IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2018-342

Reed Doyle,
Appellant

v.

City of Burlington Police Department,
Appellee

Appeal from Vermont Superior Court, Civil Division, Washington Unit
Docket No. 15-1-18 Wncv

Brief of Mr. Doyle

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STATEMENT OF THE ISSUE

Where the Public Records Act, 1 V.S.A. § 315 *et seq.*, provides record requestors the choice between inspecting a record or obtaining a copy of a record, and where 1 V.S.A. § 316(c) only authorizes public agencies to assess fees for staff time "associated with complying with a request for a copy of a public record," does § 316(c) also authorize fees for staff time associated with complying with a request to "inspect" a record?

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STATEMENT OF THE CASE

Appellant Reed Doyle is a concerned citizen of Burlington, Vermont who is attempting to exercise his rights under the Public Records Act as part of his efforts to hold Burlington Police Department (BPD) Officers accountable for actions that he contends were improper and excessive uses of force. PC 11. In 2017, Mr. Doyle witnessed an incident involving BPD officers in a public park. PC 12-13. During the incident, one BPD officer threatened a group of children with pepper spray. PC 12. Mr. Doyle alleges that, shortly thereafter, another BPD officer used physical force against one of the children, and the officers then arrested that same child. *Id*. After the arrests, Mr. Doyle approached the officers to complain about the use of force; his interaction was also recorded by BPD body cameras. PC 12-13. Mr. Doyle subsequently learned that BPD possesses approximately one hour of body camera video of this incident in addition to approximately 40 pages of written material. PC 15, 49.

After engaging in the BPD's citizen complaint process, Mr. Doyle, unsatisfied by the BPD's response, sought to inspect records related to the incident to confirm his recollection and gather additional facts to further his efforts in obtaining accountability. PC 13-14.

His request was repeatedly denied by the BPD. Pursuant to procedures in the PRA, Mr. Doyle appealed the denial of his request to BPD Chief Brandon del Pozo. PC 14. Chief del Pozo responded that the records could be produced for inspection, but only in heavily redacted form. PC 15. Chief del Pozo estimated that BPD's proposed redactions would cost Mr. Doyle between approximately $220.50 and $370.50 in staff time fees and stated that the review and redactions would not begin until the City of Burlington received a $220.50 deposit. PC 15-16.

Because BPD refused to make the requested public records available for inspection unless Mr. Doyle first paid hundreds of dollars in charges for staff time associated with making

redactions, Mr. Doyle filed his complaint against BPD in Washington Superior Court pursuant to 1 V.S.A. § 319(a). PC 11.

Mr. Doyle's third cause of action challenged BPD's failure to permit inspection of the requested records without cost, specifically alleging that "Vermont's Public Records Act, 1 V.S.A. § 316, does not authorize Defendant to charge Plaintiff money for exercising his right to inspect public records." PC 17-18. In the introductory section of the complaint, Mr. Doyle cited an earlier decision from the Washington Superior Court in *Vermont State Employees' Ass'n v. Vermont Agency of Natural Resources*, No. 517-7-10 Wncv, 2011 WL 121649 (Vt. Super. Ct. Jan. 6, 2011) (hereinafter referred to as *VSEA*). PC 11. That decision involved requests for records held, mostly in electronic form, by a state agency, and a labor union's challenge to the state agency's demand that the labor union pay administrative fees for agency staff time associated with complying with its request to inspect those records. *VSEA*, 2011 WL 121649 (reproduced in the Addendum). After analyzing the plain language of 1 V.S.A. § 316(c), the court held that "the statute provides no authority for an agency to impose a charge for inspection of documents. The Act always has permitted the free inspection of public records." *Id*. at 4.

In reliance on the *VSEA* decision and the straightforward plain language analysis it employed, as well as § 316(c)'s legislative history and an express statutory purpose of enabling "free and open examination" of government records, Mr. Doyle moved the trial court for a partial judgment on the pleadings. PC 26-35. His motion focused solely on his third cause of action related to fees for staff time. *Id*. In his motion, Mr. Doyle explained that the pleadings demonstrate BPD's admission that Mr. Doyle's request was to "inspect" the police officers' bodycam video and other written records related to the incident and arrests he witnessed. *Compare* PC 14-15, ¶ 24 (alleging that Burlington Police Chief acknowledged Mr. Doyle's

request as one "seeking to inspect" records), *with* PC 22, ¶ 24 (admitting the allegation); PC 17, ¶ 43 (alleging that, "[a]t all times, Plaintiff requested to inspect the public records involved"), *with* PC 24, ¶ 43 (admitting that "Plaintiff sought to inspect the public records Defendant offered to redact").

The trial court took note of the *VSEA* decision, but chose to disregard it as non-binding because it was not appealed. PC 4. After acknowledging that Mr. Doyle's interpretation was "reasonable," the court rejected it and concluded that:

> The staff time cost recovery provision at 1 V.S.A. § 316(c) applies to public records requests regardless whether the requestor purports to merely seek to look at responsive records rather than acquire reproductions of them.

PC 6-7. Upon entry of final judgment, Mr. Doyle filed this appeal to vindicate his right to free and open examination of the public records that he believes show inappropriate conduct of law enforcement officers.

SUMMARY OF THE ARGUMENT

This case involves a public records request going to the heart of the statute's purpose of providing "free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution . . . to enable any person to review and criticize" the actions of a public servant. 1 V.S.A. § 315(a). Here, the public servants are City of Burlington Police Officers alleged to have used excessive force in an encounter with minor children. This appeal raises a question on which two trial courts have split, but that this Court has not previously resolved: Whether the clear disjunction in the Act's plain language at § 316(a), which allows "[a]ny person" to "inspect *or* copy any public record," (emphasis added) has meaning in the context of § 316(c), which on its face only allows government agencies to charge members of the public

fees for government staff time "associated with complying with a request for a *copy* of a public record" (emphasis added).

In this case of statutory interpretation, the Court's task is familiar and straightforward: to discern the Legislature's intent as evidenced by the plain meaning of the words it used in the statute. Here, the Legislature has taken the unusual step of instructing the Court to "liberally construe[]" provisions of the Public Records Act to implement the policy of "*free and open examination* of records . . . even though such examination may cause inconvenience," § 315(a) (emphasis added), such as the diversion of government employee resources from other tasks. This clear instruction from the Legislature militates in favor of Mr. Doyle, who seeks only to examine—i.e., "inspect"—the records in question.

Moreover, application of this Court's rules of statutory interpretation confirms Mr. Doyle's reading of the statute. For example, prior cases recognize that the Legislature's use of the disjunctive "or" between operative statutory terms—here, "inspect or copy"—implies separate and independent categories. Similarly, the Court must avoid an interpretation of § 316(c) that renders as surplusage the Legislature's use of the term "for a copy" in the phrase "charge and collect the cost of staff time associated with complying with a request *for a copy* of a public record" (emphasis added). If the Legislature had intended § 316(c) to apply to both categories of requests, it would have simply ended the statutory sentence at the word "request."

Legislative history also points definitively toward the correctness of Mr. Doyle's interpretation. The legislative history of the 1996 amendments to the Act, which first added the staff time provisions, indicates a legislative intent to maintain the pre-1996 distinction, for purposes of assessing fees, between requests to inspect records and requests for a copy of a record. Even the trial court's decision acknowledges such a distinction existed prior to these

amendments. And, later amendments demonstrate the legislative intent to maintain the distinction. Furthermore, in 2011, the Legislature considered and ultimately rejected amendments that would have expanded the language of § 316(c) to explicitly allow for assessment of staff time fees even for inspection-only requests. The legislative history reflects that the amendment was proposed and rejected with knowledge of and in response to the 2011 *VSEA* trial court ruling. Additional legislative history shows that the Legislature has repeatedly refused to expand § 316(c) to provide for staff time fees in response to requests to inspect despite proposals and legislative study recommendations to the contrary over the course of two decades. Thus, the legislative record reflects a conscious decision to maximize transparency and accountability through a policy of "free and open examination" of records.

Finally, Mr. Doyle's interpretation enjoys the support of the Vermont Secretary of State as evidenced by the Secretary's *amicus curiae* brief in this matter. As the Secretary explains, the Legislature has delegated special authority to the Secretary under the Act, including in the area of establishing fees that may be charged by State agencies for staff time "when such a charge is authorized under this section." § 316(d). His reading of the statute's plain language has led him to conclude that the statute does not authorize BPD to burden Mr. Doyle's right to free and open examination of records by assessing fees for inspection of records.

The relevant provisions of the Public Records Act, when read:

- according to the Legislature's unequivocal instruction that the Court construe them liberally in favor of free access for examination purposes,
- consistently with this Court's rules of statutory interpretation,
- in light of the Act's legislative history, and

- giving account to the views of the Secretary of State to whom the Legislature delegated rulemaking authority on this topic,

compel the conclusion that BPD has acted unlawfully by conditioning Mr. Doyle's access to records on the payment of administrative fees. To prevent BPD from burdening Mr. Doyle's exercise of his right to free and open inspection of records necessary to hold public servants accountable for their actions, the Court must reverse the trial court's flawed conclusion and order BPD to allow for inspection of the records at no cost.

STANDARDS OF REVIEW

This appeal arises from the trial court's denial of a motion for partial judgment on the pleadings pursuant to V.R.C.P. 12(c). A motion for judgment on the pleadings "has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided." Charles Alan Wright et al., 5C *Federal Practice and Procedure* § 1367 (3d ed. 2004). This Court reviews "issues of law or statutory interpretation de novo" without affording any deference to the interpretation of the trial court. *In re N.E. Materials Group LLC*, 2015 VT 79, ¶ 18, 199 Vt. 577, 127 A.3d 926 (internal citation omitted); *Elkins v. Microsoft Corp.*, 174 Vt. 328, 330, 817 A.2d 9, 12 (2002) ("To the extent that our review of the trial court's decision involves questions of statutory construction, and thus questions of law, it is nondeferential and plenary.").

THE VERMONT PUBLIC RECORDS ACT

The Vermont Public Records Act ("PRA") provides that "[a]ny person aggrieved by the denial[1] of a request for public records under this subchapter may apply to . . . the Civil Division of the Superior Court of Washington County, to enjoin the public agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 1 V.S.A. § 319(a). The Court determines such actions applying a nondeferential *de novo* standard of review. *Id*. The PRA instructs courts to "liberally construe[]" its provisions to implement the statute's policy of providing for "free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution," § 315(a), and places the burden of proof on the public agency to sustain its action, §§ 315(a), 319(a).

ARGUMENT

I. THE BPD VIOLATED THE PUBLIC RECORDS ACT WHEN IT CONDITIONED MR DOYLE'S RIGHT TO INSPECT PUBLIC RECORDS ON THE PAYMENT OF ADMINISTRATIVE FEES

This case presents a pure question of law, requiring interpretation of various Public Records Act provisions. There are no facts in dispute. As Mr. Doyle pleaded below, his request was expressly and specifically one to "inspect" records created and held by BPD. PC 14-15, 17. At no point did he request to obtain a "copy" of the records. BPD has admitted these facts in its Answer to Mr. Doyle's Complaint. PC 22, 24. The trial court rendered its decision based on these admitted facts and its erroneous interpretation of Public Records Act provisions and legislative history at issue. PC 3-8.

[1] In its December 7, 2017 letter determining Mr. Doyle's administrative appeal of the initial denial of his public records request to inspect records, Defendant's Chief del Pozo purports to "grant" Mr. Doyle's request. PC 48-50. This characterization is inaccurate. BPD functionally denied Mr. Doyle's request to inspect records by unlawfully conditioning his right of inspection on his first paying BPD $220.50 in administrative fees with the possibility that Mr. Doyle will also be charged hundreds more dollars upon inspection.

A. The Plain Language of the Public Records Act Distinguishes Between Requests to "Inspect" and "Copy" Public Records for Purposes of Authorizing Assessment of Staff Time Fees

i. *The Public Records Act Starts with an Express Statewide Policy of Free and Open Examination of Records*

In determining statutory meaning, this Court is "guided by the Legislature's intent as evidenced principally by the language of the statutes themselves." *Judicial Watch, Inc. v. State*, 2005 VT 108, ¶ 17, 179 Vt. 214, 892 A.2d 191 (citing *In re Huntley*, 2004 VT 115, ¶ 6, 177 Vt. 596, 865 A.2d 1123 (mem.)). "If the statute is unambiguous, and the words have plain meaning, we accept that plain meaning as the intent of the Legislature and our inquiry proceeds no further." *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 346, 816 A.2d 448, 453 (2002). As this Court has made clear in a prior case under the Public Records Act, the inquiry "start[s] with the statement of legislative intent in the Act." *Caledonian Record Publ'g Co. v. Walton*, 154 Vt. 15, 20, 573 A.2d 296, 299 (1990).

The plain language of the Public Records Act establishes a sweeping policy statement—"to provide for *free* and open *examination* of records"—and instructs the Court that "the provisions of [the Act] shall be liberally construed to implement this policy." 1 V.S.A. § 315(a) (emphasis added). The primary dictionary definition of the adjective "free" supplied by Merriam-Webster is "not costing or charging anything." *Free*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/free. Similarly, the English Oxford Living Dictionary offers "[g]iven or available without charge" among its definitions of the term.[2] *Free*, English Oxford Living Online Dictionary, https://en.oxforddictionaries.com/definition/free. Those dictionaries respectively define the verb "examine" as meaning "to inspect closely" *Examine*, Merriam-Webster Online Dictionary, https://www.merriam-

[2] Black's Law Dictionary includes "[c]osting nothing; gratuitous" among its definitions of "free." *Free*, Black's Law Dictionary, (10th ed. 2014).

webster.com/dictionary/examine, and "inspect (someone or something) thoroughly in order to determine their nature or condition." E*xamine*, English Oxford Living Online Dictionary, https://en.oxforddictionaries.com/definition/examine. Consistent with the statute's policy statement, the Public Records Act's implementing provisions originally provided—and still provide—members of the public the right to inspect records at no cost.

ii. *Relevant Provisions of the Public Records Act Employ a Disjunctive Structure Intended to Differentiate Requests for Free Inspection from Requests for Copies*

Implementation of this policy begins in § 316(a), which provides that "[a]ny person may inspect *or* copy any public record of a public agency." (emphasis added). Here, the Legislature's use of the disjunctive word "or" to separate the terms "inspect" and "copy" "implies separate and independent categories," establishing a meaningful "relationship of contrast" between these terms that, as explained below, is significant to the question at issue. *See Judicial Watch*, 2005 VT 108, ¶ 14 (explaining "rules of construction" applicable to statutes phrased in the disjunctive "or") (citation omitted); *Viskup v. Viskup*, 150 Vt. 208, 211 n.3, 552 A.2d 400, 402 n.3 (1988) (explaining that term "or" in statute should generally be interpreted in disjunctive, not conjunctive, manner). In keeping with this relationship of contrast, and consistent with the policy of free examination of records, the subsections following § 316(a) specifically provide public agencies with authority to charge a records requestor certain fees associated solely with complying with a request for a "copy" of a record. The Legislature has never brought requests to "inspect" a record within any of the PRA's administrative fee provisions.

The first PRA provision authorizing the charging of administrative fees to a records requestor is found in § 316(b), which provides:

> If copying equipment maintained for use by a public agency is used by the agency *to copy* the public record or document requested, the agency may charge and collect from the person *requesting the copy* the actual cost of *providing the copy*.

> The agency may also charge and collect from the person making the request, the costs associated with mailing or transmitting the record by facsimile or other electronic means. Nothing in this section shall exempt any person from paying fees otherwise established by law for *obtaining copies* of public records or documents, but if such fee is established for *the copy*, no additional costs or fees shall be charged.

§ 316(b) (emphasis added). It plainly and exclusively deals with the second of the two separate and independent categories of records requests authorized under § 316(a)—a request for a copy.

The second PRA provision authorizing the charging of administrative fees to a records requestor is found in § 316(c), which provides:

> Unless otherwise provided by law, in the following instances an agency may also charge and collect the cost of staff time associated with *complying with a request for a copy of a public record*: (1) the time directly involved in complying with the request exceeds 30 minutes; (2) the agency agrees to create a public record; or (3) the agency agrees to provide the public record in a nonstandard format and the time directly involved in complying with the request exceeds 30 minutes. The agency may require that requests subject to staff time charges under this subsection be made in writing and that all charges be paid, in whole or in part, *prior to delivery of the copies*.

§ 316(c) (emphasis added). The plain language of § 316(c), like § 316(b), is limited to "copies"—expressly carrying forward the distinction between requests for inspection and requests for copies found in § 316(a). Section 316(c)'s reference to the "delivery of the copies" makes clear that the Legislature is referring to duplicates that the requestor will take possession of rather than files that a requestor will simply inspect on a public agency's premises. The PRA's plain language thus does not support the trial court's conclusion that "[t]he staff time cost recovery provision at 1 V.S.A. § 316(c) applies to public records requests regardless whether the requestor purports to merely seek to look at responsive records rather than acquire reproductions of them." PC 7.

iii. *Legislative History Further Demonstrates the Intentional Legislative Distinction Between Requests to Inspect and Copy*

Additional affirmation of the Legislature's intent to maintain the public's right to free inspection is found in its repeated amendments to the Act that distinguish between the public's right to "inspect" and "copy." *See Negotiations Comm. of Caledonia Cent. Supervisory Union v. Caledonia Cent. Educ. Ass'n*, 2018 VT 18, ¶ 14, ___Vt.___, 184 A.3d 236 (Court can consider the entire statutory scheme read together to ascertain the legislative intention from the whole of the enactments). Beginning with Act 231 (1976), the Public Records Act has distinguished between inspection and copying. *See* 1975 Acts & Resolves, No. 231 (Adj. Sess.), § 1, § 316(a) ("Any person may *inspect or copy* any public record or document of a public agency . . . ." (emphasis added)). In Act 159 of 1996, the Legislature updated the law, but did not discard the distinction between "inspect" and "copy" in § 316(a), while explicitly rejecting language that would have eliminated the distinction in § 316(c). *Compare* 1995 Acts & Resolves, No. 159 (Adj. Sess.), § 1 (limiting staff time charges to "complying with a request *for a copy*" (emphasis added)), *with* H. 780 (1995 Adj. Sess.) (as introduced) (reproduced in the Appendix at App. 003) (allowing staff time charges "associated with *complying with a request*" (emphasis added)); *see also infra*, Part I.A.iv.[3] And, while Act 159 added new exemptions to § 317, it explicitly recognized that "[t]he following public records are exempt from public inspection *and* copying,"

[3] The lower court viewed certain § 316 subsections as implying "that the production of an electronic record necessarily entails providing a 'copy' to the requestor, whether printed out or supplied in electronic form," so that no "original record" can exist in electronic form. PC 6. This is incorrect. Requestors, like Mr. Doyle, can go to a computer and view requested electronic records without a new copy being created. Such a record can even be redacted electronically, viewed by a requestor, then returned to its original form without creating a new record. Through the advent of ubiquitously available inexpensive technology, public agencies can manipulate electronic records without creating "copies" or new records. Furthermore, there is no basis to assume the Legislature engaged in the type of ontological discussion the lower court suggests. Regardless, how electronic copies are made or whether an original electronic record ever actually exists are inconsequential inquiries. Amendments discussed throughout Part I.B. demonstrate that the Legislature has repeatedly expressed its belief, through action and inaction, that inspecting electronic records with no cost to the requestor continues to be preferred and possible in the digital age.

while only permitting staff time charges when complying with a request for a *copy* in § 316(c). 1995, Acts & Resolves, No. 159, § 2 (emphasis added). The early history of the Public Records Act definitively demonstrates that the Legislature intended and interpreted inspection and copying to be two separate types of requests the public could make, resulting in different obligations for the requestor and for the public agency.

Later amendments maintained or enhanced the distinction between the public's right to inspect and the public's right to copy public records. In Act 158 (2004), the Legislature amended the PRA and required a study to address "public records access" and "technological advances." 2003 Acts & Resolves, No. 158 (Adj. Sess.), §§ 1, 5. In Act 132 (2006), the Legislature amended the PRA and sought another study of the workings of the PRA. 2005 Acts & Resolves, No. 132 (Adj. Sess.), § 4. Yet, in Act 110 (2008), the Legislature rejected the resulting study recommendation to allow staff time fees for the inspection of records, and did not amend the PRA to conflate the rights to inspect and copy. 2007 Acts & Resolves, No. 110 (Adj. Sess.); *see infra*, Part I.B.ii.

Act 59 (2011) further amended the PRA by adding subsection (d) to § 318. The amended subsection (d) required public agencies to "consult" with requestors to clarify or obtain additional information when "responding to a request to *inspect or copy* a record." 2011 Acts & Resolves, No. 59 (Adj. Sess.), § 4 (emphasis added). Once again, the Legislature recognized, in statute, that the right to inspect and the right to copy are distinct rights, necessitating inclusion of both words to ensure that the obligation to "consult" applied regardless of whether a requestor sought to inspect records or receive copies. Furthermore, in Act 59, state agencies were mandated to catalogue each instance when they "receive[d] a request to *inspect or copy* a public record." *Id*. at § 13(a) (emphasis added). The Act also charged a study committee with reviewing

whether to authorize staff time fees for responding to requests to inspect or copy, as well as time spent locating, reviewing, and redacting records. *Id*. at § 11(c)(5).

Finally, in Act 166 (2018), the Legislature amended §§ 318 and 318a, again using both "inspect" and "copy" where it sought to ensure public agency obligations applied regardless of the type of request made.[4] 2017 Acts & Resolves, No. 166 (Adj. Sess.), §§ 5, 6. Act 166 amended § 318(b)'s requirement that record custodians "shall promptly produce the record for inspection" by adding "or a copy of the record." *Id*. at § 5. The Act's amendments to § 318(b)(2) similarly added "and copying" after "exempt from inspection" to ensure that record custodians provide written certification when records are wholly exempt, regardless of whether someone seeks to inspect or copy the requested records. *Id*. While these amendments should be viewed as technical changes, they further evidence the Legislature's interpretation that copying and inspecting public records are two distinct rights of the public, resulting in distinct obligations on government.

iv. *The Trial Court Ignored the PRA's Distinction Between Requests to Inspect and Copy Records, Violating Firmly Established Rules of Statutory Construction*

When interpreting provisions such as § 316(a) and § 316(c), this Court has repeatedly rejected statutory constructions that would render words used by the Legislature mere surplusage. The following excerpt from the Court's analysis of the Archives Act in its *Judicial Watch* opinion sets forth the principle and demonstrates its firm footing in this Court's rules of statutory interpretation:

> Plaintiff's argument requires reading the statute to create two essentially identical types of restriction: "special terms" of law, and "conditions of law." Plaintiff offers no explanation, however, as to why the Legislature would create a superfluous category. *See In re Dunnett*, 172 Vt. 196, 199, 776 A.2d 406, 409

[4] Act 166 went into effect after Mr. Doyle filed his case. However, he includes reference to it as further evidence of the Legislature's unbroken chain of support for the distinction between the right to inspect and right to copy public records.

> (2001) (when interpreting a statute, we will not construe it in a way that renders language surplusage); *State v. Phillips*, 142 Vt. 283, 286 n.1, 455 A.2d 325, 327 n.1 (1982) (declining to construe two statutory clauses as "synonymous" where it would render one "mere surplusage").

2005 VT 108, ¶ 14. In light of these firmly established principles, the trial court erred by determining that, after the 1996 amendments, the PRA no longer distinguished between a request to "inspect" a record and one to obtain a "copy." PC 6-7.[5] If, however, the Legislature had intended § 316(c) to eviscerate the pre-1996 distinction that the trial court acknowledged, it could have done so without creating surplusage in the key phrase of § 316(c). Instead of authorizing a government agency to "charge and collect the cost of staff time associated with complying with a request *for a copy of a public record*," the Legislature could have simply ended the sentence at the word "request" or omitted "a copy of," leaving "a request for a public record." The trial court's opinion impermissibly renders the phrase "for a copy" mere surplusage and must be rejected.

Legislative history confirms the Legislature's intentional limitation of the authorization for charges of staff time to requests for copies of records, even as it expanded the scope of the law to deal with the increased incidence of records kept in electronic form. The bill that resulted in the 1996 PRA amendments was introduced without the pivotal "for a copy" phrase in the

[5] The trial court based its analysis of the statutory language on the premise that the 1996 amendments were intended to "usher[] in recognition of a far more complicated world of electronic public record." PC 5. The trial court then assumed that advances in technology imposed "far more substantial burdens on public agencies responding to records requests." *Id.* The trial court's assumption is not supported by record evidence or legislative history and offers no acknowledgement of technology with powerful search capabilities and cloud storage that makes files remotely and simultaneously available to multiple people at once that may actually lessen the burden of identifying and producing some records. As BPD's denial of Mr. Doyle's administrative appeal makes clear, however, the request at issue encompasses body camera video and "approximately 40 pages comprising the incident report and BPD documents associated with the prosecution of the arrestees." PC 49. It is not clear from the record whether some or all of those "40 pages" are maintained in paper form or electronic form. Nonetheless, nothing in the PRA's text supports making a distinction between paper and electronic records for purposes of whether a government entity can assess fees for inspection-only requests.

section that became present-day § 316(c). As introduced in the House, the language reads as follows:

> (f) In the following instances an agency may also charge and collect the cost of staff time associated with *complying with a request*: (1) the actual cost of providing the requested copies exceeds $1.00; (2) the time involved in complying with the request exceeds 15 minutes; (3) the agency agrees to create a record; or (4) the agency agrees to provide the record in a nonstandard format.

H. 780 (1995 Adj. Sess.) (as introduced) (emphasis added) (reproduced in the Appendix at App. 006-007). After vetting by the House Judiciary committee, which proposed a strike-all amendment, the Legislature amended the language to include the statute's current and express limitation of charges for staff time to such time "associated with complying with a request *for a copy of a public record*." *Vt. House Journal*, March 27, 1996, 749 (emphasis added) (reproduced in the Appendix at App. 109). After consideration by the Senate, which made several other changes to the House version, the key language was reorganized from subsection (f) to subsection (c), but tellingly passed both houses with the limiting "for a copy" phrase that remains in law today. 1995 Acts & Resolves, No. 159 (Adj. Sess.), § 1. As is explained in more detail, *infra*, Part I.B., this is but one of several pieces of legislative history that confirm the trial court's error in disregarding the plain meaning of the Public Records Act.

The plain language of the relevant statutory provisions evinces a clear legislative intent to distinguish between inspection-only public records requests and requests "for a copy." The former are to be "free," while the latter may, under specific circumstances, result in the requestor being assessed fees for staff time associated with providing the copies. While the trial court's opinion enumerates various policy bases upon which a different legislative choice might have been premised (and indeed, as discussed *infra* in Part I.B.,were considered and rejected), the weighing of such policy choices is consigned to the Legislature. *See Judicial Watch*, 2005 VT

108, ¶ 16 (cautioning against the "risk that the judiciary will displace legislative policy on the basis of speculation that the Legislature could not have meant what it unmistakably said." (citation and internal quotation mark omitted)).

B. The Legislature Has Always Intended Inspection of Public Records, Whether Maintained in Physical or Electronic Form, to Be Free for Requestors

The legislative history of § 316(c) determinatively shows that the Legislature intended for inspection of public records, kept in any form, to be free. A statute's history, including the circumstances of and reason for its enactment, is commonly used to discern legislative intent. *Judicial Watch*, 2005 VT 108, ¶¶ 7-9. Legislative history is especially helpful in construing statutes "where it clearly shows the intent of the [L]egislature." *In re Killington, Ltd.*, 159 Vt. 206, 216, 616 A.2d 241, 247 (1992). In addition, where the Legislature has failed to act, particularly in the face of a contemporaneous and practical interpretation by the judiciary, the inaction "suggests legislative acquiescence." *Dubaniewicz v. Houman*, 2006 VT 99, ¶ 13, 180 Vt. 367, 910 A.2d 897. Although the Court can rule in favor of Mr. Doyle upon § 316's plain meaning alone, a review of the legislative history definitively shows that the Legislature intended for inspection of public records to be without administrative fees of any kind.

i. The Most Recent Amendments and Legislative History Related to § 316(c) Make the Legislature's Intent Clear: Inspection Is Intended to Be Free

The history of § 316(c)'s most recent amendment provides strong support for interpreting "for a copy" as specifically limiting staff time fees solely to requests for copies. In examining legislative history, this Court has emphasized comparisons between earlier and amended versions of statutes. *See Burch-Clay v. Taylor*, 2015 VT 110, ¶ 19, 200 Vt. 166, 130 A.3d 180 (recognizing that a "later act can be viewed as the legislative body's interpretation of the earlier

act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting" (internal quotation marks omitted)).

In 2011, the Legislature enacted the most recent amendment to § 316(c), inserting "Unless otherwise provided by law" at the subsection's opening.[6] 2011 Acts & Resolves, No. 59 (Adj. Sess.), § 2. This phrase was added one day before the law's final passage and remains the language of § 316(c). *Vt. House Journal*, May 4, 2011, 1891-92 (reproduced in the Appendix at App. 181-82). Its purpose is detailed in the testimony of legislative counsel Michael O'Grady before the House Government Operations Committee. Hearings on H. 73, House Comm. on Gov't Operations, CD11-137, at 23:22—24:13 (May 3, 2011) (reproduced in the Appendix at App. 262); *see Dep't of Corrs. v. Human Rights Comm'n*, 2006 VT 134, ¶ 19, 181 Vt. 225, 917 A.2d 451 (court can rely on committee testimony and legislators' discussions when they convincingly reveal the intent underlying a statute). In reviewing the final proposed amendments to H. 73 with the House committee, Attorney O'Grady explained that "Unless otherwise provided by law" was added to address the conflict between § 316(c) and Title 32, resulting from the well-publicized[7] and well-known[8] *VSEA* decision. *See* Hearings on H. 73, House Comm. on

[6] The full opening phrase now reads, "Unless otherwise provided by law, in the following instances an agency may also charge and collect the cost of staff time associated with complying with a request for a copy of a public record." § 316(c).

[7] After the 2011 *VSE*A decision, the prevailing party issued a press release that was published by the online news site VTDigger, the weekly and widely-circulated Seven Days newspaper ran a story about the case, and Secretary of State Jim Condos also issued a press release applauding the *VSEA* decision and the award of attorneys' fees to the plaintiff. Press Release, *Crawford Rules in Favor of VSEA Public Records Lawsuit*, VTDigger, Jan. 10, 2011, *available at* https://vtdigger.org/2011/01/10/crawford-rules-in-favor-of-vsea-public-records-lawsuit/ (reproduced in the Appendix at App. 249); Shay Totten, *Judge: State Can't Charge Union to Inspect Public Records*, Seven Days, Jan. 10, 2011, *available at* https://www.sevendaysvt.com/vermont/judge-state-cant-charge-union-to-inspect-public-records/Content?oid=2204645 (reproduced in the Appendix at App. 257-58); Press Release, *Secretary of State Jim Condos Applauds Court decision on Attorneys fees*, Apr. 4, 2011, *available at* https://www.sec.state.vt.us/media/239316/Press-Release-Condos-Applauds-Judge-Crawford-on-Attorneys-Fees.pdf (reproduced in the Appendix at App. 259).

[8] H. 73's amendments to § 315(a) and § 316(c) were unquestionably proposed in response to the *VSEA* decision. Testimony of Beth Robison, Governor's Counsel, Hearings on H. 73, House Comm. on Gov't Operations, CD 11-044, at 55:45—57:00 (Feb. 16, 2011) (Legislator asks Beth Robinson, "We have one ruling that says you don't charge [requestors seeking to inspect], right?" Beth Robinson responds saying, "[H. 73 as introduced] eliminates that loophole.") (reproduced in the Appendix at App. 261); Testimony of Beth Robinson, Governor's Counsel,

Gov't Operations, CD11-137, at 25—27:20 (May 3, 2011) (reproduced in the Appendix at App. 262). The committee proposed the amendment because, under the *VSEA* decision, § 316(c) limited assessment of staff time fees to requests for copies of records, while a Title 32[9] statute specifically permitted town clerks to assess fees related to the *examination* of public records. [10] *Id*. The Legislature could only have viewed the laws as in conflict if it interpreted § 316(c)'s "for a copy" phrasing as not permitting the assessment of staff time fees in response to requests to inspect. This amendment demonstrates the Legislature's interpretation that § 316(c) limited staff time fees to requests "for a copy," i.e. when a requestor sought to take possession of duplicates.

Additional 2011 legislative history further illuminates the Legislature's intent to maintain free inspection of public records. As introduced, H. 73 amended § 316(c) to change "complying with a request *for a copy* of a public record" to "complying with a request *to inspect or to copy* a public record." H. 73 (2011) (as introduced) (emphasis added) (reproduced in the Appendix at App. 050). Upon review of the bill, the House Committee on Government Operations also amended § 315(a), deleting the word "free" from the PRA's policy statement requiring "free and open examination." *Vt. House Journal*, April 6, 2011, 787 (reproduced in the Appendix at App.

Hearings on H. 73, House Comm. on Gov't Operations, CD 11-029, at 20:44—21:05 (Feb. 3, 2011) ("[T]he Washington Superior Court concluded that . . . the state can't charge for the staff time spent" in response to a request to inspect public records.) (reproduced in the Appendix at App. 260); Testimony of James Condos, Secretary of State, Hearings on H. 73, House Comm. on Gov't Operations, CD 11-029, at 52:45—53:11(Feb. 3, 2011) ("The court has already adjudicated and said that inspection is . . . free to Vermonters.") (reproduced in the Appendix at App. 260). As discussed *infra* on pages 24-25, the Senate was also well aware of the *VSEA* decision. The Legislature's refusal to adopt the original House language despite knowledge of the *VSEA* decision is significant evidence of its agreement with the court's interpretation of law. *Dubaniewicz*, 2006 VT 99, ¶ 13. Since 2011, no amendments to §§ 315(a) or 316(c) have been introduced, much less enacted into law. The Court, therefore, should assume legislative agreement or at least acquiescence with the known judicial interpretation. *Id*.

[9] Although reviewed legislative recordings do not provide a specific statutory reference in Title 32, the committee was likely referring to the provisions in 32 V.S.A. § 1671(a).

[10] In Senator White's report on the amendment to the Senate, she acknowledged that the amendment was made to comport with town clerks' responsibilities. Recording of the Vermont Senate, Disc 1, Track 1 3:07—4:05 (May 5, 2011) (reproduced in the Appendix at App. 266).The Senate concurred in the House amendment. *Id*. at Track 2, 2:15—2:31.

142). The House passed the bill with both amendments. H. 73 (official), 23-24 (2011) (as passed by the House) (reproduced in the Appendix at App. 093-094).

When the bill reached the Senate, however, a majority of the Senate Committee on Government Operations disagreed with assessing fees for inspection of public records and removed the House amendments to §§ 315(a) and 316(c). *See Leas v. Leas*, 169 Vt. 364, 365-66, 737 A.2d 889, 891-92 (1999) (consideration of proposed statutory language at committee level is an "illuminating" part of legislative history); *Dep't of Corrs.*, 2006 VT 134, ¶ 19 ("[W]e have relied upon committee testimony and legislators' discussions when they convincingly reveal the intent underlying a statute."). The Senate committee members described the House amendments as antithetical to longstanding Vermont values of transparency in government. They also believed the amendments would severely limit access to public records. The committee's chair, Senator White, noted that "I feel really queasy about charging [for inspection] and we've always maintained it's free and open examination of records." Hearings on H. 73, Senate Comm. on Gov't Operations, CD 11-86, Track 2, 20:39—20:51 (April 19, 2011) (reproduced in the Appendix at App. 263). In reference to the *VSEA* decision, Senator White went on to say "my concern is that until four months ago, I think we all assumed that inspecting records was free." *Id*. at 24:29—24:44. Senator Pollina quickly agreed: "That's actually what the statute says . . . to me it's just generally a step backwards to be telling people they have to pay to look at open records." *Id*. 24:45—25:03. Senator White reiterated, "for the past 35 years we've been assuming [inspection of public records] was free . . . [changing] that doesn't make sense to me." *Id*. at 25:00—25:28.

The committee expressed further concern that permitting staff time fees for inspection, as the House amendments proposed, would result in inefficient and ineffective records management

practices. Relying on the testimony of the State Archivist, Gregory Sanford, the committee decided that better records management practices were more likely to ensure less staff time is spent fulfilling records requests, with the added benefit of simultaneously providing faster and more affordable public access.[11] *See Judicial Watch*, 2005 VT 108, ¶ 9 (citing State Archivist's legislative hearing testimony as support for Court's interpretation of law). The Archivist also explained that charging to inspect records would be like charging the taxpayer twice—once to pay for a faulty records management system and again for the unnecessarily long time it takes to retrieve the responsive non-exempt information from a flawed system. Hearings on H. 73, Senate Comm. on Gov't Operations, CD 11-86, Track 2, 25:35—26:35 (April 19, 2011) ("In terms of the taxpayers . . . why should you charge them more because it's more difficult for us to extract the information from the system we poorly designed to begin with?") (reproduced in the Appendix at App. 263). Senator Pollina responded positively: "[Free inspection] would encourage the agencies to be more efficient in terms of their storage and retrieval of information . . . . When you can charge someone to go get something, you're likely to put it further away . . . you're not going to worry that it's further away . . . . If I know I have to give it to them for free I'm going to make sure I have a better idea of where it is." *Id*. at 26:40—27:08.

After further discussion, Senator White called for a vote: "The question right now is do we charge for inspections or do we not?" *Id*. at 39:15—39:35. By a four to one vote, the committee voted to preserve the right to free inspection, removing the House amendments to §§ 315(a) and 316(c). *Id*. at 39:35—44:30. Later, the committee inserted language into the bill

[11] The lower court incorrectly claimed that there was "no apparent rational reason that the legislature would" reserve staff time charges to requests for copies. In so doing, the trial court ran afoul of this Court's caution that the judiciary not "'displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.'" *Judicial Watch*, 2005 VT 108, ¶ 16 (quoting 2A N. Singer, Statutes and Statutory Construction § 46.07, at 199 (6th ed. 2000)). The trial court erred in failing to consider as "rational reason[s]" the goals of increased access to government records, increased accountability for government officials, increased knowledge among voters, or efficiency in records management. As noted *supra*, at least some of these justifications were a part of the Legislature's reasoning for preserving "free" in § 315(a) and "for a copy" in § 316(c) in 2011.

asking a legislative study committee to review whether to allow staff time fees in response to requests to inspect public records. 2011 Acts & Resolves, No. 59 (Adj. Sess.), § 11(c)(5).

When Senator White reported H. 73 with amendments to the full Senate, early in her remarks she explicitly quoted *VSEA*, stating that:

> "[T]he burden of inspection is part of the cost of government to be borne by the polity at large and not imposed upon individuals or organizations seeking information. This is not an unreasonable legislative decision. An individual—aggrieved, or a gadfly, or a visionary—is likely to be in a poor position to pay for the cost of her inquiries. But as taxpayers and members of the community, we all benefit from these inquiries because government (like the rest of us) behaves best in an open, public setting."

Recording of the Vermont Senate, Disc 3, Track 18, 3:00—4:20 (May 2, 2011) (as reproduced in the Appendix at App. 264) (quoting *VSEA*, 2011 WL 121649); *see St. Amour v. Dep't of Social Welfare*, 158 Vt. 77, 81, 605 A.2d 1340, 1342 (1992) ("Although not decisive, the intent of the legislature as revealed by the committee report is highly persuasive." (quoting 2A N. Singer, Sutherland on Statutory Construction § 48.06, at 332–33 (5th ed. 1992))). Senator White also reported that a study committee would review whether to permit staff time fees for inspection and make recommendations. Recording of the Vermont Senate, Disc 4, Track 2, 3:00—3:08 (May 2, 2011) (as reproduced in the Appendix at App. 265). No senator proposed further amendments or raised questions regarding the removal of the House amendments to §§ 315(a) and 316(c).[12] *Vt. Senate Journal*, May 2, 2011. 1572 (as reproduced in the Appendix at App. 195-96). The Senate passed the bill as amended by Senator White's committee. *Id*. After H. 73 was returned to the House, neither the House Committee on Government Operations nor the full chamber sought to re-insert its original amendments to §§ 315(a) and 316(c). *Vt. House Journal*,

[12] Notably, Senator Flory, the Senate committee's lone vote in support of the House amendments allowing charges for inspection, did not raise the issue during her explanation of her floor vote against H. 73. Recording of the Vermont Senate, Disc 4, Track 3-4, 04:10 (Track 3)—01:17 (Track 4) (May 2, 2011) (reproduced in the Appendix at App. 265).

May 4, 2011, 1891-92 (as reproduced in the Appendix at App. 181-82). Instead, the House enacted the small change discussed *supra* to prevent a conflict between § 316(c) and town clerks' traditional Title 32 fees for their time supporting public examination of certain records. *Id*. The Senate concurred and § 316(c) was changed to its current form. *Vt. Senate Journal*, May 5, 2011, 1824-25 (reproduced in the Appendix at App. 197-98).

The Legislature's intent was made abundantly clear in 2011—the last time amendments were introduced to §§ 315(a) or 316(c). Staff time fees for record requests are limited to requests for copies to be possessed by the requestor. By introducing "Unless otherwise provided by law" and refusing to change any other part of §§ 315(a) or 316(c), the Legislature affirmed that inspection of public records has always been free and would continue to be free well into the digital age.

ii. The Legislature Has Repeatedly Declined to Authorize Any Charges Related to the Inspection or Redaction of Public Records

Between 1995 and 2012, the Legislature declined multiple opportunities to allow staff time charges for the inspection or redaction of public records. *See S. Burlington Sch. Dist. v. Goodrich*, 135 Vt. 601, 605, 382 A.2d 220, 222 (1977) (holding that legislative inaction coupled with other relevant legislative history can provide sufficient evidence of legislative intent), overruling on other grounds recognized by *Univ. of Vt. v. W.R. Grace & Co.*, 152 Vt. 287, 289, 565 A.3d 1354, 1356 (1989).[13] As detailed *supra*, the House's 1996 amendments to the introduced § 316(f) specify that staff time fees would be triggered when public agencies were "complying with a request *for a copy*," as opposed to simply "complying with a request." The

[13] Admittedly, "legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute. *Lake Bomoseen Ass'n v. Vt. Water Res. Bd.*, 2005 VT 79, ¶ 21, 178 Vt. 375, 886 A.2d 355 (quoting 2B N. Singer, Sutherland on Statutes and Statutory Construction § 49:10, at 112–14, 117 (6th ed. 2000)). However, in this case, Mr. Doyle simply notes another instance of legislative inaction as additional evidence that the Legislature has repeatedly made its intentions clear—time and again maintaining free inspection of public records in the digital age.

Legislature has amended the PRA many times since 1996, but few amendments to §§ 315(a) and 316(c) have been proposed, much less passed.

In 2008, S. 229, as introduced, sought to amend § 316(c) to allow public agencies to assess administrative fees for staff time associated with "copying or redacting a requested public record," no longer limiting such fees to requests "for a copy." S. 229, § 1 (2008) (as introduced) (reproduced in the Appendix at App. 029-030). This amendment originated in 2005 and 2007 statutorily required studies. The studies recommended amending the PRA to ensure staff time fees could be charged for reviewing record requests, retrieving records, and redacting records, regardless of whether the requestor sought to inspect or possess copies of the records. Final Legislative Council Staff Report, *Public Records, Privacy, and Electronic Access in Vermont*, at 10-11, January 2005, pursuant to 2003 Acts & Resolves, No. 158 (Adj. Sess.), § 5 (reproduced in the Appendix at App. 201-202); Legislative Council Staff Report, *Public Records Requirements in Vermont*, January 2007, pursuant to 2005 Acts & Resolves, No. 132 (Adj. Sess.), § 4 (reproduced in the Appendix at App. 204-205). The studies recommended the amendments to defray public agency costs in responding to records requests. Nevertheless, the Senate Committee on Government Operations excised the related amendments from introduced S. 229 and the Legislature passed the bill without them. *See* 2007 Acts & Resolves, No. 110 (Adj. Sess.).

Again, in 2011, as previously discussed, the Legislature removed House language in H. 73 that expressly permitted staff time charges for requests to inspect public records. H. 73 passed both houses with no change to the existing § 315(a), and a minor change to § 316(c) that can only be interpreted as specifically limiting staff time fees to requests for copies. Act 59 of 2011 also required a legislative study and survey of municipalities to gain information to determine

whether to allow staff time charges for inspection going forward. The legislative study committee would determine "[w]hether or not to authorize a public agency to charge for staff time associated with responding to a request to inspect or copy a public record, including whether an agency should be authorized to charge for the staff time incurred in locating, reviewing, or redacting a public record." 2011 Acts & Resolves, No. 59 (Adj. Sess.), § 11(c)(5). The annual survey of municipalities sought information "regarding whether municipalities are receiving an increased number of requests to inspect records, whether requests for inspection of public records are being used to circumvent copying of a record by a municipality, and whether requests to inspect records pose any administrative burdens on municipalities."[14] *Id.* § 14. Despite the following years of study, the study committee's only related recommendation was that the municipal survey requirement should be repealed. Public Records Study Committee, *2012 Interim Report*, at 5-6, January 2012, pursuant to 2011 Acts & Resolves, No. 59 (Adj. Sess.), §§ 11(c), 14 (reproduced in the Appendix at App. 224-225); Public Records Study Committee, *2013 Interim Report*, at 4, January 2013, pursuant to 2011 Acts & Resolves, No. 59 (Adj. Sess.), §§ 11(c), 14 (reproduced in the Appendix at App. 238, 240).

Every time legislative language has been introduced to allow for the assessment of staff time fees related to requests to inspect public records, the Legislature has refused to adopt such language. It has excised such language when it has been introduced and when it passed through

[14] The results of the survey are discussed in the Public Records Study Committee's 2013 and 2014 reports. The 2013 report states that the Deputy Secretary of State testified regarding the survey results. Public Records Study Committee, *2013 Interim Report*, at 4, January 2013, pursuant to 2011 Acts & Resolves, No. 59 (Adj. Sess.), §§ 11(c), 14 (reproduced in the Appendix at App. 238). The study committee found the results uninformative because municipalities were found to not accurately track the number of records requests they receive and have varying interpretations of what constitutes a public records request. *Id*. The committee voted unanimously to recommend repeal of the survey requirement and did not revisit the issue of whether to charge for inspection of public records or staff time used in locating, reviewing, and redacting a public record. *Id*.; *see also* Public Records Study Committee, *2014 Interim Report*, at 6, January 2014, pursuant to 2011 Acts & Resolves, No. 59 (Adj. Sess.), §§ 11(c), 14 (reproduced in the Appendix at App. 248). The survey requirement was repealed the following year. 2013 Acts & Resolves, No. 3 (Adj. Sess.).

the House. It has also knowingly refused to address the issue in the face of a contemporaneous judicial interpretation, legislative council study recommendations urging action, and a survey of municipalities on the particular issue. The Legislature understands and intends §§ 315 and 316(c) to provide for free inspection of all public records, with no cost to the requestor.

CONCLUSION

For the foregoing reasons, pursuant to V.R.C.P. 12(c) and the Public Records Act, Mr. Doyle is entitled to reversal of the lower court's ruling denying his motion for a partial judgment on the pleadings on his third stated cause of action.

Respectfully submitted this 18th day of January 2019 by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 7,273 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, addendum, appendix, and this certificate as permitted by Vt. R. App. 32(a)(7)(C). I have relied upon the word processor used to produce this brief, Microsoft Word 2010, to calculate the word count.

I additionally certify that the electronic copy of this brief submitted to the Court via email was scanned for viruses, and that no viruses were detected.

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