

From: Matthew D. Hardin <MatthewDHardin@protonmail.com>
Sent: Friday, December 18, 2020 10:23 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Neal Cornett <ncornettlaw@gmail.com>
Cc: Alexander, Jon <jon.alexander@vermont.gov>
Subject: RE: Public Records Act Appeal

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

Good morning,

The tolling agreement referenced below reflected that the administrative appeal would be stayed/tolled unless or until Energy Policy Advocates requested your office resume processing it in the usual course. At this time, I have to respectfully request that you resume processing the June 12 administrative appeal below.

Thanks,
Matt Hardin

On Wed, Jul 22, 2020 at 12:27 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

Mr. Cornett:

It is my understanding that a tolling agreement on this appeal has been reached until the pending litigation in Washington Superior Court is resolved. This agreement is reflected in recent communications between Attorney Hardin and AAG Jon Alexander.

If this understanding is in error, please advise.

Regards, Josh

Joshua R. Diamond, Deputy Attorney General

Vermont Attorney General's Office

109 State Street

Montpelier, Vermont 05609

802-828-3175

joshua.diamond@vermont.gov

PRIVILEGED & CONFIDENTIAL COMMUNICATION: This communication may contain information that is privileged, confidential, and exempt from disclosure under applicable law. DO NOT read, copy or disseminate this communication unless you are the intended addressee. If you are not the intended recipient (or have received this E-mail in error) please notify the sender immediately and destroy this E-mail. Vermont's lobbyist registration and disclosure law applies to certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at <https://www.sec.state.vt.us/elections/lobbying.aspx>.

From: Neal Cornett <ncornettlaw@gmail.com>
Sent: Wednesday, July 22, 2020 11:30 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Fwd: Public Records Act Appeal

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

Mr. Diamond:

I wanted to check in on the status of this appeal and confirm it was received.

Thank you,

Neal Cornett

----- Forwarded message -----

From: Neal Cornett <ncornettlaw@gmail.com>
Date: Fri, Jun 12, 2020 at 5:21 PM

Subject: Public Records Act Appeal
To: <Joshua.Diamond@vermont.gov>

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 June 4, 2020, and the Office's response, dated June 9, 2020.

Specifically, Energy Policy Advocates appeals the denial of "6 records" responsive to its request. The Office of the Attorney General stated that it was withholding such records "because they are exempt from disclosure pursuant to 1 V.S.A. § 371(c)(4) (attorney-client communications, attorney work product) and/or 1 V.S.A. § 317(c)(14) (relevant to litigation). These records consist of communications among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation."

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 June 9, 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, that the attorney work product doctrine applies, or that any litigation is extant. 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 he 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. Energy Policy Advocates also notes that the individual whose signature appears on the letter denying access to the records at issue is also the individual whose correspondence was requested. We respectfully submit that any search for and review of responsive records by the same individual whose records are requested creates an appearance of bias, and we invite the Attorney General to correct this appearance of bias in its response to this appeal.

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.

Sincerely,

Neal Cornett

Attorney at Law

--

The information contained in this message may be privileged. It is intended by the sender to be confidential. If you suspect you may not be the intended recipient, please notify the sender and delete all copies.

--

The information contained in this message may be privileged. It is intended by the sender to be confidential. If you suspect you may not be the intended recipient, please notify the sender and delete all copies.