STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Washington Unit **Docket No. 349-6-16 Wncv**

Energy & Environment Legal Institute and
Free Market Environmental Law Clinic,
Plaintiffs,

v.

The Attorney General of Vermont,
Defendant.

DECISION
Defendant's Motion to Dismiss, MPR #2, filed July 26, 2016

Plaintiffs sought documents under the Public Records Act, 1 V.S.A. §§ 315–320, in two requests, one submitted on May 6, 2016, the other on May 10, 2016.Plaintiffs are Energy & Environment Legal Institute and Free Market Environmental Law Clinic (Requestors) who sought records in the custody of the Vermont Office of the Attorney General (the AG). The AG filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Requestors failed to exhaust administrative remedies prior to filing this suit. The court heard argument on September 15, 2016. At that time, Requestors withdrew any claims based on their May 10 request.

The exhaustion issue emerged when negotiations between Requestors and the AG over the scope of the May 6 request extended beyond the statutory deadline to produce documents. Requestors then sought administrative review, 1 V.S.A. § 318(c), while continuing to actively negotiate the scope of the request. The AG took the position that administrative review was not yet timely because negotiations were ongoing and no documents had yet been produced. Requestors then sought review here, 1 V.S.A. § 319(a).

At the time of the September 15 hearing, no documents had yet been produced but the AG represented that the scope had been narrowed by agreement and its staff was working diligently on the matter and expected to produce responsive documents imminently. The only issue now ripe for determination is whether Requestors exhausted administrative remedies prior to filing suit such that this court has subject matter jurisdiction at all related to the May 6 request.

The AG's position on exhaustion essentially is that its authority to seek the clarification or narrowing of records requests implies that the timeframe for compliance with the request can be delayed while those good faith negotiations are ongoing. In 2011, the legislature added the clarification/narrowing provision to which the AG refers:

> In responding to a request to inspect or copy a record under this subchapter, a public agency shall consult with the person making the request in order to clarify the request or to obtain additional information that will assist the public agency in

> responding to the request and, when authorized by this subchapter, in facilitating production of the requested record for inspection or copying. In unusual circumstances, as that term is defined in subdivision (a)(5) of this section, a public agency may request that a person seeking a voluminous amount of separate and distinct records narrow the scope of a public records request.

1 V.S.A. § 318(d). It did not, however, adopt any provisions that would permit any such back and forth to delay the otherwise strict statutory timeframe for production.

The AG essentially argues that, at least in cases with complicated requests (here the AG asserts that the records originally requested were not only voluminous but require extensive review and redactions), some delay to the statutory timeframe must be implied. Requestors argue that no such delay provision exists, and the statutory regime continues to treat any noncompliance with the mandatory timeframe as conclusively determining the issue of exhaustion. 1 V.S.A. § 318(b) ("Any person making a request to any agency for records under subsection (a) of this section 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 limit provisions of this section.").

The court understands that complex records requests can be a significant burden on agencies. The legislature has made clear, by the strict terms of the Act (not to mention the attorney fee provision), however, that responding to records requests, whether mundane, voluminous, or otherwise complex, is a critical function of all public agencies and must be attended to expeditiously to the extent possible.

The Act includes a provision for situations such as this in which agencies cannot comply with the statutory timeframe at 1 V.S.A. § 319(c): "If the public agency can show the court that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." This subsection essentially gives supervisory authority to the courts, not the responding agency itself, when an agency cannot comply within the statutory timeframe due to the complexity of the request. This provision specifies what should happen when the agency reasonably cannot meet the statutory deadlines and a Notice of Appeal is filed.

Where, as here, a clear Notice of Appeal is filed after the deadline but the agency and requestor continue to negotiate over scope and cost, the remedy is not for the agency itself to declare "your appeal is not ripe." Rather, the remedy is that the court assumes jurisdiction and has the authority to extend the time period for compliance. This makes sense, as otherwise a recalcitrant agency could simply unilaterally delay the deadline and the requestor would have no recourse, whereas the legislation is clearly intended for the government to respond as promptly as is reasonable. This provision gives the discretion to determine 'reasonableness' to the courts rather than the agency itself.

Subsection 319(c) is directly applicable to the facts of this case. The record does not show that the AG was attempting to passively deny the records request by mounting delay upon delay or otherwise was acting in bad faith. It shows instead that it had an unusually complex

records request and that its efforts to clarify and narrow the request and produce responsive documents reasonably justify exceeding the statutory timeframe.

Requestors exhausted their administrative remedies, both because the AG exceeded the statutory timeframe for production and because they sought administrative review before filing this suit. The court does not lack subject matter jurisdiction. The court accepts the AG's representation at the September 15 hearing that production now is imminent although a little more time is needed. Pursuant to 319(c), the AG has shown that there are exceptional circumstances given the breadth of the request and the need for the documents to be individually reviewed to redact privileged material. Therefore, it is reasonable for the court to exercise its discretion to allow the AG additional time to complete its review of the requested documents and production to Requestors.

ORDER

For the foregoing reasons, the State's motion to dismiss is denied. The AG shall complete its review and production of documents by October 3, 2016. If any controversy remains in this case following the AG's compliance with this order, Requestors shall promptly amend their complaint accordingly or file an appropriate motion. If nothing is filed by October 21, 2016, the case will be dismissed without prejudice.

Dated at Montpelier, Vermont this 19th day of September 2016.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge