STATE OF VERMONT
WINDSOR COUNTY, SS

John & Megan Brendel et al. Plaintiff v. Town of Norwich Defendant	SUPERIOR COURT Docket No. 780-11-08 Wrcv

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Norwich Taxpayer Appeals Plaintiff v. Town of Norwich Defendant	SUPERIOR COURT Docket No. 756-766-10-08 Wrcv

DECISION ON MOTION FOR ACCESS TO PUBLIC RECORDS

Nearly ten months after the expiration of the time agreed to by the parties for the filing of interrogatories and requests for production, a dispute has arisen over what is essentially a discovery matter: a request for access to the Listers' records and to speak with the Listers outside the presence of counsel for the Town of Norwich.

The Plaintiffs have moved for an order granting them access to the Listers' records and to allow their counsel to communicate directly with the Listers concerning this litigation. Defendant opposes the motion.

Written discovery and depositions have taken place. The records which Plaintiffs seek to inspect at this time could have been requested through the discovery process, but were not. The Town offered to allow Plaintiffs' to inspect the records pursuant to V.R.C.P. 34, which the Plaintiffs did not accept.

Plaintiffs now seek to use the public records law, 1 V.S.A. § 315 et seq., to obtain access to the records they did not access through the discovery process. Furthermore, they wish to speak directly with the Listers outside of the presence of Town counsel concerning this litigation.

The Access to Public Records Act (PRA) is to be construed liberally, with exceptions to access being construed strictly against custodians of records and any doubts being resolved in favor of disclosure. 1 V.S.A. §§ 315, 317(b); *Finberg v. Murnane*, 159 Vt. 431 (1992). The PRA allows access to a broad range of documents and records, exceptions to disclosure are to be narrowly construed. *Judicial Watch v. State*, 2005 VT 108, 179 Vt. 214. All doubts should be resolved in favor of disclosure. *Sawyer v. Spaulding,* 2008 VT 63.

The Norwich Listers' records fall within the scope of the PRA, as the Town of Norwich is a political subdivision of the state. *Richards v. Town of Norwich,* 169 Vt. 44 (1999); *Lynch v. Town of Rutland*, 66 Vt. 570 (1894). An exception to the disclosure requirement is found at 1 V.S.A § 317(c)(14), which reads as follows:

> (14) records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation;

The scope of this exception to the disclosure requirement was fully discussed in *Wesco v. Sorrell,* 2004 VT 102, 177 Vt. 287, a case very much on point but curiously not cited by Plaintiffs in their memorandum in support of their motion. As was stated in *Wesco*:

> As evidenced by the plain language of § 317(c)(14), the Legislature's goal in passing it was to place a temporary restriction on the release of otherwise publicly accessible documents during the pendency of litigation in which the requested documents have relevance. To that end, the statute starts by exempting the broadest category of documents from disclosure—"records which are relevant to litigation." 1 V.S.A. § 317(c)(14). The statute then carves out a subcategory of documents—those "ruled discoverable by the court before which the litigation is pending," *id.*—which are not exempt from disclosure, even though they may be "relevant to litigation." Moreover, even documents not ruled discoverable are only exempt from disclosure as long as they remain "relevant to" a pending litigation, and must be released "upon final termination of the litigation."

2007 VT 102, ¶ 15.

The Court also refused to narrowly construe the language of the term "relevancy" as used in the exception, holding that the statute's plain language covered not only discoverable records, but also those which are "relevant" to the litigation. Clearly the Listers records sought here are relevant to this litigation, and both parties have conceded they would be discoverable.

In the view of the Court, this request by the Plaintiffs is an attempt at gathering discovery which could and should have been sought through the discovery process. A PRA request should not be used as an end-run around discovery. See *Wesco*, 2007 VT 102, ¶ 22 (explaining that "the public records request process should not be used to enlarge the scope of discovery or permit parties litigating with the government to do an end run around discovery rules. . . . § 317(c)(14) prevents parties from abusing the process and gaining any unfair advantage in litigation with the government"). Here, the time for written discovery has long since expired, and the timing of this request is suggestive of an effort to obtain discovery documents outside of the discovery schedule agreed to by the parties and ordered by the court. Again, this was discussed in *Wesco*:

> Our interpretation and application of § 317(c)(14) also furthers the many policy objectives the Legislature had to consider when deciding to exempt disclosure of public documents relevant to pending litigation. Exempting disclosure of documents relevant to ongoing litigation outside the discovery process prevents the issuance of conflicting and inconsistent judgments in competing courts. Discovery decisions should be reserved for the trial court before which the litigation is pending, rather than getting a second opinion by shifting them to the superior court in the form of a Public Records Act request. If appellants' approach was permitted, the superior court would be placed in a position to undermine rulings of the court presiding over the pending action or issue conflicting decisions on the same or related requests for production.

2005 VT 102, ¶ 21.

That the litigation here, unlike *Wesco*, is before the same tribunal as would consider the PRA request is no reason to deviate from the underlying principle of *Wesco*: public records of an agency relevant to pending litigation should be sought through the discovery process, not through a PRA request.

Plaintiffs attempt to avoid the application of § 317(c)(14) by suggesting that the Listers are not the public agency which is the party of record to this litigation. However, the definition of "public agency" in § 317(a) includes any "board . . . of any political subdivision of the state." Since the town is a political subdivision of the state, and since the Listers (like the town selectboard or any other public body consisting of elected officials) are a board thereof, *Richards v. Town of Norwich*, 169 Vt. 44 (1999), it follows that documents within control of the Listers fall within the exemption set forth by § 317(c)(14) where the town is the named party of record. This makes sense because lawsuits challenging tax assessments must be maintained against the town, but for all intents and purposes, it is the actions of the Listers that are at the core of these disputes. See 32 V.S.A. §§ 4111(g), 4404(a), 4461 (describing appeals procedures for persons who feel "aggrieved by the action of the listers").

For these reasons the exception to disclosure under 1 V.S.A. 317(14) applies. The Town need not grant access to the public records of the Listers at this time.

In addition, the request to speak to the Listers outside the presence of the Town's counsel will not be allowed. At issue here are the actions of the Listers in their appraisals of certain properties. These are not low-level government employees, but rather, in terms of this suit, the officials who took the actions forming the basis of Plaintiffs' complaints. While a suit against the Town does not extend attorney-client protections to all Town employees, the actions of this distinct and small group of elected government officials are at the heart this controversy.

Setting aside any question as to whether it would be appropriate to permit depositions of listers given the judicial character of their duties in making the appraisals that are the subject of these appeals, *Royalton Taxpayers' Protective Assoc., Inc. v. Wassmansdorf*, 128 Vt. 153, 158 (1969), there are established procedures for obtaining discovery from governmental entities, including through designation by the Town under V.R.C.P. 30(b)(6). 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2103. Such discovery requests have not been made and in any event are no longer timely here.

The court does not concur in the assumptions, made by Plaintiffs, that statements made by the Listers are not admissible against the Town in this action, see, e.g., V.R.E. 801(d)(2)(D), or that no action or omissions on the part of the Listers may be imputed to the Town. Rather, it appears to the Court that Plaintiffs' claims against the Town are based specifically upon the actions of the Listers.

For the foregoing reasons, the request for public access to records and to speak to the Listers concerning the subject of this litigation outside of the presence of counsel for the Town are **DENIED**.

Dated at Woodstock this 29th day of September, 2009.

Harold E. Eaton, Jr.
Superior Court Judge

FILED
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WINDSOR COUNTY CLERK