From: Diamond, Joshua
To: pbooth@keenesentinel.com
Cc: Clark, Charity; Mishaan, Jessica
Subject: Public Records Appeal.
Date: Monday, July 13, 2020 7:33:37 PM
Attachments: 2020-07-09 - PRA Appeal Response to Cuno-Booth - JRD.pdf

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Dear Mr. Booth:

Please see attached response to your public records appeal.

Sincerely, Joshua Diamond

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July 13, 2020

Paul Cuno-Booth
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BY E-MAIL ONLY

Re: Appeal of Public Records Request of June 22, 2020

Dear Mr. Booth:

I write in response to your email dated July 6, 2020. In that email you appealed a denial of access of a public record pursuant to 1 V.S.A. § 318(c)(1) relating to your request of June 22, 2020, which sought the following records:

> Any report, memo, narrative or similar document summarizing the Vermont Office of the Attorney General's review of the shooting and/or the reasons for resolving the matter without charges.

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 subordinate line prosecutor within the Criminal Division charged with reviewing investigative materials submitted to the Vermont Attorney General's 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 line prosecutor's resultant conclusions and recommendations. It was drafted for the purpose of assisting the Attorney General and

Deputy 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 the four publicly identified police officers involved in the apprehension of Mark Triolo on May 4, 2018.

The Attorney General's Office first asserts that this document is exempt from disclosure as attorney work-product pursuant to 1 V.S.A. § 317(c)(4). In your appeal, you argue that the attorney work-product exemption "requires a connection to litigation or trial prep," [2] and in support you cite to *dicta* contained in the decision of *Killington, Ltd. v. Lash*, 153 Vt. 628, 647 (1990) ("The litigation which serves as the basis for the claim must be *in esse* and not merely threatened.").[3]

However, the Vermont Supreme Court in *Killington, Ltd.* did not consider the issue presented here. Courts that have considered the scope and application of the attorney work-product exemption in either *anticipated litigation that was not commenced* or *subsequently terminated litigation* have routinely found that the exemption remains applicable in both scenarios. Notably, the United States Supreme Court has held in a federal public records request case that "attorney work-product is exempt from mandatory disclosure *without regard to the status of the litigation for which it was prepared*." *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 28 (1983) (emphasis added). Therefore, under this prevailing view, it is immaterial that the anticipated prosecution was not commenced, and the application of the attorney work-product exemption has been routinely upheld in similar declined prosecutions and enforcement actions.[4]

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[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] *Appeal of Denial Letter*, at 3, July 6, 2020.

[3] The Attorney General submits that this statement is *dicta* with no precedential value because the issue of *anticipated* or *terminated* litigation was not squarely before the Supreme Court of Vermont in *Killington, Ltd.*, and the Court has not yet had an opportunity to consider this issue, either in the context of civil litigation or criminal prosecution. *See Roy v. Woodstock Cmty. Tr., Inc.*, 2013 VT 100A at Note 12 (2014):

> Because, as noted, our earlier decisions did not address the question presented here, their broad language was essentially nonbinding dicta, and as such need not be specifically overruled. See *Pepin v. Allstate Ins. Co.,* 2004 VT 18, ¶ 16, 176 Vt. 307, 848 A.2d 269 (noting that "dicta ... is not binding authority"); *Chittenden Town Sch. Dist. v. Dep't of Educ.,* 169 Vt. 310, 348, 738 A.2d 539, 566 (1999) ("Dicta, it need hardly be stated, have no binding precedential effect.").

[4] *See, e.g.*, *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 [United States Attorney] Durham's memoranda [recommending declination of two prosecutions] were attorney work product at the time they were drafted, in part because Durham prepared them in anticipation of possible criminal prosecutions."); *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 146-47 (2d Cir. 1994) (attorney work-product exemption applicable even if staff attorney considered or recommended closing investigation); Kishore v. D.O.J., 575 F. Supp. 2d 243, 259 (D.D.C. 2008) (attorney work-product exemption applicable to document explaining government's reasons for declining prosecution); *Jackson v. U.S. Attorneys Office, Dist. of N.J.*, 293 F. Supp. 2d 34, 40 (D.D.C. 2003) ("The fact that the

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."[5]

In this instance, the prosecutor who authored the identified record created a confidential attorney-client communication containing legal recommendations to the two officials with the highest levels of authority in our agency, the Deputy Attorney General and the Attorney General, in order to assist those two officials with the exercise of their prosecutorial 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)-(3).

a. Interference with Enforcement Proceedings.

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." Mark Triolo is currently the subject of three intricately related enforcement proceedings pending in the states of Texas, New York, and the U.S. District of Kansas. They all involve criminal allegations that occurred a few days prior to Mr. Triolo's arrival in Vermont. Indeed, federal courts have applied the analog federal exemption under similar circumstances for defendants that have multiple open criminal cases.[6]

It is not just the close proximity in time of all the criminal allegations that are subject to the still pending enforcement proceedings that trigger this exemption. It is commonplace for prosecutors to seek to admit at trial evidence of flight and apprehension, including the manner and circumstances of the flight and apprehension, statements made at the time of the apprehension, and the appearance of the suspect at the time of the apprehension. In addition, if at the time of the apprehension the suspect was still in possession of any instrumentalities of any of the earlier incidents, such as the mode of transportation and communication, clothing worn, and weapons utilized, such physical evidence could be intricately related and relevant to the trial of that specific earlier incident. Furthermore, if the suspect was still in possession of proceeds from any such earlier incident, such as U.S. currency, such physical evidence would be intricately related

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litigation for which the document was prepared-presumably, a prosecution of Jackson's perjury complaint-did not occur or has otherwise been terminated does not prevent the government from properly invoking [the attorney-work product exemption].").

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

[6] *See, Kuffel v. B.O.P.*, 882 F. Supp. 1116, 1126 (D.D.C. 1995) (analog federal "interference" exemption is applicable when inmate has criminal prosecutions pending in other cases).

to the specific earlier incident, even if its recovery and circumstances happened several days after and several hundred miles removed from the occurrence of the specific earlier incident.

The events in Vermont that occurred on May 4, 2018, are intricately related to the events alleged to have occurred in Texas on April 25, 2018, in Kansas on April 26, 2018, and in New York on April 30, 2018. As such, disclosure could interfere with the pending enforcement proceedings in other states. Without limitation, pre-trial disclosure and widespread dissemination of the identified record may affect the partiality or biases of a potential jury, potentially prejudicing all parties.

b. Mr. Triolo's Right to a Fair Trial and Ethical Constraints on Pre-Trial Publicity.

Pursuant to 1 V.S.A. § 317(c)(5)(A)(ii), records are exempt if disclosure "would deprive a person of a right to a fair or an impartial adjudication." The concern here is for the trial rights of Mr. Triolo. Given the violent nature and circumstances of the apprehension of Mr. Triolo in Vermont, as well as Mr. Triolo's alleged conduct that led up to the officer involved shooting, disclosure and dissemination could deprive Mr. Triolo to his right to a fair trial in either of the three pending and intricately related enforcement proceedings. Given the recent intense debate about the propriety of use of force by law enforcement, public disclosure of the memorandum could generate significant pretrial publicity that could deprive Mr. Triolo of his right to a fair trial by effecting jury selection if information not currently public was widely disseminated.

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