

From: [Diamond, Joshua](#)
To: chelsea@sevendaysvt.com
Subject: PRA Appeal
Date: Wednesday, June 1, 2022 7:58:39 PM
Attachments: [Appeal Response 6-1-22.pdf](#)

Dear Ms. Edgar,

On behalf of the Vermont Attorney General's Office, please find our response to your public records appeal.

Regards, Josh Diamond

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June 1, 2022

Chelsea Edgar
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BY E-MAIL ONLY

Dear Ms. Edgar:

I write in response to the appeal of your public records request to the Vermont Attorney General's Office ("AGO").

I. Background.

On May 9, 2022, you made requests under the Vermont Public Records Act (the "PRA") related to Molly Gray's employment at the AGO. Specific to this appeal, you requested the "first draft of the portion of the investigative report of the St. Joseph's Orphanage Task Force prepared by Molly Gray."

The AGO responded to this PRA request on May 20, 2022, and identified drafts produced from November 2019 to May 2020. The drafts were withheld from production on the following grounds: 1 V.S.A. § 317(c)(1), (3), (4) (attorney client and work product privileged communications); 1 V.S.A. § 317(c)(5)(A)(v) (records related to the detection and investigation of crime where release would disclose techniques and procedures for law enforcement investigations).

You appealed this denial. The basis of the appeal claims that the withheld documents should be produced because Molly Gray's "past job performance should be more than usually open to public scrutiny," the AGO "has a duty to be more liberal in its interpretation of 1 V.S.A. § 317," and releasing the documents "would be in the public interest."

For the reasons set forth below, the requested documents are appropriately withheld and exempt from production under the PRA.

II. The Draft Reports Are Exempt Under the PRA Because Disclosure Would Violate the Attorney Work Product And Attorney Client Communication Privileges.

The PRA exempts from public inspection records that would cause the custodian to violate any statutory or common law privilege. 1 V.S.A § 317(c)(4). The work product doctrine falls within the (c)(4) exemption as a statutory or common law privilege. See *Killington, Ltd. V. Lash*, 153 Vt. 628, 646 (1990).

The work product doctrine shields materials prepared in anticipation of litigation or for trial, including documents prepared by a party's attorney, consultant, or agent. *Judicial Watch, Inc. v. U.S. Dept. of Justice*, 800 F. Supp. 2d 202, 212 (D.D.C. 2011). As the United States Supreme Court has recognized, the work product doctrine is essential to the litigation process so that "...a lawyer can work with a certain degree of privacy, free from unnecessary intrusion..." *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947). It "'provides a zone of privacy to think, plan, weigh facts and evidence, candidly evaluate a case, and prepare legal theories.'" *Judicial Watch*, 800 F.Supp.2d at 211 (*citation omitted*). "This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways..." *Hickman*, 329 U.S. at 511. The role of the work product doctrine in the criminal justice system is even more vital than in civil litigation. "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

The AGO has identified at least five drafts and/or outlines of a Saint Joseph's Orphanage Report that may be responsive to your request. The drafts at issue range from November 2019 to May 2020. They were created during the AGO's criminal investigation of the Saint Joseph's Orphanage ("Orphanage"), which involved allegations of homicide. During this time, the AGO's Criminal Division, including Ms. Gray, reviewed interviews of individuals who came forward with allegations of criminal activity against the Orphanage. Ms. Gray and the Criminal Division also reviewed pertinent documentation from various organizations affiliated with the Orphanage to evaluate possible allegations of criminal conduct for prosecution. The responsive drafts include observations, mental impressions, opinions and conclusions about the evidence and legal theories from Ms. Gray and the Criminal Division about the investigation. This activity, which is reflected in the drafts, falls squarely within the work product doctrine.

As noted above, the drafts were prepared in the context of an investigation to determine whether sufficient evidence and a legal basis existed to bring criminal charges, i.e., in anticipation of litigation. While some of the portions of the drafts were eventually reflected in a public report after the conclusion of the investigation, the subsequent disclosure does not render the work product privilege inapplicable. See *Carey-Canada, Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 246, fn. 11 (D.D.C. 1986)("The fact that final drafts were intended to be disclosed to the public does not render the privilege inapplicable"). Therefore, for the reasons

described above, the drafts were appropriately withheld under the PRA as attorney work product.

The documents subject to this appeal are, also, exempt from disclosure pursuant to 1 V.S.A. § 317(c)(3) & (4) as attorney client privilege. They are drafts prepared by an attorney on behalf of the Attorney General's Office to determine what information, legal theories, and conclusions might be reached and disclosed related to Orphanage investigation. As such, they represent communications in furtherance of the attorney client relationship, which is the essence of the attorney client privilege. *See* V.R.E. 502 (an attorney client communication is confidential if it is made furtherance of the rendition of professional legal services to the client); *Carey-Canada, Inc.*, 118 F.R.D. at 247 (drafts of an annual report prepared by the corporation's attorneys and submitted to the client for approval represented recommendations to the client as to what material should be released to the public and are protected by the attorney client privilege).

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