VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

STATE OF VERMONT

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SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 349-6-16 Wncv

FILED

Energy & Environment Legal Institute, et al.

Plaintiffs,

v.

The Attorney General of Vermont, et al.

Defendants.

Plaintiffs' Motion for Costs and Fees for Substantially Prevailing in Open Records Case

Plaintiff respectfully moves for payment of attorney's fees and costs pursuant to 1 V.S.A. § 319(d)(1) and, in support, relies on the Motion for Costs and the Memorandum of Law below.[1]

MEMORANDUM OF LAW

Procedural and Factual Background

Plaintiffs Energy & Environment Legal Institute ("E&E Legal") and Free Market Environmental Law Clinic ("FME Law") are non-profit public policy research and publication organizations dedicated to advancing responsible regulation and, in particular, economically sustainable environmental and energy policy. The groups have robust transparency initiatives, while E&E Legal has an active publication function to broadly disseminate policy-relevant information found in public records.

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[1] The case eventually resulted in the filing of a Third Amended Complaint (cited to as "Compl.").

This case originally involved two Vermont Public Records Act (PRA) requests (dated May 6 and May 10, 2016[2]). For the May 6 Request, Plaintiffs appealed an Assistant Attorney General's ruling. The AGO, however, refused consideration of the appeal, claiming it was "not yet ripe." This refusal to even consider the appeal, constructively denied that appeal. Additionally, under the PRA, records must be produced no "more than ten business days from receipt of the request."[3]

The AGO had sought a narrowing of the May 6 request. In response, on May 18, 2016, Plaintiffs narrowed their request by reducing the custodians to only two employees. Compl. ¶ 11. The AGO then refused to process the narrowed request unless Plaintiffs agreed to pay an outside vendor to process the request at a cost more than four times higher than allowed by statute and regulations, and in a time frame beyond that allowed by the PRA. *Id.* ¶ 12.

The AGO's failed to respond within the statutory deadlines, which is "deemed" to be an exhaustion of administrative remedies and a "final denial of the request" pursuant to 1 V.S.A. §§ 318(b) and (c)(2). Having exhausted their administrative remedies, Plaintiffs filed this case on June 20, 2016, but the AGO continued to refuse to process the requests, while it "explor[ed] whether there might be other methods of complying with [Plaintiffs'] requests." Motion to Dismiss, 12-13; Compl. Ex. G. The AGO, instead, filed a Motion to Dismiss on July 26, 2016, claiming Plaintiffs failed to exhaust their administrative remedies.

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[2] The second request, dated May 10, 2016, sought responsive records from the non-governmental accounts of two AGO employees (Attorney General William Sorrell and Assistant Attorney General Scott Kline). Plaintiffs did not receive a response to this request until 26 business days (36 calendar days) after it was submitted and two days after this suit was filed. As with the May 6 Request, all administrative remedies are deemed to have been exhausted by the tardy response.[2] During a September 15, 2016 hearing, however, Plaintiffs withdrew claims based on the May 10 request.

[3] 1 V.S.A. §§ 318(a)(5).

On September 2, 2016, the Plaintiffs agreed to a further narrowing of the request, but the AGO did not abandon its demand that Plaintiffs agree to pay an outside contractor until just before the September 15, 2016 hearing on the Motion to Dismiss. The Court denied the motion, finding Plaintiffs had "exhausted their administrative remedies, both because the [AGO] exceeded the statutory timeframe for production and because they sought administrative review before filing this suit." Decision, 9/19/16, at 3. By the time of that hearing, "no documents had yet been produced." *Id.* at 1.

The AGO did not produce any records until the evening of September 19, 2016 when it made a partial production after the Court issued its decision denying the AGO's motion to dismiss. In the AGO's partial production, the AGO withheld 228 documents, but produced no Vaughn index so that the Plaintiffs could assess the withheld records. The Court then ordered the AGO to produce a Vaughn index, which was filed on February 27, 2017. The AGO subsequently filed a Motion for Summary Judgment and Plaintiffs opposed based on its overbroad withholdings, which only became apparent with the Vaughn index. Based on the Vaughn index, Plaintiffs reduced the number of documents it sought, but continued to challenge the AGO's withholding of 28 documents.[4] In its summary judgment decision, the Court rejected the AGO's blanket assertion of privilege and ordered the AGO to produce ten of the 28 withheld documents (five of which were ordered produced with minor redactions). Decision, 12/6/17.

In sum, when Plaintiffs first submitted their May 6 request, AGO refused to process it and, then when Plaintiffs narrowed the request, it demanded Plaintiffs pay for a private

[4] After reviewing the Vaughn index, Plaintiffs dropped their demand for many of these potentially responsive records. For some of the records, after reviewing the Vaughn index, Plaintiffs agreed that the AGO had a legal right to withhold production. However, Plaintiffs were offered no reasonable explanation for such denial until well after the litigation process had begun. For other records, Plaintiffs dropped their demands for production only to ease the burden on all parties (including the Court) to review such records.

contractor at fees far in excess of what is legally allowed. The AGO eventually dropped that demand, but only after litigation had long since commenced and it had sought to have the case dismissed. While this Court denied the AGO's motion to dismiss, Plaintiffs were forced to incur the expense of opposing it. From the start, the AGO has consistently chosen to delay or issue blanket denials of access to public records rather than produce them.

The AGO also refused to ask former Attorney General William Sorrell to conduct a search of his private account for public records responsive to Plaintiffs' requests. Plaintiffs moved to join Mr. Sorrell as a Defendant after the AGO took the surprising and unsupported position in *Toensing v. The Attorney General of Vermont* that public records the former Attorney General held on his private accounts were categorically outside the reach of the PRA. No. 2017-090. Subsequent to the decision in *Toensing*, which rejected the AGO's arguments, the AGO turned over public records, at Mr. Sorrell's deposition, that Mr. Sorrell had on his personal account, some of which were not produced from Mr. Sorrell's state account. **Ex. 1** at 4, Oct. 23, 2017 Depo. of Sorrell.

In a related case involving one of the same requestors, the AGO revealed to this Court that it responds to PRA requests only as it pleases under the belief that it is entirely exempt from the PRA. **Ex. 2**, Transcript at 7-14, March 28, 2017 hearing in Case No. 558-9-16. The Chief Assistant Attorney General explained to this Court that while the law does not apply to the AGO, he will sometimes deign to release public records, but only after he performs a subjective assessment of the requests and requestors and if he believes it is in the state's interests to release the public records. Specifically, the AGO acknowledged,

> We get a request from [E&E Legal] and so one thing we might consider is where are they — who are these people? Where are they going with this? And we Google them and we find, you know, coal or Exxon or whatever — and so we're thinking this is — we better — we better give this some thought before we — before we share information with this entity. Or it might be a news organization and we think, well, what are they going to do with it? Well, they're going to publish it to the world. So that would be — I mean, that would be my mental impression and, you know, let's exercise some caution. Is there some public interest publishing this information at this time? Probably not.

Id. at 13-14.

This Court rejected the AGO's contention that it is exempt from the PRA. *Id.*; *Energy & Environment Legal Institute v. The Attorney General of Vermont*, Docket No. 558-9-16 Wncv, Decision, 07/27/17. However, the AGO's belief that it was above the law guided its "best interests of the state" filtering process for responding to Plaintiffs' PRA requests, making the litigation in this and other related cases necessary to compel the AGO to abide by its legal obligations. Notably, the decision to refuse to produce records absent litigation followed a proper production of records in response to a March 31, 2016 PRA request. That production prompted substantial national media coverage and embarrassment for the AGO.[5] Thereafter, the AGO's subjective "Google search" process seems to have led to it determine that the "best interests" of the state meant delaying or blocking public records related to a scheme the AGO helped organize to investigate political speech opposing a certain political agenda, which by that time had already

[5] See, e.g., Valerie Richardson, "Democratic AGs, climate change groups colluded on prosecuting dissenters, emails show", Washington Times, Apr. 17, 2016; available at www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/; Chris Horner, *Email bombshell: Attorneys General worked with Green groups to punish political opponents*, FoxNew.com; available at http://www.foxnews.com/opinion/2016/04/18/email-bombshell-attorneys-general-worked-with-green-groups-to-punish-political-opponents.html (April 18, 2016); Sean Higgins, *NY atty. general sought to keep lawyer's role in climate change push secret*, Washington Examiner, Apr. 18, 2016; available at http://www.washingtonexaminer.com/ny-atty-general-sought-to-keep-lawyers-role-in-climate-change-push-secret/article/2588874; Terry Wade, *U.S. state prosecutors met with climate groups as Exxon probes expanded*, Reuters, Apr. 15, 2016; available at http://www.reuters.com/article/us-exxonmobil-states/u-s-state-prosecutors-met-with-climate-groups-as-exxon-probes-expanded-idUSKCN0XC2U2

resulted in subpoenas to public policy groups. That scheme subsequently crumbled when open records requests began pouring in from numerous parties including media outlets, to various states, leading to further unfavorable revelations for the AGO.

Legal Argument

Plaintiffs substantially prevailed and are entitled to reasonable attorney's fees and litigation costs under the PRA.

The PRA instructs that a court shall assess against the public agency reasonable attorney's fees and other litigation costs reasonably incurred in any case [brought under the PRA] in which the complainant has substantially prevailed." 1 V.S.A § 319(d)(1 (2016); *Prison Legal News v. Corrections Corp. of America,* No. 332-5-13 Wncv, 2015 Vt. Super. LEXIS 91 *5 (Sept. 1, 2015) ("It is clear that the legislature's use of 'shall' in 1 V.S. A. § 319(d)(1) is intended to make that portion of the provision mandatory.")

Subsequent to the legislature amending the statute to make the award of fees mandatory, Vermont courts do not appear to have attempted to fully define when a plaintiff has "substantially prevail[ed]" in this new context. See *Id.* at *3 citing and quoting *Burlington Free Press v. University of Vermont*, 172 Vt. 303, 779 A.2d 60 (2001) (before the 2011 amendments, in assessing this standard "Vermont courts may consult FOIA entitlement factors 'along with any other relevant factors' subject to an abuse of discretion review.") However, when an agency is ordered to produce withheld records, as it has here, "there is no reasonable way to conclude that [Plaintiff] has not substantially prevailed." *Id.* at *7.

The AGO fought release of public records based on its belief that it was exempt from the PRA and that it was no longer in the "best interest of the state" to release embarrassing public records to Plaintiffs. This Court, however, ordered it to produce records based on the definition of "public records," and real, demonstrated statutory exemptions. In response, the AGO

produced 43 documents, but withheld 228 documents and only produced a Vaughn index explaining the basis for its withholding after being ordered to do so by this Court. The Plaintiffs challenged the withholding of 28 of the withheld documents and this Court, over the AGO's objection, subsequently ordered the release of all or a portion of ten of those documents (108 pages). Decision, 12/6/17. These records included published news articles, a transcript of the aforementioned press conference, and publicly available judicial pleadings. All were withheld by AGO, including documents with no conceivable privilege — or about which, as this Court stated, "any claim of privilege is too remote" (See documents 143 (Bates Nos. 834-835), 147 (Bates No. 839), 182 (Bates No. 928), 185 (Bates Nos. 935-942), 187 (Bates Nos. 943-1013)).

Plaintiffs note one of these produced records as an exemplar of the AGO's improper secretiveness and refusal to produce public records to Plaintiffs. Document No. 143 (see also documents 147, 182 and 187) manifests the wastefulness of the AGO forcing this extensive litigation and expenditure of Plaintiffs', taxpayers', and this Court's resources. That document is a draft agenda for an event co-hosted by an environmentalist pressure group. It was sent to the AGO from Harvard Law School for an event attended by pressure-group activists, academics, select state attorneys general staff and others, drafted by an outside third-party and, on its face, likely shared with at least a dozen other parties. This agenda was for an event about which both Harvard Law School and certain other participants published blog posts and the agenda was not privileged in any conceivable way.[6]

The AGO also forced a meritless fight over whether the PRA covered public records found on nongovernmental accounts and refused to even ask Mr. Sorrell whether he had

[6] See, e.g., http://environment.law.harvard.edu/2016/05/environmental-law-policy-clinic-hosts-state-discussion-of-legal-theories-for-climate-change-responsibility/ and https://blog.ucsusa.org/peter-frumhoff/scientists-state-prosecutors-fossil-fuel-companies-climate-accountability.

responsive records on his private accounts. The AGO only made this inquiry and produced responsive records from his private email account after extensive pleadings and being ordered to by this Court. Entry Regarding Motion, 10/18/17, at 1.

Attached are the reasonable attorney's fees and litigation costs incurred in connection with this litigation. **Ex 3** (Attorney fees and costs).[7] The work performed, the hours billed, and the rates charged are reasonable.

Conclusion

For the reasons set forth in this brief, Plaintiff respectfully requests this Court award attorney fees in the amount of $35,232.25 and litigation costs in the amount of $2,363.83.

Dated in Charlotte, Vermont this 16th day of February 2018.

Energy & Environmental Legal Institute
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[7] Attorney Brady Toensing has more than twenty years of complex civil and criminal litigation experience. Attorney Chris Horner has nearly twenty years of public records related litigation experience. Attorney Matthew Hardin has more than three years of public records related litigation experience.

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Certificate of Service

I hereby certify that on this 16th day of February 2018, I served a copy of this pleading by hand to the following:

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Dated at Charlotte, Vermont this 16th day of February 2018.

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