

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 338-10-20 Wncv

VERMONT JOURNALISM TRUST,
Plaintiff,

v.

VERMONT AGENCY OF COMMERCE AND
COMMUNITY DEVELOPMENT, et al.,
Defendants.

RULING ON THE TRUST'S MOTION TO COMPEL

This is a public records case in which Plaintiff the Vermont Journalism Trust, which operates the VTDigger.org news website, has sought the production of many e-mails to or from former secretary of the Agency of Commerce and Community Development Lawrence Miller related to the Jay Peak EB-5 fraud scandal. The State had withheld all of them under the litigation exception to the Public Records Act, 1 V.S.A. § 317(c)(14), asserting their relevance to the ongoing case of *Sutton v. Vermont Regl. Ctr.*, No. 100-5-17 Lecv (Vt. Super. Ct.). The *Sutton* plaintiffs had requested the same records in discovery in that case. By the time of the parties' cross-motions for summary judgment in this case, the State had decided to produce all non-privileged records in discovery in *Sutton*. This court ruled that all such records thus had to be produced promptly to the Trust as the litigation exception no longer applied. Those records were in fact produced. The Trust then filed the pending motion to compel the State to produce an "index" in compliance with 1 V.S.A. § 318(b)(2). The State opposes filing any further index of withheld records.

To be clear, at this point, the only records being withheld in this case are those that were sought in discovery in the *Sutton* case but have not been produced under a claim of attorney-client privilege. The *Sutton* court presumably has not otherwise ordered them to be produced. These documents thus remain withheld in this case under the litigation exception primarily and under the exception applicable to privileged records secondarily.

The Trust claims to want a § 318(b)(2) index to police the State's compliance with § 318(b)(2). It does not articulate any other reason to consume the State's resources in such a manner, and none is apparent. Another index would be a completely empty gesture in this case because there is no colorable claim at this point that the withheld documents are *not* subject to the litigation exception. The only conceivable reason for further indexing would be to assist the Trust in challenging the State's assertion of privilege in hopes of showing that the documents should have been produced in the *Sutton* case and thus should be produced in this case. That, however, would do exactly what the court already clearly explained the litigation exception forbids: it would put the PRA court in the position of

making discovery determinations in collateral cases. The litigation exception does not make an agency fight the battle on two fronts in that manner. There is no good faith purpose in ordering any further index in this case.

The Trust also appears to misunderstand 1 V.S.A. § 318(b)(2), which provides:

(2) If the custodian considers the record to be exempt from inspection and copying under the provisions of this subchapter, the custodian shall promptly so certify in writing. The certification shall:

- (A) identify the records withheld;
- (B) include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial;
- (C) provide the names and titles or positions of each person responsible for denial of the request; and
- (D) notify the person of his or her right to appeal to the head of the agency any adverse determination.

This provision requires an agency to produce such a certification in the course of the administrative denial of a public records request. It has nothing to do with the production of any further indexing in subsequent litigation.

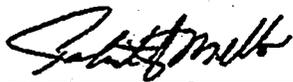
The information supplied under § 318(b)(2)(A), (B) may be sufficient for appeal purposes, but in more complicated cases it may not be. "FOIA litigation raises the procedural challenge of finding a way for agencies to prove that documents should not be disclosed without disclosing them to the requester as part of the litigation process. In response to this problem, courts developed the *Vaughn* index." 33 Fed. Prac. & Proc. Judicial Review § 8476 (2d ed.). The proper composition of a *Vaughn* index can vary with the needs of the case, which may not require one at all. See, e.g., *Rutland Herald v. Vermont State Police*, 2012 VT 24, ¶ 10 n.2, 191 Vt. 357.

In this case, it is unclear whether the State produced a fully compliant § 318(b)(2) certification as part of its original denial of the Trust's request. It does appear to have produced at least that much information in the course of summary judgment proceedings, however. In any event, the remaining withheld documents all are subject to the litigation exception. There is no point to any further indexing.

Order

For the foregoing reasons, the Trust's motion to compel is denied. The State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 2nd day of February, 2022



Robert A. Mello
Superior Judge