (5) pages of privilege logs on February 11, 2020, eighty-four (84) pages on March 25, and forty-one (41) pages on March 30, 2020. Hardin, at ¶ 12. The privilege logs identified withheld records, authors, subject field, recipients, date/time, privilege asserted and a privilege description. Ex. A.7-A.9, Privilege Logs.

The November 13, 2019 FOIA Request

On November 13, 2019, EPA submitted a FOIA request to DAG for any employment contracts with "Skip" Pruss, applications to participate in the SEEIC's Fellows program, and any common interest agreements, contingency or other fee agreements, secondment agreements,

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retainer agreements, and engagement agreements entered into by DAG in 2019. Ex. A.10, 11/13/2019 Request. DAG responded to the request with a detailed itemization fee form requesting $156.62. Hardin, at ¶ 16. EPA mailed a check for that amount on December 19, 2019. *Id.*

On January 10, 2020, DAG provided notice that it located no responsive records pertaining to the SEEIC and provided copies of both Mr. Pruss' initial contract with DAG and an amendment to that contract. *Id.* at ¶ 17. Shortly thereafter, DAG provided redacted copies of several records purporting to be common interest and/or joint defense agreements but withholding substantial portions as attorney work product pursuant to MCL 15.243(1)(h). Ex. A.11. DAG redacted, *inter alia*, the title, purpose and subject matter of the common interest agreements. Hardin, at ¶ 18. The records largely appeared to be drafted from the same template. *Id.* Yet DAG redacted uniform, boilerplate provisions in some, while releasing the same provisions in others. *Id.*

On March 20, 2020, EPA appealed DAG's redaction of the agreements, challenging the claim that the subject matter of such agreements constitutes attorney work product as defined in MCR 2.302(B)(3)(a). Ex. A.12, 03/20/2020 Appeal. DAG upheld the redactions for most of the agreements but agreed to provide copies of two agreements, asserting that, in the interim, "circumstances changed with regard to the partially-redacted common interest agreements included at pages 63-71 and 142-158 of the disclosed records . . . . Certain information redacted in those parts has been made public." Ex. A.13, 04/06/2020 Letter. On April 13, 2020, DAG provided a copy of a less redacted version of the agreement found on pages 142–158 of the disclosed records. Ex. A.14. DAG did not in fact produce pages 63–71, but, on June 3, 2020, in response to EPA's inquiry, DAG claimed that "the information contained in pages 63-71 has not been made public and remains confidential." Hardin, at ¶ 20. On information and belief, the entirety of the common interest agreement redactions and/or withholdings are improper under FOIA and that DAG

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continues to withhold from EPA records to which it is statutorily entitled. *Id.* at ¶ 23. Further, on information and belief, DAG's production also improperly withheld in full and did not acknowledge the existence of at least one responsive agreement. *Id.* at ¶ 24.

Among the records provided in response to EPA's March 27, 2020 request was a March 20, 2020 email from David Hoffmann of the Office of the Attorney General for the District of Columbia providing one of the notices described pursuant to a common interest agreement of a public records request that Office received. Ex. A.15. As indicated by DC OAG's signature page it provided as an attachment to that email, the "common interest agreement" DC OAG provided notice under is a 2019 "Amendment To Confidentiality Agreement Regarding Participation In Climate Change Public Nuisance Litigation." *Id.* According to a *Vaughn* Index provided to EPA by the Vermont Office of Attorney General, as of June 6, 2020, all parties to that agreement had entered it in 2019 ("on various dates from November to December 2019"). Hardin, at ¶ 27. DAG concluded its response to EPA's request for any common interest agreements entered into by DAG in 2019, on January 17, 2020. *Id.* at ¶ 28. As such, this agreement—if DAG is a party as DC OAG believes it is, by notifying DAG's Elizabeth Morrisseau, Neil Gordon and Kelly Schumaker—is responsive to EPA's request for any common interest agreements into by DAG at any time in 2019. *Id.* at ¶ 29. Although DAG's response to EPA's request for all common interest agreements entered into by DAG in 2019 was heavily redacted, by reconciling those records and the "Amendment To Confidentiality Agreement Regarding Participation In Climate Change Public Nuisance Litigation," EPA states on information and belief that DAG did not provide that agreement in its response to this request. *Id.* at ¶ 30.

The January 7, 2020 FOIA Request

EPA later requested all billing records and invoices submitted by Stanley "Skip" Pruss to

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Kelly Keenan and/or Susan Bannister at DAG. Ex. A.16, 01/07/20 Request. DAG provided heavily-redacted copies of these invoices, withholding substantial portions as attorney work product pursuant to MCL 15.243(1)(h). Ex. A.17, 01/15/20 Response. EPA administratively appealed these denials. Ex. A.18. DAG partly reversed its initial decision. Then DAG provided a revised version of the redacted billing summaries, revealing substantially more information including, e.g., the names of individuals participating in telephone calls, while still withholding significant portions of the contractor's itemized bills. Ex. A.19.

The January 10, 2020 FOIA Request

On January 10, 2020, EPA submitted a request for correspondence of DAG's Kelly Keenan and Peter Manning related to certain climate litigation which, other public records show, outside activists are recruiting attorneys general to file against private parties. The request also sought any correspondence with Mr. Manning containing the word "Hayes." Ex. A.20. Hayes is the last name of SEEIC's director. DAG responded with a detailed itemization fee form and a request for $892.85. EPA mailed a check for the requested deposit. Hardin, at ¶ 37. On March 12, 2020, DAG provided a final fee notice for the balance of the request and a partial denial of records as either attorney work product or privileged attorney-client communications pursuant to MCL 15.243(1)(g) & (h). EPA mailed a check for the balance of the assessed fee to process the request. Two weeks later, DAG provided a final response with copies of nonexempt records and one hundred-twenty-four (124) pages of privilege logs. Ex. A.21, 03/26/20 Response.

Among the many records identified in the privilege logs as those that DAG is withholding as attorney work product are numerous records DAG had previously released in full. Hardin, at ¶ 41. These include five (5) emails between DAG staff and plaintiffs' "climate nuisance" tort law firm Sher Edling, LLP, five (5) emails involving Michigan League of Conservation Voters' desire

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The April 17, 2020 Request

In its March 26, 2020 privilege log, DAG identified three emails with the Subject field "RE: Multi-state group discussing CO2 as a criteria pollutant," all among Ms. Morrisseau, Mr. Manning, and Mr. Gordon and all dated October 7, 2019. Hardin, at ¶ 48. By virtue of being responsive to the January 10, 2020 request, each email contains one or more of four search terms. *Id.* Typical email "subject" practice, which public records indicate DAG follows, suggests that all three emails were replies in an email "thread" whose original subject field is "Multi-state group discussing CO2 as a criteria pollutant." *Id.* at ¶ 49. Conceivably, the original emails to which these responded did not contain one or more of those key phrases and were not responsive to EPA's request. *Id.* Therefore, on April 17, 2020, EPA submitted a request seeking all correspondence of Ms. Morrisseau, Mr. Manning, Ms. Keenan, and/or Mr. Gordon with "CO2 as a criteria pollutant" in the subject line. Ex. A.25. The request sought such records dated from October 1, 2019 through the date the request was processed, but also clearly stated, "We request entire 'threads' of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter." *Id.*

On May 11, 2020 DAG responded to that request seeking all such correspondence from October 1, 2019 onward and any earlier parts of the "thread," e.g., the original email that those withheld emails replied to. Ex. A.26, 05/11/20 Response. DAG did not acknowledge any emails prior to those three withheld response emails, identifying only the three October 7, 2019 emails among Ms. Morrisseau, Mr. Manning, and Mr. Gordon which on their face are replies to an earlier email(s), withholding all three in full again claiming attorney work product in a privilege log. *Id.* DAG's privilege log also did not acknowledge the original email to which these emails responded, which, like all elements of the thread, were specifically covered by EPA's request. *Id.* In a

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departure, this privilege log omitted the subject field information. *Id*. Public records obtained by EPA show that, by this point, the coordinating attorneys general had notified each other of EPA's requests on that topic. Hardin at ¶ 52. On information and belief, the withheld information is properly subject to disclosure under FOIA and is withheld unlawfully. *Id*. at ¶ 53.

The May 1, 2020 Request

On May 1, 2020, EPA submitted a request for all purported common interest agreements entered into by DAG at any time in 2020. Ex. A.27. On May 11, 2020, DAG notified EPA of an extension to May 26, 2020 to respond to the request. Hardin at ¶ 54. On May 26, 2020 Defendant demanded $565.56 to process whatever purported common interest agreements it had entered in the first few months of 2020. Ex. A.28. Previously, and before the parties to the purported common interest agreements escalated a more aggressive coordination of their responses and oppositions to EPA's often similar requests among them, Defendant DAG charged EPA $156.62 to review all purported common interest agreements entered into in the entire year of 2019. See Hardin at ¶ 16, and *supra*. As such, here DAG's groundless use of fees-as-barrier, in violation of Michigan law, reveals *prima facie* proof of its arbitrary and capricious and punitive application of FOIA: over time DAG escalated its coordinated resistance to EPA's information requests as agreed in the (typically) ¶ 8 of its purported common interest agreements with other state attorneys general offices, including in part by raising its fees to process smaller numbers of records in response to otherwise substantively identical requests. Hardin at ¶ 57. On information and belief, the withheld information is subject to disclosure under FOIA and is withheld unlawfully.

Records Produced by DAG Through Discovery

This action was filed on May 27, 2020 to compel the production of DAG's withheld records, and a First Amended Verified Complaint was filed shortly thereafter on July 24, 2020.

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After the filing of the complaint and service of several discovery requests, DAG agreed to review its earlier productions and release further documents and an updated privilege log. On or about June 22, 2021, DAG provided updated privilege logs of priority documents along with two of the withheld "common interest agreements" and 15 other records. Ex. B, Updated Priority Privilege Logs G, H, & I; Ex. C, Late-Released Documents. Three days later, DAG provided an additional updated privilege log and released 114 other, previously withheld records—some of which were redacted under continuing claims of privilege. Ex. D, Updated Priority Privilege Log T; Ex. E, Second Late Production. For this hearing, DAG has provided a further updated privilege log of those still-withheld documents that are at issue but were not identified on the logs released on June 22, 2021.

STANDARD OF REVIEW

Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Lugo v Ameritech Corp,* 464 Mich 512, 520; 629 NW2d 384 (2001). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Oliver v Smith,* 269 Mich App 560, 564; 715 NW2d 314 (2006); MCR 2.116(G)(3) & (G)(4). The moving party may rely only on *admissible* evidence in doing so—and the reviewing court must review only admissible evidence. MCR 2.116(G)(6). If the moving party's initial burden is met, then "[t]he adverse party [must] set forth specific facts at the time of the motion," *Bernardoni v City of Saginaw*, 499 Mich 470, 473; 886 NW2d 109 (2016), by affidavits or other documentary evidence "showing that there are genuine issues for trial." MCR 2.116(G)(4).

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ARGUMENT

I. The DAG has failed to meet its burden of establishing that the still-withheld documents are protected by privilege.

DAG has not established that the documents it continues to withhold are privileged. There can be no debate that the documents are "public records." Despite its duty under FOIA, DAG has offered scant justification for withholding these records. And those records that it has already disclosed show that its continued claims of exemption are not justified or, more generally, indicate a practice of overbroadly claiming exemptions that warrants scrutiny and an *in camera* review.

a. Public bodies must disclose all "public records" unless specifically exempted under the Act.

Michigan's Freedom of Information Act ("FOIA") declares that "[i]t is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2). Doing so allows the People to "be informed so that they may fully participate in the democratic process." *Id.* As Michigan courts have explained, "FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116, 123–24 (2014), quoting *Manning v City of East Tawas*, 234 Mich App 244, 593 NW2d 649 (1999), overruled on other grounds. "On its express terms, the FOIA is a pro-disclosure statute . . . ." *Herald Co v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873, 877 (2000). Accordingly, FOIA must be interpreted "broadly to allow public access" *Prac Pol Consulting v Sec'y of State*, 287 Mich App 434, 465; 789 NW2d 178, 194 (2010), and "a public body must disclose all public

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records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011).

b. The documents at issue in this case are indisputably "public records" under MCL 15.232(i).

The documents at issue in this matter are indisputably "public records." Under FOIA, a "'[p]ublic record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). Neither DAG's status as a "public body" nor the fact that these documents were prepared, used, or held by DAG in the performance of an official function are in dispute.

i. DAG is a "public body" under MCL 15.232(h).

On the first, there is no dispute that the Michigan Department of Attorney General is a "public body." A "public body" includes "[a] state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government . . ." MCL 15.232(h)(*i*). "[T]here is no question" that the Department of Attorney General—a principal department in the executive branch of state government, see Const 1963, art V, § 3—fits squarely within this definition. *Progress Michigan v Att'y General*, 506 Mich 74, 88; 954 NW2d 475 (2020).

ii. The records at issue were prepared by DAG in the performance of an official function.

Nor is there any dispute that the documents sought by EPA were prepared by the Department in the performance of an official function. Plaintiff EPA seeks e-mails and other documents that were prepared or used by and in the possession of DAG. These include many e-mails among employees of DAG, between DAG employees and outside entities, agreements that DAG has entered, and other related documents. All such documents are associated with public,

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State of Michigan e-mail addresses. Nor has DAG in its response to FOIA requests or through discovery in this matter disputed that the records were "prepared, owned, used, in the possession of, or retained by [DAG] in the performance of an official function." MCL 15.232(i). Accordingly, the records sought by Plaintiff EPA must be disclosed unless DAG meets its burden of establishing that the records are exempt. MCL 15.240(4).

c. The DAG has not met its burden of establishing that the public records at issue are exempt. And the already released records indicate that those still-withheld records are not exempt.

DAG has not justified its continued withholding of the remaining documents. This Court reviews *de novo* a public body's claim that public records are exempt from FOIA disclosure. MCL 15.240(4). A government agency's generic claim of exemption is not sufficient. *King v Oakland Cty Prosecutor*, 303 Mich App 222, 227; 842 NW2d 403 (2013). Instead, MCL 15.243 codifies certain "particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant interest in nondisclosure." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). These specific exemptions to FOIA "must be narrowly construed, and the burden rests on the party asserting an exemption" to sustain the basis for its withholding. *Rataj*, 306 Mich App at 748; MCL 15.240(4).

i. Michigan law requires a particularized justification of exemption.

In analyzing a claim of exemption, Michigan courts must scrutinize the public body's claim with six rules in mind:

1. The burden of proof is on the party claiming exemption from disclosure. MCL 15.240(1).

2. Exemptions must be interpreted narrowly. *Vaughn v Rosen,* 157 US App DC 340, 343; 484 F2d 820 (1973).

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3. '[T]he public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.' MCL 15.244(1); MSA 4.1801(14)(1); *Vaughn v. Rosen,* 157 US App DC 345; 484 F2d 820.

4. '[D]etailed affidavits describing the matters withheld' must be supplied by the agency. *Ray v Turner,* 190 US App DC 290, 317; 587 F2d 1187 (1978).

5. Justification of exemption must be more than 'conclusory,' *i.e.,* simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings. *Campbell v Dep't of Health & Human Services,* 221 US App DC 1, 4–6, 10–11; 682 F2d 256 (1982); *Vaughn v. Rosen,* 157 US App DC 347; 484 F2d 820.

6. The mere showing of a direct relationship between records sought and an investigation is inadequate. *Campbell v Dep't of Health & Human Services,* 221 US App DC 8–9; 682 F2d 256.

Evening News Ass'n v City of Troy, 417 Mich 481, 503; 330 NW2d 481 (1983) (articulating rules in context of law-enforcement investigation exemption); see also *Nicita v City of Detroit*, 194 Mich App 657; 487 NW2d 814 (1992) (applying same rules to a distinct FOIA exemption). Consistent with those rules, each claim of exemption requires a "particularized justification" tailored to the portion of each document that is claimed to be exempt. *Evening News Ass'n*, 417 Mich at 493–494; MCL 15.244(1) (requiring separation of exempt and non-exempt material in each public record).

Requiring, at a minimum, a particularized justification from the public body supported by record evidence is a response to the "inherent problems" in FOIA litigation. *Id.* at 514. In FOIA litigation, the government is placed at a significant advantage because it knows exactly what is in a document whereas the party challenging the claim of exemption does not. As the Michigan Supreme Court explained in *Evening News Association*:

> Where one party is cognizant of the subject matter of litigation and the other is not, the normal common-law tradition of adversarial resolution of matters is decidedly hampered, if not brought to a complete impasse. If one adds to this the natural tendency of

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> bureaucracies to protect themselves by revealing no more information than they absolutely have to, it is clear that disclosure becomes neither automatic nor functionally obtainable through traditional methods. [*Id.*]

Thus, courts must "find some way to compensate the inherent problems of (1) only the government knowing what is in the requested documents, (2) the natural reluctance of the government to reveal anything it does not have to, and (3) the fact that courts normally look to two equally situated adversarial parties to focus and illuminate the facts and the law." *Id.* at 515. The solution is that courts must, as their discretion deems fit, require: (1) "a complete particularized justification as set forth in the six rules above"; (2) "conduct a hearing *in camera* based on a *de novo* review to determine whether complete particularized justification pursuant to the six rules exists"; or (3) "*consider 'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement 'whenever possible.'*" *Id.* at 516 (emphasis added).

ii. DAG has not made that showing.

Here, DAG provided initial exemption logs to justify its withholdings. Those logs provide only a generic label of exemption for each document (e.g., "work product") accompanied by a meager description of the basis for privilege (e.g., "discussion of litigation"), the names of personnel involved in the documents, and the document title. Ex. A.7-A.9, Initial Privilege Logs. DAG has updated that log during the course of litigation with minor additions that fare no better. See, e.g., Ex. B, Updated Priority Privilege Logs. The exemption logs produced by DAG do not justify its claims of privilege in the manner required by the Michigan Supreme Court in *Evening News Association*. 417 Mich at 503. Thus, summary disposition should be granted in Plaintiff EPA's favor in full under MCR 2.116(C)(10), and this Court should compel DAG to produce the remaining, still-withheld records.

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iii. The records already released by DAG disprove or otherwise undermine its claims of exemption.

Not only has DAG failed to justify its claims of exemption, but the records released by DAG also disprove certain claims of privilege, demonstrate a practice of overbroad and unsupported assertions of privilege, and suggest that other redactions and documents fully withheld are not privileged. The following non-exclusive examples indicate and are illustrative of the general overbreadth and insufficiency of DAG's claims of exemption.

For example, Documents 73 & 74, described on updated Privilege Log T were initially withheld on the basis of "deliberative process" and "attorney work-product" privilege and continue to be redacted on that basis. Ex. E, Docs. 73 & 74. Yet the redacted portions of the e-mail that DAG continues to protect as "privileged" has already been released by DAG and states nothing more than a generic observation about DAG policy. Ex. F, Released Docs. Likewise, in Documents 95, 98, 99, 100, & 103-105, DAG has redacted an AAG's statement as to which multistate work groups she participates in and then subsequently redacted an attached list indicating those assignments in the Department, again wrongly claiming work-product privilege. Ex. E, Docs. 95, 98, 99, 100, & 103-105. Identifying which work groups an AAG participates in is not privileged "work product," and DAG has once again already released the redacted material. Ex. F. DAG's internal inconsistency thus shows its vastly overbroad claims of privilege.

Similarly, the context surrounding redactions belies DAG's claims of privilege. As an example, Documents 117 & 118, released in the later-disclosed production, redact a statement from Skip Pruss reflecting "I'm continuing to work on **[REDACTED]**." The work-product privilege protects "notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery." *Messenger v Ingham Cty Prosecutor*,

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232 Mich App 633, 637; 591 NW2d 393, 396 (1998). But the mere subject matter that a contractor for DAG is involved in is not protected work product.

In this vein, DAG redacted a whole e-mail and portions of an e-mail in Documents 171 & 175. The context shows that DAG's then legislative-liaison, David Knezek, served as a conduit to a third-party interest group for a "How Green is Your AG" scorecard. Ex. E, Docs. 171 & 175. Mr. Knezek asked attorneys to comment on whether "what is written is accurate" and "if there's anything missing" on the third-party scorecard. *Id.* In a forward, context suggests that attorney Peter Manning asked subordinates to provide that information—but his e-mail is fully withheld. *Id.* DAG withheld this information as "attorney-client privilege," "work product," and "deliberative process," with the explanation it involves "institutional advice regarding the totality of the Department's climate-related litigation during the administration of AG Nessel." But the context of Mr. Knezek's e-mail again belies DAG's generic labels: this is information gathering for the political purpose of attaining a positive rating in an environmental interest group's scorecard. Relatedly, Documents 178, 179, & 180 show this clearly political purpose as DAG Communications personnel explains "[t]he AG is receiving an award at the Michigan League of Conservation Voters Gala" and was therefore assembling information for that purpose. Ex. E, Doc. 180. DAG's claims of "attorney-client privilege" and "work product" on records created for this political purpose are indefensible.

These documents are merely illustrative and a review of DAG's withholdings will show other similar examples throughout. This Court should compel DAG to release the remaining documents unredacted and to provide clean copies of those released redacted documents.

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d. Alternatively, this Court should conduct an *in camera* review to examine DAG's claims of exemption.

"In an effort to compensate" for the unbalanced litigation posture that exists in FOIA litigation, "the trial court, as the trier of fact, may and often does examine the document[s] *in camera* to determine whether the Government has properly characterized the information as exempt." *Evening News Ass'n*, 417 Mich at 513, quoting *Vaughn v Rosen*, 484 F2d 820, 825 (1973). Thus, alternatively, this Court should conduct an *in camera* review on the still-withheld public records at issue to the extent that it does not otherwise grant summary disposition and compel the production of the withheld documents.

For the reasons discussed above, those documents released after DAG's initial withholdings demonstrate that its remaining claims of exemption are suspect. DAG has demonstrated the warned-against tendency "to protect themselves by revealing no more information than they absolutely have to . . . ." *Id.* Accordingly, "it is vital" that this Court adopt a review process that "assure[s] that a party's right to act information is not submerged beneath governmental obfuscation and mischaracterization." *Id.* at 515, quoting *Vaughn*, 484 F2d at 826. Though this Court maintains discretion in how to uphold that promise of FOIA, DAG's claims of exemption here strongly suggest the need for an *in camera* review of any still-withheld documents that are not otherwise ordered to be released. Moreover, those unjustified claims of privilege illustrate the benefit of "'allowing plaintiff's counsel to have access to the contested documents in camera under special agreement'" in order to sharpen this Court's review through the adversarial process of argumentation. *Evening News Association*, 417 Mich at 516. For that reason, this Court should allow Plaintiff's counsel the opportunity to participate in any necessary *in camera* review.

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II. This Court should grant summary disposition on the attorney-fee question and, if an *in camera* review is conducted, require supplemental briefing.

Additionally, this Court should grant summary disposition in Plaintiff EPA's favor and allow Plaintiff to obtain attorney fees per MCL 15.240(6). Though it is not yet known whether Plaintiff has prevailed in full, Plaintiff has doubtless prevailed at least in part through DAG's release of improperly withheld information during discovery and, further, having shown that DAG is withholding non-privileged information it previously released. As a prevailing party, Plaintiff EPA is entitled to attorney fees. Therefore, this Court should award at a minimum a reasonable attorney fee to Plaintiff EPA for being a prevailing party in part or, to the extent necessary, require supplemental briefing on the attorney-fee question following its entry of judgment on the merits.

a. Attorney fees must be awarded where a FOIA plaintiff prevails in full and must be awarded where a FOIA plaintiff prevails in part.

FOIA provides that "[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court *shall award* reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6) (emphasis added). But "[i]f the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements." *Id.* Reading these two provisions together, Michigan courts explain that "attorney fees and costs must be awarded under the first sentence of MCL 15.240(6) only when a party prevails completely." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). But a court has discretion to award fees if a party partly prevails, *Id.* at 151, and the Michigan Supreme Court has permitted recovery even when "victory may not be total" but is nonetheless "a very substantial one." *Int'l Union UPGWA v Dep't of State Police*, 422 Mich 432, 455; 373 NW2d 713 (1985).

"A party has 'prevailed' under the FOIA if the prosecution of the action was necessary to and had a substantial causative effect on the delivery of or access to the documents." *Wilson v*

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Eaton Rapids, 196 Mich App 671, 673; 493 NW2d 433 (1992). That does not require an order compelling production. For example, in *Local Area Watch*, the Court of Appeals held that a municipality's disclosure of documents via discovery meant that the FOIA action had the causative effect on the delivery of the information sought. *Local Area Watch*, 262 Mich App at 150. The Court noted that a defendant's good faith was immaterial when its initial action was a denial and the litigation resulted in the production of documents. *Id.* Under those circumstances, the plaintiff had "prevailed in part" for purposes of FOIA because "plaintiff's FOIA action was reasonably necessary to and substantially caused defendants to produce the late-disclosed items." *Id.*

b. Energy Policy Advocates has prevailed in part because the subsequent disclosure of documents through discovery by the Attorney General, including previously withheld information, indicates that many claims of privilege never were valid.

Plaintiff EPA has likewise prevailed at least in part here, and this Court should award reasonable attorneys' fees. DAG initially withheld numerous documents from EPA in response to EPA's FOIA requests. Through discovery, Plaintiff EPA obtained DAG's late disclosure of multiple documents initially withheld on indefensible claims of privilege. Ex. E. That disclosure occurred only after discovery requests were issued by Plaintiff EPA and the parties reached an agreement to ward off a discovery fight. This action has thus undoubtedly been "necessary to" and had "a substantial causative effect on" DAG's disclosure. *Wilson*, 196 Mich App at 673. Whether EPA obtains "total" victory or only "a very substantial one," *Int'l Union UPGWA*, 422 Mich at 455, remains to be seen based on this Court's rulings on competing motions for summary disposition. Nonetheless, Plaintiff EPA's victory has been at least "very substantial," and this Court should award attorneys' fees. MCL 15.240(6).

The guiding principle for an award of attorneys' fees is that it must be reasonable. *Michigan Tax Managment Services Co v City of Warren*, 437 Mich 506, 509; 473 NW2d 263 (1991).

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"[T]here is no precise formula to determine a reasonable fee . . . ." *Prins v Michigan State Police*, 299 Mich App 634, 642; 831 NW2d 867 (2013). Factors courts should consider include: (1) the attorney's experience and professional standing; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the case's difficulty; (5) the expenses incurred; and (6) the length and nature of the professional relationship with the client." *Id.* at 642, citing *Woods v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 587–588; 321 NW2d 653 (1982).

Here, Plaintiff EPA has incurred approximately $19,775 in outside attorneys' fees and $282.60 in costs at the time of filing this motion. Outside counsel has worked approximately 79 hours on this matter, principally in reviewing and finalizing filings as local counsel, conducting discovery, negotiating resolution of a discovery dispute, reviewing released documents, and preparing this motion. Ex. G, Affidavit of Larsen, at ¶ 15. Significant costs have been avoided as Plaintiff EPA performed substantial amounts of legal work through in-house counsel. *Id.* at ¶ 16. Counsel's hourly rate in this matter is reasonable compared to average billed rates for similar practitioners. *Id.* at ¶ 19. The $250 hourly rate charged by outside counsel reflects a substantial discount on his standard $520 hourly fee, which has been provided in light of the significant public policy values served by FOIA actions. *Id.* at ¶ 18. The fee further reflects counsel's 13 years of experience in litigation, including eight years with the Michigan Department of Attorney General, and two years with an international, Am Law 200 Law Firm. *Id.* at ¶¶ 2–14. Accordingly, because Plaintiff EPA has prevailed in part and the attorneys' fees incurred in this matter have been "reasonable" under the factors reviewed above, this Court should grant summary disposition and award attorneys' fees. *Prins*, 299 Mich App at 642.

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c. To the extent necessary, this Court should allow supplemental briefing on attorney fees after it completes its *in camera* review.

To the extent necessary, this Court should order a short supplemental filing following disposition of the merits of this matter. Because of the possibility of *in camera* review, the amount of attorneys' fees actually incurred by Plaintiff EPA cannot now be known due to the ongoing nature of this action and whether Plaintiff EPA has prevailed in part or in full (and, if in part, how much) still remains to be determined pending this Court's ruling. Consequently, a short, supplemental filing will enable the parties to respond to the question of attorneys' fees when the matter is settled and can guide this Court in determining the amount to be awarded.

CONCLUSION AND RELIEF REQUESTED

The records sought by Plaintiff EPA are indisputably "public records," and DAG has failed to justify its claimed exemptions in withholding them. This Court should this grant summary disposition under MCR 2.116(C)(10) in Plaintiff EPA's favor or, alternatively, conduct an *in camera* review process to the extent necessary to scrutinize DAG's particularized justifications for each withholding. Further, this Court should grant Plaintiff EPA its reasonable attorneys' fees and require supplemental briefing following its final decision on the merits in this matter.

Respectfully Submitted,

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STATE OF MICHIGAN
COURT OF CLAIMS

ENERGY POLICY ADVOCATES, A WASHINGTON NONPROFIT CORPORATION,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant.
/

No. 20-000098-MZ

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/

11/30/2021 STIPULATION TO EXCEED THE PAGE LIMIT

The parties, by and through their respective counsel, state as follows:

1. In accordance with the Order Amending Scheduling Order dated November 2, 2021, the deadline for Parties to file Motions for Summary Disposition is November 30, 2021.

2. Pursuant to MCR 2.119(A)(3)(a), except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.

3. The Parties agree that a 7-page expansion of the page limits provided in the Local Rules is appropriate to permit the parties to fully and fairly address the matters at issue in this spute under Freedom of Information Act, MCL 15.231 *et seq*. Both counsel have striven to be

as concise as possible in their briefs but expect their respective briefs to exceed the 20-page limit by no more than 7 pages.

4. Therefore, the Parties stipulate their respective Motion and Brief for Summary Disposition filed on November 30, 2021, may be expanded to allow up to 27 pages.

WHEREFORE, the Parties respectfully request that this Court enter the attached Order.

Stipulated and agreed to:

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Dated: November 30, 2021

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Dated: November 30, 2021

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