

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Other Civil

Energy Policy Advocates,
Plaintiff,

v.

COMPLAINT

Keith Ellison, in his official capacity
as Attorney General, Office of the
Attorney General,

Defendant.

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

INTRODUCTION

1. In 2017, Bloomberg Philanthropies, a charity organized by “climate” activist Michael Bloomberg, contributed \$5.6 million to create a State Energy & Environmental Impact Center providing legal support, privately-funded lawyers, and public relations support to state attorneys general for the purpose of advancing lawsuits related to environmental and climate change litigation (the “Bloomberg NYU Program” or “SEEIC”).¹ Mr. Bloomberg housed this effort at

¹ See, e.g., “the new Bloomberg-supported State Energy and Environmental Impact Center”, November 14, 2017 10:57 AM email from Christopher Moyer to OAG’s Michael Kelly, Subject: Introduction, and also, e.g., the news report that this project is “financed by Michael Bloomberg”, Juliet Eilperin, “NYU Law launches new center to help

the New York University School of Law.

2. The Bloomberg Center offered to pay the salary and benefits of Special Assistant Attorneys General (“SAAG”) that it would hire for placement for two-year terms in attorneys general offices that agreed to use the SAAG position and their own offices to “advanc[e] progressive clean energy, climate change, and environmental legal positions,” in the words of the Bloomberg Center’s Director² or, as put by the Virginia Office of Attorney General, “to advance the agenda represented by” Bloomberg’s group.³

3. Interested attorneys general were invited to submit an application outlining, among other things, “needs within their offices related to the advancement and defense of progressive clean energy, climate change, and environmental matters,” and a demonstrated “commitment to and acute need for additional support on clean energy, climate change, and environmental issues of regional or national importance, such as those matters that cross jurisdictional boundaries or raise legal questions or conflicts that have nationwide applicability.”

4. On March 15, 2019, AG Ellison submitted such an application seeking these private resources. That application cited a desire to do more in certain areas of known public interest to Mr. Bloomberg and his SEEIC. Among the issues AG Ellison emphasized for possible greater focus, if only the OAG had more resources than the legislature appropriated for him, was “multistate initiatives...including...supporting state-led efforts to investigate Exxon Mobil [sic]Through participation in NYU’s Program, and the appointment of one or more SAAG(s), I

state AGs fight environmental rollbacks,” *Washington Post*, August 16, 2017, https://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?utm_term=.fd5d7fd9a8b8. The Bloomberg Center scrubbed its website of references to Bloomberg after attention similar to the instant matter though those remain available on the Internet’s Wayback Machine, <https://web.archive.org>.

²<https://climatelitigationwatch.org/wp-content/uploads/2018/08/FN-3-Organic-NYU-Hayes-email-to-OAGs-copy.pdf>

³<https://climatelitigationwatch.org/virginia-ag-office-promises-to-advance-the-agenda-represented-by-bloomberg-activist-group/>

hope the Office can expand its role in the federal multistate arena”. AG Ellison suggested OAG’s SAAG(s) be paid by the Bloomberg Center between \$96,000 and \$130,000 per year.

5. OAG then accepted two SEEIC SAAGs, Peter Surdo and Leigh Currie.

6. Upon information and belief, Mr. Surdo joined OAG in May 2019, under a “Secondment Agreement” dated May 24, 2019.

7. Upon information and belief, Ms. Currie joined OAG sometime prior to October 15, 2019 under a “Secondment Agreement” dated June 5, 2019.

8. Mr. Surdo and Ms. Currie have represented OAG in public filings and comments.⁴

9. Mr. Surdo and Ms. Currie are both listed as counsel of record in OAG’s June 2020 lawsuit against, *inter alia*, ExxonMobil.⁵

10. The Executive Director of a local pressure group called “Fresh Energy”, Michael Noble, who has acknowledged that his group “helped put this idea in front of Attorney General Keith Ellison shortly after he was sworn in” after “a national organization who [sic] leads on this kind of climate liability, climate litigation...brought this concept to Fresh Energy the Fall of 2018,” has publicly boasted that “attorney Leigh Currie on the Attorney General’s staff and Pete Surdo have basically been working on this full time over the last few months”.⁶

11. The information sought by Plaintiff EPA’s MGDPA requests is public information, relates to a highly unusual arrangement between a private organization and Minnesota’s chief

⁴ See, e.g., Motion for Leave to Participate in Oral Argument as Amici Curiae and for Divided Argument, *Ford Motor Company v. Montana Eighth Judicial District Court*, Nos. 19-368 and 19-369 https://www.supremecourt.gov/DocketPDF/19/19-368/140921/20200406124052063_19-368%20Motion.pdf, Comments of Attorneys General of California, et al. Re: EERE-2018-BT-STD-0005 <https://oag.ca.gov/system/files/attachments/press-docs/FINAL%20DOE%20Dishwasher%20State%20AGs%20Comment%20Oct%2016%2019.pdf>

⁵ See, e.g., Mike Hughlett, “Minnesota files climate change lawsuit against oil companies including Koch Industries, ExxonMobil,” Star Tribune, June 24, 2020, <https://www.startribune.com/minn-files-climate-change-lawsuit-against-oil-companies-including-koch-exxon-mobil/571466182/>. Complaint available at https://www.ag.state.mn.us/Office/Communications/2020/docs/ExxonKochAPI_Complaint.pdf.

⁶ See e.g., https://climatelitigationwatch.org/wp-content/uploads/2020/07/Minnesota-is-Suing-Climate-Polluters_Clip1.mov. Entire video of July 1, 2020 webinar available at <https://www.youtube.com/watch?v=2MqX14GTm-o>.

law enforcement officer, and is of great public interest.

PARTIES

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

13. Defendant Keith Ellison is the Attorney General of the State of Minnesota.

14. Defendant OAG is the Attorney General’s Office for the State of Minnesota. It is the recipient of the MGDPA requests, is the authority responsible for the data sought, and was responsible for improperly withholding public data. Its address is 445 Minnesota Street, Saint Paul, Minnesota 55101.

JURISDICTION AND VENUE

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

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

THE GOVERNMENT DATA PRACTICES ACT REQUESTS

The January 3, 2020 Request

17. On January 3, 2020, EPA requested any appointment letters sent to Leigh Currie and/or Peter Surdo from OAG, any appointment or hiring letters sent to OAG by the SEEIC regarding Ms. Currie and/or Mr. Surdo, and all electronic correspondence of two OAG employees, Karen

Olson and Oliver Larson, with Ms. Currie and/or Mr. Surdo at any email address outside of the official OAG email domain and which are dated from May 1, 2019 through the date the request was processed, inclusive. **(EXHIBIT A)**.

18. On March 2, 2020, OAG responded to the January 3, 2020 request by providing copies of two secondment agreements with the Bloomberg Center signed by Liz Kramer, Solicitor General of the State of Minnesota. OAG withheld some unstated number of potentially responsive records on the bases that: “(1) they relate to a pending civil action or investigation and are classified as nonpublic data or confidential pursuant to Minn. Stat. § 13.39, subd. 1; (2) they are attorney-client or work-product privileged and not subject to the data practices act pursuant to Minn. Stat § 13.393; or (3) they relate to communications and non-investigative files regarding administrative or policy matters which do not evidence final public actions and are classified as private data on individuals pursuant to Minn. Stat. § 13.65, subd. 1(b).” **(EXHIBIT B)**.

The February 7, 2020 Requests

19. On February 7, 2020, EPA requested all electronic correspondence of two OAG staff members, Karen Olson and Oliver Larson, containing both New York University (including also “NYU”) and any of the search terms “Fellow”, “Surdo”, and/or “Currie”, dated from August 25, 2017 through the date the request was processed. **(EXHIBIT C)**.

20. On April 17, 2020, OAG responded to the request stating that no responsive correspondence of Karen Olson had been found. OAG acknowledged the existence of, but withheld the entirety of, some unstated number of potentially responsive records of Oliver Larson on the bases that: “(1) they relate to a pending civil action or investigation and are classified as nonpublic data or confidential pursuant to Minn. Stat. § 13.39, subd. 1; (2) they are attorney-client or work-product privileged and not subject to the data practices act pursuant to

Minn. Stat § 13.393; or (3) they relate to communications and non-investigative files regarding administrative or policy matters which do not evidence final public actions and are classified as private data on individuals pursuant to Minn. Stat. § 13.65, subd. 1(b).” OAG further states, “[a]s a general matter, the potentially responsive communications were identified only because the signature lines of the e-mails indicated that Mr. Surdo or Ms. Currie have fellowships with New York University.” **(EXHIBIT D)**.

21. On February 7, 2020, EPA also requested all electronic correspondence of Ms. Olson and Mr. Larson containing “Energy Policy Advocates” and/or “Hardin” dated December 21, 2018 through the date the request was processed. **(EXHIBIT E)**.

22. On April 28, 2020, OAG responded to the request providing some correspondence acknowledging receipt of records and a draft of a potential response to EPA’s request. OAG acknowledged the existence of, but withheld the entirety of, some unstated number of potentially responsive records of Oliver Larson on the bases that: “(1) they relate to a pending civil action or investigation and are classified as nonpublic data or confidential pursuant to Minn. Stat. § 13.39, subd. 1; or (2) they are attorney-client or work-product privileged and not subject to the data practices act pursuant to Minn. Stat § 13.393.” **(EXHIBIT F)**.

The February 14, 2020 Request

23. On February 14, 2020, EPA requested any document or data related to payment, instruction, and reporting requirements of any individual related to the NYU fellowship program. **(EXHIBIT G)**.

24. On May 27, 2020, OAG again provided the two secondment agreements in addition to a directory of OAG staff that lists Ms. Currie and Mr. Surdo as “NYU Fellows”. OAG withheld an unstated number of potentially responsive records as “attorney-client or work-product privileged

and not subject to the data practices act pursuant to Minn. Stat. § 13.393.” **(EXHIBIT H)**.

The March 6, 2020 Request

25. On March 7, 2020 EPA requested electronic correspondence of Mr. Larson, Mr. Surdo, and Ms. Currie containing “Bachmann” and/or “Goffman” dated from November 1, 2019 through the date the request was processed. EPA also sought correspondence sent to Mr. Larson, Mr. Surdo, and Ms. Currie from Michael Myers of the New York State Office of Attorney General dated from November 4, 2019 through November 8, 2019 as well as correspondence dated November 17, 2019 and any invitations sent by Michael Myers to participate in a November 18, 2019 telephone call. **(EXHIBIT I)**.

26. On May 14, 2020, OAG responded by releasing a news article that, Plaintiff presumes from the context, was attached to responsive correspondence and withholding an unstated number of potentially responsive records on the bases that: “(1) they relate to a pending civil action or investigation and are classified as nonpublic data or confidential pursuant to Minn. Stat. § 13.39, subd. 1; or (2) they are attorney-client or work-product privileged and not subject to the data practices act pursuant to Minn. Stat § 13.393.” **(EXHIBIT J)**.

27. To date, OAG has provided no further response to this request.

The April 28, 2020 Request

28. On April 28, 2020, EPA requested all correspondence of two attorneys working in the OAG, Mr. Surdo and Rachel Tess, which contain both “complaint” and any of the following: “criteria pollutant”, “greenhouse gas”, or “GHG”. Plaintiff also requested all notices sent or received, pursuant to any common interest agreement, of any public records request or lawsuit submitted by Plaintiff Energy Policy Advocates and/or individuals associated with Energy Policy Advocates. **(EXHIBIT K)**.

29. After more than eight weeks, Defendant OAG has not acknowledged or provided any statutorily required response to this request.

The May 15, 2020 Request

30. On May 15, 2020, EPA requested any common interest agreement entered into by the OAG at any time in 2019 or 2020. **(EXHIBIT L)**.

31. On information and belief, OAG has entered into contracts, alternately styled as “confidentiality” and “common interest” agreements, requiring OAG to provide notice to and obtain the consent of outside parties prior to releasing certain public information, thereby contracting away the public’s access to public information as embodied in the MGDPA.

32. On information and belief, these contracts cover records relating to OAG’s aforementioned lawsuit recently filed by the Bloomberg “SAAGs” against ExxonMobil, and Koch Industries, Flint Hills Resources and the American Petroleum Institute.

33. On information and belief, these contracts also claim a “common interest” in “public nuisance” climate litigation filed in other jurisdictions by private tort firms against the same or similar parties.

34. On information and belief, in addition to not releasing these contracts, OAG is also relying on these agreements to avoid release of records at issue in this matter.

35. After more than six weeks, Defendant OAG has not acknowledged or provided any statutorily required response to this request.

STATEMENT OF CLAIMS

COUNT I

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

36. Plaintiff realleges and incorporates by reference the allegations above.

37. The MGDPA “establishes a presumption that all government data are public and are

accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01, Subd. 3.

38. In response to Plaintiff’s requests, OAG has either ignored the requests in violation of MGDPA or erroneously relied on conclusory claims of attorney-client privilege, the work product doctrine, and the pending investigation exemption to withhold public records.

39. Plaintiff is entitled to disclosure of the requested data pursuant to Minn. Stat. §§ 13.03, Subd. 1, and 13.08, Subd. 4.

40. Defendant denied Plaintiff access to requested records in violation of the MGDPA.

41. Defendant’s denial of access was willful.

42. Plaintiff was harmed as a result of Defendant’s willful violation of the MGDPA.

43. For these reasons, Plaintiff has standing to challenge Defendant’s response.

44. Defendant’s willful violations of the MGDPA entitles Plaintiff to its costs and disbursements, including reasonable attorneys’ fees. Minn. Stat. § 13.08, Subd. 4.

45. Defendant’s willful denial of Plaintiff’s requests justifies assessment of a civil penalty under Minn. Stat. § 13.08, Subd. 4.

46. Plaintiff is entitled to an immediate injunction preventing continuation of Defendant’s willful and continued violations of the MGDPA. Minn. Stat. § 13.08, Subd. 2.

COUNT II

(Disclosure of Civil Investigative Data Pursuant to Minn. Stat. § 13.39, Subds. 2a and 3 and
Minn. Stat. § 13.08, Subd. 4)

47. Plaintiff realleges and incorporates by reference the allegations above.

48. OAG denied Plaintiff’s requests for records on the stated grounds that the records “relate

to a pending civil action or investigation and are classified as nonpublic data or confidential pursuant to Minn. Stat. § 13.39, subd. 1”.

49. This includes withholding appointment and/or offer letters issued by either OAG or the SEEIC as well as correspondence of any OAG employee or NYU fellow working for OAG with outside parties.

50. The MGDPA allows disclosure of government records related to a pending civil legal action if “the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data.” Minn. Stat. § 13.39, Subd 2a.

51. In addition, the MGDPA declares “[i]nactive civil investigative data” as “public,” and defines data as “inactive” after the occurrence of any of the following events:

- a. A decision by the government entity or by the chief attorney acting for the government entity not to pursue the civil action;
- b. expiration of the time to file a complaint under the statute of limitations or agreement applicable to the civil action; or
- c. exhaustion of or expiration of rights of appeal by either party to the civil action.

52. Some of the data Plaintiff requested relates as far back in time as 2017, so on information and belief, some of the data requested and claimed to be withheld pursuant to Minn. Stat. § 13.39 is “inactive” under Minn. Stat. § 13.39, subd. 3.

53. The public has a substantial interest in the practice of private institutions recruiting elected officials to place privately hired individuals in public offices to further private goals, whether or not those are shared goals with the official running that office.

54. Disclosure of the records sought will provide a significant benefit to the public by demonstrating how this practice occurs while also providing transparency on the operations of an

elected, constitutional officer.

55. Defendant has identified no potential harms to the public or OAG that may result from the release of appointment letters, funding arrangements, reporting requirements, or correspondence with activist private parties.

56. A possible chilling effect on the placement of privately funded officials in public offices cannot plausibly outweigh the public's interest and Defendant has identified no harms to the public or their office in their response.

57. The benefits of disclosure outweigh any harms and the Court should authorize disclosure under Minn. Stat. § 13.39, Subd. 2a and 3 and under Minn. Stat. § 13.08, Subd. 4.

COUNT III

(Disclosure of Information Pursuant to Minn. Stat. § 13.393 and Minn. Stat. § 13.08, Subd. 4)

58. Plaintiff realleges and incorporates by reference the allegations above.

59. Defendant's claims of attorney-client and work product privilege are unsupported.

60. Minn. Stat. § 13.393 requires the dissemination of data by an attorney acting in a professional capacity for a government agency to be governed by the statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility.

61. Defendant presents no evidence to support the claims that any hiring and/or appointment letters or responsive correspondence by or between Mr. Larson and Mr. Surdo and/or Ms. Currie constitute work product or would be subject to attorney-client privilege.

62. Defendant presents no evidence that correspondence with activist private parties were undertaken under any attorney-client relationship.

63. Absent evidence the responsive records constitute work product or are subject to attorney-client privilege, the Court should order disclosure of the records under Minn. Stat. §

13.08, Subd. 4.

COUNT IV

(Disclosure of Information Pursuant to Minn. Stat. § 13.65 and Minn. Stat. § 13.08, Subd. 4)

64. Plaintiff realleges and incorporates by reference the allegations above.

65. Defendant's claim that certain records are communications and non-investigative files regarding administrative or policy matters which do not evidence final public actions and are classified as private data on individuals is contrary to Minn. Stat. § 13.65.

66. Defendant takes the position that any appointment, hiring letters, and correspondence between OAG staff and Ms. Currie and/or Mr. Surdo do not evidence final public action and is thus not subject to disclosure.

67. Defendant presents no evidence to support the position that offers and/or appointment letters containing the source and amount of compensation, the terms of employment and/or placement within OAG, job description, and the like would be anything other than public personnel data as defined in Minn. Stat. 13.43, subd. 2.

68. Absent a demonstration that the appointment and/or hiring letters about the placement of Ms. Currie and/or Mr. Surdo in OAG and the terms of their employment are somehow not public personnel data, the Court should order disclosure of the requested records under Minn. Stat. § 13.08, Subd. 4.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully prays that this Court:

- a) Issue a declaratory judgment that the information requested is public information within the meaning of the Minnesota Government Data Practices Act, and that the OAG has improperly failed to produce such information;
- b) Enter a permanent injunction directing Defendant to comply fully with the

MGDPA, and without further delay, to furnish Plaintiff the government data at issue in this matter, in the native format requested, subject only to legally-allowable withholdings justified by sufficient identification of the reasons for withholding;

c) Assess a civil penalty as authorized in Minn. Stat. § 13.08, Subd. 4;

d) Alternately, perform an *in camera* review of the information sought to be redacted by OAG and compel OAG to release all information for which the OAG is unable to carry its burden to prove each withholding is privileged or otherwise not subject to disclosure;

e) Award Plaintiff fees, costs, and disbursements, including reasonable attorneys' fees, as authorized in Minn. Stat. § 13.08, Subd. 4; and

f) Order such additional relief as the Court may deem just and proper.

DATED: July 7, 2020

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ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subd. 2, to the party against whom the allegations in this pleading are asserted.

Dated: July 7, 2020

By: /s/ Douglas P. Seaton
Douglas P. Seaton, #127759