
**IN THE SUPREME COURT
OF THE
STATE OF VERMONT**

DOCKET NUMBER 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 AMICI CURIAE
CONSERVATION LAW FOUNDATION
AND
VERMONT NATURAL RESOURCES COUNCIL

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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 public record and obtaining a copy of a public 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

Amici adopt the statement of the case set forth by Appellant and the facts found by the Superior Court, none of which are in dispute.

STATEMENT OF INTEREST OF AMICI

Conservation Law Foundation (CLF) is a non-partisan, non-profit organization whose mission is to protect the New England environment for the benefit of all people, using law, science, and the market to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy. CLF has a longstanding commitment to advancing the right of Vermont citizens to clean air and water and healthy communities, and to the conservation and protection of Vermont's natural environment. CLF relies upon free and open access to public records in order to achieve CLF's mission. CLF believes that an open, transparent, and accountable government is necessary to ensure conservation of natural resources, protection of public health, and thriving communities for all in New England.

Vermont Natural Resources Council (VNRC) is a non-profit organization whose mission is to engage in research, education, collaboration and advocacy that protects and enhances Vermont's natural environments, vibrant communities, productive working landscapes, rural character and unique sense of place, and to prepare the state for future challenges and opportunities. VNRC was founded in 1963, and has a long history of working on environmental policy related to clean water, healthy forests and wildlife, forestry, agriculture, sustainable communities, land use, and climate change and energy. VNRC advocates for sound environmental policy and laws in the Vermont Legislature, and serves as a watchdog organization for government and agency action in Vermont. In this capacity, VNRC believes government should operate in a transparent manner and be accountable to the public, and VNRC

relies on free and open access to government records to measure and track the implementation and enforcement of environmental laws.

SUMMARY OF ARGUMENT

The question before this Court— whether public agencies may condition the right to inspect public records on the payment of fees—has significant ramifications for all Vermonters, including individuals, members of the media, and non-profit organizations. The public has a right to review the activities of government, and individuals are not able to fully exercise this right without access to government records. Conditioning the right to inspect public records on the payment of fees raises serious equity issues, limits access to information to only those individuals or organizations that can afford to pay, and insulates the government from review.

The Vermont Public Records Act is clear: Appellant is entitled to inspect the requested public records at no cost. Where a statute is unambiguous, the Court must give effect to the intent of the legislature. *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 346, 816 A.2d 448, 453 (2002). When interpreting the Public Records Act, the Legislature has directed this Court to “liberally construe[]” the Act to “implement th[e] policy [to provide for free and open examination of records]” 1 V.S.A. § 315(a). The provisions authorizing an agency to assess fees are limited to requests to copy records. 1 V.S.A. § 316(b)–(c). The fee provisions do not apply to requests to inspect records. *See id.* In this case, the plain language of the Public Records Act prohibits the Appellee from conditioning the Appellant’s right to inspect the public records on the payment of fees. The Appellant’s extensive analysis of the legislative history supports this plain language interpretation.

The trial court failed to follow several fundamental statutory construction rules in reaching a contrary decision. The trial court erred by interpreting the same word—“copy”— in

the same section of the statute, to mean two different things. *State v. Welch*, 135 Vt. 316, 321, 376 A.2d 351, 354 (1977). The trial court concluded that “copy” means both reproduction and production in the Public Records Act, which are separate and distinct actions. PC 6-7. There is no indication that the Legislature intended for “copy” to have two different meanings in the very same section of the statute.

In addition, the trial court’s interpretation of section 316(c) would render an entire phrase as mere surplusage. PC 7. Section 316(c) states that “[i]n 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” and lists the applicable categories of staff tasks. 1 V.S.A. § 316(c) (emphasis added). In order to agree with the trial court’s interpretation, this Court would have to not give effect to the specific limitation on requests for copies of public records, which is inconsistent with the basic rule that a judicial interpretation must not render language superfluous or unnecessary. *Payea v. Howard Bank*, 164 Vt. 106, 107, 663 A.2d 937, 938 (1995).

The trial court also impermissibly substituted its own policy choice for the policy choice made by the Legislature when the court held that public agencies may assess fees for requests to inspect public records. PC 7. Unless a statute is “demonstrably at odds with any conceivable legislative purpose,” this Court must give effect to the plain language of the statute. *Judicial Watch v. State of Vermont*, 2005 VT 108, ¶ 16, 179 Vt. 214, 222 (2005). In this case, the plain language limits the authority to assess administrative fees to requests for copies of public records only, which is consistent with—and most decidedly not at odds with—the express purpose and policy of the Public Records Act to provide for open and free examination of records.

Conditioning the right of access to inspect public records on the payment of fees is contrary to core principles of our democracy. As this Court has acknowledged, an open and transparent government is fundamental to democracy. *Caledonian Record Pub. Co. v. Walton*, 154 Vt. 15, 21, 573 A.2d 296, 299 (1990). “[A] democracy cannot function unless the people are permitted to know what their government is up to.” *Id.* (quoting *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773-74, 109 S.Ct. 1468, 1481 (1989)). The ability to access public records is an essential component of an individual’s right to know about the activities of the government. *E.g., id.* at 20-21, 573 A.2d at 299. Charging the public fees to inspect public records limits access to only those individuals that can afford to pay, insulates the government from transparency, and prevents the public from holding government accountable for the actions it takes. For example, CLF and VNRC are frequently forced to choose between spending limited resources to pay for access to records or foregoing review of government actions that have an impact on public health and the environment. The trial court decision, however, fails to wrestle with this significant policy ramification of its interpretation of the Public Records Act. *See* PC 3-8.

Further, the public should not be penalized for an agency’s failure to comply with its statutory obligation to provide “ready access” to public records. 1 V.S.A. § 317a. The amount of resources expended by an agency to respond to a public records request is a function of the agency’s record management system: poor records management means more time spent on a response.¹ An agency has control over how it manages records, and the agency may not point to

¹ *E.g., Frequently Asked Questions About Records Management in General*, NATIONAL ARCHIVES, FEDERAL RECORDS MANAGEMENT, available at <https://www.archives.gov/records-mgmt/faqs/general.html> (last visited Jan. 18, 2019) (noting that spending less time searching for records is a benefit of records management policy).

an administrative burden that it has created itself to justify charging the public fees to inspect records.

Consistent with Vermont, and as an acknowledgment of widespread recognition of the critical role that access to public records plays in our democracy, all New England states and the federal government provide an avenue for free access to records for non-commercial requests. Connecticut, Massachusetts, Maine, and Rhode Island, along with the federal government contain “fee waiver” provisions that authorize a waiver or reduction of fees for records requests that are in the public interest. Although New Hampshire and Vermont do not contain fee waiver provisions, the two states provide for free inspection of records. The right to inspect public records for free under the Vermont Public Records Act is even more critical to ensuring an open and transparent government because the statute does not contain a fee waiver provision like most other New England states and the federal government.

For all these reasons, this Court should reverse the trial court’s decision and enjoin the Appellee from charging Appellant fees to inspect the public records.

ARGUMENT

I. APPELLANT IS ENTITLED TO INSPECT PUBLIC RECORDS AT NO COST.

Amici adopts Appellant’s arguments that the Public Records Act prohibits the Appellee from conditioning Appellant’s right to inspect records on the payment of fees. We write to emphasize several additional points. The plain language of the Act prohibits Appellee from charging the Appellant fees to inspect the records. Additionally, the lower court’s interpretation of the Public Records Act ignores the policy choice made by the Legislature to provide free and open examination of public records.

A. The plain language of the Public Records Act prohibits the Appellee from assessing fees for Appellant's request to inspect public records.

The Public Records Act is unambiguous: a public agency may not assess fees for a request to inspect public records. 1 V.S.A. §§ 315(a); 316(a). “The fundamental rule, underlying all other rules of statutory construction, is that this Court must give effect to the intent of the Legislature.” *Viskup v. Visкуп*, 150 Vt. 208, 210, 552 A.2d 400, 401 (1988) (citing *In re A.C.*, 144 Vt. 37, 42, 470 A.2d 1191, 1194 (1984)). “If the statute is unambiguous, and the words have plain meaning, [the Court will] 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) (citing *Town of Killington v. State*, 172 Vt. 182, 188, 776 A.2d 395, 400 (2001)).

The Public Records Act states that “[i]t is the policy of this subchapter to provide for free and open examination of records” 1 V.S.A. § 315(a). “Free” means “not costing or charging anything.”² “Examine” means “to inspect closely.”³ Section 316(a) states that “[a]ny person may inspect . . . any public record of a public agency” on Monday through Friday during certain hours. 1 V.S.A. § 316(a). There is no other limitation on the public’s right to inspect non-privileged records for free. *See* 1 V.S.A. § 316. Thus, the plain language of the statute is clear that the Legislature intended to provide the public with a right to examine records at no cost.

With respect to the assessment of fees, the Public Records Act makes an important distinction between requests to inspect public records and requests to copy records. 1 V.S.A. §

² Definition of “free,” definition 1, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/free> (last visited Jan. 18, 2019).

³ Definition of “examine,” definition 1, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/examine> (last visited Jan. 18, 2019).

316(a). The Act states that “[a]ny person may inspect *or* copy any public record of a public agency” 1 V.S.A. § 316(a). The use of the word “or” in Section 316(a) implies that the Legislature intended to create two separate and distinct categories of public records requests based upon whether a requestor seeks to inspect records or ask for copies of records. *See Judicial Watch v. State of Vermont*, 2005 VT 108, ¶ 14, 179 Vt. 214, 220-221 (2005) (noting that the use of the disjunctive term “or” implies legislative intent to establish two distinct categories).

This distinction is carried forward into the administrative fees provisions of the Public Records Act. Specifically, the two provisions of the Public Records Act that authorize an agency to assess fees (section 316(b) and (c)) only permit the assessment of fees for requests to *copy* public records. Section 316(b) states:

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.

1 V.S.A. § 316(b) (emphasis added). Section 316(c) states:

[A]n agency may also charge and collect the cost of staff time associated with complying with a *request for a copy* of a public record [in the following instances]: (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*.

1 V.S.A. § 316(c) (emphasis added). In both provisions, the ability to assess fees is limited to requests for copies by the plain language of the statute.

The trial court incorrectly concluded that there is no distinction between inspection and copying for the purpose of assessing administrative fees and held that agencies are authorized to charge for requests to inspect records. PC 7. In support of this holding, the trial court concluded that the word “copy” has two different meanings under the Public Records Act. *Id.* The court stated that “[t]he PRA uses the word copy in some places to literally mean the *reproduction* of a public record, as in to make a photocopy. In other places, such as § 316(c), the term is used more broadly to refer to the *production* of a public record.” *Id.* (emphasis added). In other words, the trial court concluded that “copy” means both reproduction and production in the same statute. *Id.*

The rule of statutory construction, however, is that the same word used in different parts of a statute should be interpreted the same. *E.g., State v. Welch*, 135 Vt. 316, 321, 376 A.2d 351, 354 (1977) (“When the same word is used in various sections of the act . . . it will bear the same meaning throughout, unless it is obvious that another meaning was intended.”) (citing *Clifford v. West Hartford Creamery Co.*, 103 Vt. 229, 253, 153 A. 205, 215 (1931)). Further, the terms production and reproduction mean two very different things and are not interchangeable.⁴ A state official, for example, can “produce” records for inspection without “reproducing” or making a “copy” of a record. The trial court offers no basis to deviate from a basic canon of statutory construction and conclude that the Legislature meant two different things when it used the same word—“copy”—in the same section of the Public Records Act. *See* PC 6-7.

In addition, the trial court’s interpretation would render words in the Public Records Act’s fee provisions as “mere surplusage.” With respect to section 316(c), the court’s interpretation ignores the rule that courts “presume that language is inserted advisedly.” *Payea*

⁴ Compare definition of “production” to “reproduction,” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary>.

v. Howard Bank, 164 Vt. 106, 107, 663 A.2d 937, 938 (1995) (citing *Trombley v. Bellows Falls Union H.S. Dist. No. 27*, 160 Vt. 101, 104, 624 A.2d 857, 860 (1993)). This Court has consistently held that the Court will not interpret a statute in a way that would render language as superfluous or unnecessary. *E.g.*, *Judicial Watch v. State of Vermont*, 2005 VT 108, ¶ 14, 179 Vt. at 197-98. Section 316(c) states “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 V.S.A. § 316(c). The plain language of the statute limits the assessment of fees to requests for a copy of a public record. *Id.* Yet the trial court again offers no basis to deviate from a basic canon of statutory construction; the court’s interpretation renders the phrase “comply with a request for a copy of a public record” meaningless. *See* PC 7.

For all these reasons, the plain language of the Public Records Act prohibits agencies from assessing fees for requests to inspect public records. This interpretation is supported by Appellant’s extensive analysis of the legislative history, which makes clear that the Legislature never intended to charge individuals fees for the inspection of public records.

B. The trial court decision ignores the policy choice made by the Legislature to provide for free and open examination of public records.

As discussed above, the express policy of the Public Records Act is “to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution.” 1 V.S.A. § 315(a). Article 6 stands for the premise that government officers are trustees and servants of the people and “at all times, in a legal way, are accountable to the them.” Vt. Const. art. VI. The Public Records Act statement of policy section underscores this bedrock principle, stating that “it is in the public interest to enable any person to review and criticize [government officers’] decisions even though such examination may cause inconvenience or

embarrassment.” 1 V.S.A. § 315(a). The statute states

that public records are essential to the administration of State and local government. Public records contain information that allows government programs to function, provides officials with a basis for making decisions, and ensures continuity with past operations. Public records document the legal responsibilities of government, help protect the rights of citizens, and provide citizens a means of monitoring government programs and measuring the performance of public officials. Public records provide documentation for the functioning of government and for the retrospective analysis of the development of Vermont government and the impact of programs on citizens.

1 V.S.A. § 315(b).

This Court has acknowledged that the Legislature’s intent in enacting the Public Records Act is to provide “a broad right of access to public records, qualified by a list of exemptions that must be strictly construed in favor of disclosure.” *E.g., Judicial Watch, Inc. v. State*, 2005 VT 108, ¶ 6, 179 Vt. 214, 217 (2005) (citing *Springfield Terminal Ry.*, 174 Vt. 341, 345, 816 A.2d 448, 452 (2002)). “The Act is to be construed liberally” and “[i]t implements the policy that the public interest clearly favors the right of access to public documents and public records” *Trombley v. Bellows Falls Union H. S. Dist. No. 27*, 160 Vt. 101, 106-107, 624 A. 2d 857, 861 (1993) (citing *Caledonian-Record Publishing Co. v. Walton*, 154 Vt. 15, 20, 573 A. 2d 296, 299 (1990)).

The Legislature made a clear policy choice to provide for free and open examination of public records, and to prohibit agencies from assessing fees for requests to inspect records.

1 V.S.A. § 316(a)-(c). Yet the trial court states that “[t]here is no apparent rational reason that the legislature would enact [§ 316(c)] but have it apply only where the requestor wants to take possession of a paper or electronic copy of the requested record and not where the requestor’s request imposes the same burden on the agency but the requestor wants to view the requested information on the premises without leaving with a copy of it.” PC 7. The trial court appears to

rely upon the “absurd results doctrine” to support its holding that agencies may assess fees for requests to inspect records. *Id.* This rule of construction states that “statutes should not be interpreted to produce ‘absurd or illogical’ results.” *Judicial Watch*, 2005 VT 108, ¶ 16, 179 Vt. at 222 (citing *Rhodes v. Town of Georgia*, 166 Vt. 153, 157, 688 A.2d 1309, 1311 (1997)). This Court, however, has stated that

[t]he rule does not . . . provide a license to substitute this Court’s policy judgments for those of the Legislature. As the leading authority on statutory construction has cautioned, “the absurd results doctrine should be used sparingly because it entails 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.”

Id. (internal citations omitted). In this case, in light of the statutory mandate to construe the provisions of the Public Records Act in favor of access, and the extensive legislative history, it was an error for the trial court to conclude that the plain language of the statute is “‘demonstrably at odds with any conceivable legislative purpose.’” *Id.* (quoting *Taylor-Hurley v. Mingo Cnty. Bd. of Educ.*, 209 W.Va. 780, 778, 551 S.E.2d 702, 710 (2001)). In sharp contrast, the plain language limitation of the assessment of administrative fees to only requests to copy records is entirely consistent with the stated policy and purpose of the statute to provide for free and open examination of public records.

II. CONDITIONING THE RIGHT TO INSPECT PUBLIC RECORDS ON THE PAYMENT OF FEES IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF DEMOCRACY.

The public has a right to know “what their government is up to.” *Caledonian Record Pub. Co. v. Walton*, 154 Vt. 15, 21, 573 A.2d 296, 299 (quoting *U.S. Dept. of Justice*, 489 U.S. 749, 773-74, 109 S.Ct. 1468, 1481)). In order to fully exercise this right, the public must have access to government records. *E.g., id.; see also* 1 V.S.A. § 315(b). Access to these important records is threatened—and raises significant equity concerns—where an agency charges fees to

inspect records because it limits access to only those that can afford to pay and insulates the government from transparency.

A. An open and transparent government is fundamental to democracy.

The importance of an open and transparent government is embedded in the Vermont Constitution and the First Amendment of the United States Constitution. Vt. Const. art. VI; 1 V.S.A. § 315(a); *Caledonia Record*, 154 Vt. at 21, 573 A.2d at 299 (recognizing “a constitutional right of access to information relating to the activities of law enforcement officers” pursuant to the First Amendment). The Vermont Constitution states “[t]hat all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.” Vt. Const. art. VI. This Court, quoting the U.S. Supreme Court, stated “‘that a democracy cannot function unless the people are permitted to know *what their government is up to.*’” *Id.* at 21, 573 A.2d at 299-300 (emphasis in original) (quoting *U.S. Dept. of Justice v. Reporters Comm.*, 489 U.S. at 773-74, 109 S.Ct. at 1481 (1989)).

B. The assessment of fees for the inspection of records effectively precludes the public’s ability to know “what their government is up to.”

Citizens must be able to access public records about the activities of the government in order to fully exercise their right to know what their government is up to. *See, e.g.*, 1 V.S.A. § 315(b); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597-598, 98 S. Ct. 1306, 1311-1312 (1978) (finding “that the courts of this country recognize a general right to inspect and copy public records and documents” to enable the public “to keep a watchful eye on the workings of public agencies.”); *Hartford Courant Co. v. Pelligrino*, 380 F.3d 83, 95-96 (2d Cir. 2004) (quoting *Press-Enterprise Co. v. Superior Ct. of Ca., Riverside Cty.*, 464 U.S. 501, 508, 104 S.Ct. 819, 823 (1984)) (recognizing a First Amendment right to inspect docket sheets on the

premise that “‘openness . . . enhances both . . . basic fairness . . . and the appearance of fairness so essential to public confidence in the system.’”). As the Vermont Secretary of State has noted, “Vermont’s public records are the cornerstone of government transparency for a knowledgeable and informed populace.”⁵ Indeed, the Vermont Public Records Act states that “[p]ublic records document the legal responsibilities of government, help protect the rights of citizens, and provide citizens a means of monitoring government programs and measuring the performance of public officials.” 1 V.S.A. § 315(b).

Conditioning the right to inspect records on the payment of fees limits access to only those individuals and organizations that can afford to pay, and insulates the government from transparency. *Vermont State Employees’ Ass’n v. Vermont Agency of Nat. Res.*, Nos. 517-7-10 Wncv, 518-7-10 Wncv, 2011 WL 121649 (Vt. Super. Ct. Jan. 6, 2011). As one court noted, fees to inspect records deter inquiry and therefore

the 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. . . . 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.

Id. at 4.

In another case related to charges for staff time to comply with the Public Records Act, the court held that the Public Records Act does not allow an agency “to charge staff time to resist public access: ‘Such an expansive interpretation could cripple cumbersome requests with unnecessarily high expenses. That the legislature could not possibly have intended; the Act is designed to encourage access, not to thwart it.’” *Judicial Watch, Inc. v. State*, 2005 VT 18, ¶ 29,

⁵ Jim Condos, *VT Public Records – Cornerstone of Government Transparency*, Op-Ed, VT OFFICE OF SECRETARY OF STATE, <https://www.sec.state.vt.us/media/768116/op-ed-vt-public-records-cornerstone-of-government-transparency.pdf> (June 14, 2016).

179 Vt. 214, 227 (2005) (Dooley, J., concurring) (quoting *Judicial Watch, Inc. v. State*, No. 656-1203 Wnev, 2004 WL 5456808 (Vt. Super. Ct. May 11, 2004)).

CLF and VNRC are regularly forced to choose between spending limited resources to pay for access to public records and foregoing review of government actions related to public health and the environment. For example, on August 9, 2018, CLF and VNRC filed a public records request pursuant to the Public Records Act for information about Agency of Agriculture, Foods and Markets (AAFM) activities related to water quality protection, including information about illegal pollution and contaminated drinking water. Correspondence Between Vermont Natural Resources Council and Conservation Law Foundation and AAFM Regarding August 9, 2018 Public Records Request (reproduced in add. at 1-2). CLF and VNRC have significant concerns about the deteriorating water quality in Lake Champlain, as well as the threat to drinking water supplies from nitrates, pesticides, and other chemicals and sought records to better understand what actions AAFM is taking to address these problems.

In our August 9th record request, CLF and VNRC specifically raised concerns about charges AAFM might apply, asking that AAFM not produce documents if it intended to charge more than \$100 to provide copies of documents. Add. at 1-2. AAFM subsequently notified us that the cost of obtaining copies of documents would exceed \$100. *Id.* at 6-8. In response to this information, CLF and VNRC requested the opportunity to inspect, rather than seek copies, of documents based on our understanding that there is no cost to inspect records under the Public Records Act. *Id.* at 5-6. AAFM informed CLF and VNRC that AAFM has the authority to charge fees to inspect the documents we requested, citing the trial court decision. *Id.* at 4.

Ultimately, AAFM charged CLF and VNRC \$1,595.70.⁶ *Id.* at 13-16. Although CLF and VNRC made a difficult decision to pay these fees under protest due to the importance of these records, this does have an impact on the limited resources of our non-profit organizations. Despite the impediment that conditioning the right to inspection of records on the payment of fees has on the ability of individuals to exercise their right to know about government activities, the trial court decision does not wrestle with this significant policy ramification of its interpretation of the Public Records Act. *See* PC 3-8.

III. PUBLIC AGENCIES HAVE AN OBLIGATION TO MANAGE RECORDS TO PROVIDE READY ACCESS TO THE PUBLIC.

The public should not be penalized for an agency's failure to appropriately manage public records. Public agencies have a statutory obligation to "systematically manage [records] to provide *ready access* to vital information, to promote the efficient and economic operation of government, and to preserve their legal, administrative, and informational value." 1 V.S.A. § 317a. (emphasis added). Each Agency is required to "establish, maintain, and implement an active and continuing program approved by the Vermont State Archives and Records Administration for the effective management . . . of records." 3 V.S.A. § 218(b). In addition, individual agency employees must manage public records under approved record schedules. 1 V.S.A. § 317a(b). "Every public employee is responsible and accountable for the lifecycle management of records and information in his or her custody."⁷

Any burden on the agency to respond to a records request is far outweighed by the public's right to access government records, especially where the agency has control over the

⁶ CLF and VNRC obtained copies of the records because AAFM would have assessed these fees regardless of whether we inspected the records or obtained copies.

⁷ *Records Management 101 for All Public Agencies* VERMONT STATE ARCHIVES & RECORDS ADMINISTRATION, available at <https://www.sec.state.vt.us/media/27737/RIM101.pdf> (last revised Dec. 16, 2008).

amount of time and resources it expends to process records requests through proper records management. *See, e.g., Rueger v. Nat. Res. Bd.*, 2012 VT 33, ¶ 7, 191 Vt. 435, 429, 49 A.3d 112, 115 (2012) (internal citations and quotations omitted) (“[T]he PRA represents a strong policy favoring access to public documents and records” and “we construe exemptions in the PRA strictly against the custodians of records and resolve any doubts in favor of disclosure.”). The manner in which an agency or individual agency employee manages public records is directly related to the amount of time and resources it takes to search for and produce records.⁸ The National Archives has noted that records management “allows quicker retrieval of documents and information from files” and “improves office efficiency and productivity.”⁹ For example, an agency employee that maintains mixed-media files (*i.e.* paper, electronic messaging systems, and electronic files) will expend more time searching for records because that employee will have to search multiple locations for responsive records like emails, electronic files, and paper files than an employee that manages files in one format.¹⁰ An agency that maintains records using an electronic records management system will use less resources than agencies that allow unlimited use of mixed-media files.¹¹ Those agencies that take the additional step to provide the public with access to this electronic records management system will spend even less time and resources to respond to public records requests.

⁸ *Frequently Asked Questions About Records Management in General*, *supra* note 1.

⁹ *Id.*

¹⁰ *Bulletin 2011-04*, NATIONAL ARCHIVES, FEDERAL RECORDS MANAGEMENT (July 18, 2011), *available at* <https://www.archives.gov/records-mgmt/bulletins/2011/2011-04.html>. In addition, mixed-media files create additional risk for government agencies, including making it more challenging to comply with open records laws, preserving records, and meeting the business needs of the agency. *Id.*

¹¹ *Bulletin 2015-02*, NATIONAL ARCHIVES, FEDERAL RECORDS MANAGEMENT (July 29, 2015), *available at* <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>. (noting the challenges of managing email records where there is no system to “capture” emails and associate them with specific “accounts or case files”).

Similarly, the procedure and tools that an agency uses to search for records responsive to a request is directly related to the amount of time it takes to search for and produce records, as well as the quality of the search.¹² For example, if an agency's procedure is to task one employee with conducting a search of all employee email records using Office 365 eDiscovery or other tools to manage email records, it will require less staff time to respond to a request than if individual employees conduct their own search of email records.¹³

A good records management system also provides other important benefits to state agencies.¹⁴ 1 V.S.A. § 317a. Employees themselves are able to locate documents more easily and spend less time hunting for documents or re-creating work that has already been completed when they can't locate an original document.¹⁵ Additional benefits, among many others, include "protection and support in litigation," prevention of unauthorized access to records; and compliance with "archival, audit, and oversight activities."¹⁶ In short, agencies have significant control over the resources it takes to respond to records requests. It is both the law and good business practice to properly manage public records.

Indeed, in rejecting an amendment to the Public Records Act to allow agencies to assess fees for inspection of records, the Legislature acknowledged this fact and recognized the direct connection between an agency's system of records management and the amount of agency resources it takes to respond to public records requests. Hearing on H. 73, Senate Committee on Government Operations, CD 11-86, Track 2, 25:57-26:29 (April 19, 2011) (reproduced in the

¹² See *id.* (recommending that agencies "[c]onfigure electronic messaging systems to allow for automated capture of electronic messages" because "[r]emoving reliance on individual users will increase ability to capture and produce messages").

¹³ *Id.*

¹⁴ *Frequently Asked Questions About Records Management in General*, *supra* note 1.

¹⁵ See *id.*

¹⁶ *Id.*

Appendix of the Appellant at App. 263) (discussing how agencies should not be allowed to charge more for access to public records because they have a “poorly designed” records management system). To the extent an agency is concerned about the amount of time spent responding to public records requests, the solution is to implement a good records management policy—not charge the public fees. In conclusion, the public’s right to inspect government records for free should not be infringed upon by an agency’s failure to comply with its statutory obligation to manage records to provide ready access to the public.

IV. ALL NEW ENGLAND STATE AND THE FEDERAL OPEN RECORDS STATUTES PROVIDE AN AVENUE FOR FREE ACCESS TO PUBLIC RECORDS.

In recognition of the critical importance of open records to our democracy, all New England states and the federal government provide some form of free access to public records. Connecticut, Massachusetts, Maine, Rhode Island, and the federal open records statute contain “fee waiver” provisions for requests for records that are in the public interest. C.G.S.A. § 1-212(d); 1 M.R.S.A. § 408-A(11); M.G.L.A. 66 §10(d)(v); R.I.G.L. 38-2-4(e); 5 U.S.C. § 552(a)(4)(A)(iii). New Hampshire and Vermont statutes provide for free inspection of public records. N.H.R.S.A. 91-A:4(IV); 1 V.S.A. §§ 315(a); 316(a).

A. The federal Freedom of Information Act contains a fee waiver provision for requests that are in the public interest.

The Freedom of Information Act (FOIA) was enacted in 1966 to provide for public access to federal government records to enable the general public to meaningfully participate in government decision-making and affect the policies of the federal government. 5 U.S.C. § 552 et seq. The high costs charged by federal agencies, however, limited the ability of several categories of requestors, including members of the news media, scholars, and nonprofit organizations, from obtaining government documents under the FOIA. *See* John E.

Bonine, *Public-Interest Fee Waivers Under the Freedom of Information Act*, 1981 Duke L.J. 213, 215 (1981) (noting that these costs can reach into the tens of thousands of dollars) (internal citations omitted). In 1974, Congress passed several amendments to the FOIA to better protect public access to government records. The public interest fee waiver provision was among those amendments, and the current statute states:

Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii). Congress enacted the fee waiver provision to “prevent government agencies from using high fees to discourage certain types of requesters and requests,” particularly journalists, scholars, and non-profit public interest groups. *See Ettlinger v. Fed. Bureau of Investigation*, 596 F.Supp. 867, 872 (D.Mass.1984) (citing S. Comm. on the Judiciary, Amending the Freedom of Information Act, S.Rep. No. 93-854, at 10-19 (1974)).

B. All New England state open records statutes contain an avenue for free access to public records.

Almost all New England state open records laws include a fee waiver provision, similar to the FOIA statute. In Connecticut, a public agency “shall waive any fee . . . when the person requesting the records is an indigent individual or, in its judgment, compliance with the applicant’s request benefits the general welfare.” C.G.S.A. § 1-212(d). In Maine, the agency or official:

[m]ay waive part or all of the total fee charged . . . if the requester is indigent or the agency or official considers the release of the public record requested to be in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

1 M.R.S.A. § 408-A(11). In Massachusetts, the records access officer may waive or reduce the amount of any fee charged upon a showing that disclosure of a requested record is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee.” M.G.L.A. 66 §10(d)(v). In Rhode Island, a court may reduce or waive the fees for costs charged for search or retrieval if it determines that the information requested “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” R.I.G.L. 38-2-4(e).

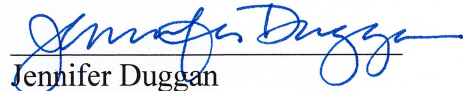
New Hampshire’s public records law does not have a fee waiver provision. However, New Hampshire’s law still maintains a pathway for citizens to access records free of charge because it prohibits an agency from charging fees for mere inspection of documents. *See* N.H.R.S.A. 91-A:4(IV) (“No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form.”). Similar to New Hampshire, Vermont’s Public Records Act does not include a fee waiver provision. Instead, the inspection of records is free. *See* 1 V.S.A. § 315(a); *see also* Hearing on H. 73, S. Comm. on Government Operations, CD 11-86, Track 2, 20:45—20:51 (April 19, 2011) (reproduced in the Appendix of the Appellant at App. 263) (In a Senate Government Operations Committee hearing discussing—and ultimately rejecting—the assessment of fees for inspection of government records, the Committee Chair noted that “we’ve always maintained that it’s free and open examination of records.”). Thus, the consensus policy among the New England states,

including Vermont, and the federal government is to provide some form of free access to public records.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the decision of the Superior Court, enter judgment in favor of Appellant, and enjoin the Appellee from assessing administrative fees against Appellant in connection with Appellant's request to inspect public records.


Respectfully Submitted,



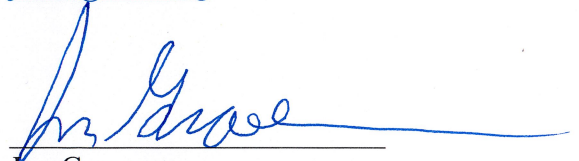
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ADDENDUM

to

Brief of Amici Curiae
Conservation Law Foundation and Vermont Natural Resources Council

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August 9, 2018

Secretary Anson Tebbetts
Vermont Agency of Agriculture, Foods and Markets
116 State Street
Montpelier, VT 05620

Via email: anson.tebbetts@vermont.gov

Re: 1 V.S.A. § 316: Access to Public Records and Documents

Dear Secretary Tebbetts:

The Vermont Natural Resources Council (VNRC) and Conservation Law Foundation (CLF) hereby file an access to public documents request pursuant to 1 V.S.A. §§ 315 – 320. We request access to the following information:

- *All inspection reports dated January 1, 2016 through the date this records request is fulfilled related to compliance with the federal Clean Water Act (CWA) and CWA regulations, policies and procedures; the Vermont Water Quality Standards (VWQS), Vermont's water pollution control laws; the Required Agricultural Practices (RAPs); or Large, Medium and Small Farm Operation programs administered by AAFM;*
- *All Notice of Alleged Violations (NOAV) issued by AAFM related to alleged violations of the RAPs; the Large, Medium and Small Farm Operation programs administered by AAFM; or non-point source discharge violations between January 1, 2016 through the date this records request is fulfilled;*
- *All records related to potential (i.e. referral was considered or discussed) or actual referrals of potential violations of the CWA and CWA regulations, policies, and procedures; the VWQS; Vermont's water pollution control laws; or point source discharges from AAFM to the Vermont Agency of Natural Resources (ANR) between January 1, 2016 through the date this records request is fulfilled;*

- *All records related to AAFM's policy, process, procedure, or practice regarding referral of potential point source discharge violations to ANR between January 1, 2016 through the date this records request is fulfilled;*
- *All records related to AAFM's policy, process, procedure, or practice regarding documenting potential point source discharge violations during an inspection; and*
- *All sampling results, including analytical results, analysis, reports, memoranda, or other narrative summaries, from groundwater and surface water testing of nitrogen, nitrates, or pesticides from January 1, 2011 through the date this records request is fulfilled.*

We believe that you and/or your Agency are the custodian of the requested documents. Please notify us at your earliest convenience if there is another custodian within state government to whom we should direct this request. If any portion of the files is exempted from public review, the above organizations request a written description of the exempt information including certification in writing stating the reason(s) for denial of access 1 V.S.A. § 318(a)(2).

Please provide the request records in an electronic format if possible. If you expect costs to exceed \$100, please provide an estimate of the charges and allow us to respond before proceeding with fulfilling the request.

Thank you for your consideration of this request. Should you need clarification, please contact us via email.

Sincerely,



Jon Groveman
Vermont Natural Resources Council
jgroveman@vnrc.org



Rebekah Weber
Conservation Law Foundation
rweber@clf.org



Jon Groveman <jon.groveman@gmail.com>

Fwd: Public records request AAFM

Jon Groveman <jgroveman@vnrc.org>
To: Jon Groveman <jon.groveman@gmail.com>

Thu, Jan 17, 2019 at 6:33 AM

----- Forwarded message -----

From: Jon Groveman <jgroveman@vnrc.org>
Date: Fri, Sep 21, 2018 at 8:31 AM
Subject: Re: Public records request AAFM
To: Stone, Alison <Alison.Stone@vermont.gov>
Cc: Houston-Anderson, Wendy <Wendy.Houston-Anderson@vermont.gov>, Rebekah Weber <rweber@clf.org>, Tebbetts, Anson <Anson.Tebbetts@vermont.gov>, Patch, Ryan <Ryan.Patch@vermont.gov>, Jen Duggan <jduggan@clf.org>, Brian Shupe <bshupe@vnrc.org>, Huber, David <David.Huber@vermont.gov>, Giguere, Cary <Cary.Giguere@vermont.gov>, DiPietro, Laura <Laura.DiPietro@vermont.gov>

Alison:

Thank you for your response and your phone message. We have reviewed your e-mail and the Superior Court case that you provided. With regard to the Superior Court case (*Reed Doyle v. City of Burlington*), the Court did not follow the ruling in *Vermont State Employees' Ass'n v. Vermont Agency of Natural Resources*, Nos. 517-7-10 Wncv, 518-7-10 Wncv, 2011 \iVL 121649 (Vt. Super. Ct. January 6, 2011), which supports our position that AAFM may not charge for costs of providing documents for inspection, or costs associated with the time lawyers spend reviewing documents to provide advice on whether portions of documents may be redacted pursuant to Vermont's public records law. Moreover, the Superior Court decision in *Reed v. Doyle* does not address the *dicta* in *Judicial Watch, Inc. v. State*, 179 Vt. 214 (2005), cited in our previous e-mail, which supports our position.

It is clear that the objections we have made to the costs AAFM proposes to charge to comply with our record request are in dispute. Accordingly, we request a final decision from AAFM on our records request and we request that the decision address our arguments that AAFM may not charge costs for staff time for our request to *inspect* public documents, or for the cost of a government attorney to provide legal advice regarding aspects of documents that may be exempt from disclosure under Vermont's public records law.

In addition, we request a final decision from AAFM on our request that AAFM delete from the cost estimate provided by Wendy Houston Anderson to us on August 22, 2018, costs related to locating and saving documents to create a "master spreadsheet." As we have noted in previous communications, we are not requesting that AAFM create any documents, including a "master spreadsheet." In contrast, we are requesting that AAFM provide us all documents that fall within our request that are within AAFM's custody for us to inspect.

Finally, based on AAFM's final response, please provide a final accounting of costs AAFM will charge VNRC and CLF to comply with our request.

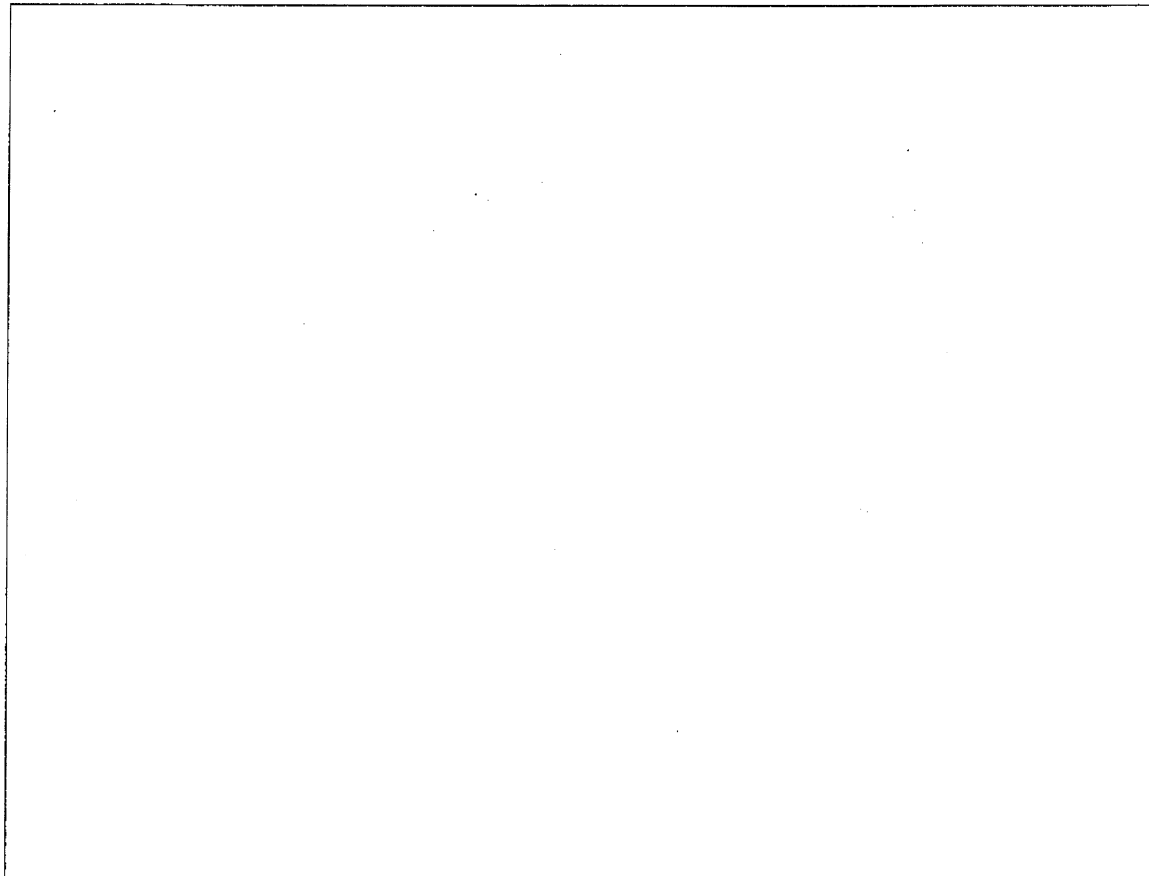
We look forward to your response.

Jon

On Fri, Sep 14, 2018 at 2:04 PM Stone, Alison <Alison.Stone@vermont.gov> wrote:

Hi Jon,

I am conferring with Agency staff so we can respond more fully to your email below as soon as possible, but for now want to draw your attention to the attached Superior Court (Washington Unit) decision dated August 31, 2018. In particular, please see the excerpt below (from page 5). This supports the State's position that the cost of staff time spent complying with a public records request, including time spent making necessary redactions, is recoverable -- regardless of whether a requestor seeks to view copies of responsive records or obtain reproductions of them.



Regards,

Alison

Alison Milbury Stone, Esq.

Assistant Attorney General

Legal Counsel to the Agency of Agriculture, Food and Markets

Office of the Attorney General

Environmental Protection Division

109 State Street

Montpelier, Vermont 05609

802-828-1361

alison.stone@vermont.gov

PRIVILEGED & CONFIDENTIAL COMMUNICATION: This communication may contain information that is privileged, confidential, and exempt from disclosure under applicable law. DO NOT read, copy or disseminate this communication unless you are the intended addressee. If you are not the intended recipient (or have received this E-mail in error) please notify the sender immediately and destroy this E-mail. Vermont's lobbyist registration and disclosure law applies to certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at <https://www.sec.state.vt.us/elections/lobbying.aspx>.



Please consider the environment before printing this e-mail

From: Jon Groveman <jgroveman@vnrc.org>

Sent: Thursday, September 13, 2018 12:32 PM

To: Houston-Anderson, Wendy <Wendy.Houston-Anderson@vermont.gov>

Cc: Rebekah Weber (rweber@clf.org) <rweber@clf.org>; Tebbetts, Anson <Anson.Tebbetts@vermont.gov>; Patch, Ryan <Ryan.Patch@vermont.gov>; Jen Duggan <jduggan@clf.org>; Brian Shupe <bshupe@vnrc.org>; Huber, David <David.Huber@vermont.gov>; Giguere, Cary <Cary.Giguere@vermont.gov>; DiPietro, Laura <Laura.DiPietro@vermont.gov>; Stone, Alison <Alison.Stone@vermont.gov>

Subject: Re: Public records request AAFM

Wendy:

We have reviewed AAFM's cost estimate for responding to our record request. Based on Vermont case law, we believe that AAFM's proposal to charge CLF and VNRC for the following costs are contrary to law:

- * Time to locate and save documents;*
- * Review and redaction of documents for information exempt under Public Records Law and Act; and*
- * Senior staff time to identify responsive emails and other documents related to the referral of cases.*

In Judicial Watch, Inc. v. State, 179 Vt. 214 (2005), the Vermont Supreme Court recognized the Washington County Superior Court's initial ruling in the case that Vermont's Public Records Act only allows the state to "charge and collect the cost of staff time associated with complying with a request for a **copy** of a public record." 1 V.S.A. § 316(c) (**emphasis added**). Washington County Superior court further held that the statute does not allow the state to charge staff time to resist public access, finding that: "Such an expansive interpretation could cripple cumbersome requests with unnecessarily high expenses." The court noted that this could not possibly be what that Legislature intended, and that "the Act is designed to encourage access, not to thwart it."

CLF and VNRC have made it clear that we are not asking AAFM for **copies** of documents. We are requesting the opportunity to **inspect** documents, and would accept electronic version of documents as a means of fulfilling our request. Based on the Washington County Superior Court's decision in **Judicial Watch**, AAFM does not have the authority to levy the charges for staff time related to complying with our request because our request is not for copies of documents, but to inspect documents. In addition, we believe under Vermont law, an agency may not under any circumstances charge for the redaction of documents by attorneys conducting a review as part of their job representing an agency.

The other charges proposed by AAFM are for creating master spread sheets. CLF and VNRC have not and are not asking AAFM to create any documents as part of this record request. We are only asking to inspect existing documents applicable to our request.

Accordingly, please let us know when we will be able to inspect the documents we have requested either in electronic or paper form, and if AAFM will still seek to charge VNRC and CLF for the cost of inspecting documents. If AAFM is still seeking to charge VNRC and CLF for the cost of complying with this request, please provide the legal authority for charging any costs, and address the arguments we have raised based on the Judicial Watch decision.

Jon

On Wed, Aug 22, 2018 at 4:17 PM, Houston-Anderson, Wendy <Wendy.Houston-Anderson@vermont.gov> wrote:

Hi Jon and Rebekah,

I am following up on your communications with Laura DiPietro, Water Quality Division Director, regarding your public records request dated August 9th.

I've set out below the estimated costs associated with fulfilling the VNRC/CLF records request. Please let us know when you would like us to proceed with filling the request, and whether you would like to change the scope in any way based on the cost estimates provided and Laura's email from last Friday. Also, my colleagues and I would be happy to talk with you on the phone at your convenience to discuss any questions you may have and any clarifications you may be able to provide, as well as to discuss a schedule for our prompt production of records (with additional input, we can endeavor to produce those that are highest priorities for you first). Relatedly, please be advised that due to the voluminous number of records requested (assuming the request is not narrowed), additional time will be required for producing the records. See 1 V.S.A. § 318(a)(5). We can identify the precise timeline once we hear back from you with any further guidance and a go-ahead to proceed with filling the request.

Additionally, in response to Attorney Groveman's email of August 16th, the Agency has determined that fulfilling the request by providing documents in electronic format will be the most cost effective (since the requested records are maintained in electronic formats). Since you indicated in your original request that you wanted the records "in an electronic format if possible," our estimate below is for electronic copies. I note that producing documents for inspection only will be comparable to producing electronic copies on an ftp site, since the documents will need to be located and reviewed for exempt material in either scenario. From our perspective, whether we post the documents to an ftp site, or whether instead VNRC/CLF staff come to the Agency to review the files on a laptop can be decided at a later date.

Finally, please note that the times provided are our best estimates; if in filling the request it looks like we will need to significantly exceed the amount estimated, we will check in with you for further approval before proceeding.

Cost Estimate

- *All inspection reports dated January 1, 2016 through the date this records request is fulfilled related to compliance with the federal Clean Water Act (CWA) and CWA regulations, policies and procedures; the Vermont Water Quality Standards (VWQS),*

Vermont's water pollution control laws; the Required Agricultural Practices (RAPs); or Large, Medium and Small Farm Operation programs administered by AAFM;

- *All Notice of Alleged Violations (NOAV) issued by AAFM related to alleged violations of the RAPs; the Large, Medium and Small Farm Operation programs administered by AAFM; or non-point source discharge violations between January 1, 2016 through the date this records request is fulfilled;*

1. Time to locate and save documents based on existing master spreadsheet of 1/1/2017 through 6/30/2018 inspections/investigations/enforcement action follow-up visits: 12.5 hours (minus first 30 minutes) = 12 hours @ 0.33/min = \$237.60.
2. Senior staff time to manage field visit tracking spreadsheets/calendar exports to create master spreadsheet of 1/1/2016 thru 12/31/2016 field visits: 6 hours @ 0.57/min = \$205.20.
3. Time to locate and save documents based on created master spreadsheet of 1/1/2016 thru 12/31/2016 inspections/investigations/enforcement action follow-up visits: 8 hours @ 0.33/min = \$158.40.
4. Review and redaction of documents for information exempt under Public Records Law and Act 64: 8 hours \$0.45/min = \$216.00

- *All records related to potential (i.e. referral was considered or discussed) or actual referrals of potential violations of the CWA and CWA regulations, policies, and procedures; the VWQS; Vermont's water pollution control laws; or point source discharges from AAFM to the Vermont Agency of Natural Resources (ANR) between January 1, 2016 through the date this records request is fulfilled;*

5. Senior staff time to identify responsive emails and other documents related to the referral of cases to ANR/DEC: 4 hours @0.57 = \$136.80
6. Review and redaction of referral-related emails/documents for information exempt under Public Records Law and Act 64: 4 hours @.45/min = \$108.00.
7. Review and redaction of enforcement tracking sheets for information exempt under Public Records Law and Act 64: 30 minutes @45/min = \$13.50.

- *All records related to AAFM's policy, process, procedure, or practice regarding referral of potential point source discharge violations to ANR between January 1, 2016 through the date this records request is fulfilled;*

8. Will provide existing copy of "Memorandum of Understanding between the Agency of Agriculture, Food, and Markets and the Agency of Natural Resources Regarding the Implementation and Enforcement of Agricultural Water Quality Programs as Required by 6 V.S.A. § 4810, 10 V.S.A. §§ 1259(i) and 8003(d)", dated March 17, 2017. No cost.
9. Will provide copy of "List of Potential Cases" which documents the discussions/decisions made during the Agency's weekly Enforcement Process Discussion Meetings from January 2017 to present. No cost.

- *All records related to AAFM's policy, process, procedure, or practice regarding documenting potential point source discharge violations during an inspection;*

10. Will provide copy of existing "Water Quality Inspection/Complaint/Survey Policy". No cost.

Total estimated costs (not including request for water quality sampling data) = \$1,075.50

Best,

Wendy

Wendy Houston-Anderson

Enforcement Coordinator

Water Quality Division

Vermont Agency of Agriculture

116 State Street

Montpelier, Vermont 05620-2901

(802) 828-3475

wendy.houston-anderson@vermont.gov

Please complete this brief survey to help us improve our customer service. Thank you for your feedback!

From: Jon Groveman <jgroveman@vnrc.org>

Sent: Monday, August 20, 2018 7:09 AM

To: DiPietro, Laura <Laura.DiPietro@vermont.gov>

Cc: Rebekah Weber (rweber@clf.org) <rweber@clf.org>; Tebbetts, Anson <Anson.Tebbetts@vermont.gov>; Houston-Anderson, Wendy <Wendy.Houston-Anderson@vermont.gov>; Patch, Ryan <Ryan.Patch@vermont.gov>; Jen Duggan <jduggan@clf.org>; Brian Shupe <bshupe@vnrc.org>; Huber, David <David.Huber@vermont.gov>; Giguere, Cary <Cary.Giguere@vermont.gov>

Subject: Re: Public records request AAFM

Laura:

Below is a response to your proposed clarifications to our record request:

1. You have accurately described our request.

2. We would like all the documents in the series as you described it.

3 and 4. - Does not accurately reflect our request. In addition to records related to actual referrals to ANR, we are requesting all records related to matters that AAFM considered or discussed as a possible referral to ANR. In other words, when AAFM meets to discuss potential referrals as you describe in your point number 4, we are requesting any and all records this group reviews, notes, any record of decision, etc.

Also, we are requesting all records related to any policy, process, procedure, guidance, practice, or criteria (including any emails) that AAFM follows when making determinations as to whether to refer a matter to ANR. In other words, what criteria or other guidance does the AAFM group you describe in your point number 4 consider when AAFM is making a determination as to whether there is a point source violation? If there are no responsive records to this portion of our request, please state so.

5. You have accurately described our request.

6. We will contact Cary.

As an overall comment, please identify the specific types of information that AAFM may be privileged on inspection reports.

Jon

On Fri, Aug 17, 2018 at 11:07 AM, DiPietro, Laura <Laura.DiPietro@vermont.gov> wrote:

Hi Jon and Rebekah,

The information you have requested does need more clarification. Here is what I understand the request to be and the records we have. Can you confirm these are the records you want us to perform an estimate on.

1. All of our completed inspection and investigation reports for farms of all sizes since 1/1/16. This includes our normal inspections that we are required to do, follow up inspections on enforcement cases and all complaints that come in, which we categorize as investigations. We have a few documents associated with this for each farm and they are all in .pdf which reduces printing costs, but we still need to review for redaction. These documents include a summary sheet (day of visit check list we leave with the farm), a general form (overview of whole farm NMP and buffers), and a facility form (specific to each individual farmstead production area under a single farming operation).
2. We do not issue NOAVs, that is the name of DEC's enforcement action which is akin to our Corrective Action Letter (no penalty) and an Administrative Penalty. Our enforcement authorities allow us to issue 4991 letters, Corrective Action Letters, Administrative Penalties, enter into Assurances of Discontinuance, and Cease and Desist Orders. Are you interested in all of these documents or just certain types of actions? Do you want the whole record in series, e.g the CAL, the farmers response to a CAL, the inspection follow up, escalated actions if no corrective measures taken, and the close out memos? We believe the whole record in series is the most useful data, however there would be more printing as items like a CAL response from a farm are often hand written and would need to be copied or scanned.
3. Our process for potential and actual point source referrals to ANR is to use email as the record. We can extract these email chains as the record.
4. For referral decisions, we meet as a team to discuss the evidence and nature of the case (similar to ANR's referral committee) and decide if it needs to be referred. This is a verbal process and the record is the

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- referral email #3 and the reports from #1. We follow the MOU, which I assume you have a copy of.
5. We have a single electronic policy document we can provide for inspections/investigations which includes the expectations of data collection for the staff.
 6. The sampling results is the item that we quickly recognized would be costly as the data is managed in a database that cannot be exported and instead each record needs to be printed out in order to retrieve the data. I think this portion of the request is best suited for a telephone conversation so we can identify the best way to get that data to you. Please contact Cary Giguere to discuss this portion of the request (802) 793-1706.

Is my understanding of the request accurate? Is it correct to assume that aside from water samples, all other records are starting from 1/1/16? If so, can you confirm the above data is what you would like us to estimate the costs on? As for your request on how to provide the cost estimate in the email below, many items do not need printing, however all need to be reviewed for redaction so there really is no difference between providing copies for inspection only as we'd still have to redact if required.

Please note-I am going on vacation next week so please be sure to contact David Huber and Wendy Houston-Anderson (both cc'd here) so they can follow this through.

Thank you,

Laura

From: Jon Groveman <jgroveman@vnrc.org>
Sent: Thursday, August 16, 2018 2:01 PM
To: DiPietro, Laura <Laura.DiPietro@vermont.gov>
Cc: Rebekah Weber (rweber@clf.org) <rweber@clf.org>; Tebbetts, Anson <Anson.Tebbetts@vermont.gov>; Houston-Anderson, Wendy <Wendy.Houston-Anderson@vermont.gov>; Patch, Ryan <Ryan.Patch@vermont.gov>; Jen Duggan <jduggan@clf.org>; Brian Shupe <bshupe@vnrc.org>
Subject: Re: Public records request AAFM

Laura:

Thank you for your response. We are happy to answer any questions you have about our request in order to assist you in providing the documents. However, we do not intend to narrow the scope of our request.

Please provide us with a cost estimate of responding to our request under the following three scenarios:

1. Providing copies of documents;
2. Providing documents for inspection only; and
3. Providing documents in electronic format, such as posting the documents on an ftp site.

We believe any questions you have about our request, and issues relating to the cost of fulfilling our request can be addressed through e-mail or brief phone call, and an in person meeting is not necessary. As you are aware, the Vermont Public Records law requires that governmental entities respond promptly to document requests and we are interested in obtaining the documents we have requested as soon as possible.

Sincerely,

Jon Groveman and Rebekah Weber

On Tue, Aug 14, 2018 at 3:56 PM, DiPietro, Laura <Laura.DiPietro@vermont.gov> wrote:

Hi Jon and Rebekah,

The Agency of Agriculture, Food and Markets (AAFM or the Agency) has received and reviewed the public records request letter that CLF and VNRC submitted to the Agency's Secretary, Anson Tebbetts, by email on August 9, 2018. AAFM recognizes and appreciates the importance of open access to public records and the public interest reflected in 1 V.S.A. § 315 et seq.

In your request, you asked that the Agency notify you of estimated charges and provide you with an opportunity to respond before fulfilling the request if costs are expected to exceed \$100. By this email, I am notifying you that costs are expected to exceed \$100, and therefore we will not proceed any further with fulfilling this request unless and until you ask that we do so.

We invite you to come to the Agency's offices in Montpelier for an in-person meeting to discuss the overall request and see if we can collectively hone in on a scope for the request that will enable us to promptly produce the information you need at a cost that works for you.

Please reach out to me directly to set up a time to speak.

Thanks,

Laura

Get Outlook for iOS

--
Jon Groveman

VNRC Policy and Water Program Director

802-249-7736 (Mobile)

802-223-2328 x-111 (Office)

Agency of Agriculture, Food & Markets
116 State Street
Montpelier, VT 05620-2901
www.Agriculture.Vermont.gov

Water Quality Division
Laura DiPietro, Director

October 23, 2018

Jon Groveman
Vermont Natural Resources Council
Via email: jgroveman@vnrc.org

Rebekah Weber
Conservation Law Foundation
Via email: rweber@clf.org

Dear Mr. Groveman and Ms. Weber,

This letter is in response to your request for the following records:

1. *All inspection reports dated January 1, 2016 through the date this records request is fulfilled related to compliance with the federal Clean Water Act (CWA) and CWA regulations, policies and procedures; the Vermont Water Quality Standards (VWQS), Vermont's water pollution control laws; the Required Agricultural Practices (RAPs); or Large, Medium and Small Farm Operation programs administered by AAFM;*
2. *All Notice of Alleged Violations (NOAV) issued by AAFM related to alleged violations of the RAPs; the Large, Medium and Small Farm Operation programs administered by AAFM; or non-point source discharge violations between January 1, 2016 through the date this records request is fulfilled;*
3. *All records related to potential (i.e. referral was considered or discussed) or actual referrals of potential violations of the CWA and CWA regulations, policies, and procedures; the VWQS; Vermont's water pollution control laws; or point source discharges from AAFM to the Vermont Agency of Natural Resources (ANR) between January 1, 2016 through the date this records request is fulfilled;*
4. *All records related to AAFM's policy, process, procedure, or practice regarding referral of potential point source discharge violations to ANR between January 1, 2016 through the date this records request is fulfilled;*
5. *All records related to AAFM's policy, process, procedure, or practice regarding documenting potential point source discharge violations during an inspection; and*
6. *All sampling results, including analytical results, analysis, reports, memoranda, or other narrative summaries, from groundwater and surface water testing of nitrogen, nitrates, or pesticides from January 1, 2011 through the date this records request is fulfilled.*



Thank you for your payment of \$536.40. AAFM recognizes and appreciates the policy of open access to public records and the public interest reflected in 1 V.S.A. § 315 et seq.

At this time, we are providing you with responsive records associated with items 1, 2, 4, and 5 above. We will work over the next week to complete the search and processing of responsive documents associated with item 3 above. We understand that you have been working separately with the Plant Health and Agricultural Resource Management (PHARM) Division to obtain the responsive data associated with item 6 above.

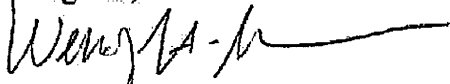
Some of the information in the records being provided has been redacted because it is exempt from disclosure under applicable law. Under 6 V.S.A. § 4992(a), "the Secretary of Agriculture shall not be required to identify the source of the complaint." Therefore, the names and other identifying information of complainants have been redacted as appropriate. Addresses, phone/cell numbers, and email addresses have been redacted in accordance with 1 V.S.A. § 317(c)(7).

Please note that you may appeal any adverse determination to the Secretary of the Agency of Agriculture, Food and Markets in accordance with 1 V.S.A. § 318(c)(1). Any appeal must be in writing addressed to:

Anson B. Tebbetts, Secretary
Vermont Agency of Agriculture, Food and Markets
116 State Street
Montpelier, Vermont 05620-2901

Please feel free to contact me if you have any questions or concerns. I can be reached at 802-828-3475 or wendy.houston-anderson@vermont.gov.

Best regards,



Wendy Houston-Anderson
Enforcement Coordinator



Agency of Agriculture, Food & Markets
116 State Street
Montpelier, VT 05620-2901
www.VermontAgriculture.com

Water Quality Division
Laura DiPietro, Director

December 14, 2018

Jon Groveman
Vermont Natural Resources Council
Via email: jgroveman@vnrc.org

Rebekah Weber
Conservation Law Foundation
Via email: rweber@clf.org

Dear Mr. Groveman and Ms. Weber,

This letter is to accompany the transmission of the following records:

All records related to potential (i.e. referral was considered or discussed) or actual referrals of potential violations of the CWA and CWA regulations, policies, and procedures; the VWQS; Vermont's water pollution control laws; or point source discharges from AAFM to the Vermont Agency of Natural Resources (ANR) between January 1, 2016 through the date this records request is fulfilled;

Thank you for your payment of \$804.60. AAFM recognizes and appreciates the policy of open access to public records and the public interest reflected in 1 V.S.A. § 315 et seq.

In order to identify the records responsive to this request, David Huber, Chief Policy Enforcement Office, conducted a search of his emails, sent and received within the time period of 1/1/2016 through the date of the search, using the search terms "Chip Gianfagna", "Referral", "Sean McVeigh", and "Kim Greenwood". As a result, these emails are organized in four separate files titled with these search terms within a larger folder titled "Referral Communications".

Some of the information in the records being provided has been redacted because it is exempt from disclosure under applicable law. Under 6 V.S.A. §4992(a), "the Secretary of Agriculture shall not be required to identify the source of the complaint." Therefore, the names and other identifying information of complainants have been redacted as appropriate. Addresses, phone/cell numbers, and email addresses have been redacted in accordance with 1 V.S.A § 317(c)(7). In accordance with 1 V.S.A § 317(c)(25), conference call-in numbers, usernames and passcodes have been redacted.

Some documents were identified as attorney-client privileged information or attorney-client work products and were not provided in accordance with 1 V.S.A. §317(c)(4). These include



communications between the Agency and the Attorney General's Office regarding cases in active enforcement.

If emails had attachments that contained exempt information, the link to that attachment was redacted within the email, and the redacted attachment was saved in a separate folder within each of the four search term folders. For example, the "Referral" folder contains a folder titled "Referral Attachments".

We are also providing a number of additional inspection/investigation/follow-up reports that were identified after our first transmission of responsive records to you in October. There is no additional charge for these files. These files are located in the folder titled "VNRC_remaining files".

Please note that you may appeal any adverse determination to the Secretary of the Agency of Agriculture, Food and Markets in accordance with 1 V.S.A. § 318(c)(1). Any appeal must be in writing addressed to:

Anson B. Tebbetts, Secretary
Vermont Agency of Agriculture, Food and Markets
116 State Street
Montpelier, Vermont 05620-2901

Please feel free to contact me if you have any questions or concerns. I can be reached at 802-828-3475 or wendy.houston-anderson@vermont.gov.

Best regards,



Wendy Houston-Anderson
Enforcement Coordinator

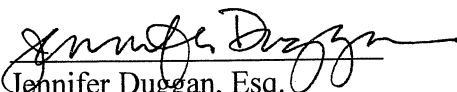
IN THE SUPREME COURT OF
THE STATE OF VERMONT

REED DOYLE,)	Docket No.: 2018-342
<i>Plaintiff/Appellant</i>)	On appeal from the
)	Vermont Superior Court
v.)	Washington Unit, Civil Div.
)	Docket No. 15-1-18 Wncv
)	
CITY OF BURLINGTON POLICE)	
DEPARTMENT,)	
<i>Defendant/Appellee</i>)	

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Vermont Rules of Appellate Procedure, undersigned counsel hereby states that the Amicus Curiae Brief accompanying this Certificate was produced with Microsoft Word for Office 365 (16.0.11126.20192), Windows 10 Professional. Undersigned counsel further certifies that, as counted by Microsoft Office Word 2013, Windows 10 Professional, the pertinent sections of the Amicus Curiae Brief identified by Rule 32(a)(7)(B) contain 7,241 words. Therefore, the Amicus Curiae Brief conforms with the pertinent word-count limitation.

Dated in Montpelier, Vermont this 18th day of January 2019.

By: 
Jennifer Duggan, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992
(802) 223-0060 (fax)
jduggan@clf.org

IN THE SUPREME COURT OF
THE STATE OF VERMONT

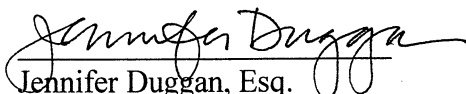
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)	
CITY OF BURLINGTON POLICE)	
DEPARTMENT,)	
<i>Defendant/Appellee</i>)	

V.R.A.P. 32(B)(4) CERTIFICATION

NOW COMES Jennifer Duggan, the attorney submitting a copy of Conservation Law Foundation and Vermont Natural Resources Council's Amicus Curiae Brief by electronic mail, and hereby certifies that sending the Amicus Curiae Brief by electronic mail through the Conservation Law Foundation network server ensures that the associated electronic mail message and attachments have been scanned and that no virus has been detected.

Dated in Montpelier, Vermont this 18th day of January 2019.

By:


Jennifer Duggan, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992
(802) 223-0060 (fax)
jduggan@clf.org