

March 26, 2012

Office of the Governor
Attn: Bill Lofy
109 State St.
Montpelier, VT 05609
Email: bill.lofy@state.vt.us

Re: Public Records Request

Dear Mr. Lofy,

This letter is an appeal pursuant to 1 V.S.A. § 318 of the Governor's Office's response provided on March 15, 2012 to the public records request from Conservation Law Foundation to the Governor's office on February 29, 2012. Your office's response indicated that several of the requested documents were exempted from disclosure by executive privilege. I believe these emails have been withheld in error for the reasons noted below. Kindly correct these errors and provide the requested records.

Procedural errors

The response provided was inadequate procedurally. The procedure for asserting the executive privilege requires that the executive "specifically identify the documents for which the privilege is claimed, and must explain why the documents are protected by the privilege." *Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 356, 816 A.2d 469, 475 (2002). Under 1 V.S.A. § 318(c), a records custodian must "identify the records withheld" and "include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial." Your response failed to indicate which records were withheld and then asserted executive privilege without providing any reason why the documents are protected by the privilege.

Scope of privilege

Executive privilege does not extend to communications between an agency and the governor's senior staff. In *Killington, Ltd. v. Lash*, the court made clear that, "while the term 'executive' has been used broadly by some courts to refer to privileges extending beyond the actual 'chief executive,' in Vermont, for purposes of the privilege, 'executive' means 'governor.'" *Professional Nurses Serv. Inc. v. Smith*, No. 732-12-04, at 2-3 (Wash. Super. Ct. July 14, 2005) citing *Killington, Ltd. v. Lash*, 153 Vt. 628, 632 n.3 (1990); see also *New England Coalition v. Office of Governor*, 164 Vt. 337, 340-42 (1995). Given this requirement, communications between the Governor's senior staff and the Department of Public Service are not protected by the executive privilege.

Need for information

Even if the records would otherwise be protected by executive privilege, they are exempt from the privilege because our need for the information outweighs the need for confidentiality. In deciding whether a given record falls under the executive privilege exemption, courts employ a balancing test weighing the need for disclosure against the need for confidential decisionmaking and formulation of policy. *Killington, Ltd. v. Lash*, 153 Vt. 628, 637-38, 572 A.2d 1368, 1374 (1990). The Vermont Supreme Court has recognized that executive privilege “is qualified and not absolute.” *Id.* The court recognized that “where litigation concerns alleged governmental wrongdoing and the information sought is essential evidence, the very nature of the conflict . . . will necessarily give some weight to the need for disclosure.” *Id.* A showing of necessity can overcome the executive privilege and require disclosure. *New England Coal. for Energy Efficiency & Env't v. Office of Governor*, 164 Vt. 337, 345 (1995). Further information is needed regarding the requested emails to determine the relative need for the records or need for confidentiality.

Redaction

If any non-privileged communication contained within the emails is severable from the privileged portions, please redact the privileged portion and produce the unredacted portion of the record accompanied by an explanation of the basis for denial of access to the redacted information within five business days after the receipt of the appeal in accordance with 1 V.S.A. § 318(c)-(e).

Thank you for your attention to this matter.

Sincerely,



Sandra Levine
Senior Attorney