

From: [DiSabito, Doug](#)
To: [Humbert, Jacob](#)
Cc: [AGO - Public Records Requests](#); [McDougall, Robert](#)
Subject: Re: 12/11 and 12/12 records requests
Date: Friday, December 15, 2023 1:34:41 AM
Attachments: [image.png](#)
Importance: High

AAG Humbert:

I hope this email response finds you well. At the outset, I would like to sincerely thank you for your prompt response to my two public record requests (12/11 and 12/12). I do appreciate it. Before I file an appeal in response to your decision to deny my requests—as I submit the records you identified as existing are being withheld in error—I feel it would be prudent, collegial, and reasonable under the circumstances to provide you with an opportunity to reconsider. **In the event you decline my request to reconsider, pursuant to your directive, I have cc'd Deputy Attorney General, Robert McDougall** (at [both](mailto:robert.mcdougall@vermont.gov) robert.mcdougall@vermont.gov *and* ago.publicrecordsrequests@vermont.gov) **and ask that this email serve as an appeal of your initial decision pursuant to 1 V.S.A. § 318(c)(1).**

As you know, the Vermont Supreme Court has "repeatedly recognized, the PRA represents a **strong policy favoring access** to public documents and records. *Rutland Herald v. Vermont State Police*, 2012 VT 24, ¶ 8 (emphasis added).

FIRST, you denied my request pursuant to "**1** V.S.A. § 164(e)(5)" (emphasis added); I assume this was a typo (I am not immune to typos myself), and you meant to cite 3 V.S.A. § 164(e)(5), which is the Adult Court Diversion Program statute. I submit that the requisite "participant's prior consent" exists in this matter to overcome the "strictly confidential" hurdle. On November 7, 2023, AAG Paul Barkus and the defense, in Docket No. 124 -1-19 Bncr, placed an agreement on the record that this matter would remain open to the public, and not confidential, while the defendant was in Diversion. Here is what the Vermont Superior Court, Bennington Unit, Criminal Division, placed under "Hearing Notes" for November 7, 2023 (I highlighted the relevant portions):

11/07/2023



Jury Draw (8:30 AM) (Judicial Officer: McDonald-Cady, Kerry Ann)

MINUTES - 11/07/2023

Hearing Held - Status Conference (Judicial Officer: Howard, David A.)

In Person

Diversion - Referred

made orally on the record by the AAG

Hearing Notes

case to remain open while in diversion; if Def completes diversion, case to become confidential

Not Guilty Plea

Charges:

4. PROHIBITED CONDUCT - FIRST OFFENSE - OPEN OR GROSS LEWDNESS (2189)

Rule 5 Waived

Disposition (Judicial Officer: McDonald-Cady, Kerry Ann)

3. LEWD - LASCIVIOUS CONDUCT

Dismissed by State Without Prejudice

Hearing Held;

Parties Present: Plaintiff State of Vermont

Attorney Sleight, David C.

Attorney Barkus, Paul A.

Co-Counsel DiSano, Dana M.

Victim's Advocate Medic, Armina

Defendant Fink, Melvin

Hearing Held

In support of the 11/07/2023 Hearing Notes noted above, I am providing you with the following from the Court record:

AAG Barkus: "One thing I'd just like to add is just, uh, that parties agree to keep open the record during the period of Diversion . . . [unintelligible]"

JUDGE McDonald-Cady: "Meaning that the agreement that this case will not be confidential while the case is pending in Diversion."

ATTORNEY Sleight: "It would only become confidential if he successfully completes it."

JUDGE McDonald-Cady "Ok. And the Court finds that that would be in the interest of justice here, also based upon the agreement of the parties."

You stated that my "requests seek Vermont Adult Court Diversion Program records, which are designated confidential by law." I don't disagree with you as to 99.9% of cases which go to Diversion. But how do you reconcile § 164(e)(5) with the record above in this particular case? What I see happening here is a public entity (i.e., the AGO), basically stating "the case is not confidential while in Diversion" on one occasion, but then the same public entity (i.e., the AGO) is basically stating "the case is confidential because it is in Diversion" just thirty-seven days later. This seems absurd and indefensible.

SECOND, you denied my request, on the assertion that production and disclosure of these records "could reasonably be calculated to cause members of the Office of the Attorney General to violate ethical obligations set forth in the Vermont Rules of Professional Conduct. See Vt. R. Prof. Cond. 3.6 (Trial Publicity) and Vt. R. Prof. Cond. 3.8 (Special Responsibilities of a Prosecutor)". The two public record requests I made (12/11 and 12/12) were seeking records solely from Willa Farrell, who works in the Community Justice Unit of the AGO. Ms. Farrell does not work in the Criminal Justice Unit of the AGO. The six responsive records you identified as existing make no mention of being sent to or from anyone in the Criminal Justice Unit. With respect to your reliance on 3.6, neither one of my two public record requests was asking for any "lawyer [with the AGO] who is participating or has participated in the

investigation or litigation of a matter” to make “an[y] extrajudicial statement”. *Vt. R. Prof. Cond.* 3.6. With respect to your reliance on 3.8, neither one of my two public record request was asking for AG Clark or any of her AAGs to make “extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused” nor were they asking for Willa Farrell to make the same. *Vt. R. Prof. Cond.* 3.8(f). I submit that given the significant publicity of this specific case, and is a case just shy of being five years old, there is no substantial likelihood of heightening public condemnation of the accused by releasing the responsive records. For instance, click on just these nine links below:

- [PRB No. 2021-018 - Fink, Melvin - Petition of Misconduct - 21-0112.pdf \(vermontjudiciary.org\)](#)
- [PRB No. 2021-018 - Fink - PRB Decision 242 - 22-0106.pdf \(vermontjudiciary.org\)](#)
- [Attorney pleads not guilty to updated charge in 2019 sexual misconduct case | Local News | benningtonbanner.com](#)
- [Attorney faces criminal, administrative charges of sexual misconduct | Uncategorized | benningtonbanner.com](#)
- [Trial may finally be coming up in attorney’s 2019 sexual misconduct charge - VTDigger](#)
- [Notice of resolution agreement signed by Judge - DocumentCloud](#)
- [Attorney general’s office offers reduced charge and diversion program to lawyer in sexual assault case. | Local News | benningtonbanner.com](#)
- [Victim in 2017 sexual assault by Vermont attorney speaks out | Local News | benningtonbanner.com](#)
- [In re Melvin Fink, Esq. :: 2022 :: Vermont Supreme Court Decisions :: Vermont Case Law :: Vermont Law :: US Law :: Justia](#)

THIRD (last, but most concerning), you denied my request on the basis that the records are "related to **pending** criminal litigation (Docket No. 124 -1-19 Bncr) to which the State, by and through the Office of the Attorney General, is a party." (emphasis added). As an aside, I note that the Court has this case's status as "inactive", and the DDR notes "settled" in an 11/21/2023 docket entry. Notwithstanding those two observations, it appears that, given the "pending criminal litigation" language in your email, you are relying on 1 V.S.A. § 317(c)(14), which states that, with respect to public records which are exempt from public inspection and copying, this includes "[r]ecords that are relevant to litigation to which the public agency is a party of record, **provided all such matters shall be available to the public** after ruled discoverable by the court before which the litigation is pending, **but in any event upon final termination of the litigation.**" 1 V.S.A. § 317(c)(14)(emphasis added). The last prong of this definition is impossible to meet with respect to records related to this case, and therefore makes your reliance on it untenable. Given the agreement placed on the record that the case will become confidential if and when the defendant successfully completes Diversion, these records will likely not "be available to the public . . . in any event upon final termination of the litigation". *Id.* This makes it impossible for any member of the public seeking these records to ever have them disclosed—it runs afoul of the "temporary restriction" the legislation places on these records, as noted by the Vermont Supreme Court:

As evidenced by the plain language of § 317(c)(14), **the Legislature's goal in passing it was to place a temporary restriction on the release of otherwise publicly accessible documents during the pendency of litigation** in which the requested documents have relevance. To that end, the statute starts by exempting the broadest category of documents from disclosure—“records which are relevant to litigation.” 1 V.S.A. § 317(c)(14). The statute then carves out a subcategory of documents—those “ruled discoverable by the court before which the litigation is pending,” *id.*—which are not exempt from disclosure, even though they may be “relevant to litigation.” Moreover, even documents not ruled discoverable are only exempt from disclosure as long as they remain “relevant to” a pending litigation, and **must be released “upon final termination of the litigation.”** *Id.*

Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 15. Given the agreement by the parties in Docket No. 124-1-19 Bncr (i.e., the AGO and the defense) as to the record remaining open if and until the defendant completes

diversion, and its acceptance by the Court as being "in the interests of justice", I submit it is indefensible for the AGO to now support its denial of my public records request under the records being "related to pending criminal litigation" where they clearly will never be released upon this particular defendant completing diversion which immediately triggers the litigation to terminate and triggers the records to become confidential. The Vermont Legislature's goal in passing § 317(c)(14) was not to allow a public agency (i.e., the AGO) to make an agreement on the record with another party involved in "pending litigation" which would transform the statute's "temporary restriction" into a permanent restriction, and then the same public agency (i.e., the AGO) relies on § 317(c)(4) to withhold the records in the same litigation once terminated. This is absurd and indefensible. The Vermont Supreme Court, when "construing a statute is to effectuate the Legislature's intent . . . favor interpretations of statutes that **further fair, rational consequences** and . . . presume that the Legislature **does not intend an interpretation that would lead to absurd or irrational consequences.**" *Id.* at ¶ 14 (emphasis added) (quotations removed).

Given all the above, I respectfully ask you to reconsider your denial of my two requests and promptly (i.e., "immediately, with little or no delay" 1 V.S.A. § 318) release for inspection or copies of the following responsive records to my office: (1) November 6, 2023 e-mail string between Willa Farrell, Erin Jacobsen and Leitha Cipriano, Subject: FW: 116/23 1:00 p.m. hearing - St v. Melvin Fink 124-1-19 Bncr; (2) November 7, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: MF Case - my thoughts; (3) Notes of verbal conversations created on or about November 7, 2023 by Willa Farrell; (4) November 8, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: Re: victim letter; (5) November 8, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: RE: 116/23 1:00 p.m. hearing - St v. Melvin Fink 124-1-19 Bncr; and (6) November 9, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: FW: "I do not want him to do that again to anyone else." Victim in sexual assault speaks out. I further respectfully ask for you to certify in writing, pursuant to 1 V.S.A. § 318(b)(4), consistent with your initial response, that no records (see my original two requests) exist as to Willa Farrell and the Rutland County Restorative Justice Center, with respect to Docket No. 124 -1-19 Bncr. My review of the record seems to suggest otherwise, but I could be mistaken.

Thank you for your time and patience. I sincerely appreciate it.

Douglas E. DiSabito, Esq.

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From: Humbert, Jacob <jacob.humbert@vermont.gov>

Sent: Thursday, December 14, 2023 4:10 PM

To: DiSabito, Doug <Doug.DiSabito@vermont.gov>

Subject: 12/11 and 12/12 records requests

Mr. DiSabito:

I am reaching out related to your two recent records requests dated December 11, 2023 and December 12, 2023 seeking, respectively:

- “[a]ny and all written communications, whether in hard copy or electronic form, received by and sent by Willa Farrell, AG Diversion Coordinator, and anyone and everyone employed by or associated with (1) the Center for Restorative Justice in Bennington, VT; and/or (2) the Rutland County Restorative Justice Center, with respect to Docket No. 124 -1-19 Bncr, in the Vermont Superior Court, Bennington Unit, Criminal Division. The Date range is from January 28, 2019 to December 11, 2023” and
- “any contemporaneous notes taken by Willa Farrell, whether in hard copy or electronic form, as to conversations she had with anyone and everyone employed by or associated with (1) the Center for Restorative Justice in Bennington, VT; and/or (2) the Rutland County Restorative Justice Center, with respect to Docket No. 124 -1-19 Bncr, in the Vermont Superior Court, Bennington Unit, Criminal Division. The Date range is from January 28, 2019 to December 11, 2023.”

After a review of our files, we have identified the following responsive records: (1) November 6, 2023 e-mail string between Willa Farrell, Erin Jacobsen and Leitha Cipriano, Subject: FW: 116/23 1:00 p.m. hearing - St v. Melvin Fink 124-1-19 Bncr; (2) November 7, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: MF Case - my thoughts; (3) Notes of verbal conversations created on or about November 7, 2023 by Willa Farrell; (4) November 8, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: Re: victim letter; (5) November 8, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: RE: 116/23 1:00 p.m. hearing - St v. Melvin Fink 124-1-19 Bncr; and (6) November 9, 2023 e-mail string between Willa Farrell and Leitha Cipriano, Subject: FW: "I do not want him to do that again to anyone else." Victim in sexual assault speaks out.

As the designated custodian of such records, I certify that such records are exempt from public inspection or copying, and are being withheld, pursuant the Vermont Public Records Act. *See* 1 V.S.A. § 317(c)(1) (exempts “[r]ecords that by law are designated confidential or by a similar term”); *id.* § 317(c)(3) (exempts “[r]ecords that, if made public pursuant to this subchapter, would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the State”); *id.* § 317(c)(14) (exempts “[r]ecords that are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation”).

Indeed, your requests seek Vermont Adult Court Diversion Program records, which are designated confidential by law. *See* 1 V.S.A. § 164(e)(5) (“All information gathered in the course of the adult diversion process shall be held strictly confidential and shall not be released without the participant’s prior consent (except that research and reports that do not establish the identity of individual participants are allowed”). Further, your requests seek production of records the disclosure of which could reasonably be calculated to cause members of the Office of the Attorney General to violate ethical obligations set forth in the Vermont Rules of Professional Conduct. *See* Vt. R. Prof. Cond. 3.6 (Trial Publicity) and Vt. R. Prof. Cond. 3.8 (Special Responsibilities of a Prosecutor). Lastly, please note that your requests seek records related to pending criminal litigation (Docket No. 124 -1-19 Bncr) to which the State, by and through the Office of the Attorney General, is a party.

Pursuant to 1 V.S.A. § 318(c), and to the extent you feel any records have been withheld in error, you may appeal to the Deputy Attorney General, Robert McDougall at: ago.publicrecordsrequests@vermont.gov.

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Pronouns: he/him/his

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