

From: Neal Cornett <ncornettlaw@gmail.com>
Sent: Thursday, December 17, 2020 3:31 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Public Records Act Appeal

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Mr. Diamond:

Please see the attached appeal, request, and agency response.

Thank you,
Neal Cornett

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December 17, 2020

Joshua Diamond
Deputy Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001

Dear Deputy Attorney General 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 copy of a December 11, 2020 public records request submitted to the Attorney General's Office and the Office's December 16, 2020 response letter and responsive record.

The Attorney General's Office's response provided one (1) responsive record. Certain responsive records have already been provided in response to an earlier November 5, 2020 public records request. As to the withheld records responsive to the December 11, 2020 request, the response letter states, in pertinent part:

We are providing to you with this letter one additional document, which is responsive to this request. This document was forwarded as part of two separate email chains, both of which we are withholding because they are exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4). One email chain is between the Vermont Attorney General's office and an agency of the State of Vermont, and was generated in connection with anticipated litigation and for the purpose of facilitating the rendition of legal services to the State of Vermont. The second email chain is between the Vermont Attorney General's Office and the Attorney General's Office of another state, pertains to an issue of common interest, and was generated in connection with anticipated litigation and for the purpose of facilitating the rendition of legal services to the respective states.

Additionally, we are withholding internal Vermont Attorney General's office communications generated in connection with responding to this public request, your public records request dated November 5, 2020, and your November 30, 2020 appeal of that public records request because they are exempt from disclosure pursuant to 1 V.S.A. §317(c)(4).

EPA appeals the withholding of only the second email chain between the Vermont Attorney General's Office and the Attorney General's Office of another state.

1 V.S.A. § 318 (b)(2) establishes the four requirements of an agency denial of access. It is Energy Policy Advocates' position that those requirements have not been met.

First, an agency is required to identify the records withheld. 1 V.S.A. § 318 (b)(2)(A). The Office's description of the withheld email chain is insufficient because the agency has failed to identify the number of withheld emails, the parties to the emails, the dates of the emails within the chain, and

a description of general subject matter of each withheld email. At a minimum, the Attorney General's Office should specify the number of emails withheld, the date(s) of, specific parties to, and general subject matter of each withheld email.

Second, an agency must include the statutory basis for denial and a brief statement of the reasons and supporting facts for denial. 1 V.S.A. §318(b)(2)(B) Here, the Attorney General's Office cites 1 V.S.A. § 317(c)(4) (exempting records which, if made public, would violate a common law or statutory privilege) to withhold the responsive email chain and provides the conclusory assertion that the chain pertains to an issue of common interest, and was generated in connection with anticipated litigation and for the purpose of facilitating the rendition of legal services to the respective states. No further facts of any type or variety are in the denial letter, much less facts that establish the email chain pertains to an issue of common interest, and that it was generated in connection with anticipated litigation and for the purpose of facilitating the rendition of legal services to the respective states.

A further issue is the failure to cite or provide any agreement creating a privileged relationship between the Vermont Attorney General's Office and the Attorney General's Office of another state related to the alleged issue of common interest. Without the agreement(s) or a citation to the agreement(s), 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, at a minimum, provide a *Vaughn* style index listing the agreement(s) and providing an explanation as to how any such agreement(s) applies. Alternately, the Vermont Attorney General's Office should release the withheld email chain.

For the above reasons, Energy Policy Advocates believes the Vermont Attorney General's Office has failed to adequately state the reasons and supporting facts for withholding the responsive email chain.

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.

In summation, the Attorney General's Office should release the second email chain responsive to this request or, at a minimum, provide a *Vaughn* index detailing the precise nature of all records

withheld, including the number withheld, the date(s) of, specific parties to, and general subject matter of the withheld emails. Further, the Vermont Attorney General's Office should provide a copy of any agreement(s) supporting a privileged relationship between it and the other attorney general's office or, at a minimum, a brief description of any such agreement(s).

Sincerely,
Neal Cornett
Attorney at Law