

From: Neal Cornett <ncornettlaw@gmail.com>
Sent: Monday, November 30, 2020 4:14 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Appeal of the Attorney General's November 23, 2020 PRA Response

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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 November 5, 2020, and the Office's responses, dated November 12, 2020 and November 23, 2020.

The Attorney General's Office's response provided 15 responsive records. The response letter notes information regarding telephone and Zoom conferences from Record Nos. 3, 4, 12 and 23 was redacted pursuant to 1 V.S.A. § 371(c)(4) and/or 1 V.S.A. § 371(c)(7). The email that transmitted Record No. 1 was also withheld as exempt pursuant to 1 V.S.A. § 317(c)(4) as it was "among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation and for the purposes of facilitating the rendition of legal services to the respective states."

The response letter further notes that seventy-nine were withheld pursuant to 1 V.S.A. § 317(c)(4) and/or 1 V.S.A. § 317(c)(14). "Fifty-one of the withheld records consist of communications among the Attorney General's offices of two or more states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services to the respective states. Fifteen of the withheld records consist of internal Vermont Attorney General's office communications regarding matters with which Vermont has a common interest with other states, made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services to the State of Vermont. Twelve of the withheld records consists of communications between the Vermont Attorney General's office and an agency of the State of Vermont, made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services to the State of Vermont. And one of the records consists of a communications among a number of states and another party to ongoing litigation, in which the states, including Vermont, are parties of record." Finally, the response letter notes an unstated amount of attorney-client, attorney work-product communications generated in responding to the records request were withheld.

1 V.S.A. § 318 (b)(2) lays out four requirements that apply when an agency wishes to deny access to a record. These statutory requirements have not been satisfied, toward the redacted materials, the withheld responsive records, or the communications generated in responding to the request, by the November 23, 2020 letter.

An agency is required to identify the records it is withholding and the agency must identify the "reasons and supporting facts for the denial." 1 V.S.A. § 318 (b)(2)(A)-(B). The agency's descriptions of the withheld communications are general and conclusory in nature, and are insufficient to assess the propriety of any claimed exemption because the agency has failed to identify the parties to the communications. It is Energy Policy Advocates' position that the Attorney General must specifically identify the records in a more descriptive fashion to satisfy its statutory burden, at a minimum. It is further our position that closer examination of the records once such

details are provided will prove no privilege or exemption applies. At minimum, this identification should include the date(s) of, parties to, and general subject matter of each withheld record.

In the instant matter, the Attorney General's Office cites two statutory exemptions, 1 V.S.A. § 317(c)(4) (exempting records which, if made public, would violate a common law or statutory privilege) and 1 V.S.A. § 317(c)(14) (exempting records which are relevant to litigation to which the public agency is a party of record), to withheld responsive records and provides conclusory assertions that the records were made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services. No further facts of any type or variety are to be found in the denial letter, much less facts that establish the records are related to connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services. The exception to this is final category of records withheld, the communications between Vermont, other states, and an unnamed other party in which the states, including Vermont, are claimed to be parties of record. While the response letter states that one or both of the cited exemptions may apply to any specific category, it does not clarify how each or either exemption may apply to any specific category.

The Attorney General's Office should clarify if one or both exemptions apply to each category of records. If the Attorney General's Office is asserting that this final category of records are subject to the exemption found in 1 V.S.A. § 317(c)(7), the specific privilege asserted must be explained in greater detail. If the exemption in 1 V.S.A. 317(c)(14) is being asserted, the litigation to which the communication pertains should be identified.

The fifty-one records involving communications between the Attorney General's offices of several states and the single record involving several states and an additional party involve parties beyond the Attorney General's Office or any agency of the State of Vermont. No agreements have been provided or cited that would establish any privileged relationship between the parties to those records. Without the agreements or a citation to the agreements, the response letter appears to indicate a waiver of any privilege. As such, the Attorney General's Office should provide any agreements relied upon to claim any privilege or provide a *Vaughn* style index listing the agreements and providing an explanation as to which records they apply and how they apply. Alternately, the Attorney General's Office should release the fifty-one records.

As to the "withheld attorney-client, attorney work-product communications generated in responding to [this] public records request", nothing is presented to establish 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.

Thus for the reasons stated in the preceding paragraphs, Energy Policy Advocates considers the reasons and supporting facts of the denials to be insufficient.

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.

The Attorney General's Office should release all records responsive to this request or, at a minimum, provide a *Vaughn* index detailing the precise nature of the records withheld, including date(s) of, parties to, and general subject matter of each withheld record, including whether it relates to any pending litigation, as well as the specific exemption applicable to each withheld record. It should further provide, in those instances involving parties that are not internal to the Vermont Attorney General's Office or another agency of the State of Vermont, a brief description of any agreement supporting a claimed exemption. In the alternative, the Vermont Attorney General's Office should provide copies of any agreement supporting a claimed exemption.

I look forward to your response. In the event that you have further questions or concerns, please contact me via email at ncornettlaw@gmail.com.

Best,
Neal Cornett

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