

**From:** Neal Cornett <[ncornettlaw@gmail.com](mailto:ncornettlaw@gmail.com)>  
**Sent:** Thursday, April 1, 2021 10:58 AM  
**To:** Diamond, Joshua <[Joshua.Diamond@vermont.gov](mailto:Joshua.Diamond@vermont.gov)>  
**Subject:** PRA Appeal

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Mr. Diamond:

Please see the attached PRA appeal, original PRA request, Vermont Attorney General's Office response, and supporting document. If you have any questions, please feel free to contact me.

Yours,  
Neal Cornett

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April 1, 2021

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

Mr. Diamond

I write, on behalf of my client Energy Policy Advocates (“EPA”), to appeal a denial of access to public records pursuant to 1 V.S.A. § 318 (c)(3). Please see attached a public records request I submitted to the Attorney General’s Office on February 22, 2021, and the Office’s response, dated March 5, 2021.

The PRA request sought “any common interest agreement, confidentiality agreement, information agreement, and/or non-disclosure agreement related to Ozone NAAQS entered into by the Vermont Attorney General’s Office at any time in July, August, or September 2020.” The Attorney General’s Office’s response withheld one agreement pursuant to 1 V.S.A. § 317(c)(4) and 1 V.S.A. § 317(c)(14). EPA appeals the withholding of this agreement.

On March 30, 2021, the New York State Office of the Attorney General released a common interest agreement titled “COMMON INTEREST AGREEMENT REGARDING THE SHARING OF INFORMATION CONCERNING ANTICIPATED COMMENTS AND LITIGATION RELATING TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY’S OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS” in response to an EPA New York Freedom of Information Law request seeking the same as EPA’s Vermont Public Records Act request. The agreement appears to show that the Vermont Attorney General’s Office joined the agreement on August 14, 2020. I am attaching the agreement released by the New York State Office of the Attorney General with this appeal.

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.

First, an agency is required to identify withheld records and the agency must identify the “reasons and supporting facts for the denial.” 1 V.S.A. § 318 (b)(2)(A)-(B). The Attorney General’s Office’s response withheld the agreement as “relat[ing] to issues of common interest among the signatory states...made in anticipation of litigation and for the purpose of facilitating the rendition of professional legal services[]. [It] is relevant to “State of New York et al. v. United States Environmental Protection Agency, United States Court of Appeals for the District of Columbia Circuit, No. 21-1028.” The New York State Office of the Attorney General’s subsequent release of what appears to be the same agreement that Vermont is withholding negates the rationale of the Attorney General’s Office’s withholding of the agreement. Even had New York not released the document, however, the document would not be exempt from production in Vermont because it

does not meet the Vermont definitions of information protected by the work product or attorney-client privileges, and Vermont courts have never recognized the common interest doctrine.

Second, an agency must include the statutory basis for denial and a brief statement of the reasons and supporting facts for denial. In the instant matter, the Attorney General's Office cites 1 V.S.A. § 317(c)(4) (would violate adopted standards or ethics of a regulated profession, attorney-client communications, attorney work product, exempt from production due to pending litigation), and 1 V.S.A. § 317(c)(14) (related to litigation). As stated, *supra*, the release by the New York State Office of the Attorney General's subsequent release of the agreement negates the rationale of the Attorney General's Office's withholding of the agreement. As also stated, *supra*, had New York not released the document, the document would nevertheless not be exempt from production under Vermont law because it does not meet the Vermont definitions of information protected by the work product or attorney-client privileges, and Vermont courts have never recognized the common interest doctrine.

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 Assistant Attorney General Persampieri, 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.

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.

For the above reasons, the Attorney General's Office should release the agreement responsive to this request.

Sincerely,  
Neal Cornett  
Attorney at Law

## **REQUEST UNDER VERMONT PUBLIC RECORDS ACT**

February 22, 2021

Vermont Attorney General's Office  
109 State Street  
Montpelier, VT 05609-1001

**By Electronic Mail:** [ago.info@vermont.gov](mailto:ago.info@vermont.gov)

**Re:** Ozone NAAQS Agreement

Dear Sir or Madam:

On behalf of Energy Policy Advocates (EPA), recognized by the Internal Revenue Service as a non-profit public policy institute under § 501(c)(3) of the Internal Revenue Code, and pursuant to the Vermont Public Records Act, 1 V.S.A. §§315-320, please provide copies of any common interest agreement, confidentiality agreement, information sharing agreement, and/or non-disclosure agreement related to Ozone NAAQS entered into by the Vermont Attorney's General Office at any time in July, August, or September 2020.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, EPA is a non-profit public policy organization dedicated to informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. EPA's ability to obtain fee waivers is essential to this work. EPA intends to use any responsive

information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how regulatory, policy and enforcement decisions are reached. EPA ensures the public is made aware of its work and findings via media, its website [epadvocates.org](http://epadvocates.org), its partnership with the non-profit public interest law firm Government Accountability & Oversight, P.C., and its counsel GAO's [ClimateLitigationWatch.org](http://ClimateLitigationWatch.org) project dedicated to broadly disseminating energy and environmental policy news and developments. The public information obtained by EPA have been relied upon by established media outlets, including the Washington Times and Wall Street Journal editorial page.<sup>1</sup>

We look forward to your response. If you have any questions, do not hesitate to contact me by email at [ncornettlaw@gmail.com](mailto:ncornettlaw@gmail.com).

Sincerely,  
Neal Cornett  
Attorney at Law

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<sup>1</sup> See, EPA In the News at <http://epadvocates.org/news/>.

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

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DEPUTY ATTORNEY GENERAL

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<http://www.ago.vermont.gov>

STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
109 STATE STREET  
MONTPELIER, VT  
05609-1001

March 5, 2021

Neal Cornett  
Attorney at Law

By e-mail to: [ncornettlaw@gmail.com](mailto:ncornettlaw@gmail.com)

Re: Vermont Public Records Act Request

Dear Mr. Cornett:

I write in response to your Vermont Access to Public Records Act request dated June February 22, 2021. In that request, on behalf of Energy Policy Advocates, you sought:

any common interest agreement, confidentiality agreement, information sharing agreement, and/ or non-disclosure agreement related to Ozone NAAQS entered into by the Vermont Attorney's General Office at any time in July, August, or September 2020.

On February 22, 2021, you agreed that we could treat the request as received on March 1, 2021 to accommodate my vacation schedule. Thank you for that.

In response to your request, please be advised that we have one record that is responsive to the request, and we are withholding it because it is exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4) (attorney-client communications, attorney work product) and 1 V.S.A. § 317(c)(14) (relevant to litigation). The record is a common interest agreement related to Ozone NAAQS entered into by Vermont and a number of other states. The agreement relates to issues of common interest among the signatory states, and was made in anticipation of litigation and for the purpose of facilitating the rendition of professional legal services to the

signatory states by their respective offices of attorney general. The agreement is relevant to *State of New York, et al. v. United States Environmental Protection Agency*, United States Court of Appeals for the District of Columbia Circuit, No. 21-1028, a case filed January 19, 2021 to which the State of Vermont is a party.

If you feel any information or records have been withheld in error, you may appeal to Deputy Attorney General Joshua Diamond at the following email address: [Joshua.Diamond@vermont.gov](mailto:Joshua.Diamond@vermont.gov).

Sincerely,

/s/Nicholas F. Persampieri

Nicholas F. Persampieri  
Assistant Attorney General