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*Jeb Spaulding, Secretary*

January 17, 2012

Michael Casey  
General Counsel  
Vermont State Employees' Association, Inc.  
P.O. Box 518  
Montpelier, VT 05601-0518

**Delivered by E-mail**

**Re: VSEA 12-8-11 Public Records Request for post-Irene State Hospital contracts**

Dear Mr. Casey:

I am writing to respond to your January 5, 2012 public records appeal in which you repeat your December 8, 2011 request to inspect the following: (1) copies of any contracts entered into by the State "whereby an entity is providing services the same or similar to those previously provided, in whole in part, by permanent classified employees of the Vermont State Hospital," and (2) "copies of any and all documents, including electronic correspondence (email), since August 28, 2011, that pertain in any manner to entering into agreements with any entity to provide services similar to those previously provided by the Vermont State Hospital." I received your appeal on January 9, 2012.

On December 22 and 23, 2011, Deputy Secretary Clasen produced records regarding existing agreements and related correspondence. Deputy Secretary Clasen explained, however, that additional records responsive to your request are exempt from disclosure because they pertain to contract negotiations, and/or are protected by the executive, attorney-client, or work product privileges. You responded by again requesting "all documents that are responsive to [your] December 8, 2011 request."

Below I have identified Agency records withheld and the basis for withholding them in accordance with 1 V.S.A. § 318(a)(2):

- Internal correspondence, external correspondence, notes, draft agreements, and proposals related to negotiation of contracts with providers of mental health services. These documents are specifically exempt from public disclosure under 1 V.S.A. § 317(c)(15) which exempts "records relating specifically to negotiation of contracts including but not limited to collective bargaining agreements with public employees."

- Cabinet correspondence to the Governor, and communications to and from attorneys who work for the State. These documents are privileged under the doctrines of executive privilege, attorney-client privilege, and attorney work product privilege. *See, e.g.*, 1 V.S.A. § 317 (c)(1), (c)(3), (c)(4).

The State cannot reasonably negotiate contracts in the public domain. Taxpayers would be severely disadvantaged if the State's internal positions were revealed to contractors, and would be further disadvantaged if contractors knew the State's positions, and the positions of other contractors. Negotiation contemplates compromise, and the State cannot successfully negotiate agreements when contractors know precisely what the State's concerns are, or what the State is willing—or not willing—to do. The Legislature recognized this public policy concern, and made documents relating to contract negotiations exempt from disclosure. Similarly, Judge Toor properly noted: "The same rationale—protecting the State's ability to obtain the best contracts for its citizens—applies to all such communications regardless of whether they actually lead to a contract or not." Rinkers, Inc. v. State of Vermont, Communications Board, No. 798-11-08 Wncv, 2009 WL 2969646 (Vt. Super. May 29, 2009).

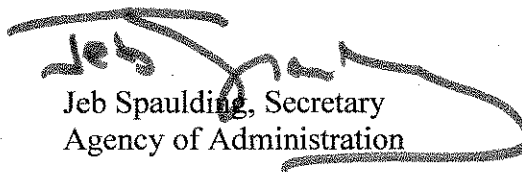
I have considered your appeal, and for the expressed reasons, deny it. This administration staunchly supports open government, but the State would do a disservice to the public it serves if it disclosed records that relate to ongoing contract negotiations, or waived important privileges. Please be advised that you have a right to challenge my determination in court, 1 V.S.A. § 319, and that I will gladly consider any legal authority you have that you believe requires disclosure of the above documents.

You also ask the Agency to create a "list identifying the authors and recipients of all documents, a description of the content of the document, the document's date, and basis for withholding the document in accordance with 1 V.S.A. 318(a)(2) and 318(e)." I disagree with your interpretation of the cited statutory provisions, and believe I have "identified the records withheld and the basis for the denial" as required by 1 V.S.A. § 318(a)(2). Again, however, I will gladly consider any additional legal authority you have that you believe requires a different result.

Finally, I repeat Deputy Secretary Clasen's statement to you in his December 22, 2011 letter: before the State executes any "privatization contract" as defined by 3 V.S.A. § 341(3), the State will satisfy its statutory obligations, including notice to VSEA, as set forth in 3 V.S.A. §§ 341-344.

Thank you for your thoughtful consideration, and please feel free to contact me with any questions or concerns.

Sincerely,

  
Jeb Spaulding, Secretary  
Agency of Administration