IN THE SUPREME COURT OF THE STATE OF VERMONT

Docket No. 22-AP-081

Vermont Journalism Trust,
Appellant

v.

Agency of Commerce and Community Development and Lindsay Kurrle, Secretary,
Appellees.

Appeal from Vermont Superior Court, Civil Division, Washington Unit
Docket No. 338-10-20 Wncv

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STATEMENT OF ISSUES

1. Whether 1 V.S.A. § 318(b)(2) requires an agency withholding public records under a claim of exemption to produce a certification identifying the records withheld and including the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial?.....9, 19

2. Whether a spreadsheet that does not identify the records withheld under a claim of exemption and does not include the asserted statutory basis for denial or a brief statement of the reasons and supporting facts for denial, satisfies an agency's obligation under 1 V.S.A. § 318(b)(2)?.....14

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STATEMENT OF THE CASE

VTDigger, an investigative news outlet operated by the Vermont Journalism Trust ("VJT"), has received nationwide recognition for first reporting the largest financial fraud in Vermont history. AV1-257–58, AV1-90. The fraud involved the misuse of more than $200 million that foreign nationals, in exchange for the promise of legal resident EB-5 visas, had invested, purportedly to expand the Jay Peak ski resort and a state-of-the-art laboratory in Newport. AV4-84–85, 88.

On August 20, 2020, VTDigger founder Anne Galloway emailed a public records request on behalf of VJT to the Agency of Commerce and Community Development ("ACCD") seeking emails of former Secretary Lawrence Miller pertaining to the fraud. AV3-320–21. In that request, VJT asked for an itemized "list of . . . records" withheld along with a citation to "the specific exemption that applies to each record" and "a description of the material that has been withheld." AV3-321.

The ACCD denied VJT's records request, asserting that the records were "relevant to pending litigation concerning ACCD and its administration of the State's EB-5 program which are the subject of the plaintiffs' claims in *Sutton v. Vermont Regional Center, et al.*, Supreme Court Docket No. 2018-158." AV3-237.[1] The ACCD did not produce any index or certification.

VJT appealed the denial and again requested that any denial "include the asserted statutory basis for denial and a brief statement of reasons and supporting facts for denial." AV3-342–44. ACCD denied the appeal, AV3-232, and once again, no index or certification accompanied that determination.

VJT filed this Public Records Act ("PRA") lawsuit in Vermont Superior Court in October 2020, seeking access to the withheld records. AV4-84–104. In March 2021, the State filed its Motion for Summary Judgment opposing disclosure. AV1-302–17. As support for its withholdings, the State attached a

[1] Plaintiff investors in *Sutton* filed suit in 2017 alleging that the ACCD and certain employees were liable for, *inter alia*, negligence, negligent misrepresentation, breach of contract, and of the covenants of good faith and fair dealing. AV4-96.

263-page spreadsheet listing 1,089 emails and attachments identified as potentially responsive to VJT's request. *See* AV2-2–265. In support of withholding all 1,089 records as exempt under 1 V.S.A. § 317(c)(14), Special Assistant Attorney General William E. Griffin averred that he conducted a "sample review of 200" of those documents and determined that they were "relevant" to the *Sutton* litigation because their contents "have some bearing on the *Sutton* plaintiffs' allegations about ACCD's oversight of the Jay Peak EB-5 Projects and/or ACCD's notice or knowledge concerning the solicitation and use of Jay Peak EB-5 investor funds." AV1-266. The State also identified an additional "approximately 300" emails within the scope of VJT's request that did "not relate or pertain to Jay Peak or the EB-5 program" and were not included on the spreadsheet. AV1-265.

VJT noted that some of the subject lines provided in the list of 1,089 purportedly exempt emails appeared to be unrelated to the *Sutton* litigation. AV1-189. The State conceded in its reply brief that only 1,066 of the 1,089 records were relevant to *Sutton* and stated that it would produce the 23 remaining records. AV1-172. In fact, the State produced 24 such records (along with the "approximately 300" not included on the State's spreadsheet), leaving 1,065 relevant records still withheld. The supplemental Griffin declaration also stated that, of those records, 10-12 were privileged attorney-client communications. AV1-172. The State ultimately produced a total of 323 erroneously withheld emails to VJT without a court order.

On July 13, 2021, the trial court ruled on the summary judgment motions. Explaining that "underlying events have partially overtaken the pace of this case," AV1-100, the court noted that when the State filed its summary judgment motion, "it was aware of the *Sutton* discovery request but apparently had not yet determined how to respond." AV1-103. However, the court observed, the State had "subsequently determined to voluntarily comply with the discovery request (minus any privileged documents)." *Id.*

The court concluded that since "the State ha[d] determined to voluntarily produce documents in the underlying litigation, it then must produce them in th[is] public records case," explaining that the State "no longer has any litigation interest in withholding them." *Id.* Although the

Court noted that VJT had argued that "all or some of the withheld documents are not relevant to the *Sutton* litigation," it found that it was "unnecessary to determine if that might be so because the State is now willing to produce all non-privileged documents." *Id.* The court thus ordered the State to produce to VJT any responsive documents that it had previously produced in *Sutton*. AV1-104. Prior to production, VJT again requested an index identifying and explaining any remaining withholdings. AV1-50.

The State produced 965 *Sutton* records in August 2021 and stated that 75 had been withheld in *Sutton* under a claim of attorney-client privilege and would likewise be withheld from VJT. AV1-56. Although the State had earlier averred that only 10-12 were privileged attorney-client communications, AV1-172, the State provided no explanation for the seven-fold increase in the number of documents identified as privileged. Nor did it explain the 25-record gap between the total number of relevant records (1,065) and the number of them accounted for (965 produced to VJT plus 75 withheld in *Sutton* and from VJT = 1,040). The State did not provide VJT the requested index or any reasons or supporting facts for the documents withheld. AV1-56.

VJT explained that, since the State was withholding documents from its production, it was required to produce a log "under 1 V.S.A. § 318(b)(2), including identification of the records withheld, the asserted statutory basis for withholding, and a brief statement of the reasons and supporting facts for the withholding." AV1-62. The State refused to produce any identification or justification for the withheld documents. AV1-61–87. The State instead claimed that it had already produced a sufficient index, pointing to the previously submitted list of 1,089 emails. *See, e.g.*, AV1-61–62. Although VJT explained that the prior index was insufficient under § 318(b)(2) for several reasons, including that it "does not identify *which* of the 1089 documents listed are the 75 withheld under a claim of privilege or some other exemption," AV1-79 (emphasis added), the State refused to provide a certification.

Having exhausted its good-faith efforts to ensure that the State complied with its statutory obligations, VJT filed a motion to compel

production of an index[2] under 1 V.S.A. § 318(b)(2). AV1-90–94. VJT argued that (i) the plain language of § 318(b)(2) of the PRA entitled it to a *Vaughn*-like certification; and (ii) the State's previously submitted list of 1,089 emails was inadequate, given that it failed to identify the 75 records purportedly withheld in *Sutton* or provide any support for the asserted exemptions. *See* AV1-31–36, 92–93. The State in its opposition argued that (i) § 318(b)(2) does not require a *Vaughn* index; and (ii) an index was unnecessary since the relevant documents all remained exempt under the litigation exemption. AV1-41–45.

After oral argument, now before a different judge, the trial court denied VJT's motion to compel. The court concluded that "[a]nother index would be a completely empty gesture" because all non-privileged *Sutton* "records were in fact produced" and "there [wa]s no colorable claim at this point that the withheld documents are *not* subject to the litigation exception." AV1-19. The court cited no support for its conclusion, even though the prior trial court judge had ruled it was "unnecessary to determine" whether any withheld documents were, in fact, "relevant to the *Sutton* litigation," AV1-103, and neither judge had requested an index of the withheld documents or reviewed them *in camera* to determine their identity and the basis for their non-disclosure. The court further explained that, in its view, "[t]he only conceivable reason for further indexing would be to assist [VJT] in challenging the State's assertion of privilege in hopes of showing that the documents should have been produced in the *Sutton* case," which "would put the PRA court in the position of making discovery determinations in collateral cases." AV1-19-20. The court therefore concluded that "[t]here is no good faith purpose in ordering any further index in this case." AV1-20.

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[2] While the term *Vaughn* index is commonly used as a shorthand in both the administrative and litigation contexts, as explained in more detail below, such indexes can serve different purposes in each context. VJT had initially requested a *Vaughn* index under § 318(b)(2)—but for purposes of this brief, VJT will use "§ 318(b)(2) index" to refer to the certification statutorily required regardless of whether litigation ensues, and "*Vaughn* index" to refer to the judicially imposed obligation to justify withholdings at the summary judgment stage. *See infra* Part I.B.

The court further opined that VJT "appear[ed] to misunderstand 1 V.S.A. § 318(b)(2)," declaring that it applies only "in the course of the administrative denial of a public records request" and "has nothing to do with the production of any further indexing in subsequent litigation." AV1-20. Instead, the court wrote that, for purposes of litigation, "[t]he proper composition of a *Vaughn* index can vary with the needs of the case, which may not require one at all." *Id.* (citing *Rutland Herald v. Vermont State Police*, 2012 VT 24, ¶ 10 n.2, 191 Vt. 357, 49 A.3d 91). The court then noted, without further explanation, that while "it is unclear whether the State produced a fully compliant § 318(b)(2) certification as part of its original denial," "[i]t does appear to have produced at least that much information in the course of summary judgment proceedings." *Id.* The court concluded that, since "the remaining withheld documents all are subject to the litigation exception[,] [t]here is no point to any further indexing." *Id.*

VJT timely brought this appeal.

SUMMARY OF THE ARGUMENT

The trial court fundamentally misunderstood the meaning of § 318(b)(2) and the extent of the information the State still has not provided.

Chapter I, Article 6, of the Vermont Constitution provides that "all power being originally inherent in and co[n]sequently derived from the people," "all officers of government . . . are their trustees and servants; and at all times, in a legal way, accountable to them." The PRA breathes life into this provision by making real the "principle that a democracy cannot function unless the people are permitted to know *what their government is up to.*" *Caledonian Rec. Publ'g Co. v. Walton*, 154 Vt. 15, 21, 573 A.2d 296, 299 (1990) (quoting *U.S. DOJ v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 773–74 (1989)).

While there are State interests that may "override the interest in public disclosure," *Caledonian Rec.*, 154 Vt. at 21, 573 A.2d at 300, the PRA's "philosophical commitment to accountability," *Toensing v. Att'y Gen.*, 2017 VT 99, ¶ 20, 206 Vt. 1, 178 A.3d 1000, requires that when the State withholds relevant information, it must—at a minimum—identify what it has shielded from public scrutiny, and why.

1 V.S.A. § 318(b)(2) therefore mandates that a custodian withholding records "shall promptly so certify in writing" and "identify the records withheld" along with "the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." As the practice of Vermont courts makes clear, this certification typically takes the form of a *Vaughn*-like index, which identifies—with specificity—the precise documents withheld and details the individualized basis for their non-disclosure.

The State has refused to produce a § 318(b)(2) certification for the records it withheld from VJT's request. The trial court nevertheless ruled that it did not have to, as the records were allegedly subject to the PRA's litigation exemption. But the State has never identified the 75 documents it withheld as privileged (or the additional 25 unaccounted for), let alone

demonstrated that the exemption applies. That is precisely the information that a § 318(b)(2) certification is meant to establish.

Alternatively, the court ruled that § 318(b)(2) applied only in the administrative context, and the State had disclosed sufficient information during summary judgment briefing. Nothing in the plain language of § 318(b)(2) limits it to the administrative context, however, and the spreadsheet produced in summary judgment falls far short of providing the information § 318(b)(2) requires. Indeed, even after expending significant time and resources parsing the spreadsheet, VJT cannot reliably identify the documents that remain withheld.

Finally, the trial court ruled, based on a footnote in this Court's opinion in *Rutland Herald*, 2012 VT 24, that no index was required because the records fall under a "categorical" exemption. That conclusion misunderstands the scope of *Rutland Herald*, which did not address § 318(b)(2). In any event, the withheld emails here are ineligible for categorical treatment, which would still require the State to produce a certification identifying these specific documents and justifying their non-disclosure. This Court should therefore reverse.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *Agency of Transp. v. Timberlake Assocs.*, 2020 VT 73, ¶ 9, 213 Vt. 106, 239 A.3d 253. In the public records context more broadly, "the applicability of the litigation exception of the Public Records Act to . . . withheld documents" is an "issue of law," *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 6, 188 Vt. 470, 13 A.3d 1075, and the burden is on the State to substantiate a specific exception claim, *Kade v. Smith*, 2006 VT 44, ¶ 7, 180 Vt. 554, 904 A.2d 1080.

ARGUMENT

I. For Any Record Withheld Under a PRA Exemption, the PRA Requires at Least an Index Identifying Those Withheld Records and the Reasons Supporting that Denial.

A. The PRA's Plain Language Requires that the State Identify What Records are Withheld and Why

The PRA is seated within the Constitution's mandate of open government. *See* 1 V.S.A. § 315(a) ("It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution" and "it is in the public interest to enable any person to review and criticize [the government's] decisions even though such examination may cause inconvenience or embarrassment.").

Given the PRA's roots in open government, the command of the PRA's certification requirement, 1 V.S.A. § 318(b)(2), could not be clearer:

> 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.

The plain language is unequivocal: an agency custodian withholding a record as exempt from disclosure "shall promptly so certify in writing" an explanation that "identif[ies] the records withheld" and "include[s] the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." *Id.* This Court presumes the Legislature "intended the plain, ordinary meaning of the adopted statutory language." *Wesco, Inc. v. Sorrell*, 177 Vt. 287, 293, 865 A.2d 350, 356 (2004). Accordingly, the choice to use the word "shall" in a statute, as here, "generally means that

the action is mandatory, as opposed to directory." *Baron v. McGinty*, 2021 VT 6, ¶ 26, 214 Vt. 141, 252 A.3d 291 (citation and quotation marks omitted)). Moreover, the PRA is to be construed "liberally in favor of disclosure, mindful of its strong policy favoring access to public records." *U.S. Right to Know v. Univ. of Vt.*, 2021 VT 33, ¶ 11, __ Vt. __, 255 A.3d 719.

Importantly, this command contains no exceptions. Indeed, in enacting and amending the PRA, the Legislature carved out 43 exemptions to disclosure to balance the public's right to public records against the government's need to protect certain policy interests, such as privacy, commercial interests, and litigation. *See* § 317(c). Not one of those exemptions alleviates the State's duty to produce a certification. *Whenever* an agency withholds a document under the PRA, it must produce a certification "identify[ing] the records withheld" and "includ[ing] the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." § 318(b)(2).

B. A § 318(b)(2) Certification Typically Takes the Form of a *Vaughn*-like Index

It makes sense that § 318(b)(2)'s certification requirements apply whenever an agency withholds a document under a PRA exemption. The PRA requires an agency to "sustain its action," 1 V.S.A. § 315(a), and without an index, that task is impossible.

Years before the Legislature enacted the PRA, the D.C. Circuit in *Vaughn v. Rosen*, 484 F.2d 820, 824–26 (D.C. Cir. 1973), adopted its now-famous index requirement to address the "'asymmetrical distribution of knowledge' where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request." *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006). Absent this index, it is "obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information." *Vaughn*, 484 F.2d at 823. This is why the command of § 318(b)(2) fits so squarely within the law's overarching requirement that an agency withholding records "bear[s] the burden of showing that the exception applies through a specific factual record"—a burden that cannot be met

without producing the required certification. *Herald Ass'n v. Dean*, 174 Vt. 350, 359, 816 A.2d 469, 477 (2002).

Of course, a *Vaughn* index and a § 318(b)(2) index are, in important ways, distinct. The *Vaughn* index is a judicial creation, designed to aid a court in adjudication, since "the lack of access of the party seeking disclosure undercuts the traditional adversarial theory of judicial dispute resolution." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977). The specificity required by an index benefits both sides to a public records dispute because it provides the agency "a full opportunity to make its claim for withholding information" and the requester "a full opportunity to challenge those claims," with "the court—not the agency—mak[ing] the final decision as to the legality of the Government's claims." *Citizens for Resp. & Ethics in Wash. v. U.S. DOJ*, 840 F. Supp. 2d 226, 230 (D.D.C. 2012). Accordingly, the *Vaughn* inquiry is flexible; a court's "focus is on the functions served by the *Vaughn* index"—on presenting factual material "in a way that facilitates litigant challenges and court review of the agency's withholdings." *Jud. Watch*, 449 F.3d at 148. The PRA's mandate, in contrast, is more than a functional judge-made tool; it is a legislative command that the State—whenever it withholds documents, even outside of litigation—identify what it has withheld, and why. *See* 1 V.S.A. § 318(b)(2).

However, the purposes of a *Vaughn* index and § 318(b)(2) certification substantially overlap. The *Vaughn* index has been "used commonly in both federal and state courts," because it "complements the interests and process of analysis set out in Vermont" regarding agency withholdings. *Judicial Watch, Inc. v. State*, No. 656-12-03 Wncv, 2004 WL 5452936, at *1 (Vt. Super. Feb. 13, 2004). And just like FOIA litigants, PRA requestors without the information provided in a detailed index are "necessarily[] at a disadvantage because they have not seen the withheld documents." *Kimberlin v. DOJ*, 139 F.3d 944, 950 (D.C. Cir. 1998). Vermont courts have therefore often required certifications to take a *Vaughn*-like form.

For example, Vermont courts interpret § 318(b)(2) to impose "a statutory responsibility to respond to PRA requests by producing the requested documents or explaining why not *with specificity*." *Energy Pol'y*

Advocs. v. Att'y Gen.'s Off., No. 173-4-20 Wncv, 2021 WL 4189795, at *8 (Vt. Super. July 16, 2021) (emphasis in original). The textual command to "identify the records" and provide "a brief statement of the reasons and supporting facts for upholding the denial," coupled with the agency's obligation to "sustain its action," 1 V.S.A. §§ 315(a), 319(a), has been interpreted to "create[] an on-going obligation on the part of the agency to establish the factual basis for the denial," *News & Citizen v. Johnson*, No. 22-CV-01246, 2022 WL 3140453, at *4 (Vt. Super. Aug. 02, 2022).

This obligation continues over time, meaning that an agency cannot deny the requestor a certification justifying withholdings in advance of suit, as was done here, and then fail to provide supplemental information in court that adequately sustains its withholdings. The agency must instead "continue to review" the basis provided and either "provid[e] supplemental information if additional facts become apparent or shift[] away from denial if subsequent facts cause the basis to erode and become unsustainable." *Id*.

The level of specificity required by an adequate § 318(b)(2) certification must therefore typically mirror that required by a *Vaughn* index. For example, while an index has no prescribed format, Vermont courts recognize that an agency must provide specific "meaningful detail" regarding withheld documents to "allow[] the requesting party to respond meaningfully without having seen the document," including typically "the author, recipient, and content" and "an explanation of why the document or portion is exempt from disclosure and why disclosure would be harmful." *Jud. Watch*, 2004 WL 5452936, at *1. And when an agency fails to meet its burden to justify withholding documents, Vermont courts have ordered that the documents be produced or that the index provided be revised to include the appropriate level of specificity. *See, e.g.*, *Energy Pol'y Advocs.*, 2021 WL 4189795, at *8 (ordering the production of common interest agreements listed erroneously on indexes as exempt work product); *Chevrette v. Touchette*, No. 639-11-18 Wncv, 2019 WL 13061516, at *2 (Vt. Super. July 25, 2019) (ordering the State to "refine its privilege log" to demonstrate whether any potentially nonexempt agency documents were incorporated into previously identified exempt documents).

C. The Trial Court Fundamentally Misconstrued the PRA

Despite § 318(b)(2)'s clear command, the State has not produced a certification "identify[ing] the records withheld" and "includ[ing] the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." § 318(b)(2). The trial court nonetheless denied VJT's motion to compel an index, disregarding § 318(b)(2)'s plain language and the caselaw applying it.

In its ruling, the trial court opined that the task of certifying the exempted records was an unreasonable use of the State's resources. AV1-19. But that is simply not a judgment for the court to make; the Legislature has already concluded that certification is important for open government and directed the State to produce it. Nothing in § 318(b)(2)'s text permits courts to balance the burden of certification against the need for indexing; § 318(b)(2)'s plain language makes clear it applies in all circumstances without exception.

The trial court also suggested that VJT had "no good faith purpose" in seeking an index, since, in its view, the only reason VJT would seek an index would be to "challeng[e] 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." *Id.* As explained further below, that is incorrect—even putting aside questions of privilege in *Sutton*, VJT seeks an index to determine *which* records the State is withholding and why it believes they are exempt in *this PRA* case. Regardless, inquiry into VJT's purpose too was error, since the "motive of the requestor cannot be considered when weighing access to public documents." *Shlansky*, 2010 VT 90, ¶ 11.

Next, the trial court concluded that VJT "appear[ed] to misunderstand 1 V.S.A. § 318(b)(2)," declaring that it applies only "in the course of [an] administrative denial" and "has nothing to do with the production of any further indexing in subsequent litigation." AV1-20. But nothing in the plain language of § 318(b)(2) absolves a custodian of the need to identify, explain, and substantiate withholdings as soon as a PRA lawsuit begins. If it were otherwise, any agency could skirt § 318(b)(2)'s command simply by not producing an index and forcing a party to file suit—at which point, per the trial court's ruling, § 318(b)(2) is no longer operative.

Indeed, the trial court's ruling effectively renders *any* certification requirement unenforceable in certain cases. If an agency refuses to produce such an index, a court following the trial court's ruling could simply hold that the certification served no real purpose when the agency was claiming (but not proving, *see infra* Part II.B) a categorical exemption, or that the plaintiff's motive was unsound, or that a wholly inadequate response met the certification requirements. Section 318(b)(2), however, is a clear statutory command: regardless of the circumstances, an agency withholding records must identify the documents withheld and substantiate their non-disclosure. *Id.* Accordingly, the Court should require the State to perform its duty to provide VJT with a certification of each record it has withheld.

D. The State's Original Denial and List of 1,089 Emails Submitted in Summary Judgment Do Not Satisfy § 318(b)(2)

As explained above, the trial court simply rejected the premise that the State must comply with § 318(b)(2) in justifying withholding documents. However, in denying VJT's Motion to Compel, the trial court nonetheless stated—seemingly in the alternative—that, while "it is unclear whether the State produced a fully compliant § 318(b)(2) certification as part of its original denial," "[i]t does appear to have produced at least that much information in the course of summary judgment proceedings." AV1-20.

Each statement was in error. The State has never produced a § 318(b)(2) certification for *any* of its withholdings, and the spreadsheet produced in summary judgment falls far short of providing the information § 318(b)(2) requires. Indeed, even after expending significant time and resources, VJT cannot reliably identify the documents that remain withheld. The Court should thus remand the case to the trial court with directions to order the State to produce an index of withheld documents in compliance with § 318(b)(2).

1. The State's Original Denial Was Insufficient

The record is clear that the State did not produce any sort of certification—fully compliant or otherwise—in denying VJT's PRA request.

The State's original response to VJT's request denied access to all requested records under 1 V.S.A. § 317(c)(14), claiming they were "relevant to

pending litigation" in *Sutton*. AV3-237. This blanket denial, unaccompanied by any index or certification, plainly failed to meet the PRA's certification requirements because it did not "identify the records withheld" or "include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." § 318(b)(2).

The State's second blanket denial, on appeal, also failed to satisfy the PRA's requirements under a related provision, § 318(c)(2), because it neither identified the "asserted statutory basis for upholding the denial" with specificity as to each record or provided an adequate "brief statement of the reasons and supporting facts for upholding the denial." Indeed, the State's conclusory explanation concerning the individuals described in the request proved to be plainly overbroad once the State actually reviewed the requested documents. The State in its summary judgment briefing identified "approximately 300" emails within the scope of the request that it conceded "do not relate or pertain to Jay Peak or the EB-5 program." AV1-265. The State later conceded that an additional 23 emails, all of which it had flagged as purportedly exempt, were also not properly withheld. AV1-172. The State ultimately produced 323 erroneously withheld emails to VJT without a court order. AV1-162.

In short, the State issued a blanket denial of VJT's records request and, in doing so, made no effort to "identify the records withheld," § 318(b)(2)(A), or otherwise describe—in aggregate or in particular—the universe of withheld documents, much less to provide the factual basis justifying the denial. The trial court was simply incorrect that it was "unclear" whether the State had produced a compliant certification in the administrative process; the State had produced no certification at all.

2. The State's Subsequent List of 1,089 Emails Was Likewise Deficient

The State made no argument below as to how the list of 1,089 emails that it submitted in summary judgment also sufficed as a § 318(b)(2) certification concerning the subset of documents it withheld several months later. AV1-42. Nor could it. The State's spreadsheet did not meet its initial burden to justify withholding the 1,089 records as related to the *Sutton*

litigation—and, again, the trial court never made (or was in a position to make) a factual finding that the State met that burden. For three reasons, it cannot now rely on that spreadsheet to justify the continued withholding of a small subset of unidentified records among those 1,089.

First, the spreadsheet fails to identify in any fashion the subset of records the State ultimately withheld. *See* AV2-2–265. That is unsurprising since, at the time of the spreadsheet's creation, the State still sought to withhold all 1,089 documents and had only reviewed a sample of 200 of them. The State later argued that providing a separate index for the documents withheld in *Sutton*, and thus from VJT, "would be redundant and pointless," AV1-61–62, given that its spreadsheet, produced several months earlier, contained the 75 assertedly privileged emails. But it did not explain where, amidst the 1,089 emails it initially intended to withhold, VJT could find them, and the State has not subsequently identified the still-withheld documents through any supplemental submission.

Second, that spreadsheet also failed to identify most, if not all, of the documents with sufficient specificity to determine whether an exemption properly applied. The State's own description of the list indicates that it merely catalogues the 1,089 emails "by bates number, date, author, recipients, and subject line," AV1-266, with no corresponding description of the actual content of the emails or reasons and supporting facts for withholding them, *see generally* AV2-2–265. In addition, many of the subject lines are either blank or consist only of some iteration of "Re:" or "FW:" and thus provide no description to identify the documents or the propriety of the claimed exemption. *See, e.g.*, AV2-3–6 (document numbers 1–7, 9–10, 12–19). Regardless of whether those records were properly withheld as privileged in *Sutton*, the State has a statutory obligation to provide sufficient information to allow VJT—and the PRA court—to assess whether the still-withheld records in fact "have some bearing on the *Sutton* plaintiffs' allegations," as described by the declaration, AV1-266. The spreadsheet does not satisfy that obligation.

Finally, the State's list of 1,089 emails failed to assert a statutory basis for denial or any reasons and supporting facts for denial. The State's

categorical claim over the 75 withheld emails as privileged fails because "the applicability of exemptions depends on the specific documents and their content." *Energy & Env't Legal Inst. v. Att'y Gen.*, No. 558-9-16 Wncv, 2017 WL 11676871, at *3 (Vt. Super. July __, 2017) (rejecting blanket claim of privilege and ordering production of "log of withheld and/or redacted documents with identification of the redaction or document and the specific basis for any claimed exemption as to each item"). The State's bare assertion that these documents relate to litigation "does not automatically endow these documents with privileged status." *Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 69 (1st Cir. 2002). The State must still meet its burden of demonstrating the attorney-client privilege applies—or has at least been asserted—for each withheld document. *Id.*

That bare justification is critical. Even if VJT may not test the *adequacy* of an underlying claim of privilege in the *Sutton* litigation, it is still entitled to the information by which the agency seeks to justify that claim here. VJT likewise must be permitted to test the adequacy of the State's claim that these withheld documents are, in fact, relevant to *Sutton*. Without an adequate description of the documents and their content, neither VJT nor the Court can assess the propriety of withholdings here.

The spreadsheet is thus plainly insufficient to meet the PRA's requirements that the State "identify" the withheld records and include both "the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." § 318(b)(2). It is, therefore, difficult to see how the trial court was able to conclude that the State "produced at least [as] much information" as § 318(b)(2) requires "in the course of summary judgment proceedings." AV1-20.

Nor can VJT reliably identify the withheld documents by comparing the spreadsheet to the State's productions. That is partly because the State, assertedly unconstrained by § 318(b)(2)'s certification requirements, has provided conflicting descriptions of its productions and withholdings. As noted above, after initially stating that all 1,089 records were relevant to *Sutton*, the State subsequently determined that only 1,066 of them were (ultimately 1,065 after the State produced 24 records not relevant to *Sutton*).

AV1-172. And, after reviewing all the records and determining that 10-12 were privileged attorney-client communications, AV1-172, the State subsequently stated that 75 records had been withheld in *Sutton* under a claim of attorney-client privilege and would likewise be withheld from VJT. AV1-56. The State did not explain the dramatic increase in the number of documents claimed to be privileged. Nor did it disclose or account for an additional 25 records that were not produced.

In fact, even after undertaking the time-consuming task of comparing the State's spreadsheet with the records released, line-by-line, VJT still cannot confidently identify the documents that remain withheld. For the purposes of this appeal, VJT attempted to determine which of the 1,089 entries on the spreadsheet corresponded to which of the 989 records produced (the 24 deemed not relevant to *Sutton* and therefore produced to VJT plus the 965 produced to VJT after they were produced in *Sutton*). Because the Bates numbers provided on the spreadsheet do not correspond to the Bates numbers applied to the records produced here, each of these 989 records had to be opened and reviewed individually to compare their metadata to that provided on the spreadsheet.

Nevertheless, VJT was able to determine with reasonable confidence which entries on the spreadsheet corresponded to each document produced—but that still leaves 100 entries. From there, VJT could only surmise which records were claimed to be privileged and which were simply unaccounted for. VJT assumes, but does not know, that the State does not claim privilege for the 25 emails and attachments that include senders or recipients outside of state government, *see* AV2-2–265, but it is not otherwise clear why these were not produced. Even without seeing the content of these emails, several self-evidently fall within the scope of at least the second part of VJT's records request. *See* AV3-320 (seeking any and all communications to, from, or copying Miller and William Stenger, Alexandra MacLean, or Douglas Hulme). For example, document numbers 337, 338, 341, 343, 344, 345, 358, and 383 each include both Miller and Stenger, and document number 638 includes both Miller and Hulme. *See* AV2-72–82. Yet the State has provided no justification, by § 318(b)(2) index or otherwise, for withholding these records.

As for the records as to which the State claims attorney-client privilege, the State has not confirmed whether it produced a privilege log to the *Sutton* plaintiffs, AV1-68–70, although it is not clear why it would not have done so, *see* V.R.C.P. 26(b)(6)(a). In any event, it has provided no such log or similar justification to VJT.

As this all makes clear, the State has nowhere adequately "identif[ied] the records" withheld, nor provided "a brief statement of the reasons and supporting facts for denial." § 318(b)(2). Although VJT, with significant effort, was able to determine which records it *believes* the State withheld, and, of those, which it *predicts* the State claims are privileged, VJT cannot establish that information for certain. And the State has provided no information by which VJT can even guess as to why the State withheld the remaining 25. But § 318(b)(2) puts the burden of providing this information on the agency—the entity in possession of the information—and not the requestor.

In enacting § 318(b)(2), the Legislature intended that requestors denied records would know—at a minimum—what records they were denied access to and why. The State continues to deny VJT that information. Because the State still has not identified the documents withheld, let alone justified their withholding, the trial court erred in concluding that the State, "in the course of summary judgment proceedings," has "produced at least [as] much information" as § 318(b)(2) requires. AV1-20.

II. Even Assuming an Index Might Be Unnecessary in Some Cases, § 318(B)(2) Requires Further Certification Here.

As explained above, the State cannot seriously argue that its spreadsheet of 1,089 emails satisfies § 318(b)(2) with respect to the withheld documents at issue. Instead, the State chiefly contends that it need not produce an index at *all*. The State grounds that view in *Rutland Herald*, 2012 VT 24, where this Court observed—in a footnote—that "[w]e do not believe that a *Vaughn* index is necessary, or would even be helpful, where the records fall under a categorical exemption from public access," *id.* ¶ 10 n.2. The trial court agreed, noting that "[t]he proper composition of a *Vaughn* index can vary with the needs of the case, which may not require one at all,"

before concluding that there was "no point to any further indexing" here since all the documents were "subject to the litigation exception." AV1-20.

That reasoning fundamentally misunderstands *Rutland Herald* and the federal FOIA caselaw it relies on. *Rutland Herald* concerned a request for a *Vaughn* index, not a § 318(b)(2) certification, and its logic says nothing about what § 318(b)(2) requires here. But more importantly, even if *Rutland Herald* and its federal FOIA analogs applied in full to § 318(b)(2), they would still require the State to produce significantly more information about the documents it has withheld.

A. *Rutland Herald* Did Not Address § 318(b)(2)

Although key to the State's argument below, *Rutland Herald* is irrelevant to the questions presented in this case. This dispute centers on the meaning of § 318(b)(2), the statutory provision requiring a custodian to "certify" to the requestor the basis for withholding public records, regardless of whether the records request is ever litigated. *Rutland Herald* dealt with an entirely separate question: in what instances a court may forgo requiring a *Vaughn* index—a judge-imposed obligation on agencies withholding records, meant to aid the court in its review of the propriety of those withholdings. *Vaughn*, 484 F.2d at 826–28; *see supra*, Part I.B. *Rutland Herald* and the cases on which it relies, then, are examples of courts adjusting the parameters of a court-created tool to best meet the needs of the adjudicative process. What the State asks here is something very different: that the Court adjust the parameters of a legislatively mandated obligation where the statutory language permits no such inquiry and admits no exceptions. *See supra* Parts I.A, B.

Accordingly, *Rutland Herald* neither confronted nor interpreted any of this legislative language, which is the sole subject of this appeal. Instead, the Court applied uncontroversial federal FOIA principles to determine whether a *Vaughn* index met the needs of the case before it. But, as addressed earlier, the bona fide *Vaughn* inquiry is necessarily distinct from—and narrower than—the plain language of § 318(b)(2), which does more than simply codify the need for a *Vaughn* index. *Rutland Herald* did not decide what § 318(b)(2)'s terms require—indeed, at no point in the opinion does the Court

mention § 318 or the word "certify" or "certification." The necessity of a *Vaughn* index is a distinct issue from what § 318(b)(2)'s statutory text requires—and the trial court was mistaken to collapse them into a single inquiry.

B. Even Applying *Rutland Herald* to § 318(b)(2), the State Must Produce Additional Certification

That error alone requires remand. However, the court's reliance on *Rutland Herald* to excuse the State from substantiating its withholdings fails for a second reason: even by its own logic, *Rutland Herald* and the federal caselaw it relies on would *still* require the State to produce a certification identifying these specific documents and justifying their non-disclosure.

In *Rutland Herald*, a newspaper sought records related to a criminal investigation of child pornography possession by employees of the Vermont Criminal Justice Training Council. 2012 VT 24, ¶ 1. The State rejected the records request under 1 V.S.A. § 317(c)(5), the PRA provision that at the time exempted "records dealing with the detection and investigation of crime," [3] and this Court agreed. *Id.*¶¶ 4, 12, 30. But critically, the court's *in camera* review showed, and no party disputed, that the records withheld were, in fact, all "records dealing with the detection and investigation of crime." *Id.* ¶ 10. Instead, the Herald argued that—even though the records were of the type that necessarily fell within the exemption—disclosure was nonetheless "appropriate because the investigation [wa]s complete, and the public interest favor[ed] disclosure." *Id.* ¶ 11. This Court rejected that argument, concluding that even though the investigation had concluded and the records might well be important to the public, § 317(c)(5) "provides a categorical exemption for such records irrespective of their specific content" and contained no "temporal limitation" based on the status of the investigation. *Id.* ¶¶ 20, 24.

Then, in a footnote, the Court addressed the Herald's argument that the State should have still produced a *Vaughn* index. The Court wrote that a

[3] This exemption has since been amended to provide that such records are presumptively *not* exempt unless the agency can show that any of the enumerated triggering scenarios in § 317(c)(5)(A) applies.

Vaughn index would not be "necessary, or . . . helpful, where the records fall under a categorical exemption from public access," and quoted the D.C. Circuit's decision in *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986), which observed that "[w]hen . . . a claimed [FOIA] exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile," *id.* ¶ 10 n.2 (quoting 792 F.2d at 152).

The trial court took this caselaw to mean that there was "no point to any further indexing" since the "documents [at issue] all are subject to the litigation exception." AV1-20. But that conclusion fundamentally misapprehends the rule applied in *Rutland Herald* and the cases underlying it.

Those cases do not—as the trial court appeared to believe—obviate the need for an index simply because the State asserts that documents, as a group, ultimately fall into a single exemption. Instead, *Rutland Herald* simply illustrates the commonsense rule that *within* specific exemptions, certain *types of documents* may, by their very nature, presumptively qualify for a statutory exclusion, and therefore withholdings can be justified on a category-of-document-by-category-of-document basis. But—critically—even in the narrow circumstances where certain kinds of records "categorically" qualify for an exemption by their nature, the custodian must still demonstrate that the documents are, in fact, the specific kind of records eligible for a generic showing. As explained further below, the trial court's reliance on *Rutland Herald* falters at both requirements: the withheld emails here are ineligible for categorical treatment, and, even if they were eligible, the State would still have to demonstrate that the documents are, in fact, properly withheld.

First, the emails at issue here are not the kind of records amenable to categorical or generic treatment. As the U.S. Supreme Court has explained, the "generic determination" authorized in the FOIA context simply acknowledges that, for specific *kinds of records*, "categorical decisions may be appropriate and individual circumstances disregarded" because those types of documents will qualify for exemptions by their nature, "without regard to

individual circumstances." *Reps. Comm. for Freedom of the Press*, 489 U.S. at 776, 780 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)).

The premise for this rule is that while many records disputes require "case-by-case, or ad hoc, balanc[ing]" between certain interests, there is a subset of records categories—"a genus"—in which it is clear that "the balance characteristically tips in one direction." *Id.* at 776. So, for example, courts may assume that "witnesses to a gang-related murder" who speak to the FBI are likely confidential sources within the meaning of FOIA Exemption 7(D), *U.S. DOJ v. Landano*, 508 U.S. 165, 179 (1993), or that "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy," *Reps. Comm. for Freedom of the Press*, 489 U.S. at 780. Or, as in *Church of Scientology*, documents may, *by their nature*, necessarily fall within a statutory definition, like tax documents protected under 26 U.S.C. § 6103 and, therefore, Exemption 3 of FOIA. 792 F.2d at 152; *cf. Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978) ("Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.").

For such classes of records, "the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document"—as "long as its definitions of relevant categories are sufficiently distinct." *Gallant v. NLRB*, 26 F.3d 168, 173 (D.C. Cir. 1994) (quotation marks and citation omitted). But the crux of "categorical" or "generic" treatment is that a court can determine an exemption's applicability based on the *identity* or *type* of document, without resort to its content.

The emails at issue here are simply not that kind of record. Unlike the tax documents in *Church of Scientology*, the witness statements in *Landano*, or the uncontested investigative reports in *Rutland Herald*, there is nothing inherent about the withheld emails that enables a court to evaluate the applicability of the litigation exemption to all the documents in one fell swoop, irrespective of their contents. That makes sense: there is no stable

"category" of document type that can be presumed relevant to litigation across contexts. Instead, an agency invoking § 317(c)(14) must, *within each case*, "demonstrate that the withheld documents [are] related in any principled manner to [an] ongoing . . . litigation," *Shlansky*, 2010 VT 90, ¶ 9. Indeed, *Rutland Herald*'s description of categorical exemptions, which apply to records "irrespective of their specific content," 2012 VT 24, ¶ 24, cannot be squared with *Shlansky*'s requirement that an agency invoking the litigation exemption provide a basis for the reviewing court to "see a connection" between the subject of materials withheld and the underlying litigation, 2010 VT 90, ¶ 10. Because it is the content of these records, rather than their type, that purportedly qualifies them for § 317(c)(14), they are ineligible for the categorical approach outlined in *Rutland Herald* and the cases on which it relies.

Second, and more importantly, even where a categorical approach is appropriate, the State must still demonstrate that the records do, in fact, fall within the "category" alleged. To be sure, the categorical approach allows the Government to "justify its withholdings . . . category-of-document by category-of-document" rather than "document-by-document"—but the approach still exists to "allow a court to determine whether the specific claimed exemptions are properly applied." *Gallant*, 26 F.3d at 173 (quotation marks, citation, and alterations omitted). That has not happened here.

Again, *Rutland Herald* is illustrative. There, "the State produced the withheld material for in camera review," 2012 VT 24, ¶ 5, and "the trial court inspected the records," concluding that they were, indeed, "records dealing with the detection and investigation of crime," *id.* ¶ 10. "The Herald ha[d] not challenged th[at] threshold determination." *Id.* ¶ 10. That "uncontested" showing, *id.* ¶ 18, underpinned the conclusion that a categorical approach was appropriate at that point: there was no need for "a content-based analysis of these records *once they ha[d] been determined to be 'records dealing with the detection and investigation of crime.'" Id.* ¶ 30 (emphasis added).

That analysis accords with *Church of Scientology* and its progeny: even under a categorical approach, the government still must "establish that the

document or group of documents in question actually falls into the exempted category," 792 F.2d at 152, whether "in the form of an *in camera* review of the actual documents, something labelled a 'Vaughn Index,' a detailed affidavit, or oral testimony," *Gallant*, 26 F.3d at 172 (quotation marks, citation, and alterations omitted); *see also Shlanksy*, 2010 VT 90, ¶ 9 ("[W]hen an agency seeks to withhold a document under § 317(c)(14), it must demonstrate that it is, *in fact*, 'related or pertinent' to the ongoing litigation." (emphasis added)).

The trial court overlooked this step. At no point has the court reviewed these documents to establish that they, in fact, fall within any category or exemption. The earlier trial court judge had ruled it was "unnecessary to determine" whether any withheld documents were "relevant to the *Sutton* litigation," AV1-103, and neither judge reviewed *in camera* the withheld documents to determine either their identity or the basis for their non-disclosure. Instead, the trial court simply rejected VJT's motion, concluding that an index was unnecessary because all of the withheld documents are "subject to the litigation exception." AV1-20. That is not how the categorical approach works; as explained above, a categorical showing depends on the category of *record* and has nothing to do with whether the records all purportedly fall within the same PRA exemption. Worse, it gets the analysis backwards: it is tautological to say that the categorical approach is appropriate *because* the withheld documents purportedly fall into the same exemption, since the categorical approach *requires* the State to make precisely that showing.

It has not done so. In its briefing below, the State asserted that no further justification was required because the 75 purportedly privileged documents were allegedly all withheld as privileged in *Sutton*, and therefore remained "exempt from [VJT's] PRA request as documents relevant to litigation." AV1-43. But, again, while that may *ultimately* prove true, that "threshold determination" of whether the State has asserted privilege over these documents is precisely what the State must establish through § 318(b)(2). The State has refused to even offer a privilege log, however; even in *Shlanksy*, where this Court remanded because it could not "determine[e] whether the City met its burden to demonstrate that the withheld documents were related in any principled manner to the ongoing traffic-ticket litigation,"

the City had at least previously provided an "itemized list of documents withheld." 2010 VT 90, ¶¶ 4, 9, 15.

To the extent that the State intends to rely on its first Griffin declaration, that document cannot justify a categorical approach for the remaining emails at issue. All that declaration establishes is that the custodian "conduct[ed] a sample review of 200 of the 1,089 Miller Emails" and concluded that "they all have some bearing on the *Sutton* plaintiffs' allegations." AV1-266, ¶¶ 9-10. That is plainly insufficient with respect to the 75 documents withheld as privileged and the additional 25 unaccounted for: even where an agency "need not justify its withholding on a document-by-document basis in court," it still "must *itself* review each document to determine the category in which it properly belongs." *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (emphasis added). The declaration itself concedes that the State did not do so.

Griffin's supplemental declaration, AV1-170–73, does not remedy these deficiencies. Like the first declaration, it nowhere identifies the withheld emails. Griffin avers that, after reviewing all 1,089 records, he determined that *10-12* were protected by attorney-client privilege and would thus be withheld from the *Sutton* plaintiffs. AV1-172. At no point has the State provided any explanation for, or identification of, the *75* emails it now claims are privileged or the additional 25 unaccounted for withheld emails.

In sum, *Rutland Herald* does not allow the State to forgo further explanation entirely. The categorical approach authorized there applies only to limited circumstances unsuited to the case-specific, content-specific nature of § 317(c)(14) and, in any event, would *still* require substantially more justification than the State has provided here. The trial court therefore erred in relying on *Rutland Herald* to excuse the State from further indexing or explanation.

CONCLUSION

This Court should reverse.

Respectfully submitted this 12th Day of September 2022,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 8774 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. 32(a)(4)(C). I have relied upon the word processor used to produce this brief, Microsoft Word for Office 365, to calculate the word count.

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