IN THE SUPREME COURT OF THE STATE OF VERMONT

DOCKET NO. 2020-270

CHRISTOPHER MCVEIGH, APPELLANT

V.

VERMONT SCHOOL BOARDS ASSOCIATION, APPELLEE

Appealed from:
Vermont Superior Court
Washington Unit, Civil Division
Docket No. 484-9-19 Wncv

BRIEF OF *AMICUS CURIAE*, NATIONAL SCHOOL BOARDS ASSOCIATION

Francisco M. Negrón, Jr.*
Chief Legal Officer
NATIONAL SCHOOL
BOARDS ASSOCIATION
1680 Duke Street, Floor 2
Alexandria, VA 22314
Telephone: (703) 838-6710
E-mail: fnegron@nsba.org

*Admitted to practice in
Vermont *Pro hac vice*

John H. Klesch, Esq.
Stitzel, Page & Fletcher, P.C.
171 Battery Street
P.O. Box 1507
Burlington, VT 05402-1507
Telephone: (802) 660-2555
E-mail: jklesch@firmspf.com

Attorneys for Amicus National School Boards Association

January 27, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

Vermont Case Law:

Other State Case Law:

Federal Case Law:

Vermont Statutes and Rules:

Other State Statutes:

Other Sources:

INTEREST OF AMICUS

The National School Boards Association ("NSBA") is a non-profit organization founded in 1940 that represents 49 state school boards associations and the Board of Education of the U.S. Virgin Islands. Its mission is to promote excellence and equity in public education through school board leadership. NSBA member state associations support over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA strives to promote public education and ensure equal educational access for all children. Through legal and legislative advocacy, and public awareness programs, NSBA promotes its members' interests in ensuring excellent public education and effective school board governance.

NSBA supports its member state associations' professional development programs for school board members, who in turn perform the crucial public function of leading through development of district policy and guiding school district staff. Local school boards are an essential and enduring part of the American institution of representative government. They are the educational policy makers for the public schools in local communities, which in turn performing a critical public function: preparing students for individual success and participation in our democracy. State school boards associations like Appellee Vermont School Boards Association ("Appellee" or "VSBA"), which are non-profit corporation membership associations, provide training and resources to support the mission of public education in their states.

Pursuant to V.R.A.P. 29(a), the parties' written consent for NSBA's submission of this *amicus curiae* brief is provided in the Appendix.

ARGUMENT

Appellant Christopher McVeigh ("Appellant") proposes that this Court set a precedent that would make the Vermont Supreme Court the first state appellate court in the United States to hold that a private non-profit statewide school boards association like Appellee is subject to a state's public records law (hereafter also "PRA"). Moreover, even in those jurisdictions which have adopted some sort of functional equivalence approach, there appears to be no reported appellate decision which has applied this test to a state's school boards association. As explained further below, state courts have not found state public records acts to include private non-profit membership associations without a clear legislative directive to do so. The purpose of public records act is to make government processes and decision-making accessible, and therefore accountable, to the people. *See, e.g.*, *Marsh-Monsanto v. St. Thomas-St. John Bd. of Elections*, 60 V.I. 41, 53, 2014 WL 465632 (V.I. Super. 2014) (The purpose of public records acts is to provide citizens with access to the information on which governmental decisions are made in order to promote transparency and accountability in the governmental process.); *Caldecott v. Superior Court*, 243 Cal.App.4th 212, 218-219 (2015) ("The [California Public Records Act] embodies a strong policy in favor of disclosure of public records...."); *Gautreaux v. Internal Medicine Educ. Foundation, Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) ("The purpose of the Public Records Act is to promote public oversight of governmental

activities."). In the case of non-profit school boards associations, this is especially apparent, as the public function is not the work of the school board associations themselves, but of the government entity – local school boards, districts, and their staffs. Absent express statutory language, this Court should not expand the scope of the Vermont Public Records Act ("PRA") by judicial action; rather, it should leave such a policy decision to the Legislature, as some state legislatures have done.

Additionally, the public policy arguments Appellant recites for his position suggest against release of the communications he seeks, as the records clearly fall within the deliberative process privilege. The Vermont Legislature has already made a public policy decision to exempt from the PRA's disclosure requirements the sort of information that Mr. McVeigh requests from VSBA, thereby fostering a best practice in corporate and public governance and, in turn, benefiting the public at large. Thus, Appellant's public policy arguments should not persuade the Court to disturb the Superior Court's ruling.

I. THIS COURT SHOULD REFRAIN FROM BECOMING THE FIRST APPELLATE COURT IN THE UNITED STATES TO FIND A PUBLIC RECORDS STATUTE APPLIES TO A STATEWIDE SCHOOL BOARDS ASSOCIATION, AND INSTEAD SHOULD LEAVE THAT POLICY CHOICE TO THE LEGISLATURE.

A. No State Appellate Court Has Found a Statewide School Boards Association Subject to the Public Records Law.

Generally, under state public records laws, education trade associations are not considered public entities simply because they overlap in subject matter with a public function like education. Some states specifically incorporate the "functional

equivalency" test, or "public function" test, and many tie public records disclosure requirements to organizations that are at least partially publicly funded. *See, e.g.*, National Association of Counties, *Open Records Laws, A State by State Report*, https://www.governmentecmsolutions.com/files/124482256.pdf (December 2010). Where state public records laws have been interpreted with respect to private non-profit membership associations of public boards, courts have examined carefully whether the legislature intended to include such a private body within the law's requirements. Courts have found PRAs applicable to private associations only when the private organizations are performing a governmental or quasi-governmental function. For instance, in Florida, a state with perhaps the most comprehensive public records laws in the country,[1] the statute includes a private entity "acting on behalf of any public agency," Fla. Stat. § 119.011(2) (2020), as a public agency subject to disclosure requirements. This is "to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility." *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17, 18 (Fla. Dist. Ct. App. 2008)*; see also Stanfield v. Salvation Army*, 695 So.2d 501 (Fla. Dist. Ct. App. 1997) (public access to records required for a private entity that completely assumed a governmental obligation in its contract with a county government to provide probationary services.); *Putnam County Humane Soc'y, Inc. v. Woodward*, 740 So.2d 1238, 1240 (Fla. Dist. Ct. App. 1999) (private entity's animal control on behalf of county held to generate public

[1] Fla. Stat. § 119.01, *et seq.* (2020).

records); *Prison Health Servs., Inc. v. Lakeland Ledger Publ'g Co.*, 718 So.2d 204, 205 (Fla. Dist. Ct. App. 1998) (private provider of medical services to jail inmates generated documents deemed public records). Other states have similarly required a showing that a private entity performs a public function. *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 3d 456 (Ohio. 2006) (Private entities are not subject to the Public Records Act absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.); *Gautreaux*, 336 S.W.3d at 529 (Records of a private entity are subject to the Public Records Act if the nature of the private entity's relationship with the government is so extensive that the entity is the "functional equivalent of a governmental agency."); *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67 (Tenn. 2002) (Private entities could be subject to the Public Records Act to prevent government agencies from escaping the requirements of the Act by delegating their duties to private entities.)

But statewide school boards associations could not, and do not, perform the critical public function that local school boards provide. School boards lead their communities' efforts to prepare students to be successful, active participants in our democracy. The Vermont School Boards Association and its sister associations throughout the nation advocate for statewide policies that support that vital public institution – public education – and the school boards that implement it.

B. This Court's PRA Precedents Indicate it is Up to the Legislature, not the Court, to Expand the Reach of the PRA to an Entity Like VSBA.

As in other states, the Vermont PRA is not ambiguous on the subject of whether VSBA meets the definition of "public agency." Indeed, Appellant himself makes no such argument. In the absence of textual ambiguity, this Court should refrain from broadening the statutory definition of "public agency" in order to encompass VSBA for what Appellee argues are policy reasons. As this Court has recently observed in *Doyle v. City of Burlington Police Department*, 2019 VT 66, ¶ 12, __Vt. __, 219 A.3d 326:

> We note that both parties, as well as the many *amici curiae*, raise competing policy concerns regarding their respective positions. These concerns cannot control our analysis. "Our role is to interpret the law to give effect to the Legislature's intent, not to impose our policy preferences on the public." *McGoff v. Acadia Ins. Co.*, 2011 VT 102, ¶ 13, 190 Vt. 612, 30 A.3d 680 (mem.); see also *Rousso v. State*, 170 Wash.2d 70, 239 P.3d 1084, 1095 (2010) (en banc) ("It is the role of the legislature, not the judiciary, to balance public policy interests and enact law."). "[W]e must accord deference to the policy choices made by the Legislature," *Badgley v. Walton*, 2010 VT 68, ¶ 38, 188 Vt. 367, 10 A.3d 469, and "enforce [the statute] according to its terms," *Richland, 2015 VT 126, ¶ 6, 200 Vt. 401, 132 A.3d 702. See also Sirloin Saloon of Shelburne, Rutland, & Manchester, Inc. v. Dep't of Emp't & Training*, 151 Vt. 123, 129, 558 A.2d 226, 229-30 (1989) ("[T]he policy issue is for the Legislature, not this Court, where as here the statute is plain on its face.").

Just as in *Doyle*, policy concerns should not control the analysis here where the statutory definition of "public agency" is plain on its face.[2] It is rare for a court to

---

[2] The Superior Court below did not reach the issue of ambiguity because it decided that, even if the functional equivalence test were applied, VSBA is not subject to the PRA. See Printed Case at 2 ("the plain language of [the PRA, VSBA] argues, altogether eschews the concept of functional equivalence. ... That issue only becomes necessary to resolve if in fact applying the functional equivalence test would subject VSBA to the PRA.").

expand the reach of the statute beyond its clear language without a finding that the private entity was plainly performing a public function. *See Better Gov't Ass'n v. Illinois High Sch. Ass'n*, 89 N.E.3d 376, 386 (Ill. 2017) (Association of public and private high schools was not "subsidiary body" of governmental unit under the state's FOIA, emphasizing that the key factors to the analysis are government creation and control); *Breighner v. Michigan High School Athletic Ass'n, Inc.* 683 N.W.2d 639, 647 (Mich. 2004) (High school athletic association was not "created by state or local authority" as required by state public records statute); *Texas Ass'n of Appraisal Districts, Inc. v. Hart*, 382 S.W.3d 587, 595 (Tex. App. 2012) (nonprofit corporation promoting the effective and efficient functioning of appraisal districts was not a "governmental entity" under the state's public records law where it created newsletters, prepared legislative updates, trained appraisers, put on conferences, and sold books in exchange for membership fees.).

The Vermont Legislature has not expanded the definition of "public agency" to encompass a private non-profit corporation that may receive membership revenue from public officials or boards, a choice it arguably could make. In several states, the legislature has made the policy choice to include certain private entities within the reach of its public records statute. For instance, Delaware defines "public body" in its public records law to include:

> "unless specifically excluded, **any ... association** ... council or any other entity or body ... established by any body established by the General Assembly of the State, which: **(1) Is supported in whole or in part by any public funds**; or (2) Expends or disburses any public funds, including grants, gifts or other similar disbursals and distributions; or **(3) Is impliedly or specifically charged by any other public**

> **official, body**, or agency to advise or **to make** reports, investigations or **recommendations**."

29 Del. C. § 10002(h) (2020) (emphasis added). Florida defines a public "agency" as:

> "any ... municipal ... unit of government created or established by law ... and any other public or private agency, person, partnership, **corporation, or business entity acting on behalf of any public agency**."

Fla. Stat. § 119.011(2) (2020) (emphasis added).

Other state statutes tie application of the public records law to criteria such as specific membership entities, and funding source. Georgia specifies that public "agency" or "office" includes:

> **"any association, corporation**, or other similar organization **which: (1) has a membership** or ownership body **composed primarily of** counties, municipal corporations, or **school districts of this state** or their officers or any combination thereof; **and (2) derives a substantial portion of its general operating budget from payments from such political subdivisions."**

O.C.G.A. § 50-18-70 (2020) (emphasis added). Kansas includes in its definition "**any other entity** receiving or expending and **supported in whole or in part** by the public funds appropriated by the state or **by public funds of any political or taxing subdivision of the state**." K.S.A. § 45-217(f) (2020) (emphasis added). North Dakota includes: "**[o]rganizations** or agencies **supported in whole or in part by public funds, or expending public funds**... "Public funds" means cash and other assets with more than minimal value **received from** the state or **any political subdivision of the state**. N.D.C.C. § 44-04-17.1.13 and 14 (2020) (emphasis added).

The Vermont PRA, on the other hand, narrowly defines "public agency" as "any agency, board, department, commission, committee, branch, instrumentality, or

authority of the State or ... any political subdivision of the State." 1 V.S.A. § 317(a)(2). The legislature did not include private non-profit membership associations whose members include public school boards in the definition of "public agency," nor did it specify that private corporations receiving membership dues from public school boards meet that definition.

Because any shift in PRA coverage would constitute a policy choice, it is the Vermont Legislature that should make it.

C. Non-profit and Other Corporations Are Not Subject to the Public Records Laws Absent Specific Legislative Directive.

State public records acts generally do not apply to private entities, which have recognized rights to operate their businesses with appropriate financial oversight from the state and federal governments, but with their proprietary information protected. *See, e.g.*, Vermont: 1 V.S.A. § 317(c)(9); Delaware: 29 Del. C. § 10002(l)(2) (2020) (excluding from the definition of "public record" "[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature"); New Jersey: N.J.S.A. 47:1A-1.1 (2020) (excluding from the definition of "government records" in the state public records act "trade secrets and proprietary commercial or financial information obtained from any source."); *see also Texas Ass'n of Appraisal Districts, Inc. v. Hart*, 382 S.W.3d at 594 (adopting an analytical approach "best suited to effectuate the transparency goals of the [state public records act] while not over-burdening private entities that happen to provide goods and services to the government"). Non-profit corporations are already subject

to certain financial disclosures, including IRS Form 990, which shows unrelated business activities, and documents showing the original purpose of the organization. States also add disclosure requirements for nonprofits. *See, e.g.*, 11B V.S.A. § 16.20-22 (Reporting requirements for non-profits). But generally, non-profit corporations' budget planning documents, confidential deliberative material, executive session minutes, donor lists, communications, and private information such as board member addresses and personal health information are not public so that they can preserve proprietary and confidential member information.

A state legislature would have to make a clear policy choice, codified into statute, to dictate what records a non-profit corporation must disclose to the public. Here, there is no compelling reason for the Court to disturb the Vermont Legislature's public policy choices not to require private corporations such as VSBA to disclose communications to the public.

II. INFORMATION OF THE NATURE SOUGHT BY THE APPELLANT IS EXEMPT UNDER THE POLICY CHOICES ALREADY MADE BY THE VERMONT LEGISLATURE.

The policy choices already made by the Vermont legislature compel a finding that the information Appellant seeks from Appellee VSBA is exempt from the PRA's coverage. Even if VSBA were a covered "public agency" under the PRA, deliberative communications are not required to be disclosed.

The Appellant's proffered reason for an expansion of PRA application to the VSBA is refuted by policy choices the Legislature has already made. He asks for communications between VSBA and Vermont statewide associations of education

administrators so that he can see "how they decide" to make certain choices. (Appellant's brief at 28). While records containing factual information upon which a public agency relies to make policy-based decisions may be available for inspection and copying under the PRA, records of recommendations, critical thinking, and debate amongst public officials are not required to be released under the statute because the Legislature has chosen to exempt such information from disclosure.

The statute expressly exempts such information from public access under 1 V.S.A. § 317(c)(17):

> [R]ecords of interdepartmental and intradepartmental communications in any county, city, town, village, town school district...to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action or precede the presentation of the budget at a meeting held in accordance with 1 V.S.A. § 312.

The purpose of the exemption is to preserve "the necessary ability of local government officials and their representatives to engage in a full, and frank exchange of views, and to debate alternative scenarios and hypothetical impacts, before arriving at an official action or announcement of policy." *Munson Earth Moving Corp. v. City of South Burlington*, No. S0805-08 CnC, slip op. at 8, 2009 WL 8019258 (Vt. Super. Ct. March 30, 2009) (Pearson, J.) (copy in Appendix) (comparing 317(c)(17) and the common law deliberative process privilege); see also *Professional Nurses Service, Inc. v. Smith*, No. 732-12-04 Wncv, slip op. at 4, 2005 WL 6137459 (Vt. Super. Ct. July 14, 2005) (Katz, J.) (copy in Appendix) ("The Legislature also specifically created an exception analogous to the deliberative process privilege for political subdivisions of

the state, § 317(c)(17).”). This court recently explained the rationale for exclusion of deliberative communications from coverage under the federal FOIA:

> Under federal case law, the deliberative process privilege rests “on the policy of protecting the ‘decision making processes of government agencies,’ and focus[es] on documents ‘reflecting advisory opinions, recommendations and *deliberations* comprising part of a process by which governmental decisions and policies are formulated.’” [*Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)] (citations omitted and emphasis added). Federal courts have drawn a distinction between predecisional communications, which are protected from disclosure under FOIA, and “communications made after the decision and designed to explain it, which are not.” (citations omitted).
>
> Predecisional documents are generally viewed “as part of the agency ‘give-and-take’ leading up to a decision, while postdecisional documents frequently represent the agency's position on an issue, or explain such a position, and thus may constitute the ‘working law’ of an agency.” *New England Coal. for Energy Efficiency [v. Office of the Governor*, 164 Vt. 337, 341, 670 A.2d 815, 817 (1995)] (quotations omitted). The federal courts reason that “the quality of agency decisions is maintained by protecting the ingredients of the decisionmaking process from disclosure,” while “communications that follow the decision, explaining or implementing it, do not raise the same concerns for candor and frank discussion.” *Id.* (quotation omitted).

Rueger v. Natural Resources Bd., 2012 VT 33, ¶¶ 14-15, 191 Vt. 429, 49 A.3d 112. Application of the exemption does not depend on deliberative processes resulting in an actual decision or action. *Professional Nurses Service*, slip op. at 6 (“It is the nature of the governmental process at work, not its result, that matters.”); *see also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 95 S.Ct. 1504, 1517, 44 L.Ed.2d 29, n. 18 (1975) (deliberative process privilege does not depend on an actual decision being made or action being taken because “[a]agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate

memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.").

Given that the Legislature has not included statewide trade associations composed of representatives of political subdivisions within the current definition of "public agency," it is not surprising that the precise contours of the Act itself and criteria of § 317(c)(17) may not precisely "fit" a private corporation like VSBA. To the extent the Court might determine VSBA is subject to the PRA despite the incongruence between the organization's make-up and the statute's definition of "public agency," logic would dictate that 1 V.S.A. § 317(c)(17) would apply.

Common law deliberative process privilege is another basis for exemption which may fit VSBA if it were subjected to the PRA, and 1 V.S.A. § 317(c)(4) would render exempt the information Appellant argues ought to be accessible to the public. See *Munson*, slip op. at 8 ("§ 317(c)(4), by its plain language, leaves the deliberative process privilege available, and fully applicable to the public records of municipalities"). Although a public agency may face additional burdens in establishing a common law privilege, see, e.g., *Professional Nurses Service,* slip op. at 5 ("the deliberative process privilege is qualified"), it is highly likely that the sort of information the Appellant seeks from VSBA under the PRA would indeed largely be privileged.

The Appellant's argument invokes public policy considerations, but statutory exemptions are at least as strong an indication of the public policy as determined by the Vermont Legislature. As Judge Katz observed in *Professional Nurses Service*:

> Acknowledging that the Act strongly favors open government, we note that there are no fewer than 35 specific statutory exceptions to public access, of which common law privileges are a part of but one. Though we construe the exceptions strictly in favor of access, *Springfield Terminal Railway Co. v. Agency of Transp.*, 174 Vt. 341, 345 (2002), still, the implied suggestion that the Act makes all or nearly all public records accessible is more rhetoric than reality. The Act and how we apply it reveal a tension with which we should struggle: between openness at one end, and privacy and effective governance at the other.

Professional Nurses Service, slip op. at 4. The Legislature has made the policy choice that, for the sake of good governance, information like that sought by the Appellant – email communications within private non-profit associations representing education boards and officials – should not be accessible to the public. Appellant's public policy arguments therefore do not compel the outcome he seeks.

Conclusion

For the reasons discussed above and in the Vermont School Boards Association's brief, *amicus curiae* National School Boards Association respectfully requests that this Court affirm the Superior Court's decision that the Vermont Public Record Act does not apply.

DATED at Burlington, Vermont, this 27th day of January 2021.

By: 

John H. Klesch, Esq. (ERN: 2043)
STITZEL, PAGE & FLETCHER, P.C.
171 Battery Street, P.O. Box 1507
Burlington, VT 05402-1507
Telephone: (802) 660-2555
E-mail: jklesch@firmspf.com

Francisco M. Negrón, Jr.
Chief Legal Officer
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street, Floor 2
Alexandria, VA 22314
Telephone: (703) 838-6710
E-mail: fnegron@nsba.org

CERTIFICATE OF WORD COUNT

I certify that the above brief submitted under V.R.A.P. 32(a)(7) was prepared using Microsoft Word for Microsoft 365 MSO 32-bit and that the word count is 3,769.

CERTIFICATE OF VIRUS PROTECTION

Pursuant to V.R.A.P. 32(b)(4) I certify that the electronic file has been scanned for viruses using Bitdefender Endpoint Security Tools product version: 6.6.17.249 and that no viruses have been detected.

DATED at Burlington, Vermont, this 27th day of January 2021.

By: **STITZEL, PAGE & FLETCHER, P.C.**

John H. Klesch, Esq.

The Supreme Court of the State of Vermont

McVeigh v. Vermont School Board Association

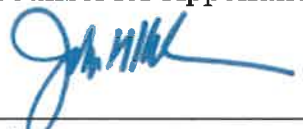
Docket No. 2020-270

CONSENT TO AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION

Pursuant to V.R.A.P. 29(a), undersigned counsel for Appellant and Appellee consent to the National School Boards Association's submission of an amicus curiae brief. Counsel for both parties have authorized counsel for NSBA to sign this notice of consent on behalf of each of them.

DATED at Burlington, Vermont, this 27th day of January 2021.

MCVEIGH SKIFF, LLP
Counsel for Appellant



Christopher McVeigh, Esq.
P.O. Box 1112
Burlington, VT 05402
(802) 660-2466
chris@mcveighskiff.com

DATED at Burlington, Vermont, this 27th day of January 2021.

ZALINGER CAMERON & LAMBEK
Counsel for Appellee

Bernard D. Lambek, Esq.
15 East State Street, Suite 5
Montpelier, VT 05602
(802) 223-1000
blambek@zclpc.com

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S0805-08 CnC

MUNSON EARTH MOVING CORP.

v.

CITY OF SOUTH BURLINGTON

DECISION AND ENTRY ORDER

This is an action brought by Plaintiff Munson Earth Moving Corp. ("Munson") pursuant to the Vermont Pubic Records Act, 1 V.S.A. § 316 *et seq.*, seeking disclosure of certain records and documents withheld by the Defendant City of South Burlington relating to the multi-year reconstruction of Kennedy Drive. Munson was the successful bidder and eventual general contractor on that project. By motion for summary judgment (filed September 9, 2008), Munson argues there are no materially disputed questions of fact, that it is entitled to judgment on all issues as a matter of law, and that judgment should be entered in its favor requiring disclosure of all requested documents not heretofore released by the City. The City opposes Munson's application, but has not cross-moved for summary judgment in its own right. Oral argument was heard by the court on November 24, 2008. Due to the press of other business, the length, argumentative tone and complexity of the parties' filings,[1] and other scheduling issues given the sheer volume of cases pending in the Chittenden Superior Court, the court has taken up the pending motion as expeditiously as is reasonably possible. *See* 1 V.S.A. § 319(b).[2]

[1] This case has already grown into its 3rd file folder, with well over 6" of paper (including the subject documents submitted by the City for *in camera* review). The briefs are somewhat more difficult, and thus took somewhat longer to read than usual, because neither side has taken a wholly dispassionate and objective tone to the legal points presented; the fact that these attorneys have been representing their respective clients for many years already on the underlying contract negotiation, construction management, and now disputed payment issues, only tends to prove the old adage about familiarity breeding contempt. One might hope the new ethics and professionalism CLE requirements will help ameliorate such instincts, and lead to a more civil tone in the future, especially the almost inevitable breach of contract/payment suit waiting in the wings (unless, of course, there is mandatory, binding arbitration (or some administrative dispute resolution mechanism) under Munson's contact with the City; the court hesitates to make a more definitive statement, because the entire contract is not before the court, and that point is not an issue at this time).

[2] *Cf., e.g., Judicial Watch, Inc. v. State of Vermont*, 2005 VT 108, ¶s 31-32, 179 Vt. 214, 227-28 (Dooley, J., concurring) (the Act, and Legislature, have yet to "come to grips with a record request of this magnitude" in terms of "time and cost that [must] be expended to litigate claims of . . . privilege and other public access exemptions," especially when "a complex judgment, affected by a number of factors, must be made on each record.") Munson is no stranger to litigation, and even now has at least 2 other suits pending in this court which have required substantial time and attention, including pending summary judgment motions. *See Munson Earth Moving Corp. v. Barr & Barr, Inc., et al.*, Dkt. # S0693-06 CnC (7 file folders with almost 2 feet of paper filed already); *Poquette v. Munson Earth Moving Corp.*, Dkt. # S0503-07 CnC.

BACKGROUND

In 2005 Munson had the winning bid, and entered into a contract with the City to rebuild Kennedy Drive, at an initial contract price of approximately $8.5 million. Most of the funds, however, would come from the federal government (81.08%), with 8.92% from the State of Vermont (by and through its Agency of Transportation, or "VTrans"), and 10% "local participation," or funds from the City. Accordingly, an extensive Cooperative Agreement was entered into between VTrans and the City, with the City having primary "responsibility" for and ultimate ownership of the project, but VTrans retaining critical oversight and supervising authority, in particular with regard to the expenditure of all State and federal funds, and the right to control essential design parameters and other specifications for the project. The Cooperative Agreement required several amendments and revisions; by the time of the 6th Amendment in June 2005, the estimated cost of the project had ballooned to $11,307,000. As is well-known locally, there were substantial delays in finishing the project, and there appear to be substantial, and continuing disputes between the City and Munson over whether the reconstruction of Kennedy Drive is in fact entirely completed, and whether what has been completed fully meets all contract specifications.

Because of the delays and other issues, even as early as August 2006 the City had withheld payment from Munson in the amount of some $913,067, *see* 8/16/06 e-mail (Anderson to Quade, *et. al*),[3] fomenting the contentiousness which has obviously dogged this matter ever since. *See* fn. 1 above. Although no precise number was named, at argument counsel intimated that the amounts at issue, and in dispute between the City and Munson regarding the project now exceed $1 million. As of the date hereof, it is also unclear (and not relevant in any event) whether Munson has formally commenced the necessary claim proceedings to litigate recovery of any of the withheld payments, and/or additional payments for unreimbursed costs allegedly incurred by Munson.

Pursuant to the Cooperative Agreement, the City and State were each allowed to hire various engineering firms to assist their respective in-house staff to monitor, and manage the Kennedy Drive project. The City retained McFarland-Johnson, Inc. ("McF-J") as the overall design engineers, and the local firm of Lamoureaux & Dickinson Consulting Engineers, Inc. ("L&D") as the "Project Manager." VTrans retained Parson Brinckerhoff ("PB") as another one of the outside firms to assist it with engineering and consulting services on the project. Each of these entities had at least one, and sometimes several employees who worked on, and were involved in the Kennedy Drive project, and all of those people had constant, and continuing communications with all of the other engineers and advisors assigned to the project – in writing, by e-mail, at meetings, at the job site, etc.. Of course, both the City and VTrans also each had

[3] As discussed below, Munson has already obtained substantial disclosure, and release of many pertinent documents and records from VTrans under the Public Records Act. This e-mail, among many others, is apparently one which the City had withheld from Munson.

their own staff employees working on the project, as well as legal counsel for both the State and the City.[4]

On January 8, 2008, counsel for Munson sent the City a public records disclosure request for "[y]our complete file on the above-referenced project," i.e., "Kennedy Drive Reconstruction, NH 121-1(1)." Although the remainder of the 1/8/08 letter went into some further detail as to description of the documents and records requested, the simple, and comprehensive request for essentially every record the City had in its possession or control regarding the project, in whatever form or format, was then, and has remained the operative public records request.[5] The City's production of records and documents already existing in, or previously reduced to written or tangible form proceeded apace, not within the strict statutory deadlines, but sufficiently quickly that those items are not the principal subject of this suit, except as discussed below regarding specific claims by the city as to privilege or statutory exemption.

However, with regard to e-mails and other records generated or maintained primarily, or only in electronic format, the City's efforts to obtain, review, and then disclose those records was substantially extended over the next 7 months, with the City's disclosure not completed until August 18, 2008,[6] by delivery of "a CD containing approximately 3000 e-mails and other electronic correspondence . . . related to the Kennedy Drive project," accompanied by a letter obviously prepared by counsel, but signed by Bruce Hoar, Director of Public Works for the City. Hoar had been the City's principal point person on the project since the beginning. That 8/18/08 letter asserted four general categories of exemption under the Act, without specifying, or describing the number or volume of documents withheld, and certainly not indentifying each withheld record specifically. The four general grounds cited for withholding records were attorney-client privilege, a "deliberative process privilege," documents relating to "contract negotiation," and documents containing "personal information."[7]

---

[4] The State principally relied on Tom Viall from the Attorney General's office, as the long-time Deputy AG assigned to VTrans; the City has relied on its long-time outside counsel, Stitzel, Page & Fletcher, and 2 attorneys from that office.

[5] An almost identical records request was sent to VTrans on 1/25/08. As noted, the State has already disclosed a substantial portion (if not almost all) of its files, including e-mails and other electronically maintained records. It is the court's understanding that no similar records disclosure case under the Act is pending against the State, at least as of last November 2008.

[6] The parties hotly dispute whether this delay was affirmatively "agreed to" by Munson, or whether Munson more realistically just "acquiesced to" and "accommodated" a delay the City essentially presented as a *fait accompli* in any event. As noted, although the City has not itself formally moved for summary judgment, the court could still grant such relief against Munson if the court determined the City was entitled to judgment as a matter of law. VRCP 56(c)(3) [last sentence]. In that posture, and since it is ultimately the City's burden to establish any claimed exemptions from disclosure, and that it otherwise complied with the Act, the court would, and thus does assume this "fact" in the light most favorable to Munson, i.e., Munson did not fully agree to any such extension(s), and did not permanently waive its rights to insist on timely compliance with the statutory requirements, or the consequences of non-compliance.

[7] Any such claim of non-disclosure based on allegedly applicable exemptions must be initially asserted within 2 days, or if a delay is claimed because of "unusual circumstances" no more than

Meanwhile, Plaintiff had already filed this action on June 16, 2008, before, and without taking any arguably available appeal from the 8/18/08 letter to the South Burlington City Council, the designated "head of agency" for purposes of all public record requests to the City. Pursuant to the City's motion, Bruce Hoar was almost immediately dismissed as an individual named Defendant.[8] Subsequent filings and memoranda on Plaintiff's motion for summary judgment, replete with numerous attachments, now seem to indicate that with respect to the disputed e-mails and other electronically stored records, the controversy has been substantially narrowed – primarily due to the disclosures made by VTrans in response to the companion request to it under the Act, so that Munson now has many of the documents despite the City's withholding of them – and that a relatively manageable universe of contested records is presently before the court.

As most recently described by Munson, and essentially confirmed by the indices and documents filed by the City for *in camera* review, the disputed records are as follows:

> (A) 38 remaining e-mails allegedly protected by attorney-client privilege have been reduced to 17 which Plaintiff still has not obtained.
> (B) 479 e-mails supposedly protected by a "deliberative process" privilege, or express statutory exemption, have been reduced to 82 which Munson has not already obtained copies; of those, 20 appear to have been copied to VTrans, but the State apparently did not disclose them in its production.
> (C) 9 remaining e-mails or other electronic records allegedly exempted because they pertain to "personnel issues" or other confidential personal information.
> (D) 49 documents which the City claims were/are protected because they relate to "contract negotiations" have been reduced to only 4 still not already obtained by Munson.

Accordingly, after resolving the legal issues, the court's *in camera* review of still-contested records – apart from the parties' more recent dispute, *see* Part VI below – would involve necessary inspection of "only" 92 documents, still somewhat time-consuming but not the Herculean task it might have been. *See* fn. 2, above.

DISCUSSION

I. Exhaustion. Although it has not formally moved for either dismissal or summary judgment on these grounds, the City asserts defensively that the court lacks subject matter jurisdiction over Munson's present suit because Plaintiff never took the appeal to the "head of the agency" which "may" be taken under 1

---

an additional 10 days after that (i.e., 12 days total). 1 V.S.A. §§ 318(a)(2), (5). The court need not resolve whether the City's notice, or "certification" to invoke the 10-day extension was fully compliant, because the maximum 12-day window was clearly exceeded in any event.

[8] Munson's opposition to such a seemingly benign request indicated that this case, and the larger continuing dispute between the parties, is about more than just the legal issues raised.

V.S.A. § 318(c)(1). The City argues such an appeal is mandatory, and jurisdictional, and there is no "final," appealable determination until such an appeal is pursued, and decided. As noted, here the City Council is the designated "head of agency" for these purposes.

The statutory regime in this regard is quite clear, and puts the burden of compliance at all times, and for all purposes on the governmental entity from whom public records are requested: "Any person making a request to any agency for records . . . shall be deemed to have exhausted the person's administrative remedies with respect to each request if the agency fails to comply within the applicable time limits . . . . A failure by the agency to comply with any of the time limit provisions . . . shall be deemed to be a final denial of the request of records by the agency." 1 V.S.A. §§ 318(b)(1), (c)(2). Munson's request for records, to the extent not completely honored by the City within the statutory timeframe, became ripe for suit under 1 V.S.A. § 319(a) on the 12th day after the request, and no further action at the City level, or administrative appeal to the City Council, was required. This court has jurisdiction of this action under § 319(a).

The City seems to argue that the 8/18/08 letter, signed by Bruce Hoar as the head of the City's Public Works Department (and the key City employee on this project from the get-go), was somehow not a legally effective response at all by "the agency" and/or "custodian of [the] public record[s]" and that such a response could only come ultimately from the City Council. This assertion makes no sense, is inconsistent with the express statutory language, and would lead to absurd results. Sections 318(b) and (c)(1) clearly make a distinction between "the agency" as a whole and the day-to-day "custodian of . . . public record[s]," and the "head of the agency" to which any administrative appeal would go; what the designated front-line employee does, or does not do with regard to the request initially, is obviously effective and sufficient unto itself to trigger available rights under the Act. And, failure to disclose within the statutory time limits is self-triggering as to availability of court action, without more, regardless of whether it is the actual "custodian" of the records or the "head of the agency" that fails to comply. Finally, on this record it is fairly evident that requiring further administrative exhaustion would have been, and would at this point still be "futile" and simply cause even more delay, completely contrary to one of the core principles of the Act. The 8/18/08 letter was obviously, and carefully drafted by the City's counsel (who are hired by, and take direction from the City Council), and already represents the "bottom line" position the City Council would likely take in any event. *Cf., e.g., Washington v. Pierce*, 2005 VT 125, ¶s 16, 34-35, 43, 179 Vt. 318, 324-25, 332, 334-35 (discussing "futility" exception to administrative exhaustion requirement, as provided by 16 V.S.A. § 14(b)).

(II) Attorney-Client Privilege & "Inadvertent Waiver". Although Munson somewhat grudgingly accepts the premise that documents and records which are confidential in accordance with established common-law principles such as the attorney-client privilege, are protected from disclosure as statutorily exempt

under 1 V.S.A. § 317(c)(4),[9] here it argues any such privilege was waived by the City's "inadvertent disclosure" of such documents when the City included numerous participants on the project in the loop for such e-mails or documents; when the City then made its initial, wholesale release of the hard-copy, or paper records, some of which included documents arguably subject to the privilege; and that these unintentional disclosures then vitiated, and waived the privilege as to all such documents, even those the City was more careful to shield from inadvertent release.

The over-riding standard in these cases has been often repeated: the public entity has the continuing, and ultimate burden to establish that any withheld records fall squarely within one, or more of the express statutory exemptions under § 317(c), and all such exemptions must be narrowly construed in favor of disclosure, and against non-disclosure. *See, e.g., Sawyer v. Spaulding*, 2008 T 63, ¶ 8; *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶s 10-11, 177 Vt. 287, 291; 1 V.S.A. § 319(a). Here each of the persons receiving the disputed attorney-client e-mails (and, sometimes, attached documents) were key employees of the various consulting/engineering firms hired by the City and the State to monitor, administer, and manage this multi-million dollar construction project. Each of these employees had an on-going, and not just superficial, or one-time-only relationship to, and involvement with the project. They were included in the e-mail loop, or "string" because their advice and input was deemed to be material to the formulation of some legal issue, or position taken, or being considered by either, or both VTrans and the City under their joint Cooperative Agreement. These e-mail strings also included either, or both of the State's lawyer, Deputy AG Viall, or an attorney from the City's outside law firm.

As such, these communications fall well within the established "common interest" aspect of the attorney-client privilege, where communications among 3rd persons who are all working toward a mutual objective of the client, and are necessarily material to the information-gathering and advice-formulating functions of counsel, are duly protected. *Cf.* VREv 502(a)(2), (b) (privilege protects communications to & from "representatives of the client"); *cf. e.g., Baisley v. Missisquoi Cemetery Assn.*, 167 Vt. 473 (1998). *See also, e.g., United States v. Schwimmer*, 892 F.2d 237, 243 (2nd Cir. 1989), *cert. denied*, 502 U.S. 810 (1991); *Sokol v. Wyeth, Inc.*, 2008 WL 3166662, at *4 (S.D.N.Y. 2008). The narrow scope and application of the privilege which Munson argues for[10] would be wholly inappropriate to this type of complex public construction project, and would frustrate legitimate public objectives in necessary, and effective (and competent) outside oversight of the general contractor. Especially where billions of dollars nationally, and millions of dollars in Vermont will soon be made available by the U.S. Congress for "fast track" public construction projects, probably one of the last things a court should do is recognize that contractors can,

[9] *See, e.g., 232511 Investments, Ltd. v. Town of Stowe DRB*, 2005 VT 59, 178 Vt. 590; *Killington, Ltd. v. Lash*, 153 Vt. 628, 646-47 (1990).

[10] The court declines to limit the "common interest" extension of the attorney-client privilege just to those situations involving joint defense pacts, or consideration of purely "legal" issues.

through the Public Records Act, routinely force the disclosure of confidential communications among the various public entities directly spending that money, their lawyers, and the key representatives of the consulting/engineering firms necessarily hired to supervise, implement, and manage these projects. The City here has met its burden to establish these communications were generally protected by attorney-client privilege, and thus arguably exempt under § 317(c)(4).[11]

Within the 4 corners of this public records access case under 1 V.S.A. § 319(a), the court need not, and does not address, or resolve the full import of the "inadvertent disclosure" doctrine, and its potential impact here insofar as the City's initial disclosure of paper records may have included privileged records. To the extent that Munson has already obtained copies of public records or documents which might otherwise be subject to a claim of attorney-client privilege, there is no further justiciable "case or controversy" for compelled release under the Act. Nor, does this court have any authority pursuant to § 319 to impose any restrictions on Munson's subsequent use of those documents, or to order "reverse disgorgement" of any such records, as the City seems to argue.

However, to the extent that Plaintiff further argues that any such unintentional release of privileged records automatically voids any claim of confidentiality as to all remaining similarly-situated documents, this court understands that at least that most drastic application of the "inadvertent disclosure" principle is not incorporated into the required analysis under the Act. That is, our Court appears to have said that disclosure, or exemption, is to be principally determined by applying substantive legal principles to the nature and character of the documents themselves, in light of the express statutory exemptions under § 317(c), and not necessarily by the conduct of public officials attempting to comply with the Act's procedural requirements. *Cf., e.g., 232511 Investments, supra,* ¶ 5, 178 Vt. at 591; *Id.,* 2006 WL 5868424 (Dkt. # 2005-403) (non-precedential 3-Justice decision, after remand) (non-compliance with disclosure deadlines did not waive attorney-client privilege, merits of which still needed to be resolved by court under § 319). Accordingly, the City's claim to attorney-client protection for the 17 documents still disputed, has been adequately preserved.[12]

(III) "Deliberative Process" Privilege. First, the court rejects Plaintiff's assertion there is no such thing as an established, recognized "deliberative process privilege" at common law. The Legislature's express recognition that one

[11] Whether the disputed documents are in fact protected by the privilege requires *in camera* review, the results of which are discussed below. *See 232511 Investments,* 2005 VT 59.

[12] This court also rejects the contention that the City's non-compliance with the statutory disclosure deadlines was a blanket waiver of its right to claim any/all arguably applicable privileges, and exemptions. The Act represents a considered balance between two sometimes competing public policies, and legitimate public interests. In a controversy with a private business entity, the public's substantial rights should not be automatically compromised because its public servants made procedural mistakes.

exists is clearly stated, and thus binding, in its 2006 amendment to 1 V.S.A. § 317(c)(4), declaring that "the common law deliberative process privilege" does not apply to, and is not an exemption for records of "the general assembly and the executive branch agencies of the state of Vermont." Second, the court also rejects Munson's *ad hominem* attack on the Bennington Superior Court's decision in *Bethel v. Bennington School District, et al.*, Dkt. # 403-10-07 Wncv (July 24, 2008) (Howard, J.). *Bethel* is thorough, well-reasoned and persuasive, and cites ample authority for the proposition that such a privilege has been sufficiently, and previously recognized by many courts as a matter of common law. Finally, *Bethel* explains why the 2006 amendment to § 317(c)(4), by its plain language, leaves the deliberative process privilege available, and fully applicable to the public records of municipalities such as the City of South Burlington.

What *Bethel* does not address, perhaps because it was not argued there, is the City's contention that the deliberative process privilege is essentially equivalent with the express exemption provided at § 317(c)(17); the latter shields from disclosure "records of interdepartmental and intradepartmental communications . . . to the extent they cover other than primarily factual materials and are preliminary to any determination of policy or action . . . ." To be sure, the common law privilege, and the statutory exemption appear to serve many of the same substantive considerations, namely the necessary ability of local government officials and their representatives to engage in a full, and frank exchange of views, and to debate alternative scenarios and hypothetical impacts, before arriving at an official action or announcement of policy. *Cf., e.g., Killington, Ltd. v. Lash, supra,* 153 Vt. at 636-37 (same policies underlying recognized common law "executive privilege").

At least two arguable differences are that (a) the common law privilege may present a stiffer burden for the public entity to establish in a given case, *cf. Judicial watch, supra,* 2005 VT 108, ¶ 30, 179 Vt. at 227 (Dooley, J. concurring) (privilege claim must be supported by affidavit as to each particular document); and (b) the common law deliberative process privilege, like executive privilege, is only a "qualified" privilege which may be overcome in certain circumstances, such as a demonstrated "need" for the documents which outweighs the agency's interest in confidentiality. *See, e.g., Killington, Ltd. v. Lash, supra,* 153 Vt. at 638-40; *City of Colorado Springs v. White,* 967 P.2d 1042, 1054 (Colo. 1998).[13] Thirdly, the express exemption under § 317(c)(17) may arguably be broader than the common law privilege, because the statute applies not only to records concerning the formulation of more general policies, but also to non-factual communications which are "preliminary" to any decision to take some unspecified "action."

Additionally, it must be noted that the same "common interest" approach as pertains to the circle of participants engaged in attorney-client

[13] Here Munson does not contend that the records must be disclosed to "shed light on government misconduct." *City of Colorado Springs v. White,* 967 P.2d 1042, 1054 (Colo. 1998)

communications, must necessarily apply to the deliberative process privilege for it to have any efficacy given the multiple actors, many from outside consulting/engineering firms, who were legitimately involved in preliminary discussions about, and consideration of various "action[s]" to be taken affecting the Kennedy Drive project. The court need not resolve this tension here, or definitively decide whether § 317(c)(17) essentially restates the deliberative process privilege, because the records still at issue under this heading would qualify (or not) for protection under either approach (i.e., common-law privilege vs. § 317(c)(17)). *See* Part V(b), *infra*. The City has met its burden to establish that the still-disputed e-mails and other communications were generally protected by either a deliberative process privilege, and thus arguably exempt under § 317(c)(4), and/or directly under § 317(c)(17).[14]

Finally, the deliberative process privilege is only a qualified privilege, that is, it does not apply absolutely, and could be superseded if Munson were to demonstrate sufficient "need" for the documents to overcome the *prima facie* showing of confidentiality established by the City. *See Herald Assoc. v. Dean, supra, citing New England Coalition v. Office of the Governor*, 164 Vt. 337, 339 (1995); *City of Colorado Springs v. White, supra*, 967 P.2d at 1051, 1054; *Bethel v. Bennington Sch. Dist., supra*. Accordingly, in reviewing specific documents the court must be alert to determine whether (A) they are in fact "pre-decisional" and (B) truly deliberative, reflecting primarily advice and opinion rather than primarily factual analysis or observations, such that disclosure would produce a "chilling effect" on government officials' ability to engage in open and frank discussions before adopting policy or making key decisions.

The requestor's "need" for the records includes not only their importance to the requestor, but also whether they could be obtained from another, or different source. Thus, although the motivation behind a public records request is ordinarily irrelevant, *see Finberg v. Murnane*, 159 Vt. 431, 437 (1992), any effort to overcome an exemption based upon the deliberative process privilege brings essentially the same concept back into the case. Here, as noted, Munson seeks access to the City's records to assist it in pursuing at least an administrative claim, if not full-blown litigation against the City for construction payments withheld, denied, or otherwise not made to Munson by the City. Many of these records have already been disclosed to Plaintiff by the State – or should have been, with respect to "all but 20" of 82 documents still withheld by the City based on this privilege, because VTrans is expressly barred from claiming the "deliberative process" privilege under § 317(c)(4). Of the twenty records apparently still in contention, it would seem that Munson's "need" for those items sufficient to overcome the privilege cannot really be addressed until the payment dispute is brought into more specific focus, and actual claims are made against

[14] There is no real dispute about at least the overall scope, or applicability of the other two exemptions relied on by the City, as to "contract negotiation" documents, § 317(c)(15), and documents "relating to personal [or] medical . . . facts concerning any individual," § 317(c)(7). Thus the court will address those documents only in the *in camera* review section below.

which to balance need vs. confidentiality. Accordingly, in connection with the court's *in camera* inspection of the records submitted under seal by the City, Part V(b) below, the court will strive to apply the principles just stated in a more generic fashion, leaving open to Munson the ability to pursue further disclosure at some later date, in a different context or proceeding. *Cf. Wesco, Inc. v. Sorrell, supra.* Plaintiff's showing in this case, however, is insufficient to abrogate the privilege, and thus, except as noted below, the records are exempt under the Act.

(IV) Records "produced or acquired" by the City. A public agency is subject to the Act with respect to, and must produce for inspection and copying any "public record" or "public document" which is, or consists of "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). *See Herald Assoc., Inc. v. Dean*, 174 Vt. 350, 353-54 (2002) (focus on records which are "an integral and essential part of the daily functioning" of the agency at issue). Documents or records which are not "produced or acquired in the course of public agency business" are not subject to mandatory disclosure. Here, much of the continuing dispute centers on Munson's contention that the City is obligated to retrieve, and disclose each and every document, including all internal e-mails of each of the consulting/engineering firms retained by the City and/or VTrans concerning the project, even if the City (or one of its employees) was not a party to that communication, or the record of it (electronic, or otherwise) does not actually exist in some City file or repository. The City does not dispute that it must turn over all non-exempt records which the City itself created, generated, or "produced," nor does it contest that non-exempt documents and records created by others, but actually found in City files regarding the project, must be released; the City asserts it has in fact done so in each of those broad categories.

What the City has resisted, and Plaintiff still argues for, is the notion that records not in the actual possession of the City, but which it arguably has some legal control over, must be produced. In other words, the dispute is essentially over whether the City has "acquired in the course of agency business" the internal e-mails (and other relevant records) of each of the consulting/engineering firms retained by the City and/or VTrans concerning the project, even if the City (or one of its employees) was not a party to that communication, or the record of it (electronic, or otherwise) does not actually exist in some City file or repository. If the answer under the Act is "yes," then City has not yet fully complied with the Act, and the universe of still-disputed documents is larger than the relatively manageable number of records now submitted for *in camera* review, because the City has denied any obligation to obtain or disclose those outside e-mails, etc., and has not attempted to do so.[15] However, if the answer is "no," then all that is left for this court to resolve – again, apart from the more recent contretemps

[15] Furthermore, it is also now unclear, given Plaintiff's Reply Memorandum, at pg. 16, whether pre-2005 documents and records are also still at issue, and have never been retrieved, reviewed, or disclosed by the City at all.

discussed in Part VI below – is whether the documents submitted for *in camera* review do qualify for statutory exemption, or are privileged as discussed above.

Relying on *Affiliated Const. Trades v. Regional Jail & Correctional Facility Auth.*, 200 W.Va. 621, 490 S.E.2d 708 (1997), the City argues that actual acquisition, i.e., custody and possession of the subject records, is the touchstone for application of § 317(b), and not just the right to obtain 3d-party documents. However, this issue is somewhat complicated here by the vague, if not potentially ambiguous terminology used in the project contracts, especially the contracts with outside consulting/engineering firms. A common attachment to the consulting agreements between the City, McF-J and L&D provides in part as follows (pp. 3-13 to 3-14):

> All data, EDM, valuable papers, and documents produced under the terms of the Agreement, shall become the property of the Municipality. The consultant agrees to allow access to all data, EDM, and valuable papers at all times.

This legal ownership clause[16] establishes that the City did "acquire" these items for purposes of § 317(b) – the City essentially concedes that "ownership" equates with acquisition for purposes of our Public Records Act – and trumps any rule to the contrary as arguably stated in the West Virginia case.[17] But what does "all data, EDM, and valuable papers and documents" mean in these circumstances?

Given the overall context, the purpose of the consulting agreement(s), and the apparent intent of the parties as reflected in other provisions used in the contracts as a whole, it seems to this court that the terms can be rendered non-ambiguous if the subject phrase is construed to mean, and encompass all substantive, and "primarily factual" records, documents, and other tangible things created, or supplied by McF-J or L&D which were used, or intended to be used for actual oversight, implementation, or management of the project construction contract between the City and Munson. In other words, items such

[16] The City also references another contract clause which purportedly refers to the same concept, but instead calls the materials "Instruments of Professional Service." The source, however, is not easily identifiable from the City's pleadings and attachments, and so the court will simply assume that the ultimate meaning is essentially the same, or that the broader definition quoted above is controlling in any event.

[17] *Affiliated Const. Trades* is distinguishable in any event, because the West Virginia statutory definition of "public record" is different than in Vermont. West Virginia "defines a public record as 'any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body.'" *Id.*, 200 W.Va. at 624, 490 S.E.2d at 711 (cits. omitted), *quoting* W.Va.Code § 29B-1-2(4) (1977). The Vermont formulation of "produced or acquired" is obviously much broader. The other case cited by the City, *Wolfe v. U.S. Dept. Health & Human Services*, 711 F.2d 1077, 1080 (D.C.Cir. 1983), is also not persuasive because federal FOIA law (at least as there, and then construed) was based on records "created" or "obtained," and the latter concept required actual possession and/or custody. *Cf., e.g., Herald Assoc., Inc. v. Judicial Conduct Bd.*, 149 Vt. 233 (1988) (Board's inadvertent receipt of discovery deposition transcript did not make it a "record" subject to disclosure).

as design plans and specifications, and all documents (including e-mails) concerning or discussing any "primarily factual" observations, grounds, or basis for assessing Munson's compliance (or not) with plans or specs, are "valuable papers" and necessary "data" which the City has effectively, and legally acquired.

Conversely, e-mails and other internal communications – i.e., internal to the consulting/engineering firm, and heretofore never shared with, or disclosed to the City – which are only tangentially project-related (e.g., e-mails discussing scheduling issues, or who will meet with whom, or assigning tasks or duties within the firm)[18] and have no substantive bearing on the consultant's discharge of its contractual duties to assist in managing and monitoring the project, would not appear to be "valuable papers" as contemplated by the addendum(s) to the consulting agreement(s). This distinction may be difficult to discern and apply in actual practice, but, again, the City asserts that it has already done so and has disclosed all items from McF-J and L&D which fall within the first category. Apart from inviting yet another round of time-consuming *in camera* review of every single item or piece of paper in each of McF-J's and L&D's presumably voluminous files, the court is stymied as to what else can effectively be done here.

(V) "*In Camera*" Review of Documents Submitted by City. Returning to the four general types of documents which are categorized by means of the privilege or exemption asserted, *see* introduction above at pg. 4, the court has itself conducted the required review of all documents submitted under seal by the City. The court's conclusions, applying the general principles articulated above, are as follows:

(a) Attorney-Client Documents. Each of the 16 documents listed, and included here are covered by, and fall within the attorney-client privilege, and are thus exempt under § 317(c)(4).

(b) "Deliberative Process" Privilege Documents. The City's "*Vaughn*" index, and the court's own review of the items in question – the City lists 77, as does Munson's reconfigured index, but Munson most recently argues it was 82; Munson also says "all but 20" are no longer exempt (the court's review of Plaintiff's own version of this list does show only 20 such items) because a State employee (or a VTrans consultant/outside engineer) either authored, or received the record, and the State cannot claim this privilege under § 317(c)(4) – establishes the necessary *prima facie* case that, except for six (6) records discussed below, the remaining

[18] If this were primary litigation between these parties, these items might well be discoverable given the broad scope of "relevancy" stated in VRCP 26(b)(1), and could be obtained directly from McF-J or L&D by way of deposition subpoena under VRCP 45(a)(1)(C). But where the Act is being used strategically for "pre-suit" discovery purposes, as here, the Plaintiff must live with the limitations inherent in the structure of the Act. *See Wesco, Inc. v. Sorrell, supra.* On the other hand, it must be noted that if this were traditional discovery, the court would then have inherent powers under Rule 26 to itself manage the discovery, and this litigation generally in order to balance demonstrated need vs. unreasonable burden.

documents listed in the index are at least initially, or arguably protected by the "deliberative process" privilege.[19]

The six (6) records (i.e., e-mail "strings") which do not appear to fit the requirements of the privilege, or § 317(c)(4), because they do not reflect any truly substantive, non-factual, or policy discussion prior to some further decision-making activity, are as follows:

1. 12/11/07, Hoar to DiPietro
2. 3/14/07, Hoar to DiPietro
3. 3/15/07, Hoar to Plumb
4. 4/16/07, Hoar to Lambert
5. 6/13/06, Hoar to Rowe
6. 3/14/07, Hodgson to Garant

These records must be disclosed by Defendant within ten (10) days of the date of this order. Also, the City must disclose its copies of the documents in this group identified by Munson as no longer being privileged because VTrans (or its consultants) were included in the communication circle; although the City is technically correct that the State's non-privileged status under § 317(c)(4) cannot affect its own separate privilege, it would exalt form over substance, and be contrary to the essential policies of the Act, to force Plaintiff to go back to VTrans and file another request for the very same documents. On the other hand, because these documents do not satisfy the deliberative process privilege, they most likely provide little, if any actual substance concerning the underlying payment claims.

(c) "Personal Information" Exemption. This exemption, under § 317(c)(7), is to be narrowly construed to "apply only to documents that reveal 'intimate details' of a person's life." *Katz v. South Burlington School District*, 2009 VT 6, ¶ 7 & fn. 2 (Jan. 20, 2009), *citing Trombley v. Bellows Falls Union H.S. Dist. No. 27*, 160 Vt. 101, 110 (1993). The court's review of these withheld documents reveals that none of them pass that demanding test. Several discuss vacation or other scheduling issues; a couple refer in only the most general terms to the mere fact of unspecified out-patient surgery for one of the VTrans engineers; and the rest refer generally to the replacement of "Pete," the resident engineer originally assigned to the project, a fact already well-known. The City has not met its burden with respect to exemption of these materials, and they shall be released ten (10) days after entry of this order. Again, however, it must be stressed that these documents provide absolutely no substantive, or useful information.

[19] The following would also, or alternatively be protected by the attorney-client privilege (as broadly applied to a "common interest" group, *supra*): 10/30/06, Allen to Rowe, Eustace, Hoar; 10/16/07, Allen to Fletcher, Hoar; 8/28/06, Danforth to Allen, et al.; 9/18/07, Hoar to Allen, et al.; and 4/18/07, Allen to Eustace, et al.

(d) "Contract Negotiation" Documents. The court has reviewed all 4 of these e-mail "strings," and they all involve communications prefatory to negotiation of contract modifications (i.e., "change orders") to the primary construction agreement between the city and Munson. They are therefore exempt from disclosure under § 317(c)(15).

(VI) "New" Issues and Plaintiff's "Motion to Compel" (filed 2/17/09). This issue is apparently, or essentially the same as that addressed in Part IV above, i.e., whether the City must be compelled to produce under the Public Records Act additional e-mails and other "internal" documents and materials of McF-J and L&D beyond those already disclosed. In that sense, it is not really a typical "motion to compel" in the sense usually filed under VRCP 37, but rather an application to the court on the merits of whether the City has failed to produce records covered by the Act. The court's reaction is also essentially the same: all substantive contract-management records, communications and documents must be disclosed (as well as all non-exempt items and materials which the City has in fact physically "acquired").

Accordingly, the City shall undertake another review of McF-J and L&D records and documents to assure full compliance with the court's determination, release any additional non-exempt items which are covered by the Act as applied herein, and file with the court an additional index of any still-withheld McF-J or L&D records which (A) were actually or legally "acquired," but (B) the City claims an exemption, all within 30 days hereof.

ORDER

1. Plaintiff's motion for summary judgment (filed 9/9/08) is **granted in part** and **denied in part**, consistent with the above rulings. The records and documents identified in Parts V(b) and (c) above shall be released by the City within 10 days of the date hereof.

2. Plaintiff's motion to compel additional documents and records (filed 2/27/09), is **granted in part** and **denied in part**, consistent with the above rulings in Parts IV and VI. Defendant shall file any further "*Vaughn*" index within 30 days of the date hereof.

3. Defendant's motion to continue sealing of the records submitted for *in camera* review[20] is **granted in part** and **denied in part**, consistent with the above rulings in Parts V(b) and (c). All records which the court has found to be exempt under the Act shall be retained in the file for further review or

[20] Plaintiff's partial opposition to this application is yet another example of the heightened adversarial approach taken here. Munson's positions on the merits of whether the disputed records should be exempt under the Act, raise entirely legitimate issues; but to argue against the need to preserve the confidentiality of those records once the court has resolved those issues in favor of continued exemption, is to misconstrue the separate principles applicable to access to court records.

proceedings as necessary, but shall not be publicly available, as the very purpose of the exemptions from disclosure under the Act would be defeated by the necessity to file them with the court to allow it to undertake *in camera* review. VRACR 7(a); *In Re Sealed Documents*, 172 Vt. 152, 161-65 (2001).

IT IS SO ORDERED, at Burlington, Vermont, this 30th day of March, 2009.

Dennis R. Pearson, Presiding Judge.

STATE OF VERMONT
Washington County, ss.:

SUPERIOR COURT
Docket No. 732-12-04 Wncv

PROFESSIONAL NURSES SERVICE, INC.,

v.

CHARLES SMITH

ENTRY

This is a public records access case, filed after the Vermont Department of Aging and Disabilities—and the Secretary of the Agency of Human Services on appeal—partially denied an access to public records request by Plaintiff Professional Nurse Service, Inc.

Plaintiff made an extensive public records request to the Department believing that the requested documents might aid its application for a "certificate of need" with the Commissioner of Banking, Insurance, Securities, and Health Care. The Department provided access to all requested documents but two: each is a two-sided single-page memorandum from Patrick Flood, Commissioner of the Department, to Charles Smith, Secretary of the Agency. Claiming that each memorandum consists of frank, deliberative policy discussion, the State denied access to these documents citing the executive and the deliberative process privileges.

The Access to Public Records Act, 1 V.S.A. §§ 315–320, explicitly incorporates common law privileges, *id.* § 317(c)(4). A privilege recognized under § 317(c)(4) may justify the denial of access to a requested public record. Vermont first recognized the doctrine of executive privilege in *Killington, Ltd. v. Lash*, 153 Vt. 628, 636–37 (1990). The *Lash* Court

made clear that, while the term "executive" has been used broadly by some courts to refer to privileges extending beyond the actual "chief executive," in Vermont, for purposes of the privilege, "executive" means "governor." See *id.* at 632 n.3; see also *New England Coalition v. Office of Governor*, 164 Vt. 337, 340-42 (1995) (distinguishing executive privilege from the more broadly applicable deliberative process privilege and FOIA exception 5). Because the disputed memoranda in this case are unrelated to the governor, we agree with Plaintiff that the executive privilege, as recognized in Vermont, does not apply.

The State maintains, however, that the deliberative process privilege, which is similar to the executive privilege but applies to communications between government officials other than the governor, applies to these documents and should be recognized under 1 V.S.A. § 317(c)(4). The Vermont Supreme Court has never addressed the recognition of the deliberative process privilege.

Generally, the deliberative process privilege allows the government (other than the chief executive) to withhold from public access information of an advisory or deliberative nature that relates to the governmental decision or policy-making process. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); see generally Russell L. Weaver and James T.R. Jones, The Deliberative Process Privilege, 54 Mo. L. Rev. 279 (1989) (discussing substantive and procedural requirements of the privilege). The privilege's ultimate purpose "'is to prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *In re Sealed Case*, 121 F.3d at 737 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). It was first adopted overtly by a federal court in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F.Supp. 939 (Ct. Cl. 1958), but its common law roots long predate that case. For a detailed discussion of the common law origins and evolution of the doctrine, see Gerald Wetlaufer, An Objection to the General Deliberative Privilege, 65 Ind. L.J. 845, 856–82 (1990). Since *Kaiser*, "the question of whether there ought to be a privilege has received only the most perfunctory and stylized attention. All the serious energies of the [federal]

courts have, instead, gone into the development of rules related to the application of the privilege." Wetlaufer, *supra*, at 875.

Though varying state laws have made state treatment of the privilege less consistent than federal treatment, numerous state courts have recognized it. See *City of Colorado Springs v. White*, 967 P.2d 1042, 1049 (Colo. 1998) (collecting cases). We are persuaded that the Vermont Supreme Court would recognize the privilege as well—not to venerate the privilege's position in the common law but because its role in the effective administration of government is crucial. See generally *id.* (exhaustively analyzing and then recognizing the privilege in Colorado). We recall here that 1 V.S.A. § 317(c)(4) calls upon us to evaluate—and thus participate in—the common law, the evolving body of law derived from judicial decisions.

> The common law . . . is inarticulate until it is expressed in a judgment . . . . Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges follow[] his decision. They [do] not do so by construing the words of his judgment. They look[] for the reason which had made him decide the case the way he did, the *ratio descendi* . . . .[,] the principle of the case.

Patrick Devlin, The Judge 177 (1979)); see also *Hay v. Medical Ctr. Hosp.*, 145 Vt. 533, 542 (1985) ("It is the role of this Court to adapt the common law to the changing needs and conditions of the people of this state . . . ."). Even if the privileges are not coextensive, the governmental need for the deliberative process privilege—and the corresponding public benefit—is just as compelling as that for the executive privilege. "As objectionable as the image is of government conducted in secrecy's darkened chambers, it is hard to imagine a government functioning with no opportunity for private exchange among its ministers, with no moments of speculation, venturesome alternatives, or retractable words." *Killington, Ltd.*, 153 Vt. at 637. This guiding insight, which motivates Vermont's executive privilege

cases, applies with equal vigor to the more widely applicable deliberative process privilege.

Plaintiff opposes the recognition of the privilege, arguing that it would eviscerate the Access to Public Records Act and its strong open-government policy: the government, presumably, would render the Act hollow by always claiming the privilege. Acknowledging that the Act strongly favors open government, we note that there are no fewer than 35 specific statutory exceptions to public access, of which common law privileges are a part of but one. Though we construe the exceptions strictly in favor of access, *Springfield Terminal Railway Co. v. Agency of Transp.*, 174 Vt. 341, 345 (2002), still, the implied suggestion that the Act makes all or nearly all public records accessible is more rhetoric than reality. The Act and how we apply it reveal a tension with which we should struggle: between openness at one end, and privacy and effective governance at the other. We do not by recognizing the privilege add a new exception that will swallow the rule; we merely apply recognized law as part of an exception that the Legislature itself specifically created: 1 V.S.A. § 317(c)(4).

The Legislature also specifically created an exception analogous to the deliberative process privilege for political subdivisions of the state, § 317(c)(17), exempting from access "records of interdepartmental and intradepartmental communications in any . . . political subdivision of the state to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy . . . ." Interpreting the Act to exempt such information when it arises in the smaller and more intimate political subdivisions of the state, where policy consideration is far more likely to be oral, but not when it arises in the larger agencies of the state, where written communication is far more likely to occur, would be irrational. See *Rowell v. Tunbridge*, 118 Vt. 23, 27-28 (1953) (irrational statutory interpretations should be avoided where possible).

Plaintiff's argument in opposition to the privilege, however, is really more about its breadth—the extent to which it should be limited and how it

should be applied—than whether it should be recognized. The privilege does not apply where its purposes are not served. *White*, 967 P.2d at 1051. The government has the initial burden of showing that the requested information genuinely is part of a predecisional and deliberative process. *Id.* at 1053. Even where it applies, like the executive privilege, *Killington, Ltd.*, 153 Vt. at 637, the deliberative process privilege is qualified, *White*, 967 P.2d at 1051. A party seeking the information may overcome the privilege with a sufficient showing of need. The exception does not risk swallowing the rule.

We turn then to the facts of this case. The State has discharged its initial burden by submitting a *Vaughn* index, which describes the two requested documents, and affidavits from both the author and recipient of the memoranda. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); see generally Weaver & Jones, supra, at 300-12 (describing the *Vaughn* index and affidavit requirements). These submissions reveal that each short memorandum was written by Commissioner Flood, a subordinate, to provide frank opinions and advice exclusively to Secretary Smith, his superior, directly relating to the Secretary's contemplations on the general topic of Vermont's home health system, and, at least in part, on the more specific topic of a certificate of need, policy matters plainly within the scope of the roles of the Commissioner and the Secretary.

While the State's *Vaughn* index is not particularly detailed, it is sufficient in the circumstances of this case. The general subject matter of the memoranda is advisory (deliberative) in nature, and was provided to the Secretary for his use in contemplating matters of policy. Both the Commissioner and the Secretary treated the memoranda as a confidential predecisional policy discussion. As the memoranda may relate to Plaintiff's application for a certificate of need before BISHCA, we note that the Secretary eventually made a specific "decision," which appears in a letter—to which Plaintiff has access—from Secretary Smith to BISHCA Commissioner Crowley. See Defendant's Motion for Summary Judgment at 9 (filed Jan. 31, 2005). The *Vaughn* index does not more specifically detail the decisions the Secretary was considering when he received the

memoranda, but an internal policy discussion need not even ripen into a specific decision for the privilege to apply. See *White*, 967 P.2d at 1051 n.8. It is the nature of the governmental process at work, not its result, that matters. We reject Plaintiff's claim that the accompanying affidavits are not based on the personal knowledge of the affiants. The affidavits are signed by the Commissioner and Secretary, the author and recipient, respectively, of the memoranda, after all.

We see no reason in these circumstances to review the memoranda in camera, or to order the State to supplement the index. See 1 V.S.A. § 319(a) (the court may, but is not required, to do in camera review). We conclude that the State has shown that the deliberative process privilege supports its decision to deny access to the two requested memoranda.

Plaintiff argues that it has a need for the documents that outweighs the State's interest in maintaining their confidentiality, namely, that they may contain some information that could in some way aid its certificate of need application. That bare allegation alone, however, is not a sufficient showing of need. Plaintiff does not explain why knowing the Commissioner's advice—the options the Secretary entertained (the memoranda)—is important, particularly considering that it knows the option (the letter) that the Secretary later chose. Ordinarily, it is the "postdecisional" information, the chosen alternative, that "the public has a strong interest in" as that becomes the "'working law' of the agency." *White*, 967 P.2d at 1051 (quoting *Sears*, 421 U.S. at 152). Nor does Plaintiff attempt any showing of governmental wrongdoing or improper motives that might suggest an inappropriate application of the privilege.

The State's motion for summary judgment is granted. The State's motion to dismiss is denied as moot. Plaintiff's motion for summary judgment is denied.

Dated at Montpelier, Vermont, July 14, 2005.