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NOTICE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 19-3333-BLS1

COMMONWEALTH OF MASSACHUSETTS
Plaintiff

vs.

EXXON MOBIL CORPORATION
Defendant

MEMORANDUM AND ORDER
RE: DISCOVERY MOTIONS

The Commonwealth alleges here that Exxon Mobil Corporation (“Exxon”) misrepresented and failed to disclose material facts about the risks of climate change to Massachusetts investors and misrepresented to consumers the environmental benefits of using certain of its products in violation of G.L. c. 93A. The case is complex, involves the discovery of enormous volumes of documents, and has been hard fought.¹

The case is before me on six motions to compel by Exxon² and two motions to compel by the Commonwealth. Exxon seeks to compel the Commonwealth to search for and produce (1)

¹ Familiarity with other decisions in this litigation is assumed. See generally Commonwealth v. Exxon Mobil Corp., 2021 WL 3493456 (Mass. Super. June 22, 2021) (Green, J.) (denying motion to dismiss under Mass. R. Civ. P. 12(b)(2) and 12(b)(6)); Commonwealth v. Exxon Mobil Corp., 2021 WL 3488414 (Mass. Super. June 22, 2021) (Green, J.) (denying special motion to dismiss under anti-SLAPP statute), aff’d, 489 Mass. 724 (2022); Commonwealth v. Exxon Mobil Corp., 2022 WL 1039300 (Mass. Super. Feb. 8, 2022) (Krupp, J.) (authorizing two depositions pending appeal); Commonwealth v. Exxon Mobil Corp., 2022 WL 16839211 (Mar. 21, 2022) (Krupp, J.) (striking certain defenses).

² A seventh Exxon motion requires additional discussion among the parties and will be heard by this court after the parties have adequately conferred and attempted to resolve their dispute under Superior Court Rule 9C. See Exxon Mobil Corporation’s Motion to Compel the Massachusetts Treasury to Produce Responsive Documents (Docket #116).

certain specified documents responsive to Request for Production (“RFP”) Nos. 6-8, 10, 34, 35, and 39-42 in Defendant Exxon Mobil Corporation’s First Request for Production of Documents dated July 14, 2022 (“Exxon’s Request”) (Docket #93); (2) documents related to fossil fuel use and knowledge about climate change in Massachusetts responsive to RFP Nos. 13, 15-26, 28-33 and 36-38 (Docket #96); and (3) documents in possession of various agencies and departments of the Commonwealth (Docket #99).³ Exxon also moves to compel (4) the Commonwealth to explain why Exxon’s statements, acts and practices were deceptive (Docket #125), (5) four different state agencies to produce emails (Docket #131), and (6) Avangrid, Inc. (“Avangrid”) to produce records about the Commonwealth Wind project (Docket #138).⁴ The Commonwealth, in turn, moves to compel Exxon (1) to produce documents responsive to three RFPs through the parties’ agreed “targeted” document protocol (Docket #108); and (2) to respond completely to Interrogatory Nos. 3 and 5 in the Commonwealth’s Second Set of Interrogatories (Docket #146).⁵ After hearing, and a careful review of the parties’ voluminous filings, the motions are allowed in part and denied in part.

DISCUSSION

I. General Principles

A few general principles bear noting before I address each pending discovery motion. First is the general concept of relevance and the reasonableness constraints on that concept. A

³ The issues in these motions could have easily been presented through a single motion.

⁴ Avangrid also cross-moves to quash Exxon’s subpoena dated August 15, 2023 (Docket #141). Although Exxon’s subpoena to Avangrid is much broader than just one project, Exxon made clear at oral argument that it would limit its request to only one project.

⁵ Although the Commonwealth’s motion also sought to compel a complete response to Interrogatory No. 4, the Commonwealth withdrew that portion of its motion.

party ordinarily “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Mass. R. Civ. P. 26(b)(1). “The threshold for determining whether evidence is relevant is a low one.” Commonwealth v. Correia, 492 Mass. 220, 228 (2023). See Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609, 615 (1993) (“Generally, discovery is permissible of any nonprivileged material which is relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence.”).

Relevance, however, is not the only consideration. The court has considerable discretion to balance relevant discovery requests against the undue burden and expense of the requested discovery in light of, among other things, the potential probative value of that discovery. See Mass. R. Civ. P. 26(c). In this regard, much depends on the facts of the case, the extent of the prior discovery, and the availability of relevant information to each of the parties. Id.

The second general principle is the role of the Attorney General. When the Attorney General brings an enforcement action under G.L. c. 93A, the Attorney General does not stand in the shoes of other executive agencies of the Commonwealth and is not required to produce documents in the possession of agencies other than the Attorney General’s Office (“AGO”). In this regard, I agree with Judge Sanders’ analysis in Commonwealth v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., 30 Mass. L. Rptr. 377, 2012 WL 5392617 at ** 1-3 (Oct. 5, 2012) (“I am more persuaded by the Commonwealth’s arguments” that when the Attorney General sues under G.L. c. 93A, § 4, “state agencies are not themselves parties, nor does the Attorney General have any particular power to demand that they search for documents”).

Of course, that does not mean that agency records are entirely off limits. Exxon may seek relevant documents from Commonwealth agencies, just as it may with any relevant third-party,

through third-party subpoenas under Mass. R. Civ. P. 45. Indeed, it has done so here. But Exxon may not do so in a manner that imposes an “undue burden or expense” on the third-party. Mass. R. Civ. P. 26(c). To the extent a party seeks documents under a third-party subpoena, the court has the “power to vacate any subpoena which it determines is unreasonable, oppressive, irrelevant, or improper.” Hull Mun. Lighting, 414 Mass. at 616. See Mass. R. Civ. P. 45(f)(3)(A) (incorporating Mass. R. Civ. P. 26(c)).

II. Exxon’s Motions to Compel

A. Motion re: Various Withheld Documents

In its first motion, Exxon moves to compel the Commonwealth to produce documents responsive to RFP Nos. 6-8, 10, 34-35, and 39-42. I address these RFPs, as I have constrained Exxon’s expansive definitions. See, infra, at 8-9.

1. RFP Nos. 6-8 and 10

RFP Nos. 6-8 and 10 seek all documents concerning communications between the AGO and any person or entity, including members of the press or the public, at meetings or otherwise, about Exxon, the AGO’s investigation, or the allegations in the amended complaint. These requests are extraordinarily broad and seek to discover all aspects of the AGO’s investigation and preparation of this case, invading many aspects of the work product doctrine. See, e.g., Commonwealth v. First Nat’l Supermarkets, Inc., 112 F.R.D. 149, 152-154 (D. Mass. 1986) (Collings, M.J.). Although cases have been decided on both sides of this issue, it bears noting that this is not a tailored request for the communications between the AGO and a narrow

category of likely trial witnesses,⁶ but a wholesale invasion of the AGO's work to investigate and prepare this case.

I have previously ruled that Exxon may not pursue defenses based on selective enforcement and improprieties in the AGO's investigation. See Commonwealth v. Exxon Mobil Corp., 2022 WL 16839211 at ** 6-10 (Mar. 21, 2022). At a minimum, substantial portions of these requests invade that ruling.

Moreover, Exxon has separately requested the AGO to identify all persons with information relevant to this case. See Defendant Exxon Mobil Corporation's First Set of Interrogatories at 6-7. Exxon does not complain about deficiencies in the Commonwealth's response to these interrogatories. I will not compel further answers to RFP Nos. 6-8 and 10.

2. RFP Nos. 34 and 35

RFP Nos. 34 and 35 seek documents related to the AGO's "involvement" in rulemaking proceedings before and after the filing of this case as well as its involvement in two cases, Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007), and Kain v. Department of Environmental Protection, 474 Mass. 278 (2016). Exxon contends that these documents will demonstrate that Massachusetts investors and consumers were generally aware of climate change risks. The Commonwealth has produced documents responsive to these requests to the extent they are responsive to other RFPs, including after service of Exxon's motion. To the extent this information is sought regarding what was known to Massachusetts investors and consumers, it is the publicly available information regarding these matters that is

⁶ See, e.g., Healey v. Uber Technologies, Inc., 2022 WL 16839219 at ** 1-2 (Mass. Super. Feb. 28, 2022) (Krupp, J.) (allowing discovery of AGO's communications with Uber and Lyft drivers).

relevant and that would have arguably been available to investors and consumers.⁷ The Commonwealth need only produce responsive information that was publicly disclosed or publicly available.

3. RFP Nos. 39-42

RFP Nos. 39-41 seek documents related to, or covered by, common interest agreements between the AGO and other attorneys general regarding state actions against energy companies. The Commonwealth has already produced certain written common interest agreements. But a common interest need not be committed to writing; it is sufficient if the common interest is “a joint effort to establish a common litigation . . . strategy,” even if the interests of the parties are not identical. Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 618 (2007). Compelling RFP Nos. 39-41 would improperly interfere with the common interest between chief law enforcement officers of various states. See, e.g., Energy Policy Advocates v. Attorney General’s Office, 308 A.3d 456, 462-463 (2023). I will not compel production in response to those RFPs.

RFP No. 42 seeks documents related to communications with Matthew Pawa, who the AGO considered hiring to represent the Attorney General, beginning on February 2, 2016. “[P]reliminary consultations” with an attorney exploring whether the client will hire the attorney may give rise to attorney-client privileged communications, regardless of whether the representation comes to fruition. Bays v. Theran, 418 Mass. 685, 690-691 (1995). Here, the Commonwealth has adequately demonstrated the existence of an attorney-client relationship by virtue of “preliminary consultations.” Any responsive documents disclosed or exchanged prior to

⁷ Many of the responsive non-public documents would likely involve information protected from disclosure under the attorney-client privilege or work product doctrine.

February 2, 2016 shall be produced, but documents dated, disclosed or exchanged on or after February 2, 2016 need not.

B. Motion re: Fossil Fuel Use and Knowledge about Climate Change

Exxon moves to compel the production of documents related to the Commonwealth's use of fossil fuels, RFP Nos. 15, 16, 19-24, 29 and 36; its investment in energy and renewable energy companies, RFP Nos. 37 and 38; its plans for, or knowledge of the challenges posed by, reducing the use of fossil fuels, RFP No. 13, 17, 18, 28 and 30-33, and its knowledge of the causes of climate change. RFP Nos. 25 and 26.

Fundamentally, this case concerns the accuracy or misleading nature of statements, advertisements and disclosures by Exxon to consumers and investors, and asks whether those statements were "deceptive" under Chapter 93A. "[A] practice is 'deceptive,' for purposes of G.L. c. 93A, 'if it could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted.'" Aspinall v. Philip Morris Cos., Inc., 442 Mass. 381, 394 (2004), quoting Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 777 (1980). As the Supreme Judicial Court wrote in Aspinall, "[a] successful G.L. c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation . . . or that the defendant intended to deceive the plaintiff, . . . or even knowledge on the part of the defendant that the representation was false." 442 Mass. at 394.

The focus in this case is therefore on what was known to Exxon at the time of its statements and whether its statements could have caused consumers or investors to act differently as a result. The materiality of those representations, and other information generally known to consumers and investors, is obviously relevant. But in this kind of enforcement action by the Attorney General, the materiality question involves what was publicly or generally known

about climate change and the difficulties, challenges or costs of reducing the use of fossil fuels. How much fossil fuel was used by one consumer (the Commonwealth) and the investment history of a single investor (the Commonwealth) is irrelevant. Similarly, what was known about climate change by a single consumer (the Commonwealth) is relevant only to the extent it was disseminated or known more widely or made available generally to consumers and investors in Massachusetts.

For these reasons, information about the Commonwealth's use of fossil fuels, and its history of investment in energy companies, is irrelevant and I will not compel production of documents responsive to RFP Nos. 15, 16, 19-24, 29 and 36-38. The Commonwealth's knowledge of the causes of climate change and the challenges posed by reducing fossil fuel use is relevant insofar as it was shared with consumers and investors in Massachusetts more widely. Internal information is not relevant (or, if relevant, its limited probative value is outweighed by the substantial burden of locating and producing such information). Accordingly, to the extent it has not done so already, the Commonwealth shall produce all publicly disclosed or publicly available documents responsive to RFP No. 13, 17, 18, 25, 26, 28 and 30-33.

C. Motion Re: Documents Possessed by Other Agencies and Departments

Exxon moves to compel the Commonwealth to produce documents in the possession of agencies and departments beyond the Attorney General's Office. Specifically, in Exxon's Request, Exxon seeks documents from the "Commonwealth," expansively defined to "mean the Commonwealth of Massachusetts, including any of its departments, agencies, employees, agents, and representatives."⁸ Exxon's Request at 2 (emphasis added). In response, the Commonwealth

⁸ Exxon's Request likewise broadly defines "you" and "your" to "mean the Commonwealth of Massachusetts, and any departments, agencies, employees, agents, and representatives thereof, including the Massachusetts Office of the Attorney General and its

objected to producing documents or information “not within the AGO’s possession, custody and control” and made clear that it was not responding based on information possessed by “any other Office, department, agency or political subdivision of the Commonwealth of Massachusetts.” Responses of the Commonwealth of Massachusetts to Defendant Exxon Mobil Corporation’s First Request for Production of Documents at 3.

The Attorney General brings this case on behalf of the Commonwealth under the enforcement power statutorily provided to the Attorney General under G.L. c. 93A. As indicated above, I agree with Judge Sanders’ analysis in Ortho-McNeil. Such an action does not make the other agencies and departments of the Commonwealth parties to this action, nor does it authorize or compel the Attorney General to search for relevant or responsive documents in the possession of each or any other executive branch agency or department of the Commonwealth.

Exxon, of course, may employ the methods provided under Mass. R. Civ. P. 45 to secure relevant documents from those agencies and departments, as it has sought to do here; subject to the constraints on such third-party subpoenas. To the extent Exxon seeks to compel the Commonwealth to produce documents beyond those in the possession, custody and control of the Attorney General’s Office, the request is denied.

employees, agents, and representatives.” Exxon Request at 5. The breadth and unreasonableness of this definition, which includes every state employee (including, for example, judges), is underscored by the breadth of some of the requests. See, e.g., RFP No. 6 (“All . . . communications between you and any person . . . related to ExxonMobil”), No. 15 (“All documents sufficient to show the amount of fossil fuels and/or lubricants that the Commonwealth has purchased and/or consumed.”). As Exxon has defined terms, these requests would require the plaintiff to produce, for example, all of my (or any other Commonwealth employee’s) credit card receipts showing each time we personally filled up our vehicles with gasoline and each employee’s reimbursement voucher for vehicular travel.

D. Motion re: Why Exxon's Statements and Acts Were Deceptive

Against the backdrop of an extensive complaint, which provides substantial detail about the Commonwealth's theories of deception, Exxon moves to compel particularized disclosures by the Commonwealth about how every statement, act or practice by Exxon, which the Commonwealth contends is deceptive, was, in fact, deceptive, false or otherwise misleading by false statement or omission.

In response to other discovery requests, the Commonwealth produced a spreadsheet listing the statements, acts and practices, which the Commonwealth views as deceptive. Exxon is entitled to know what portion of each statement, act or practice the Commonwealth contends was deceptive or false, and, if the statement is false by omission, what information could have been included to render the statement non-deceptive. Within thirty (30) days of this Order, as discussed at oral argument, the Commonwealth shall supplement its spreadsheet of allegedly deceptive statements, acts and practices to add a column listing generally why the Commonwealth contends that each statement, act or practice was deceptive, and whether there are any specific or particular misstatements or omissions that are unique to that particular statement, act or practice.

E. Motion re: Named Agencies' Emails

Exxon has subpoenaed records from, among others, the Massachusetts Department of Environmental Protection, Department of Energy Resources, Department of Public Utilities, and the Operational Services Division ("the Four Agencies"). It seeks to compel the production of emails in the possession of the Four Agencies bearing on, among other things, the purchase of fossil fuel products and what was known about the risks of climate change. As I have explained above, the purchase of fossil fuel products by a particular consumer and the knowledge about

climate change risks by a particular consumer is irrelevant, or not sufficiently relevant to justify the burden and expense of mining particular agencies' emails for such information, unless, of course, the information was publicly disclosed or made publicly available. See, supra, at 7-8. In Docket #131, Exxon seeks internal emails at the Four Agencies. I will not compel such disclosures for the reasons stated.

F. Motion re: Avangrid

Exxon moves to compel Avangrid to produce documents related to the Commonwealth Wind project pursuant to a third-party subpoena. Among other things, Exxon seeks Avangrid's internal communications and documents discussing its analyses regarding the costs and challenges of completing the particular Commonwealth Wind project, and documents exchanged with third-parties concerning the economic and technical viability of, and all internal documents related to the negotiation of initial contracts for, Commonwealth Wind. Exxon's subpoena covers the entire multi-year period during which Commonwealth Wind was under consideration, regulatory discussion, and negotiation. It is not limited to the time relevant to this case. Avangrid cross-moves to quash Exxon's subpoena.

Even if a single project is potentially relevant to what was known and knowable to Exxon when it made its allegedly deceptive statements (or to investors or consumers in Massachusetts), the parties concede there was considerable press coverage about the Commonwealth Wind project⁹ and considerable information disclosed in public regulatory filings. It is also inconceivable to me that this case could involve the admission of internal information about a particular wind project as bearing on the deceptiveness of Exxon's representations to its

⁹ See, e.g., Chesto, J., "Avangrid's cancellation of offshore power contracts to cost it \$48 million," *The Boston Globe* (July 18, 2023).

investors, consumers, and regulators in Massachusetts. Admission of such information would threaten to nest a long trial about the factors impacting the Commonwealth Wind project within what will otherwise be an extraordinarily long trial on the merits and to divert this trial into irrelevancies. Nor has Exxon demonstrated why the voluminous internal documents it seeks would advance its proof in light of the mountains of publicly available information related to Commonwealth Wind. Exxon's subpoena to Avangrid is overbroad and unduly burdensome in light of the limited (if any) probative value of the information sought. Exxon's motion to compel shall be denied and Avangrid's motion to quash shall be allowed.

III. Commonwealth's Motions to Compel

A. Motion re: RFP Nos. 11, 12 and 88

Under Mass. R. Civ. P. 34(b)(2)(C)(i), unless the parties agree or the court orders otherwise, a party responding to a request for production of documents "shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request." Because of the exceptional number of documents at issue in this case, the parties agreed to use both alternatives and to divide the requests accordingly. Specifically, the parties agreed to a "custodial" search process using search terms with specified custodians, which did not require Bates number range designation (a process akin to the production of documents "as they are kept in the usual course of business"); and a "targeted" search process, which required the producing party to specifically identify the particular documents produced in response to a request. The Commonwealth now moves to compel Exxon to produce documents responsive to three of its requests through the "targeted" process, as the parties previously agreed; rather than through the "custodial" process, which Exxon has

unilaterally selected. The requests relate to complaints (RFP Nos. 11 and 12) and consumer perceptions (RFP No. 88).

I agree with the Commonwealth that Exxon's refusal at this stage to identify the documents responsive to RFP Nos. 11, 12 and 88 puts the Commonwealth at a disadvantage. The Commonwealth agreed to custodians and search terms to be used under the "custodial" production process at a time when it reasonably believed, based on Exxon's agreement, that the documents responsive to RFP Nos. 11, 12 and 88 would be produced under the "targeted" method. To be sure, the custodial process may locate and produce some documents responsive to RFP Nos. 11, 12 and 88, but the Commonwealth will have difficulty locating them among the terabytes of produced data and it reasonably lacks confidence that the custodial process will capture all or many of the responsive documents given the search terms selected. Moreover, Exxon is in a better position to identify the documents it produces in response to these requests for production than is the Commonwealth. Exxon will be held to its initial agreements.

B. Motion re: Interrogatory Nos. 3 and 5

The Commonwealth moves to compel Exxon to respond completely to Interrogatory Nos. 3 and 5 in the Commonwealth's Second Set of Interrogatories. I address each interrogatory separately.

Interrogatory No. 3 asks "whether ExxonMobil, as of the date of ExxonMobil's response, 'is confident that none of its hydrocarbon reserves are now or will become stranded'" and, if not, why. This interrogatory requires Exxon to analyze a prior quoted statement – apparently from a report that Exxon issued in 2014 – in light of its present knowledge. Interrogatories are not designed to require a responding party to engage in expert analyses. Nor is the question in this case whether Exxon now believes any of its prior predictions, beliefs or confidences about the

future are still reasonable. The question is whether the statements Exxon made were deceptive at the time they were made. I will not compel a further answer to this interrogatory.

Interrogatory No. 5 asks what Exxon “meant to communicate when it published the following statement ‘Keeps your engine 2x cleaner for better gas mileage,’ together with all facts, data, and analysis which You contend support and/or substantiate that statement.” Exxon has reasonably responded to this interrogatory by reference to the specific location where this statement was made and the footnote to the source upon which it relied for the accuracy of the statement. It need not do more.

ORDER

A. Exxon’s Motions

Defendant Exxon Mobil Corporation’s Motion to Compel the Commonwealth to Search for and Produce Relevant Documents and Make Appropriate Disclosures with Respect to Withheld Documents (Docket #93) is **ALLOWED** only as to documents responsive to RFP Nos. 34 and 35 that were publicly disclosed or publicly available, and documents responsive to RFP No. 42 that were disclosed or exchanged prior to February 2, 2016. Docket #93 is otherwise **DENIED**.

Defendant Exxon Mobil Corporation’s Motion to Compel the Commonwealth to Produce Documents Related to Fossil Fuel Use and Knowledge about Climate Change in Massachusetts (Docket #96) is **ALLOWED** only as to documents responsive to RFP Nos. 13, 17, 18, 25, 26, 28, and 30-33 that were publicly disclosed or publicly available. Docket #96 is otherwise **DENIED**.

Defendant Exxon Mobil Corporation's Motion to Compel the Commonwealth to Search for and Produce Relevant Documents Possessed by the Commonwealth's Own Governmental Agencies and Departments (Docket #99) is **DENIED**.

Defendant Exxon Mobil Corporation's Motion to Compel the Commonwealth to Explain Why it Believes ExxonMobil's Statements, Acts, and Practices Were Deceptive (Docket #125) is **ALLOWED** insofar as the Commonwealth shall supplement its list of deceptive statements with another column listing the general and specific reasons the Commonwealth contends each statement was deceptive, but is otherwise **DENIED**.

Defendant Exxon Mobil Corporation's Motion to Compel Named Agencies to Produce Responsive Emails (Docket #131) is **DENIED**.

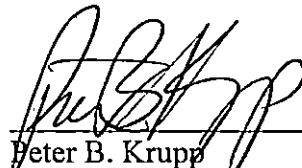
Defendant Exxon Mobil Corporation's Motion to Compel Avangrid to Produce Records in Response to the Subpoena (Docket #138) is **DENIED**. Avangrid, Inc.'s Cross-Motion to Quash Third-Party Subpoena (Docket #141) is **ALLOWED**.

B. Commonwealth's Motions

The Motion of the Commonwealth to Compel ExxonMobil to Produce Documents Responsive to Requests for Production 11, 12, and 88 Through a "Targeted" Process (Docket #108) is **ALLOWED**.

The Motion of the Commonwealth to Compel ExxonMobil to Provide Complete Responses to Interrogatory Nos. 3, 4, and 5 (Docket #146) is **DENIED** as to Interrogatory Nos. 3 and 5. No action is taken on Interrogatory No. 4.

Dated: July 29, 2024



Peter B. Krupp
Justice of the Superior Court