

From: [Diamond, Joshua](#)
To: cunninghamcook@cvglawoffice.com
Cc: [Mishaan, Jessica](#)
Subject: Public Records request
Date: Friday, June 11, 2021 4:21:42 PM
Attachments: [Appeal Response to Cunningham-Cook 6-11-21.pdf](#)

Dear Ms. Cunningham-Cook:

Please find attached the AGO's response to your public records appeal.

Sincerely, Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
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Montpelier, Vermont 05609
802-595-8317
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June 11, 2021

VIA E-MAIL

Zoe Cunningham-Cook
Law Clerk
Costello, Valente & Gentry, P.C.
PO Box 483
Brattleboro, VT 05302

RE: April 12, 2021, Public Records Request

Dear Ms. Cunningham-Cook:

I write in response to your email dated June 4, 2021. In that email you appealed a denial of access of a public record pursuant to 1 V.S.A. § 318(c) relating to your request of April 12, 2021, in which you sought the following records:

A copy of the report from the Vermont Attorney's
General's review of an investigation regarding Mr.
Goodnough's shooting.

I have reviewed your appeal, and for the reasons set forth below, your appeal is denied.

1. The Record is Attorney-Work Product and is Subject to the Attorney-Client Privilege

The single record identified as responsive to your request is a memorandum drafted by a prosecutor within the Criminal Division charged with reviewing investigative materials submitted to the Office for purposes of a prosecution review. The memorandum comprises a synthesis of relevant facts ascertained from

investigative materials, and the application of both Vermont law and persuasive legal authority to said facts, and the prosecutor's resultant conclusions and recommendations. The memorandum was drafted for the purpose of assisting the Attorney General in the exercise of prosecutorial discretion. By its very nature, this memorandum is prepared in anticipation of litigation, specifically "in anticipation of possible criminal prosecutions"¹ of a publicly identified police officer involved in the shooting of Michael Goodnough on July 8, 2020. The Attorney General's Office asserts that this document is exempt from the disclosure as attorney work-product pursuant to 1 V.S.A. § 317(c)(4).

Additionally, the memorandum constitutes an attorney client communication that is privileged and exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4). *See* V.R.E. 502 ("a client has a privilege to...prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services..."). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer."²

In this instance, the prosecutor who authored the identified record created a confidential attorney-client communication containing legal recommendations to the highest level of authority in our agency, the Attorney General, in order to assist that official with the exercise of their prosecutor's discretion. As such, it is exempt from disclosure.

2. The Record is Exempt Because it is a Record Dealing with Detection and Investigation of Crime Pursuant to 1 V.S.A. § 317(c)(5)(A)(i).

Pursuant to 1 V.S.A. § 317(c)(5)(A)(i), records are exempt if disclosure "could reasonably be expected to interfere with enforcement proceedings." Mr. Goodnough is currently being investigated by the Rutland County State's Attorney's Office for possible criminal charges arising out of the same incident that occurred on July 8, 2020. Disclosure of the requested record could possibly interfere with this investigation. Therefore, this document is not subject to disclosure.

¹ *See New York Times Co. v. United States Dep't of Justice*, 939 F.3d 479, 494 (2d Cir. 2019) ("It is not disputed here that [U.S. Attorney] Durham's memoranda were attorney work product at the time they were drafted, in part because Durham prepared them in anticipation of possible criminal prosecutions.")

² *Tax Analysts v. I.R.S.*, 117 F.3d 607, 618 (D.C. Cir. 1997).

Pursuant to 1 V.S.A. § 319, you may seek judicial review of this determination from the Civil Division of the Vermont Superior Court.

Sincerely,

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

Electronically Transmitted