

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

JOSHUA R. DIAMOND  
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON  
CHIEF ASST. ATTORNEY GENERAL



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

TEL: (802) 828-3171

FAX: (802) 828-3187

TTY: (802) 828-3665

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

April 3, 2019

Alan J. Keays  
VTDigger  
26 State Street, Suite 8  
Montpelier, Vermont 05602

**BY E-MAIL ONLY**

Re: Response to Public Records Request Appeal.

Dear Mr. Keays:

I write in response to your March 27 email appealing a "partial denial" of records under Vermont's Public Records Act. In sum, you request that we release any and all records withheld or redacted in responding to your request, particularly relating to Max Misch. You also request that where records have been redacted or withheld that this Office provide a list and description of these records along with citation to the applicable Vermont Public Records Act exemptions.

I have reviewed your appeal. As previously stated, with minimal exception, we have provided you with the totality of electronic and audio files responsive to your request.

We have withheld or redacted files where public disclosure at this time would violate our obligations under the Vermont Public Records Act. In response to your request for additional information about the withheld records, please find below further description of the records and the basis for the exemption:

- 1 internal email including legal analysis regarding possible charges;
- 1 internal legal memorandum regarding possible charges; and
- 1 timeline of events and exhibits produced by Ms. Morris' attorney.

With regards to the withheld and redacted records, as previously stated, Max Misch was arraigned on criminal charges which are currently pending. Consistent with 1 V.S.A. § 317(c)(5)(A)(ii), because some records contained information that could deprive Max Misch of his right to a fair trial, we were obliged, at this stage, to exempt

or redact this material from disclosure. Disclosure could also violate duly adopted Vermont Rules of Professional Conduct pursuant to 1 V.S.A. § 317(c)(3). Specifically, Rule 3.6 of the Vermont Rules of Professional Conduct prohibits a lawyer from making an extrajudicial statement that would have a substantial likelihood of materially prejudicing an adjudicative proceeding. We are also bound under 1 V.S.A. § 317(c)(1) & (3) to withhold records where disclosure would violate the attorney-client privilege and result in disclosure of documents that are considered attorney work product.

Separately, pursuant to 1 V.S.A. § 317(c)(5)(A)(iii) some statements have been redacted in order to protect against a possible unwarranted invasion of personal privacy. Specifically, this includes the redaction of personal or identifying information for persons involved in the investigation.

With regards to your request for a list and description of redacted or withheld records, the information contained in this letter, in addition to the information this Office has already provided you, fulfill the obligation to provide “the asserted statutory basis for denial and a *brief* statement of the reasons and supporting facts for denial.” 1 V.S.A. § 318(a)(2) (emphasis added). There is no legal requirement to provide an index of withheld records at the administrative level. *See* 1 V.S.A. § 318(a)(2); *see also e.g., Browning v. State*, No. 272-5-14, 2014 WL 10321350 \*4 (Vt. Dec. 2014) (upholding sufficiency of State’s index in Superior Court where no index was provided at administrative level). Courts make a case-by-case determination to determine what level of specificity is required to evaluate an Agency’s determination that specific records are exempt from disclosure under the Public Records Act. “No Vermont authority requires an agency to spell out an asserted basis for nondisclosure in an index when doing so is not helpful,” even at the trial court level. *Id.*

For the reasons set forth above, your appeal is denied. Under 1 V.S.A. § 319, you may seek judicial review of this determination from the Civil Division of the Vermont Superior Court.

Sincerely,



Joshua R. Diamond  
Deputy Attorney General

Electronically Transmitted