STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 338-10-20 Wncv

VERMONT JOURNALISM TRUST,

Plaintiff,

v.

VERMONT AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT and LINDSAY KURRLE, SECRETARY OF THE AGENCY OF COMMERCE AND COMMUNITY DEVELOPMENT

Defendants.

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, CROSS-MOTION FOR SUMMARY JUDGMENT, AND INCORPORATED MEMORANDUM OF LAW

NOW COMES Plaintiff Vermont Journalism Trust, Ltd. and, pursuant to V.R.C.P. 56, cross-moves for summary judgment in its favor on all claims asserted against it by Defendants Vermont Agency of Commerce and Community Development ("ACCD") and Secretary Lindsay Kurrle (together, "Defendants") on the basis that there is no genuine dispute as to any material fact, and Plaintiff is entitled to judgment as a matter of law. In support hereof, Plaintiff offers: (1) the following incorporated Memorandum of Law; (2) its Statement of Undisputed Material Facts ("Pl. SUMF"); and (3) the Declaration of Anne Galloway and accompanying Exhibits thereto.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This action marks the third time in five years that the Vermont Journalism Trust ("VTDigger") has been forced to file a Public Records Act ("PRA") case to challenge the State's use of Vermont's litigation exemption as a blanket denial of access to records that would aid VTDigger's coverage of a Ponzi-like scheme that bilked more than $200 million from immigrant investors. VTDigger seeks certain communications of Lawrence Miller, the then-head of the agency tasked with overseeing the State's EB-5 immigrant investors program. The requested communications (the "Miller emails") involve (1) specific projects that the defrauded immigrants invested in, including the Jay Peak ski resort and various related amenities and an unrelated biotechnology company; and (2) three people that figured prominently in VTDigger stories leading up to the launch of a federal securities fraud investigation into the scheme. The Miller emails are of great public interest because they may show what the State Agency of Commerce and Community Development ("ACCD") knew or should have known about the largest fraud case in Vermont's history prior to the fraud becoming public.

Defendants argue that they properly denied VTDigger's request for the Miller emails because Vermont's litigation exemption allows them to withhold documents that are "broadly relevant, that is factually related or pertinent," to the class action *Sutton* litigation brought against the State by the defrauded investors that is pending in Lamoille Superior Court. Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law ("Defs. Br.") at 2. As a threshold issue, even if we were to assume that Defendants' overly broad definition of relevance is correct, Defendants concede that they cannot rely on the litigation exemption to withhold more than 20 percent of the Miller emails involving either Jay Peak CEO Bill Stenger or employee Alex MacLean because they "do not relate or pertain to Jay Peak or the EB-5 program." Declaration of William E. Griffin ("Griffin Decl.") ¶ 6. Rather than produce these documents to VTDigger now, the State instead makes the incorrect and

wholly illogical claim that these documents are non-responsive because VTDigger somehow narrowed its document request in the Complaint. *Id.* No fair reading of the Complaint supports this assertion.

With respect to the remaining approximately 1,089 Miller emails, the State claims that a ruling in its favor is required because the interests in court control of discovery and in avoiding "unfairly disadvantaging public agencies" outweigh the great "public interest in government accountability" here. Defs. Br. at 2. But the purported purpose of the litigation exemption is not served here—the *Sutton* plaintiffs are not seeking an "end run around discovery rules" to obtain documents that they had been denied in litigation. *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 22. Indeed, there is no relationship whatsoever between Plaintiff VTDigger here, which seeks to hold the State accountable in the court of public opinion, and the *Sutton* plaintiffs, who seek to hold the State legally liable for its actions.

In addition, the Vermont Supreme Court has recognized that the mere fact that records have not been ruled discoverable in the litigation at issue does not hamstring a court's ability to order that documents be produced to avoid construing the litigation exemption to be "so broad and enduring as to effectively eliminate the general policy favoring public disclosure." *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 14. Defendants' overbroad view that there is a blanket prohibition against ordering production in this context ignores the overriding public interest in government accountability here. Defs. Br. at 9-10. As another state court has recognized, given the public interest at stake here it would be "a small price to pay to require disclosure of public records even to a litigant opposing the government, outside the rules of discovery." *Fairley v. Superior Ct.,* 66 Cal. App. 4th 1414, 1422 (1998).

The Court should deny the State's motion for summary judgment and grant VTDigger's cross-motion for summary judgment for two reasons. First, the State's overly broad interpretation of the exemption here transforms it into an indefinite ban on access to records that is inconsistent with the PRA, caselaw, and other states' narrower interpretations of their litigation exemptions. Indeed, accepting the State's interpretation in this case would position Vermont as an outlier among the small

minority of states that even have litigation exemptions. Second, the public interest in disclosure here clearly outweighs the State's purported interest in court control of discovery and in avoiding an unfair disadvantage in the *Sutton* litigation. For these reasons, Defendants fail to satisfy their burden of establishing that the litigation exemption applies to the Miller emails.

STATEMENT OF FACTS

The Vermont EB-5 Scandal

The federal EB-5 Immigrant Investor Visa Program provides foreign participants a path to U.S. citizenship in exchange for investments in underdeveloped rural areas. Pl. SUMF ¶ 3. The ACCD was designated in 1997 as an EB-5 regional center to participate in the federal program. *Id.* ¶ 4. In 2006, Ariel Quiros, then-owner of the Jay Peak ski resort, and then-CEO Bill Stenger enacted a plan to use the EB-5 program to fund a major expansion of the resort and the construction of AnC Bio Vermont, a stem cell laboratory. *Id.* ¶ 5. Quiros and Stenger raised more than $250 million for the Jay Peak expansion and approximately $85 million for the AnC Bio project from around 800 investors. *Id.*

These projects would never come to fruition, as Quiros instead "pilfer[ed] tens of millions of dollars of investor funds" for his own use. *Id.* ¶ 6. In 2016, the U.S. Securities and Exchange Commission ("SEC") brought a 52-count action against Quiros and Stenger, both of whom subsequently settled with the SEC in 2018 and were indicted by a grand jury. *Id.* ¶ 7. The scheme stymied Jay Peak's expansion and left hundreds of investors at risk of losing their green cards. *Id.*

The State Rebuffs Concerns and Overlooks Warning Signs

Following the SEC investigation and indictments, the United States Citizenship and Immigration Services ("USCIS") terminated Vermont's EB-5 program. *Id.* ¶ 8. The USCIS, which runs the federal EB-5 program, made this decision based on Vermont's failure to provide "oversight, monitoring, and management of" the EB-5 projects. *Id.* Significantly, the USCIS also expressly noted

in its rejection of the State's appeal that the State had evidence of the fraud that it failed to communicate until after the SEC initiated its investigation. *Id.* ¶ 9.

Long before Vermont's EB-5 program was shut down, Douglas Hulme, owner of EB-5 consulting firm Rapid USA Visas, told State officials back in 2012 about concerns he had with Jay Peak's business practices. *Id.* ¶ 11. Hulme's concerns were met with retaliation. *Id.* Miller told Hulme he was not authorized to use the State's logo on the Rapid USA website and threatened to report his alleged marketing of an EB-5 program without State approval to the Vermont Attorney General. *Id.*

That same year, Miller also refused then-EB-5 Regional Center Director Brent Raymond's requests for audits of the Jay Peak project after Stenger asserted that a private audit would be expensive. *Id.* ¶ 12. Raymond continued to question the project, causing MacLean, a former aide to Governor Peter Shumlin, to demand that he "[l]ay off." *Id.*

VTDigger's Role in Uncovering the Fraud

The Vermont Journalism Trust operates VTDigger, which serves as one of Vermont's major news sources. *Id.* ¶ 2. VTDigger's coverage of the Jay Peak and AnC Bio projects has been publicly credited for its role in uncovering the fraud that led to the SEC bringing suit against Quiros and Stenger. *Id.* VTDigger's editor and founder Anne Galloway became suspicious of the projects in 2012, when she realized that Quiros and Stenger's promises seemed "too good to be true." *Id.* ¶ 9. Galloway's suspicions increased in 2013 after reporting revealed that the State had investigated and cancelled a separate EB-5 resort project based on misrepresentations and lack of progress but failed to scrutinize the Jay Peak project for similar issues. *Id.*

VTDigger's Record Requests and the Litigation Exemption

Throughout its investigation of the fraud, VTDigger has made record requests to fully inform the public and hold government officials accountable. *Id.* ¶ 14. The State has repeatedly rejected these requests or refused to fulfill them in whole. *Id.* Many of the documents that the State has produced

have been heavily redacted and in one case the State admitted that it lost certain communications. *Id.* ¶ 16. VTDigger has twice previously been forced to sue the State over records to assist in its investigation of Jay Peak. *Id.* ¶¶ 20-21.

In rejecting VTDigger's record requests, the State has repeatedly invoked the Public Record Act's litigation exemption to deny VTDigger's access to records. *Id.* ¶¶ 15, 17, 21-23. The litigation exemption applies to records "relevant to litigation to which the agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation." 1 V.S.A. § 317(c)(14).

In 2016, the State relied on a fraud suit that it filed against Jay Peak defendants, *State v. Quiros*, to broadly withhold all EB-5 documents from reporters. Pl. SUMF ¶ 20. Even prior to announcing its broad ban on access, the State had been withholding EB-5 documents, including an October 2015 litigation hold letter, from VTDigger based on the existence of the litigation hold. *Id.* After investors brought a suit against the ACCD and various state employees in 2017, the State began to cite that suit—*Sutton, et al. v. State of Vermont Agency of Commerce and Community Development, James Candido, and Brent Raymond*, Docket No. 100-5-17 Lecv—as well in rejecting VTDigger's requests. *Id.* ¶ 21. In the *Sutton* suit, the Vermont Supreme Court has dismissed investors' claims against some officials, including Miller, based on sovereign and qualified immunity—not a lack of wrongdoing. *Id.* ¶ 19. The suit, focused on the State's duty to the investors, is in the discovery phase, and the parties do not expect it to be "trial-ready" until September of 2022. *Id.* ¶¶ 19, 24. The State has also used the *Sutton* litigation to deny VTDigger access to documents related to the Trapp Family Lodge EB-5 activities, a project that is not at issue in *Sutton*. *Id.* ¶ 22.

On August 20, 2020, Galloway sent a PRA request to the ACCD seeking Miller's emails between January 1, 2011 and December 31, 2014 (i) pertaining to AnC Bio, Rapid USA Visas, the Hotel Jay and the Jay Peak Penthouse Suites L.P. projects, Bill Stenger, Alex MacLean or Rapid USA

Visa owner Douglas Hulme; and (ii) documenting his communications with Stenger, MacLean, or Hulme. *Id.* ¶ 16.

On August 25, 2020, the ACCD denied the request based on the PRA's litigation exemption, citing the *Sutton* litigation, and stating, "As this case is still open, the records you request are exempt from public disclosure under 1 VSA 317(c)(14), provided that they shall otherwise be available as allowed under the Public Records Act upon termination of the litigation, or earlier if ruled discoverable by a court." *Id.* ¶ 17. On September 15, 2020, Galloway appealed the decision to Secretary Lindsay Kurrle, and this appeal was denied on September 29, 2020. *Id.* ¶ 18.

VTDigger now seeks the Miller emails to provide the public information vital in holding State officials accountable for any lack of oversight or mishandling of the EB-5 program.

ARGUMENT

The Court should grant VTDigger's motion for summary judgment for two compelling reasons. First, the State's overly broad interpretation of the exemption here transforms it into an indefinite ban on access to records that is inconsistent with the narrower interpretation required by the PRA and caselaw and with other states' interpretations of their litigation exemptions. Second, the public interest in government accountability here substantially outweighs the State's purported interest in court control of discovery and in avoiding an unfair disadvantage in the *Sutton* litigation.

I. A Proper Interpretation of § 317(c)(14) Requires Disclosure of the Miller Emails.

Vermont courts "construe [PRA] exceptions strictly against the custodians of records and resolve any doubts in favor of disclosure." *Wesco*, 2004 VT 102, ¶ 10. As a threshold matter, "defendants bear the burden of showing that the exemption applies through a specific factual record." *Herald Ass'n Inc. v. Dean*, 174 Vt. 350, 359 (2002). Defendants cannot "avoid [disclosure] merely by invoking the magic word 'relevant' under the litigation exception. To do so would threaten to cut off valuable information not only to the parties to the litigation but to all Vermonters." *Shlansky,* 2010 VT

90, ¶ 12. The litigation exemption cannot be interpreted to be "so broad and enduring as to effectively eliminate the general policy favoring public disclosure." *Id.* at ¶ 14.

A. The State's Interpretation Is Overly Broad Because It Undermines the Temporal Scope of the Litigation Exemption

Defendants acknowledge that the litigation exemption is designed as only a "temporary restriction" during which "access to [] documents is simply delayed until the termination of litigation" or "until they have been ruled discoverable." Defs. Br. at 9. Defendants herald this "temporary restriction" as causing no "undue hardship," *id.*, but in doing so ignore that they have continually used the litigation exemption to bar access to EB-5 records over the past five years. Before the *Sutton* litigation was even filed, the State relied on a separate fraud suit that it filed against a series of businesses and individuals connected to Jay Peak, *State v. Quiros*, to deny VTDigger access to EB-5 records. Pl. SUMF ¶ 20. At the time, the State instituted a blanket ban on access to these records, stating that it would withhold all its communications about the EB-5 program until the conclusion of the *Quiros* litigation. *Id.* No logical reading of the litigation exemption's text supported a general denial of that nature with no consideration as to the specific documents' relevance or discoverability. While the *Quiros* litigation finally did settle last year, no end is yet in sight for the *Sutton* litigation. Parties estimate that *Sutton* will not likely go to trial until at least September 2022. *Id.* ¶ 24. This means that under the State's interpretation of the litigation exemption the public will likely continue to be deprived of vital information throughout this time period, with every day inflicting additional harm.

The State's use of multiple lawsuits to bar access to all records concerning the EB-5 program over a several-year period is precisely the type of restriction that the Vermont Supreme Court warned against in *Shlansky*. The *Shlansky* Court rejected an agency's attempt to use a pending traffic ticket proceeding to withhold general documents relating to policies, procedures, and day-to-day administration in part because the agency could use ongoing litigation to withhold these documents "indefinitely." *Shlansky,* 2010 VT 90, ¶ 14. The Court rejected the agency's interpretation, which

would transform the litigation exemption into a ban on access "so broad and enduring as to effectively eliminate the general policy favoring public disclosure." *Id.* The Court went on to explicitly caution against the factual scenario at play here, where, due to serial litigation, reporters are indefinitely denied access to information concerning the day-to-day conduct of government officials. *Id.* ¶¶ 13-14. Like in *Shlansky*, the State has been and is likely to continue to be involved for years to come in some form of litigation relating to the EB-5 program. The Court therefore should not sanction such a "broad and enduring" interpretation of the litigation exemption that may serve to shield government officials from accountability. *Id.* ¶ 14. Instead, the Court should adopt the narrow interpretation of the litigation exemption propounded by VTDigger, which aligns Vermont with the laws of other states and which recognizes the overwhelming public interest in the records in question.

B. The State's Interpretation of Relevance Is Overly Broad Because It Encompasses All EB-5 Records.

The State claims that a subset of approximately 1,089 of the Miller emails are exempted from disclosure under the litigation exemption because they are "broadly relevant, that is, factually related or pertinent, to the subject matter" of the *Sutton* litigation. Defs. Br. at 1-2. The State supports this claim by pointing to (1) the Complaint's allegations that the Miller emails may shed light on what the State knew about the fraud and when it knew it; (2) the *Sutton* plaintiffs seeking production of the same emails sought by VTDigger; and (3) the conclusion of ACCD's *Sutton* litigation counsel that a subset of 200 of these 1,089 Miller emails he reviewed are generally pertinent to the *Sutton* claims and allegations. Defs. Br. at 11. The State's evidence does not constitute a "specific factual record" demonstrating that the emails fall within the litigation exemption. *Dean*, 174 Vt. at 359.

By relying on its own characterizations of VTDigger's allegations concerning what the Miller emails contain as supposed proof of their relevance to the *Sutton* litigation, the State has impermissibly attempted to shift its burden of proof onto VTDigger for demonstrating the exemption applies. Likewise, the mere fact that the *Sutton* plaintiffs "contend that these documents are discoverable and,

by implication, have evidentiary relevance to the *Sutton* litigation," Defs. Br. at 14, fails to demonstrate that the documents are in fact relevant for purposes of the litigation exemption.

The State's affidavit from *Sutton* counsel attesting to the relevance of the Miller emails to the *Sutton* litigation likewise fails to serve as proof of the documents' relevance because it is wholly conclusory and, moreover, pertains to only the small subset of 200 emails that counsel actually reviewed. *See* Griffin Decl. ¶¶ 9-10. Counsel concluded that the Miller emails fall under the litigation exemption because the 200 he reviewed "all have some bearing on the *Sutton* plaintiffs' allegations about ACCD's oversight of the Jay Peak EB-5 Projects and/or ACCD's notice or knowledge concerning the solicitation and use of Jay Peak EB-5 investor funds." *Id.* ¶ 10. As purported evidence of this conclusion, an accompanying spreadsheet lists 1,089 of the Miller emails along with what appears to be the original email subject lines. *See* Griffin Decl. Ex. 3. Even a cursory review of the subject lines in this spreadsheet belies Griffin's conclusion and demonstrates the insufficiency of the State's evidence. For example, it is unclear how Doc. No. 915, which was purportedly sent to a large list of recipients, including the ACLU of Vermont, and concerns an "Invitation to Vermont Commission on Women 50th Anniversary Celebration" could possibly be at issue in the *Sutton* litigation. *Id.* The same could be said, for example, of Doc. No. 174, which was sent to Miller by the Vermont Chamber of Commerce and concerns "Photos from Citizen of the Year Event & Invitation to Taste of Vermont." *Id.* Moreover, a significant portion of the remaining subject lines are either blank or provide no indication of the email's subject line. *Id.*

The Vermont Supreme Court has previously rejected an agency's similar attempt to supply only conclusory evidence as proof of the requested records' relevance. *Shlansky*, 2010 VT 90, ¶¶ 9, 11. In *Shlansky*, the Court rejected the trial court's improper reliance on the motive of the records requestor to determine relevance because "the relevance of the documents to the specific pending litigation must be established independently." *Id.* ¶ 11. The Court instructed that on remand the

agency must "clearly establish the relevance of the documents being withheld[.]" *Id.* ¶ 18. So, too, here. No effort was made to demonstrate to this Court that any—let alone all—of the specific emails listed on the spreadsheet are in fact relevant to the *Sutton* litigation. The spreadsheet instead either displays a carelessness in applying the relevance standard or is evidence of an attempt to avoid disclosure regardless of how far removed a given document is from the litigation for which the State seeks an exemption. The conclusory evidence produced here is tantamount to merely "invoking the magic word 'relevant'" in the hope that the Court will somehow deem this sufficient. *Id.* ¶ 12.

The State's interpretation is likewise insufficient because its breadth clearly encompasses "general information regarding the day-to-day operations of the [agency]" that may not be "at issue" in a particular case. *Shlansky*, 2010 VT 90, ¶¶ 10-11, 13. Like in *Shlansky*, the State here has failed to show, as required, that any of the withheld Miller emails are "related in any principled manner" to the *Sutton* litigation. *Id.* ¶ 9. The State's interpretation would allow it to cite *Sutton* to categorically deny access to any general document related to Vermont's EB-5 program. Griffin's spreadsheet is not the only evidence of the State's overly broad approach in recent months. The State also relied on the *Sutton* litigation to deny access to VTDigger's request last year for records related to the Trapp Family Lodge EB-5 project, which is entirely separate from the Jay Peak project at issue in *Sutton*. Pl. SUMF ¶ 22. The Vermont Supreme Court has refused to take an interpretation of relevance "'that would lead to absurd or irrational consequences'" of this sort. *Shlansky*, 2010 VT 90, ¶ 8 (citation omitted). This Court should likewise reject the State's invitation to *expand* the strictures of the litigation exemption beyond what it is currently authorized to do.

C. Other State Courts' Narrower Interpretations of Their Litigation Exemptions Support This Court Rejecting the State's Interpretation Here.

If adopted, the State's broad interpretation of the litigation exemption would make Vermont an outlier among the approximately 10 states that have pending litigation exemptions in addition to attorney-client privilege exemptions. Some state courts interpret their litigation exemption provisions

more narrowly than the State does here because they have language in the text of their provisions that explicitly limits the scope of the exemptions.[1] And other states have broader language as in Vermont's PRA but nonetheless have chosen to interpret their provisions narrowly precisely because their public records acts require that exemptions be narrowly construed. *See, e.g., Perez v. City of Fresno*, No. 1:18-CV-0127 AWI EPG, 2021 WL 516734, at *5 (E.D. Cal. Feb. 11, 2021) (collecting cases supporting release of bodycam video that "fit[] within literal terms of ["pertaining to pending" litigation exemption]" because the exemption had been "construed narrowly" to only cover the video if "made specifically for this litigation" or shown that the dominant purpose was for litigation).[2] This Court likewise is constrained by the PRA to construe Vermont's litigation exemption narrowly, see *supra* at 7, and should thus reject the State's broad interpretation.

Most states with litigation exemptions have construed them narrowly to protect work product, attorney-client privilege, and similar sensitive material. *See infra* at 12-16. California courts' interpretation of their state's litigation exemption is instructive. The California exemption applies to "records pertaining to pending litigation to which [a] public agency is a party . . . until the pending litigation or claim has been finally adjudicated or otherwise settled." Cal. Gov. Code § 6254(b). The

[1] For example, Connecticut's litigation exemption applies to "[r]ecords pertaining to *strategy and negotiations* with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled." Conn. Gen. Stat. § 1-210(b)(4**)** (emphasis added). Kansas's exemption applies even more narrowly to "[r]ecords of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent." Kan. Stat. Ann. § 45-221(a)(11). The statute's intent is to "prevent an agency from investigating and continue to investigate and use that pretext to not disclose records." *Stauffer Commc'ns, Inc. v. Bd. of Cty. Comm'rs,* No. 00-C-561, 2001 WL 34117818, at *16 (Kan. Dist. Ct. Jan. 12, 2001).

[2] The Vermont Supreme Court has looked to other states to interpret exemptions to the PRA, including § 317(c)(14). *See Wesco,* 2004 VT 102, ¶ 22 (examining Michigan's Freedom of Information Act in interpreting § 317(c)(14)).

text on its face appears to sweep more broadly than Vermont's because it omits Vermont's reference to disclosing records "after ruled discoverable by the court before which the litigation is pending." 1 V.S.A. § 317(c)(14). But California courts have nonetheless construed the exemption narrowly to only allow an agency to withhold a document if it "*was specifically prepared for use in litigation.*" *County of Los Angeles v. Superior Ct.,* 211 Cal. App. 4th 57, 64, 67 (2012), *as modified* (Dec. 3, 2012) (emphasis in original) (citations and internal quotation marks omitted) (affirming finding that billing and payment records were not exempt because they "were not prepared for use in litigation" despite the fact that they "*relate* to pending litigation"). This construction "serves to protect documents created by a public entity for its own use in anticipation of litigation, which documents it reasonably has an interest in keeping to itself until litigation is finalized." *Fairley,* 66 Cal. App. at 1421.

California courts have rejected an argument that mirrors Defendants' argument here in finding "no blanket prohibition against a party to litigation using the [act] to obtain documents even though those documents might be available (or not available) through traditional discovery methods." *County of Los Angeles*, 211 Cal. App. 4th at 65. To the contrary, because "the whole purpose of the [act] is to shed public light on the activities of our governmental entities[,]" California courts find that "it is a small price to pay to require disclosure of public records even to a litigant opposing the government, outside the rules of discovery." *Fairley,* 66 Cal. App. 4th at 1422.

California, like Vermont, also separately exempts documents subject to attorney-client privilege and work product protections. *Id.* at 1422 n.5. A California court explained that this narrow construction of the litigation exemption does not render it duplicative of privilege and work product protections because it "confers a broader exemption from disclosure by protecting the 'work product' generated by a public agency in anticipation of litigation" and covers litigation records generally rather than just matters of privilege. *Id.*

Oregon courts have followed California's lead in construing their own litigation exemption narrowly. Like Vermont's, Oregon's exemption on its face broadly covers "records of a public body pertaining to ongoing litigation to which the public body is a party . . . [and] does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation." Or. Stat. § 192.345(1). But "to further the statutory policy that government records be open to the public," the Oregon Court of Appeals has held that "public records are exempt only when the records contain information compiled or acquired by the public body for use in ongoing litigation" or where such litigation is reasonably likely to occur. *Lane County Sch. Dist. No. 4J v. Parks*, 637 P.2d 1383, 1385 (1981).

Washington's litigation exemption, which is also comparable to Vermont's, states that it exempts "[r]ecords that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts[.]" Wash. Rev. Code § 42.56.290. The Washington Supreme Court has interpreted this exemption similarly to California and Oregon to "specifically exempt[] work product from disclosure." *Kittitas Cty. v. Allphin*, 416 P.3d 1232, 1245 (2018), *as amended* (June 18, 2018) (emphasis omitted); *see also Wash. State Dep't of Transp. v. Mendoza de Sugiyama*, 330 P.3d 209, 215 (2014) (comparing state litigation exemption to Exemption 5 of the Freedom of Information Act and similarly construing the state exemption to only exempt documents "like those under the . . . work product doctrine and . . . [attorney-client] privilege[]"). While Washington courts "are cognizant of the fact that control over pretrial discovery in civil litigation is a vital government interest for our courts," they recognize that this "consideration[] only sometimes outweigh[]s the PRA's broad policy in favor of disclosing records." *Id.* at 214.[3]

[3] Hawaii's litigation exemption similarly covers "[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or

Texas likewise has a broadly worded litigation exemption that courts have construed more narrowly. The exemption states that it covers "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party . . . ." Tex. Gov't Code § 552.103. A Texas appellate court has interpreted the exemption to not only require that the information sought relate to a pending or reasonably anticipated litigation, but also "perhaps more importantly, confidentiality of the information must be necessary to protect the governmental body's position in the litigation." *Gonzalez v. City of Laredo,* No. 04-95-00353-CV, 1997 WL 136505, at *3 (Tex. App. Mar. 26, 1997), *writ denied* (Oct. 16, 1997). The exemption is thus "geared toward preventing disclosure of information which may compromise the governmental body's trial strategy." *Id.*

Other states' narrow interpretations of their litigation exemptions demonstrate that adopting the State's interpretation here would make Vermont an outlier in withholding access from the public to such a broad swath of documents. While courts recognize the states' interest in court control over discovery, they have also recognized that this "consideration[] only sometimes outweigh[]s the PRA's broad policy in favor of disclosing records." *Wash. State Dep't of Transp.*, 330 P.3d at 214. In fact, most state public records acts and the federal Freedom of Information Act have no litigation exemption to specifically protect the State's interest in court control over discovery. That fact alone demonstrates that discovery can proceed in an orderly and fair fashion even when a litigant obtains relevant documents via a records request. This Court should therefore reject the State's interpretation because

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may be a party, to the extent that such records would not be discoverable[.]" Haw. Rev. Stat. § 92F-13(2). This exemption has also been read narrowly to "protect[] from disclosure those government records which would be protected under Rule 26 of the Hawaii Rules of Civil Procedure[,]" thus "preserv[ing] the confidentiality of documents covered by the attorney-client privilege, attorney work-product doctrine, or other judicially recognized discovery protections." Re: Report on Claim Against the State, OIP Op. Ltr. No. 92-14 (Aug. 13, 1992), *available at* http://oip.hawaii.gov/wp-content/uploads/1992/08/opinion-92-14.pdf.

the PRA demands and other states' interpretations support a narrow interpretation of the litigation exemption.

II. The Public Interest in Disclosing the Miller Emails Far Outweighs the State's Purported Interest in Court Control of Discovery and in Unfairly Disadvantaging Public Agencies

The State acknowledges that this Court must consider "[t]he public interest in government accountability" in determining whether to grant VTDigger's public records request. Defs. Br. at 2. But it fails to weigh the competing interests in its brief or in fact to offer any specific facts in support of its bare conclusion that the public interest is outweighed here by the State's interest in court control of discovery and in avoiding "unfairly disadvantaging public agencies" in pending litigation. Defs. Br. at 2-3, 9-10. The State's failure to give weight to the public interest here is inconsistent with overarching principles of government accountability and transparency underpinning both the PRA and public records caselaw and fatal to Defendants' summary judgment motion.

A. The PRA and Public Records Case Law Require That the Court Consider the Public's Interest in Government Accountability Here.

The Legislature in enacting the PRA "to provide for the free and open examination of records" set forth an overriding government accountability principle derived from the Vermont Constitution that it requires be considered in construing the PRA's provisions. 1 V.S.A. § 315. Recognizing that public officials are "trustees and servants of the people," the PRA declares that "it is in the public interest to enable any person to review or criticize their decisions even though such examination may cause inconvenience or embarrassment." *Id.* To that end, the Vermont Supreme Court's "overall approach to cases arising under the Public Records Act" is that "[t]he Act is to be construed liberally" in favor of disclosure with "the burden [] on the agency to sustain its action." *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 106 (1993) (citing 1 V.S.A. §§ 315, 319(a)).

Because the PRA "was intended to mirror the constitutional right of access," the Vermont Supreme Court has determined that "the exceptions enumerated in the statute allow a balancing of

the competing interests." *Bain v. Windham County Sheriff Keith Clark*, 2012 VT 14, ¶ 18 (quoting *Caledonian Record Publ'g Co. v. Walton*, 154 Vt. 15, 21 (1990)). The State claims that in the context of § 317(c)(14) this Court must take a different approach and place a thumb on the scale to deny access to the Miller emails during the pendency of the *Sutton* litigation "unless [they are] ruled discoverable at a litigant's request." Defs. Br. at 9-10. The State claims this approach is required because "to do otherwise would make the litigation exception meaningless." Defs. Br. at 10 (citing *Shlansky*, 2010 VT 90, ¶ 13). But the *Shlansky* case that the State relies on here expressly rejected construing the exemption this broadly because it would "threaten to cut off valuable information not only to the parties to the litigation but to all Vermonters." *Id.* ¶ 12. In doing so, the Court recognized that "open access to governmental records is a fundamental precept of our society" because "a democracy cannot function unless the people are permitted to know what their government is up to." *Id.* (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 772–73 (1989) (emphasis and internal quotation marks omitted)).

The Vermont Supreme Court views the public interest in government accountability as particularly important in cases like this one, where government misconduct has been alleged. *Rutland Herald v. City of Rutland* is instructive. 2012 VT 26, ¶¶ 34-41. In *Rutland Herald*, a newspaper requested disciplinary documents in connection with an investigation into whether police officers had been viewing pornography at work. *Id.* ¶ 3. Because "'it *is* in the public interest to enable any person to review and criticize'" government officials' decisions, the Vermont Supreme Court upheld the trial court's determination to order disclosure of disciplinary letters. *Id.* ¶ 41 (quoting 1 V.S.A. § 315). The Supreme Court likewise recognized in remanding a separate threshold determination that the release of investigative records "may promote the Legislature's desire for accountability to the public through knowledge of how and how well the [agency] manages its employees . . . [including,] whether that agency is responsive to specific instances of misconduct . . . and whether it challenges its own

assumptions regularly in a way designed to expose systemic infirmity in management oversight and control." *Id.* ¶ 34. The trial court in subsequently determining to release the bulk of these documents also relied on this government accountability principle, finding that "the public had a heightened interest in the disclosure of records that shed light on an agency's performance of its official duties." *Herald v. City of Rutland*, No. 221-3-10 RDCV, 2012 WL 4848665 (Vt. Super. Sep. 27, 2012), *aff'd*, *Rutland Herald v. City of Rutland*, 2013 VT 98, ¶ 22.

The public's heightened interest is present even in cases where disclosure may undermine the public's confidence in its government. For example, the Vermont Supreme Court has found that "the PRA's express, overarching goal of ensuring public access 'to review and criticize' the performance of our public officials . . . must take precedence" over the election statute's purported goal of preserving public perception of election integrity by withholding records demonstrating errors or discrepancies. *Price v. Town of Fairlee*, 2011 VT 48, ¶ 17.

As in the *Rutland Herald* and *Price* cases, VTDigger is likewise seeking access to documents that go to the core of the "PRA's express, overarching goal," *Price*, 2011 VT 48, ¶ 17, by "promot[ing] the Legislature's desire for accountability to the public," *Rutland Herald*, 2012 VT 26, ¶ 34. The Court should therefore consider the public interest in government accountability in analyzing whether the litigation exemption applies here.

B. The Public Interest Tilts Heavily in Favor of Disclosure

The State argues that the public interest in government accountability is outweighed here by the State's interest in court control of discovery and in avoiding "unfairly disadvantaging public agencies" in pending litigation. Defs. Br. at 2-3, 9-10. But the State fails to acknowledge in invoking these interests that the legislative purpose of exemption § 317(c)(14) is not in fact served by withholding the Miller emails here. This failure is fatal to its claim.

The purpose of the litigation exemption is to temporarily promote court control of discovery. *Shlansky*, 2010 VT 90, ¶¶ 8-9. This purpose is served when withholding allows the courts to 1) "retain control over issues regarding the production of documents relevant to the case"; and 2) prevent an "end-run around discovery rules." *Id.* Defendants have failed to demonstrate that this purpose is served by withholding the Miller emails from VTDigger.

In contrast to the plaintiffs in *Shlansky* and *Wesco*, this is not a case where the *Sutton* plaintiffs are seeking an "end-run around discovery rules" to obtain documents that they had been denied in litigation. *Shlansky,* 2010 VT 90, ¶¶ 8-9; *Wesco,* 2004 VT 102, ¶ 1. In addition, the *Shlansky* Court has recognized that the mere fact that records have not been ruled discoverable in the litigation at issue does not constrain a court's ability to order that documents be produced to avoid construing the litigation exemption to be "so broad and enduring as to effectively eliminate the general policy favoring public disclosure." *Shlansky*, 2010 VT 90, ¶ 14. Indeed, other courts have recognized that a state's interest in court control over discovery only "sometimes outweigh[]s the PRA's broad policy in favor of disclosing records." *Wash. State Dep't of Transp.*, 330 P.3d at 214.

While the State has posited that it has an interest here in court control over discovery and in avoiding unfairly disadvantaging itself in litigation, the only true "purpose" that the litigation exemption would serve in withholding documents here is an improper one: to delay the release of the Miller emails for as long as possible. The State already indicated five years ago that delay was its true intention in deploying the litigation exemption here in declaring that it would withhold all of its communications about the EB-5 program until the conclusion of the fraud litigation. *See* Pl. SUMF ¶ 20. The use of multiple lawsuits over the span of five years and counting to withhold EB-5 records here is exactly the type of indefinite deprivation that the *Shlansky* Court warned is "so broad and enduring as to effectively eliminate the general policy favoring public disclosure." *Shlansky*, 2010 VT 90, ¶ 14. If, as expected, no ruling on the discoverability of the Miller emails is forthcoming,

Defendants may be able to withhold these documents until after the litigation concludes, which at this time is estimated to continue until late 2022 at the earliest. *See* Pl. SUMF ¶ 24. Like in *Shlansky*, the State has been and is likely to continue to be involved for years to come in some form of litigation relating to the EB-5 program. The Court therefore should not sanction such a "broad and enduring" interpretation of the litigation exemption that may serve to shield government officials from accountability. *Shlansky*, 2010 VT 90, ¶ 14.

This Court should instead recognize that the public's interest in government accountability is at its peak here given that State officials have been accused of overlooking early warning signs of the largest financial fraud in Vermont's history. *See* Pl. SUMF ¶¶ 9, 11-12. VTDigger is seeking through its request for the Miller emails to perform its role of informing the public "so that they can be confident in the operation of their government" in the future. *Rutland Herald*, 2012 VT 26, ¶ 35 (citation and internal quotation marks omitted). Miller, whose tenure as head of the ACCD coincided with a critical period of Quiros and Stenger's defrauding of Jay Peak investors, allegedly not only ignored concerns raised to him by Hulme but tried to squelch that criticism. *See* Pl. SUMF ¶ 11. That same year Miller also refused then-EB-5 Regional Center Director Brent Raymond's requests for audits of the Jay Peak project after Stenger asserted that a private audit would be expensive. *See id.* ¶ 12.

Disclosure in this case would further the overriding policy of the PRA by providing the people of Vermont with information necessary to "review and criticize" the decisions and actions of those in charge of running the ACCD. 1 V.S.A. § 315. The Miller emails may help answer critical questions related to how and why the ACCD failed to detect the fraud until it was too late. Answering these questions will help bring the public closer to "knowing whether public servants [were] carrying out their duties in an efficient and law-abiding manner." *Rutland Herald*, 2012 VT 26, ¶ 35.

Miller, as the head of the ACCD, was, like all other public officials, a "trustee[] and servant[]" of the people of Vermont, and therefore, "at all times, in a legal way, accountable to them." Vt. Const. Ch. 1, Art. VI. Because the Vermont Supreme Court dismissed claims in the *Sutton* litigation against Miller and others, *see* Pl. SUMF ¶ 19, the only way to hold public officials like Miller accountable is through the court of public opinion.

The Miller emails are precisely the type of records that the framers of the Vermont Constitution and the legislators who enacted PRA contemplated when they set forth an overriding government accountability principle that courts are required to consider in construing the PRA's provisions. Because the litigation exemption's purpose of promoting court control of discovery is not served here by withholding the Miller emails, this Court should find that the balance clearly tips in favor of disclosure due to the significant public interest in government accountability.

CONCLUSION

For the foregoing reasons, VTDigger respectfully requests an order requiring Secretary Kurrle and the ACCD to provide promptly copies or access to all records responsive to VTDigger's request and to pay all costs and attorney's fees VTDigger incurred in pursing this action.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2021, I served Plaintiff's Combined Opposition to Defendants' Motion for Summary Judgment, Cross-Motion for Summary Judgment, Incorporated Memorandum of Law, and supporting documents using the Vermont Judiciary's Odyssey Electronic Filing System and by email to the following:

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