

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Tuesday, December 8, 2020 7:23 PM
To: Neal Cornett <ncornettlaw@gmail.com>
Cc: Mishaan, Jessica <Jessica.Mishaan@vermont.gov>
Subject: RE: Appeal of the Attorney General's November 23, 2020 PRA Response

Dear Attorney Cornett:

In response to your appeal, please find attached.

Regards, Josh Diamond

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
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802-595-8317
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December 8, 2020

Neal Cornett
Attorney at Law

By e-mail to: 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), of the appeal set forth in your November 30, 2020 email of this office's November 23, 2020 response to your Vermont Access to Public Records Act request dated November 5, 2020, which this office received on November 6, 2020.

In your request, on behalf of Energy Policy Advocates, you sought:

all electronic correspondence, and any accompanying information . . . including also any attachments, a) sent to or from or which copies (whether as cc: or bcc:) Nick Persampieri, that b) includes, *anywhere*, whether in an email address, in the sent, to, from, cc, bcc fields, or the subject fields or body of an email or email "thread", including also in any attachments, i) "GHG NAAQS", ii) "climate NAAQS", iii) "CO2 NAAQS", iv) "secondary NAAQS", and/or v) "ozone NAAQS", and c) is dated from February 1, 2020 through the date you process this request, inclusive.

This office's November 23, 2020 response to your request provided you with a PDF containing 15 records responsive to your request (Record Nos. 1-15), and advised that we have redacted access information regarding

telephone and Zoom conferences from Record Nos. 3, 4, 12 and 13, because it is exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4) and/or 1 V.S.A. § 317(c)(7), and that we have withheld email from Record No. 1 because it is exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4). The response identified the withheld email as communication among the Attorney General's offices of multiple states, including Vermont, regarding issues of common interest, made in connection with anticipated litigation and for the purpose of facilitating the rendition of legal services to the respective states.

This office's November 23, 2020 response also advised that we withheld seventy-nine additional records because they are exempt from disclosure pursuant to 1 V.S.A. § 317(c)(4) and/or 1 V.S.A. § 317(c)(14). It stated that: (1) Fifty-one of the withheld records consist of communications among the Attorney General's offices of two or more states, including Vermont, regarding issues of common interest, made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services to the respective states; (2) Fifteen of the withheld records consist of internal Vermont Attorney General's office communications regarding matters for which Vermont has a common interest with other states, made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services to the State of Vermont; (3) Twelve of the withheld records consist of communications between the Vermont Attorney General's office and an agency of the State of Vermont, made in connection with ongoing or anticipated litigation and/or for the purpose of facilitating the rendition of legal services to the State of Vermont; and (4) One of the withheld records consists of a communication among a number of states and another party to ongoing litigation, in which the states, including Vermont, are parties of record.

Finally, this office's November 23, 2020 response advised that we have also withheld attorney-client, attorney work-product communications generated in responding to your public records request.

In your November 30, 2020 appeal you assert that this Office's November 23, 2020 response fails to adequately identify "reasons and supporting facts for the denial" of access to the records described above. You assert that the Attorney General's Office should release all records responsive to your request or provide a Vaughn index, which, for each record, identifies the date(s), parties, general subject matter, whether it relates to any pending litigation, and the specific exemption(s) applicable. For communications with parties who are not part of the government of the State

of Vermont, you assert that this Office should identify or provide a copy of any agreement supporting a claim of exemption.

I have considered your appeal. Your appeal is partially granted in that I have determined that one additional record should be disclosed (one of the internal Vermont Attorney General's Office communications withheld in response to your initial request) and a second email attachment should have been included in Record No. 1, which was provided to you with this office's November 23 response to your request. These records are attached to the transmittal e-mail accompanying this letter and labeled Record Nos. 16 and 1A. Additionally, I am correcting two errors in the November 23 response. This office counted as withheld an internal Vermont Attorney General's communication which was included among the records produced with the November 23 response, and one withheld communication which was counted as among the Attorney General's Offices of multiple states was in fact an internal Vermont Attorney General's Office communication. Taking these adjustments into account, we are withholding a total of seventy-seven records in addition to the material that we are withholding from Records 1-15. Fifty of these are communications among the Attorney General's offices of multiple states, fourteen are internal Vermont Attorney General's Office communications, twelve are communications between the Vermont Attorney General's office and an agency of the State of Vermont, and one is a communication among a number of states and another party to ongoing litigation. Because these records or portions of records which we are withholding are exempt from disclosure under the Public Records Act, your appeal is otherwise denied.

Section 318(b)(2) does not require a full "*Vaughn* index" as described in your appeal to support claims of exemption. The following reasons and supporting facts support exemption of the withheld records from disclosure.

First, the material redacted from Record Nos. 3, 4, 12 and 13, consists solely of: (1) security codes for group conference calls among representatives of the Attorney General's Offices of multiple states, which have been redacted from Record Nos. 3 and 4; and (2) information needed to access a Zoom meeting held by a nongovernmental lawyer, including a link for internet access, telephone numbers for telephone access, a meeting ID number, and passcodes, which have been redacted from Record Nos. 12 and 13. This is all personal information, which is exempt from disclosure under 1 V.S.A. § 317(a)(7).

Second, the email withheld from Record No. 1, is from a lawyer in the Attorney General's office of a State which is a signatory to a common interest agreement to lawyers in the Attorney General's Offices of other States who are signatories to the common interest agreement. The common interest agreement concerns the sharing of information in anticipation of the parties participating as litigants or counsel for litigants in as-yet unfiled judicial or administrative actions under state or federal law regarding greenhouse gas emissions. It is named the "the GHG Litigation CIA" and described more fully in Defendant's Index of Withheld Documents, filed on or about May 20, 2020, as Exhibit A to the State of Vermont's Answer in *Energy Policy Advocates v. Attorney General's Office*, Docket No. 173-4-20 Wncv. The email was prepared in anticipation of litigation and communicated among the states for the purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. It is exempt from disclosure under 1 V.S.A. § 317(c)(4).

Third, with respect to the additional fifty withheld records consisting of communications among the Attorney General's offices of multiple states, including Vermont:

(1) Five consist of email communications, some with attachments, among signatories to the GHG Litigation CIA described above. These communications were made in anticipation of litigation and for the purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(2) Twenty-Nine consist of email communications, some with attachments, among signatories to common interest agreements concerning the sharing of information and participation as litigants in ongoing administrative and as yet unfiled judicial actions related to the Ozone National Ambient Air Quality Standards ("Ozone NAAQS"). Participating states have entered into two such common interest agreements related to the Ozone NAAQS, the first in 2017, and the second in August 2020. These communications were made in anticipation of litigation and for purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(3) Seven consist of email communications, with attachments, among signatories to a common interest agreement concerning the sharing of information and participation as litigants in ongoing administrative and judicial actions related to Clean Air Act New Source Performance Standards for the oil and gas industry. The communications are work-product and were made for the purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. They are exempt from disclosure under 1 V.S.A. § 317(c)(4). Each of these records is also relevant to litigation to which the State of Vermont is a party of record, *California v. Wheeler*, No. 20-1357 (D.C. Circuit) and/or *California v. Wheeler*, No. 20-1367 (D,C, Circuit). Therefore, these records are also exempt from disclosure under 1 V.S.A. § 317(c)(14).

(4) Four consist of email communications, with attachments, among signatories to a common interest agreement concerning the sharing of information and participation as litigants in ongoing administrative and as yet unfiled judicial actions related to the PM National Ambient Air Quality Standards ("PM NAAQS"). These communications were made in anticipation of litigation and for purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(5) Two consist of email communications, with attachments, among signatories to a common interest agreement concerning the sharing of information and participation as litigants in administrative and judicial action, which was ongoing at the time of the communications, related to an Environmental Protection Agency action entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program." The communications are work-product and were made for the purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(6) One is an email communication, with attachments, among signatories to a common interest agreement concerning the sharing of information and participation as litigants in ongoing administrative and judicial actions regarding vehicle emission and fuel economy standards. The communication is work-product and was made for the purpose of facilitating the rendition of professional legal services by the signatory Attorney

General's offices to their respective states regarding matters of common interest to the states. It is exempt from disclosure under 1 V.S.A. § 317(c)(4). The record is also relevant to litigation to which the State of Vermont is a party of record, *California v. Wheeler*, No. 20-1167 (D.C. Circuit). Therefore, this record is also exempt from disclosure under 1 V.S.A. § 317(c)(14).

(7) One is an email communication, with attachments, among signatories to a common interest agreement concerning the sharing of information and participation as litigants in ongoing administrative and judicial actions regarding EPA regulation of hazardous air pollutants from electric utility steam generating units. The communication is work-product and was made for the purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. It is exempt from disclosure under 1 V.S.A. § 317(c)(4). The record is also relevant to litigation to which the State of Vermont is a party of record, *Massachusetts v. Environmental Protection Agency*, No. 20-1265 (D.C. Circuit) and *Westmoreland Mining Holdings, LLC v. Environmental Protection Agency*, Nos. 19-1176 and 19-1179 (D.C. Cir.). Therefore, this record is also exempt from disclosure under 1 V.S.A. § 317(c)(14).

(8) One is an email, with attachments, among signatories to a common interest agreement concerning the sharing of information and participation as litigants in administrative and as yet unfiled judicial actions regarding EPA rulemaking or other action related to EPA's consideration of benefits and costs in its decision making. The communication was made in anticipation of litigation and for the purpose of facilitating the rendition of professional legal services by the signatory Attorney General's offices to their respective states regarding matters of common interest to the states. It is exempt from disclosure under 1 V.S.A. § 317(c)(4).

Fourth, with respect to the fourteen records consisting of withheld internal Vermont Attorney General's Office communications:

(1) Five consist of email communications among Vermont Assistant Attorney General Nicholas F. Persampieri, other Vermont Assistant Attorney Generals and a law student intern to the Vermont Attorney General's Office, some of which include attachments, regarding multi-state calls at which numerous issues of common interest to the states were discussed. Two of these also concern whether Vermont would participate in matters discussed on the multistate calls. These communications were made for the purpose of

facilitating the rendition of professional legal services to the State of Vermont. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(2) Four consist of email communications among Vermont Assistant Attorney General Nicholas F. Persampieri and another Vermont Assistant Attorney General, some including attachments, about multi-state comment letters regarding the PM NAAQS. These communications were made in anticipation of litigation and for the purpose of facilitating the rendition of professional legal services to the State of Vermont. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(3) Three consist of email communications, two of which contain attachments, among Vermont Assistant Attorney General Nicholas F. Persampieri and other lawyers in the Vermont Attorney General's Office about multi-state letters regarding the Ozone NAAQS. These communications were made in anticipation of litigation and for the purpose of facilitating the rendition of professional legal services to the State of Vermont. They are exempt from disclosure under 1 V.S.A. § 317(c)(4).

(4) One is an email communication from Vermont Assistant Attorney General Nicholas F. Persampieri to another Vermont Assistant Attorney General regarding review of a draft multistate brief and declaration that the states were preparing to file in *New York v. EPA*, No. 20-CV-3714 (S.D.N.Y.). Drafts of the brief and declaration are attached to the email. The record is work product and the communication was made for the purpose of facilitating the rendition of professional legal services to the State of Vermont. It is exempt from disclosure under 1 V.S.A. § 317(c)(4).

(5) One is an email communication from Vermont Assistant Attorney General Nicholas F. Persampieri to another Vermont Assistant Attorney General regarding *California v. Wheeler*, No. 20-1357 (D.C. Circuit) and *California v. Wheeler*, No. 20-1367 (D.C. Circuit). The record is work product and was made for the purpose of facilitating the rendition of professional legal services to the State of Vermont. It is exempt from disclosure under 1 V.S.A. § 317(c)(4). As the record is relevant to litigation to which the State of Vermont is a party of record (the two aforementioned cases), it is also exempt from disclosure under 1 V.S.A. § 317(c)(14).

Fifth, all twelve of the records consisting of withheld communications between the Vermont Attorney General's office and an agency of the State of Vermont, are email communications, some with attachments, between Vermont Assistant Attorney General Nicholas F. Persampieri, and a lawyer

for the Vermont Agency of Natural Resources. These communications all constitute attorney work product generating in anticipation of litigation, or, in the case of two of the records, generated in connection with ongoing litigation. These communications were all made for the purpose of facilitating the rendition of professional legal services to the State of Vermont. These records are therefore exemption from disclosure under 1 V.S.A. § 317(c)(4). These records are further described as follows:

(1) Five relate to a multistate comment letter on EPA's recent review of the Ozone NAAQS.

(2) Two of the records relate to both the Ozone NAAQS comment letter and ongoing litigation to which the State is a party of record, *California v. Wheeler*, No. 20-1167 (D.C. Cir.) These records are also exempt from disclosure pursuant to 1 V.S.A. § 317(c)(14).

(3) Three of the records relate to a multistate comment letter on EPA's recent review of the PM NAAQS.

(4) One of the records relates to litigation that was later filed challenging an EPA final rule that revised refrigerant management standards, 85 Fed. Reg. 14150 (March 11, 2020).

(5) one of the records relates to a conference relevant to the efforts of the Attorney General's Office and the Agency of Natural Resources to promote federal action to reduce greenhouse gas emissions.

Sixth, the withheld communication among a number of states and another party to ongoing litigation, in which the states, including Vermont, are parties of record concerns litigation consolidated under *American Petroleum Institute v. EPA*, No. 13-1108 (D.C. Cir.). This record is exempt from disclosure under 1 V.S.A. § 317(c)(14).

Finally, the withheld records generated in responding to your request total three. These records are: (1) an email chain among Vermont Attorney General's Office personnel by which your request was directed to Assistant Attorney General Nicholas F. Persampieri for response; (2) a series of emails from Assistant Attorney General Nicholas F. Persampieri to our IT staff; and (3) an email communication, with attachments, from a legal assistant in our office to Assistant Attorney General Nicholas F. Persampieri. These records were all made in anticipation of litigation and for the purpose of facilitating

the rendition of professional legal services to the State of Vermont. The records are exempt from disclosure under 1 V.S.A. § 317(c)(4).

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

Record No. 1A



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

(518) 776-2009

July 21, 2020

Neal Cornett
Energy Policy Advocates

VIA EMAIL: ncornettlaw.com

Re: Appeal re: Freedom of Information Law Request # G000176-030920

Dear Mr. Cornett:

I write in response to your July 7 and July 14, 2020 administrative appeals in the above-referenced Freedom of Information Law (FOIL) matter.

You requested electronic correspondence and accompanying records sent to or from Assistant Attorney General Michael Myers for an approximately four-month period beginning November 2019 that include either “Bachmann” or “Goffman” and any invitations sent by AAG Myers to participate in a November 18, 2019 telephone call.

The Records Access Officer disclosed more than 1500 pages of responsive records and explained in writing why she was withholding portions of those records and other responsive records. You administratively appeal the withholding of portions of ten pages of records.

I am herewith redisclosing the ten pages at issue with certain of the redactions removed. Please be advised that I am continuing to withhold direct contact information for private individuals to avoid an unwarranted invasion of their personal privacy. Public Officers Law §§ 87(2)(b), 89(2)(b). I also am continuing to withhold portions that reflect the legal analysis, evaluation, impressions, and strategies of attorneys—specifically, Nancy Ketcham-Colwill and Sara Schneeberg Robinson—that were shared within a closed group with a common

Mr. Cornett
FOIL Appeal G000176-030920
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legal interest. These portions can be withheld as attorney work product under Public Officers Law § 87(2)(a) and CPLR 3101(c).

This is a final agency determination. Please be advised that judicial review of this determination can be obtained under Article 78 of the Civil Practice Law & Rules.

Very truly yours,



KATHRYN SHEINGOLD
FOIL Appeals Officer

Cc: Committee on Open Government
OAG Records Access Officer

Record No. 16

From: [Persampieri, Nick](#)
To: [McDougall, Robert](#); [Sala, Natasha](#)
Subject: Oil and Gas Petition for Review
Date: Tuesday, September 15, 2020 9:37:00 PM
Attachments: [CA v. Wheeler Tech Amendments PFR TO FILE.pdf](#)

This was filed today. It is separate from the one that was filed yesterday and should go on our multistate page. I can provide the details per our new policy to Natasha next week. Thanks.

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