

From: [Matthew D. Hardin](#)
To: [Diamond, Joshua](#)
Cc: [Stone, Alison](#)
Subject: Vermont PRA Appeal
Date: Wednesday, April 15, 2020 9:48:37 PM
Attachments: [VT OAG Bachmann Request copy.pdf](#)
[20200413 Hardin response Energy Policy Associates.pdf](#)

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Dear Mr. Diamond,

I write, on behalf of my client Energy Policy Advocates, to appeal a denial of access to public records pursuant to 1 V.S.A. § 318 (c)(1). Please see attached a public records request I submitted to the Attorney General's Office on March 27, 2020, and the Office's response, dated April 13, 2020.

With respect to items 1 through 3 of the request at issue, the Attorney General's Office has denied access to records on the basis that "no responsive records were identified." That appears to be intended as an assertion that no records exist. However, 1 V.S.A. § 318 (b)(4) requires that, if the Attorney General intends to assert no records exist, the Office "certify in writing that the record does not exist under the name given to the custodian by the applicant, or by any other name known to the custodian." It is the position of Energy Policy Advocates that the Attorney General's one-sentence statement does not comport with the requirements of 1 V.S.A. § 318 (b)(4). Additionally, to determine the accuracy of such an assertion, a brief description of the Attorney General's efforts to search for responsive records would be helpful.

With respect to item 4 of the request at issue, the Attorney General's Office has denied access to the records on the basis that "6 records which may be responsive to your request have been withheld as exempt from disclosure. These potentially responsive records are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product)." However, 1 V.S.A. § 318 (b)(2) sets forth four specific requirements that apply when an agency wishes to deny access to a record. I discuss each statutory requirement in detail below. It is our position that none of the statutory requirements have been satisfied by the April 13, 2020 letter.

First, the agency is required to identify the records it is withholding. 1 V.S.A. § 318 (b)(2)(A). Here, the agency has only stated that it is withholding six records, and that they are "potentially" responsive. The agency has not identified records it is withholding, but has instead merely enumerated how many records it is withholding. It is Energy Policy Advocates' position that the Attorney General must specifically identify the records in some more descriptive fashion to satisfy its statutory burden.

Second, the agency must identify the "reasons and supporting facts for the denial." 1 V.S.A. § 318 (b)(2)(B). In the instant matter, the Attorney General's Office only asserts only two conclusory legal doctrines for denying access. No facts of any type or variety are to be found in the denial letter, much less facts that establish a *prima facie* case that attorney-client privilege exists or that the attorney work product doctrine applies. Moreover, Energy Policy Advocates doubts that privilege or work product protection could, as a matter of law, apply to the records at issue.

Third, the agency must "provide the names and titles or positions of each person responsible

for the denial of the request.” 1 V.S.A. § 318 (b)(2)(C). Here, although the letter is signed by an Assistant Attorney General, there is no assertion that she is the only agency official responsible for the denial of the request. Energy Policy Advocates has the statutory right to know whether any additional agency employees were responsible for denying access to records.

Fourth, the agency must "notify the person of his or her right to appeal to the head of the agency any adverse determination.” 1 V.S.A. § 318 (b)(2)(D). Here, the agency gave notice of a right to appeal, but asked that such an appeal be directed to the Deputy Attorney General. While Energy Policy Advocates does not quarrel with how the agency wishes to handle administrative appeals internally, I do feel compelled to note, for purposes of clarifying the record should litigation ensue, that Energy Policy Advocates is following the procedures to appeal that the agency itself has requested be followed. It is for that reason that this correspondence is not directed to the “head of the agency,” and we trust that the Attorney General will not later claim that this appeal was directed to the wrong party.

I look forward to your response. Let me know if you have any questions.

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