

**From:** [Diamond, Joshua](#)  
**To:** [johnbvce@yahoo.com](mailto:johnbvce@yahoo.com)  
**Cc:** [Mishaan, Jessica](#)  
**Subject:** Public Records Appeal  
**Date:** Thursday, January 7, 2021 9:55:21 PM  
**Attachments:** [20210107 Appeal Response.pdf](#)

---

Mr. Brabant,

Please see attached. Regards, Josh Diamond

Joshua R. Diamond, Deputy Attorney General  
Vermont Attorney General's Office  
109 State Street  
Montpelier, Vermont 05609  
802-595-8317  
[joshua.diamond@vermont.gov](mailto:joshua.diamond@vermont.gov)

**PRIVILEGED & CONFIDENTIAL COMMUNICATION:** This communication may contain information that is privileged, confidential, and exempt from disclosure under applicable law. **DO NOT** read, copy or disseminate this communication unless you are the intended addressee. If you are not the intended recipient (or have received this E-mail in error) please notify the sender immediately and destroy this E-mail. Vermont's lobbyist registration and disclosure law applies to certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at <https://www.sec.state.vt.us/elections/lobbying.aspx>.

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

JOSHUA R. DIAMOND  
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON  
CHIEF ASST. ATTORNEY  
GENERAL



TEL: (802) 828-3171

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

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

January 7, 2021

John Brabant, Regulatory Affairs Director  
Vermonters for a Clean Environment

VIA EMAIL: [johnbvce@yahoo.com](mailto:johnbvce@yahoo.com)

Re: Appeal of Vermont Public Records Act Request

Dear Mr. Brabant:

This is a determination pursuant to 1 V.S.A. § 318(c) of your December 30, 2020 appeal of this office's December 17, 2020 response to your Vermont Public Records Act request.

In your request, you sought records "*...regarding the Chittenden Solid Waste District's illegal disposal and unlicensed/unpermitted use of contaminated and off-specification glass derived from its materials recycling facility (MRF) located in Williston, VT,*" and modified this request to exclude records produced by the Agency of Natural Resources on October 27, 2020. On November 9, 2020, this office notified you of the costs to produce the records, and after payment was received, responded to your request on December 17, 2020.

#### **A. Appeal**

You appeal the decision to withhold certain records as exempt and request production of these records, including "documents and references informing [the State's] settlement discussions and terms." You also request a listing of documents that are being withheld or redacted. The public records response on appeal identified four types of records that had been withheld or redacted:

1. Attorney-client privileged & attorney work product (confidential emails and documents from and with assistant attorneys general and client agency counsel and staff) withheld pursuant to 1 V.S.A. § 317(c)(3) & (4).
2. Personal information (home phone number) redacted pursuant to 1 V.S.A. § 317(c)(7).
3. Trade secret information was redacted pursuant to 1 V.S.A. § 317(c)(9).
4. Records related to settlement negotiations withheld as exempt under 1 V.S.A. §§ 317(c)(15) (records relating to contract negotiations) and 317(c)(3) (records required to be kept confidential by rules of professional conduct).

Each category is addressed, and the records further identified, below.

**1. Attorney-client privileged & attorney work product (confidential emails and documents from and with assistant attorneys general and client agency counsel and staff) withheld pursuant to 1 V.S.A. § 317(c)(3) & (4).**

The records in question are email communications, memos, and drafts created and exchanged internally between AGO attorneys and staff, and/or Natural Resources Board (NRB) attorneys and staff, between October 2018 to the date of your request. Your records request excluded records that the Agency of Natural Resources also had, so this is the full extent of responsive records that were withheld under these exemptions. These records were created to facilitate the provision of legal services by attorneys in this office to the State of Vermont, and/or were created in anticipation of litigation. They also reveal information relating to the representation of clients by one or more assistant attorneys general in this office.

The Public Records Act protects the confidentiality of records which, if made public, would cause the custodian to violate any statutory or common law privilege, such as attorney-client privilege and attorney work product privilege. 1 V.S.A § 317(c)(4). It also protects the confidentiality of records which, if made public, would cause the custodian to violate duly adopted standards of ethics. 1 V.S.A § 317(c)(3). Rule 1.6 of the Vermont Rules of Professional Conduct provides that a lawyer “shall not reveal information relating to the representation of a client.” This prohibition applies broadly to information concerning the representation of a client and is not limited to privileged or confidential information. The records in question were properly withheld because both cited exemptions apply.

**2. Personal information (home phone number) redacted pursuant to 1 V.S.A. § 317(c)(7).**

The only item redacted under this exemption was one home phone number. The person’s business phone number and email are not redacted, and the home phone number is properly redacted as personal information under 1 V.S.A. § 317(c)(7).

**3. Trade secret information redacted pursuant to 1 V.S.A. § 317(c)(9).**

This information was redacted in one of the records emailed to us by a private company (Glavel), that was produced to you in redacted form in December. A trade secret is sensitive information that, if released, could have the potential to give a competitor a competitive advantage. *Springfield Terminal Railway Co. v. Agency of Transportation*, 174 Vt. 341 (2002).

**4. Records related to settlement negotiations withheld as exempt under 1 V.S.A. §§ 317(c)(15) (records relating to contract negotiations) and 317(c)(3) (records required to be kept confidential by rules of professional conduct).**

The records in this category are email communications, letters, drafts, documents, and attachments, from January 18, 2019 through December 24, 2020, by and between Assistant Attorneys General representing the State, ANR, and the NRB, and counsel for Chittenden Solid Waste District. A more detailed list is as follows:

- 1/18 – 23/2019 Email communications between Assistant Attorney General Melanie Kehne and CSWD counsel Thomas R. Melloni, Esq.
- 2/6/2019 Email communications from CSWD counsel Thomas R. Melloni, Esq. to AAG Melanie Kehne, and reply
- 2/11/2019 Outlook calendar entry for meeting with assistant attorneys general, Agency of Natural Resources counsel and staff, and CSWD counsel and staff
- 2/14/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne attaching letter
- 2/20/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. and reply from Thomas R. Melloni, Esq. to AAG Melanie Kehne attaching corrected letter
- 3/1/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. attaching letter and two photos
- 4/12/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne attaching letter and test results
- 5/13/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. with reply
- 5/31/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne attaching liability insurance policy
- 8/28/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne re Act 250 JO
- 10/23/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. attaching letter
- 10/29 - 31/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne and replies
- 11/20/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. and Mark G. Hall, Esq. sharing numerous files via ftp site

11/21/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne

12/5/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq.

12/7/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq. attaching letter dated 12/6/2019

12/11/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq., and reply

12/12/2019 Outlook calendar entry for meeting with Assistant Attorneys General, ANR counsel and staff, NRB counsel, and CSWD counsel and staff

12/20/2019 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne, AAG Robert F. McDougall, and NRB counsel

12/23/2019 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq.

1/3/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne attaching letter and documents

1/10/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne

2/3/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne

2/11/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne and reply

2/27/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq. attaching letter and documents

3/16/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne and reply

4/7/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. and exchange

4/15/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne attaching letter and document

4/28/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq.

5/1 - 4/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq., and exchange

6/5/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. and Mark G. Hall, Esq.

6/8/2020 Email from Mark G. Hall, Esq. to AAG Melanie Kehne cc Thomas R. Melloni, Esq. and reply; Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq.

6/29/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq.

7/20/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne and Robert F. McDougall cc Mark G. Hall, Esq.

8/3/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq. and AAG Robert F. McDougall

10/06/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. and Mark G. Hall, Esq. cc AAG Justin Kolber attaching letter and document

10/16/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq., and reply

11/2/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq.

11/3/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq. and AAG Justin Kolber

11/12 - 13/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq., and reply

11/18/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq. and AAG Justin Kolber attaching letter

11/18/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq. and AAG Justin Kolber, and reply

12/3/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq. attaching letter

12/11/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq. attaching documents

12/14-15/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq., and reply

12/15-16/2020 Email from Mark G. Hall, Esq. to AAG Melanie Kehne cc Thomas R. Melloni, Esq. and exchange

12/16/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq. attaching documents

12/18/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq.

12/19/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. cc Mark G. Hall, Esq. and AAG Justin Kolber attaching documents

12/21/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq. and AAG Justin Kolber attaching document

12/23/2020 Email from AAG Melanie Kehne to Thomas R. Melloni, Esq. and Mark G. Hall, Esq. attaching documents

12/24/2020 Email from Thomas R. Melloni, Esq. to AAG Melanie Kehne cc Mark G. Hall, Esq. attaching document, and reply

These are records of communications between the State and counsel for CSWD in furtherance of settlement negotiations. While they are not attorney-client privileged, they do reveal information about the representation of one or more State clients by lawyers in this office. Disclosing it in response to a public records request could risk our attorneys' compliance with Rule 1.6, which as stated above, bars lawyers from disclosing information about the representation of a client. To the extent that such information is protected by Rule 1.6, it is exempt under 1 V.S.A § 317(c)(3).

These records are also be exempt as records of contract negotiations under 1 V.S.A. 1 V.S.A § 317(c)(15). Settlement agreements are essentially contracts. *See, In re Taylor*, 2015 VT 95, ¶ 25, 200 Vt. 1, 12, 128 A.3d 422, 429 (2015) ("The stipulation is a contract between petitioner and the State to settle the twenty-five-count specification of charges the State filed in 2004.") (citing *Marble Bank v. Heaton*, 160 Vt. 188, 192, 624 A.2d 365, 367 (1993) (observing that stipulation is contractual and governed by contract rules)); *see also, Gannon v. Quechee Lakes Corp.*, 162 Vt. 465 (1994) (construing settlement agreement as a contract).

Applying this exemption to records of such negotiations supports the public interest in encouraging settlement of disputes. Conversely, disclosure of such records would have a chilling effect on the willingness of adverse parties to be forthcoming with information or engage in settlement discussions with the State. These are some of the reasons evidence of settlement negotiations is generally inadmissible in court. *See* Reporter's Notes to V.R.E. 408 (noting that the rule "reflects both doubt as to the probative value of the fact of settlement and a policy to encourage settlements," and that statements made during negotiations "are also made inadmissible to encourage freedom of communication in negotiations and to eliminate controversy over the scope of the compromise offer"). While Rule 408 deals only with admissibility of evidence in court, its policy goals are not unlike those served by Section 317(c)(15). This policy interest is even stronger in the context of legal settlements than with State contracts, where submitting information to the State is a basic requirement for obtaining a State contract, and bidders are put on notice that bid records will be disclosed after the award is made and the contract is executed. Whereas contract bidders voluntarily submit that information, settlement negotiations are optional, and adverse parties are often reluctant to engage in settlement discussions and to provide information to the State.

Disclosure of settlement negotiations would hinder the State's ability to settle more cases effectively and get the best terms for its citizens. *See, Rinkers v. State*, 2009 WL 2969646 (Vt. Super. 2009) (Toor, J.) (holding that rationale of protecting the State's ability to obtain the best contracts for its citizens supported exempting communications between State and bidding parties, as well as internal State

communications regarding that process, under Section 317(c)(15)). In short, strong public policy reasons support applying the contract negotiations exemption to these records.

In addition, now that this matter has been filed in court, all of these records are exempt pursuant to 1 V.S.A. § 317(c)(14) (relevant to litigation).

**B. Notice of Determination**

I have considered your appeal and have determined that the records in question were properly withheld. These records are exempt under the Public Records Act based on the facts and factors set forth above.

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