VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

DEAN PIERCE, Plaintiff v. TOWN OF SHELBURNE, Defendant	Docket No. 22-CV-1188

RULING ON APPEAL

Plaintiff Dean Pierce sought certain public records from the Town of Shelburne pursuant to Vermont's Public Records Act. He now brings this action under 1 V.S.A. § 319(a), alleging that the Town both improperly denied his requests and provided certain records in the wrong format. He seeks production of certain documents requested on December 24, 2021 and May 10, 2022, as well as production of the documents requested on January 3, 2022 in their original electronic format.

Background

Pierce submitted two separate public records requests on December 24, 2021 seeking:

- Complaints about town manager Lee Krohn;
- Materials and communications between selectboard members and/or the town manager about Plaintiff Pierce;
- Complaints regarding Planning and Zoning Department staff performance and documents related to such complaints;
- Material regarding reorganization of the Planning and Zoning Department;

- Any public records requests made to the town manager during a certain time frame.

Pierce's January 3, 2022 records request sought:

- Communications related to various development projects in Shelburne;
- Materials related to the town manager's interviews with a local news reporter;
- A document visible on screen during the video recording of a March 23, 2021 Shelburne selectboard meeting;
- Zoning permits or certificates of occupancy signed by the town manager in his capacity as a zoning official.

Lastly, Pierce's May 10, 2022 request sought two documents: A letter placed in a town employee's file as a result of selectboard action taken on February 17, 2022, and a copy of the minutes for that meeting. The Town produced some documents in response to Pierce's requests, but also denied his requests in part. The Town Selectboard denied Pierce's appeals, and this action followed.

Discussion

Preliminarily, the Town contends that many of the requested documents that Pierce discusses in his briefing are beyond the scope of his complaint and should not be considered. The court agrees. "[P]arties are generally required to identify their legal claims and specify their requests for judgments in their pleadings." Jones v. Hart, 2021 VT 61, ¶ 54 (quotation omitted); *see also* Valsangiacomo v. Paige & Campbell Co., 136 Vt. 278, 280 (1978) ("generally cases are to be tried according to the issues made by the pleadings"). In his amended complaint, Pierce plainly limits his request for relief to certain subsets of the original records requests: (1) from the December 24, 2021 requests, "copies of written complaints against the performance of the staff of the Planning and Zoning Department, and documents relating to such complaints" and "material

pertaining to the reorganization of the Planning and Zoning Department," Am. Compl. ¶¶ 2–4, 13; (2) from the January 3, 2022 request, the records "in their original electronic format," id. ¶¶ 7–8, 14; and, from the May 10, 2022 request, the letter placed in a town employee's file as a result of selectboard action taken on February 17, 2022. Id. ¶ 11.[1] While issues not raised by the pleadings may be tried by express or implied consent of the parties under Rule 15(b), there is no such consent here as the Town objects to those issues. The court will not consider the requested documents not raised in Pierce's amended complaint.

The Public Records Act provides that "[a]ny person may inspect or copy any public record of a public agency. . ." 1 V.S.A. § 316(a). "[P]ublic record" or "public document" is defined as "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). The Act's statement of policy advocates for "free and open examination of records" despite the potential for "inconvenience or embarrassment," but also recognizes that "[a]ll people . . . have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer." 1 V.S.A. § 315. In an appeal from the denial of a public records request, the court determines the matter de novo, and may examine the records in camera to decide if the records shall be withheld. 1 V.S.A. § 319(a). The governmental entity withholding the records has the burden of proof. Id.

The Town submitted a Vaughn index of withheld documents, indicating that the documents fall under the attorney-client privilege and are therefore exempt from

[1] The court observes that while Pierce mentions the May 10, 2022 request in his complaint in paragraphs 11 and 12, he fails to request any specific relief concerning that request. *See* Am. Compl. ¶¶ 13–14. The Town does not object to this, however, and therefore the court considers the May 10th records request.

disclosure under 1 V.S.A. § 317(c)(4).[2] Pierce asks the court to review these in camera. The Town responds that it "does not object should this Court order an in-camera review," but that in camera review is "not necessary" because the documents "clearly fall under the [privilege] exemption[]." Town's Opp'n at 4. Relying on Killington, Ltd. v. Lash, 153 Vt. 628, 638–39 (1990), the Town argues that with the privilege exemption, the requestor has the burden to provide "some demonstration of need for the documents" before the court orders an in camera review, and that Pierce has not met that burden here. That discussion in Killington, however, deals with executive privilege, not attorney-client privilege. *See* id. at 639.

In any event, the Court noted that the statute incorporates common-law privilege law, and that under a common law privilege, "the requester assumes the burden of demonstrating need *once a prima facie case has been made for the existence of a privilege*." Id. (emphasis added). The Town has not met that initial burden to show a prima facie case here. "PRA exemptions are construed strictly against the custodian of such records, and . . . the custodian must do more than provide conclusory claims or pleadings to establish that the exemption applies." Rutland Herald v. City of Rutland, 2012 VT 26, ¶ 6, 191 Vt. 387 (quotation omitted). The index lists the authors, recipients, and subject matter of each document, but is insufficient to determine whether these documents are wholly privileged. *See* 232511 Invs., Ltd. v. Town of Stowe Dev. Rev. Bd., 2005 VT 59, ¶ 3, 178 Vt. 590 (mem.) (remanding to trial court to conduct in camera review of board's attorney's letter to "decide whether any part or all of the letter is legal advice within the meaning of the exemption"). Moreover, an agency "cannot withhold an entire

[2] Pierce says that he is not interested in the last four documents listed in the Vaughn index, all of which relate to "short term rental[s]" and are labelled as falling under the § 317(c)(17) exemption as "policy communication[s]." Appellant's Reply at 1.

document . . . without describing the mix of privileged and non-privileged information and explaining why it would not be possible to simply redact the privileged materials." Jud. Watch, Inc. v. U.S. Postal Serv., 297 F. Supp. 2d 252, 267 (D.D.C. 2004).

Without additional information supporting the Vaughn index, such as an affidavit summarizing the contents of the allegedly privileged documents, in camera review is necessary to decide whether the documents are wholly privileged or might be redacted in part. *See* 1 V.S.A. § 318(e); Kade v. Smith, 2006 VT 44, ¶ 10, 180 Vt. 554 (concluding in the context of privacy concerns that while in camera review is "often necessary, . . . the trial court did not abuse its discretion in finding that the exception applied based on the index and supporting affidavits"); C. Hitchcock, 1 Guidebook to the Freedom of Information and Privacy Acts § 10:11 ("As with the other privileges, the quality of an agency's declaration and Vaughn Index has been found to be crucial to the agency's ability to withhold records under [the attorney-client privilege exemption to FOIA]."); Buckovetz v. U.S. Department of the Navy, 2016 WL 1529901, *3 (S.D. Cal. 2016) (finding court could not grant summary judgment based on conclusory statements); Jud. Watch, Inc., 297 F. Supp. 2d at 267 (determining that agency failed to show documents involved provision of specific legal advice or that they were intended to be confidential). The court will require either a detailed affidavit or submission of the records for in camera review.

Pierce next asserts that some of the documents provided in response to his January 3 request were not supplied in their "standard format." *See* 1 V.S.A. § 316(h) ("Standard formats for copies of public records shall be as follows: . . . for copies in electronic form, the format in which the record is maintained.); id. § 316(i) ("If an agency maintains public records in an electronic format, nonexempt public records shall be available for copying in either the standard electronic format or the standard paper format, as designated by

the party requesting the records."). The Town agrees to comply with this request and has apparently engaged an outside contractor to "move native format emails to a drive for Plaintiff's inspection," but it requests additional time to comply with the request for over 1,200 emails. Town's Opp'n at 8–9. The Town also seeks costs related to this effort in the event that Pierce wants electronic copies of these emails rather than the opportunity for inspection, pursuant to 1 V.S.A. § 316(c). Town's Opp'n at 8. The Town's requests are reasonable, and Pierce does not object in his Reply. The Town shall have 30 additional days to comply with the requests for emails in their "standard format," and is entitled to costs associated with the request pursuant to § 316(c).

Finally, Pierce's May 10 request sought a letter placed in a town employee's file as a result of selectboard action taken on February 17, 2022. The Town contends that this letter is exempt from disclosure as a "'personal' document related to an employee, kept in the employee's file." *See* Town's Opp'n at 7 (citing 1 V.S.A. § 317(c)(7)). Subsection (c)(7) exempts "[p]ersonal documents relating to an individual, including information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency; information in any files relating to personal finances; medical or psychological facts concerning any individual or corporation; . . . ." The Supreme Court has defined the term "personal documents" to mean documents that reveal "intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends." Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 110 (1993) (quotation omitted). In other words, "where disclosure would constitute an invasion of personal privacy." Id. at 109; *see also* Rutland Herald v. City of Rutland, 2012 VT 26, ¶ 39, 191 Vt. 387 ("We have construed the term 'personal documents' to apply only when the privacy of the individual is involved.");

Rutland Herald v. Vermont State Police, 2012 VT 24, ¶ 22, 191 Vt. 357 ("In other words, documents are evaluated under this exemption based on their *content,* and not simply whether they have been included in a particular type of file.") (emphasis in original).

Moreover, the court "must balance the interests in privacy and disclosure in deciding if a document is exempt under this provision." Rutland Herald v. City of Rutland, 2012 VT 26, ¶ 40. In doing so, it

> must consider not only the relevance, if any, of the records to the public interest for which they are sought, but any other factors that may affect the balance, including: the significance of the public interest asserted; the nature, gravity, and potential consequences of the invasion of privacy occasioned by the disclosure; and the availability of alternative sources for the requested information.

Id. (quoting Kade v. Smith, 2006 VT 44, ¶ 14, 180 Vt. 554). Here, the Town has plainly not met its burden to show that the requested letter implicates the employee's privacy. Nor has it provided any information that would enable to court to "balance the interests in privacy and disclosure" as required by Rutland Herald and Kade. To meet that burden, the Town shall submit the letter to the court for in camera review.

Order

The court denies Plaintiff's appeal to the extent that he raises issues beyond the scope of his complaint. The court grants the appeal to the extent that Plaintiff seeks further support for the privilege log as to the documents listed in the Vaughn Index (except the last four) and the letter placed in the town employee's file requested on May 10. The Town shall submit the letter for in camera review, and either a detailed affidavit or the balance of the other documents themselves for in camera review within 14 days. The Town shall have 30 days to comply with the requests for emails in their "standard

format" and, in the event that Plaintiff wants electronic copies of these emails rather than the opportunity for inspection, the Town is entitled to costs associated with the request pursuant to 1 V.S.A. § 316(c).

Electronically signed on November 17, 2022 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge