

**From:** [Diamond, Joshua](#)  
**To:** [Neal Cornett](#)  
**Cc:** [Mishaan, Jessica](#)  
**Subject:** RE: PRA Appeal  
**Date:** Friday, April 9, 2021 8:13:32 AM  
**Attachments:** [Appeal Response FINAL.pdf](#)

---

Dear Attorney Cornett:

Please see attached response to your public records appeal.

Best, Josh

Joshua R. Diamond, Deputy Attorney General  
Vermont Attorney General's Office  
109 State Street  
Montpelier, Vermont 05609  
802-595-8317  
[joshua.diamond@vermont.gov](mailto: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:** Thursday, April 1, 2021 10:58 AM  
**To:** Diamond, Joshua <Joshua.Diamond@vermont.gov>  
**Subject:** PRA Appeal

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

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

--

\*\*\*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.\*\*\*

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

JOSHUA R. DIAMOND  
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON  
CHIEF ASST. ATTORNEY  
GENERAL



TEL: (802) 828-3171

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

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

April 8, 2021

Neal Cornett  
Attorney at Law

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

Re: Appeal of Vermont Public Records Act Request

Dear Attorney Cornett:

This is a determination, pursuant to 1 V.S.A. § 318(c), on the appeal of your client, Energy Policy Advocates (“EPA”), set forth in your April 1, 2021 letter to this office, which followed this office’s March 5, 2021 response to EPA’s February 22, 2021 Vermont Access to Public Records Act request.

The February 22, 2021 Vermont Public Records Act request 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.

In our March 5, 2021 response, we advised you that we have one record that is responsive to the request- a common interest agreement related to the National Ambient Air Quality Standards for ozone (“Ozone NAAQS”) entered into by Vermont and a number of other states- and that 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 response stated that the common

interest 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,” and that 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.”

In your April 1, 2021 appeal, you state that the New York Attorney General’s Office has released to you in response to an EPA New York Freedom of Information Law request 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.” You attached a copy of the common interest agreement that you received from New York. Without waiving the basis for the denial of your appeal as set forth below, the agreement produced by New York is identical to the common interest agreement in our possession that is at issue here. Both the text of the agreement and the signatories to the agreement are identical.

Your appeal contends that: (1) New York’s release of the agreement negates the rationale for our office’s withholding of the agreement; and (2) even if New York had not released the agreement, it would not be exempt from disclosure 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.”

I have considered your appeal and am denying it because: (1) the common interest agreement is exempt from disclosure under 1 V.S.A. § 317(c)(4), and (c)(14); and (2) New York’s production of the common interest agreement did not in any way negate, waive or otherwise affect the exemptions from disclosure held by the State of Vermont under Vermont law.

The 1 V.S.A. § 317(c)(4) exemption covers both attorney-client privilege and work-product materials. The common interest agreement at issue falls within both. It was entered into by the Vermont Attorney General’s Office, the Attorney General’s Offices of 15 other states and the District of Columbia, the California Air Resources Board, and the Office of the Corporation Counsel of the City of New York for the purpose of facilitating the rendition of

professional legal services by those offices to their respective governments regarding administrative and judicial proceedings related to the Ozone NAAQS. The agreement was made in anticipation of litigation, and, on January 19, 2021, most of the signatories to the agreement filed a petition for review in *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, which challenged an EPA final rule on the Ozone NAAQS, which is within the scope of the agreement. The agreement was entered into and shared among the signatories in furtherance of the signatories' common interests in the litigation and related administrative proceedings, and therefore, is subject to the common interest doctrine. Vermont Rule of Evidence 502(b)(3) incorporates the common interest doctrine as part of the attorney client privilege, and the doctrine has been recognized by Vermont courts. See *In re Champlain Marina Dock Expansion*, Docket No. 28-2-09 Vtec, 2010 WL 2594034, at \*1 (Vt. Env'tl. Ct. June 16, 2010); *Munson Earth Moving Corp. v. City of South Burlington*, Docket No. S0805-08 Cnev, 2009 WL 8019258 (Vt. Super Ct. Mar. 30, 2009).

The pendency of *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, to which the State of Vermont is a party, provides an independent basis for exempting the agreement from disclosure under 1 V.S.A. § 317(c)(14).

New York's disclosure of the agreement to EPA did not somehow negate the exemptions from disclosure under 1 V.S.A. § 317(c)(4) and (c)(14). Such disclosure did not waive the attorney-client privilege or work-product protections held by Vermont because Vermont did not consent to the disclosure. "[T]he case law is clear that one party to a JDA [joint defense agreement] cannot unilaterally waive the privilege for other holders." *United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012); see also *United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007) (noting that the "privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties."). Further, New York's disclosure had no effect on the exemption from disclosure under 1 V.S.A. § 317(c)(14). This exemption applies to "[r]ecords which are relevant to litigation to which the public agency is a party of record," regardless of whether the records have been disclosed to a third party outside of discovery in the pending litigation.

Please be advised that any person aggrieved by the denial of a request for public records may apply to the Civil Division of the Superior Court pursuant to 1 V.S.A. § 319.

Sincerely,

/s/ Joshua R. Diamond  
Joshua R. Diamond  
Deputy Attorney General