In the Supreme Court of The State of Vermont

Docket No. 2017-090

Brady C. Toensing,

Plaintiff-Appellant

v.

The Attorney General of Vermont,

Defendant-Appellee

Appeal From
Superior Court, Chittenden Unit
Docket No. 500-6-16 Cncv

BRIEF OF *AMICI CURIAE* VERMONT JOURNALISM TRUST, CALEDONIAN-RECORD PUBLISHING CO., NEW ENGLAND FIRST AMENDMENT COALITION, THE VERMONT PRESS ASSOCIATION, AND DA CAPO PUBLISHING, INC., ON BEHALF OF APPELLANT BRADY TOENSING

Corporate Disclosure Statement

None of the *amici* has a parent corporation, and no public corporation has more than 10% of any stock.

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Motion of Vermont Journalism Trust, Caledonian-Record Publishing Co., New England First Amendment Coalition, The Vermont Press Association, and Da Capo Publishing, Inc. for permission to file incorporated amicus brief in support of Appellant Brady Toensing, Esq.

Vermont Journalism Trust, Caledonian-Record Publishing Co., New England First Amendment Coalition, the Vermont Press Association and Da Capo Publishing, Inc. (*"Amici")*, move this Court pursuant to V.R.A.P. 29(a) and (c) for permission to file the Amicus Brief set forth below. As required by V.R.A.P. 29(a), the Respondent, the Vermont Attorney General, has consented to this filing, even though it is not filed within the time allowed the Appellant. Coordinating this brief required approval of a number of boards and executives and could not be synchronized with the Appellant's filing.

Statement of Interest of *Amici Curiae* Vermont Journalism Trust, Caledonian Record, New England First Amendment Coalition, the Vermont Press Association and Da Capo Publishing, Inc.

Vermont Journalism Trust is a nonprofit organization located in Montpelier, Vermont and dedicated to advancing good journalism in Vermont, holding local and state government accountable and engaging Vermonters in the democratic process through VTDigger.com.

The Caledonian-Record Publishing Co. is the publisher of The Caledonian – Record, a daily newspaper based in St. Johnsbury, which

circulates throughout northern Vermont and New Hampshire. New England First Amendment Coalition is a broad-based organization of lawyers, journalists, historians, librarians, academics and private citizens, which is dedicated to the advancement of the First Amendment and public access to government.

The Vermont Press Association ("VPA"), based in the Journalism Department at St. Michael's College, represents the interests of the 11 daily and four dozen non-daily newspapers that regularly circulate in Vermont and cover state and local news in all 251 communities. The VPA has been invited often by the Vermont Legislature for more than 35 years to help update open government laws, including Vermont's Access to Public Records Act ("PRA"), 1 V.S.A. § 315-320, the statute that serves as the basis for this appeal.

Da Capo Publishing, Inc. is the publisher of Seven Days,a statewide newsweekly. Mr. Toensing's public records requests was made after an article appeared in Seven Days discussing then Attorney General William Sorrell's campaign finance activities.

The *Amici* have a powerful interest in the outcome of this case. Access to agency documents and records is critical to journalists' ability to independently gather information. Without open access, journalists must

rely on the good graces of interested officials. This serves neither the press nor the public.

The *Amici* urge the Court to apply the Vermont Public Records Act as the Legislature intended and the plain text requires, consistent with its own past ruling on the definition of "public document," and that the Court require the Attorney General's Office ("AGO") and all state agencies to produce all responsive documents under the Public Records Act, even if they are located at a private email address or text. The *Amici* fear that a decision that instead supports the AGO will create a huge loophole that enables public officials to conceal public records simply by communicating on a private email server. This result will cripple journalists' ability to gather information and hold the government accountable.

Statement of Issues for Review

The *Amici* entirely adopt the Appellant's issues for review.

Statement of the Case and Facts

The *Amici* provide the following summary of the facts:[1]

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[1] *Amici* rely primarily upon the facts set forth in the Superior Court's Ruling dated February 8, 2017 that is the subject of this Appeal. *Toensing v. The Attorney General of Vermont*, 500-6-16 (Chittenden Co. 2016). The Superior Court described these facts as undisputed. Ruling at 1.

On March 11, 2015, Brady C. Toensing submitted a public records request to the AGO pursuant to the Access to Public Records Act ("PRA"), 1 VSA 316 *et seq.*, seeking all communications between nine employees of the AGO and 30 individuals and organizations. After conducting a search, the AGO produced some documents, but declined to search for, or produce documents that might otherwise be responsive, but were maintained by public officials on private e-mail servers. After the AGO denied Mr. Toensing's request for a search of the private emails and text messages of those nine employees, and his appeal to the Deputy Attorney General was denied, Mr. Toensing filed the instant case with the Chittenden County Superior Court, seeking declaratory and injunctive relief.

On February 9, 2017, the Superior Court ruled that information transmitted by a public official over a private e-mail server is not a "public record of a public agency" that must be produced pursuant to the PRA, even if it otherwise fit the definition of a public record. Ruling at 3. The Court reasoned that since a public agency has no custody or control over private email, those emails cannot be "of a public agency". *Id.* at 4-6. Moreover, on a practical level, the Court said that a public agency could not force its employees and officials to search their private emails, and requiring the state to do so raises troubling privacy concerns. *Id.*

Mr. Toensing timely appealed the Final Order.

SUMMARY OF THE ARGUMENT

This is a controversy over whether documents and records that would otherwise be subject to disclosure under the PRA should be held out of the public's reach because they were produced or kept on private email address or as a private text message.

The appropriate analysis is contained in the text of the PRA itself and set forth by this Court in *Herald Ass'n, Inc. v. Dean,* 816 A.2d 469, 473 (Vt. 2002)("The determinative factor under the Act is [] whether the document at issue is 'produced or acquired in the course of agency business.'") Accordingly, in analyzing whether a document falls within the PRA, a Vermont court should examine the subject-matter of the records, rather than the custodianship, and determine whether they were produced or acquired in the course of agency business. By examining the substance of the communication in this fashion, rather than the form of its creation, the courts can determine whether a communication is private (even if it is sent on a government email server) or public (even if it is sent from a private, third party address) in a manner that is fair to everyone. Simply put, if a document is produced in the course of agency business, it is a public record,

regardless of how it is created, how it is communicated, or where it is stored.

The interpretation of the PRA made by the Superior Court does great violence to the overall aim of the PRA and avoids the controlling question: was the document under consideration *produced or acquired in the course of agency* business? Absent that analysis, a state official can now put a record entirely out of the public's reach simply by using a private third party email channel or text message. Because the Ruling creates a massive and unintended loophole in the PRA, the Supreme Court should overturn this result and restore the PRA as a key tool for public accountability.

ARGUMENT

I. VERMONT HAS LONG FAVORED PUBLIC ACCESS TO GOVERNMENT DOCUMENTS.

Long before the Public Records Act even existed, Vermont recognized a common law right to public records when not detrimental to the public interest. *Clement v. Graham,* 78 Vt. 290, 63 A. 146 (Vt. 1906); *Matte v. City of Winooski,* 271 A 2d 830, 831 (1970).

Enshrined as a statute, the Access to Public Records Act ("PRA") puts Vermont among 14 other states considered "open records" states, because it allows any person to access a public record regardless of the person's

identity or motive. Final Legislative Council Staff Report on Public Records, Privacy and Access to Electronic Access in Vermont (January 2005) at 18. Because the Vermont Constitution makes clear that government officers are servants of the public, in enacting the PRA, "the General Assembly applied the accountability by the Vermont Constitution to public records." *Id.*

This Court has long recognized that the PRA strongly favors public access to agency documents and records. *Springfield Terminal Rwy Co. v. Agency of Transportation,* 816 A.2d 448, 452 (2002). The PRA is intended to be "administered and enforced with a liberal bias toward openness and accessibility. Vermont Secretary of State, A Matter of Public Record: A Guide to Vermont's Public Records Laws, (2014) at 5, avail. at: <https://www.sec.state.vt.us/media/560403/a-matter-of-public-record-2014.pdf>.

Consequently, because the PRA explicitly favors the right of access to public documents, any claim to an exception to this policy "should be construed strictly against the custodians of the records and any doubts should be resolved in favor of disclosure." *Caledonian-Record Publishing Co. v. Walton,* 154 Vt. 15, 20 (Vt. 1990). The burden is on the agency, and the agency "cannot discharge this burden by conclusory claims or pleadings" but instead must "make the specific factual record necessary to

support the exception claim." *Finberg v. Murnane,* 623 A.2d 979, 983 (Vt. 1992).

II. WHEN DETERMINING WHETHER INFORMATION IS A "PUBLIC RECORD" UNREST THE PRA, THE ONLY APPROPRIATE CONSIDERATION IS WHETHER THE SOUGHT DOCUMENTS WERE PRODUCED IN THE COURSE OF PUBLIC AGENCY BUSINESS.

As this is a case that requires close consideration of the Access to Public Records Act ("PRA"), analysis should follow the general rules of statutory construction:

> When interpreting statutes, the bedrock rule of statutory construction is to determine and give effect to the intent of the Legislature. We effectuate this intent by first examining the plain meaning of the language used in the light of the statute's legislative purpose. If that plain language resolves the conflict without doing violence to the legislative scheme, there is no need to go further. But if the literal meaning of the words is inconsistent with legislative intent, the intent must prevail. Such inconsistency occurs if applying the precise wording of a statute produces results that are manifestly unjust, unreasonable, absurd, unreasonable or unintended, or conflicts with other expressions of legislative intent.

Delta Psi Fraternity v. City of Burlington, 2008 VT 109 ¶ 7 (Vt. 2008).

The legislative purpose of the PRA and its stance toward the privacy of government officers is clearly spelled out in the Act:

> It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.

1 V.S.A. § 315.

Under the Act, the right to access records is, indeed, limited by privacy rights:

> All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer.

Id.

However, that limitation must be read in concert with Chapter I, Article 6 of the Vermont Constitution, which states: "That 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." *See Rowe v. Brown*, 157 Vt. 373, 377 (Vt. 1991)("[F]or enforcement of the constitutional maxim, other than popular election, plaintiffs must avail themselves of the legislative enactments giving effect to Article 6."); *Welch*

v. Seery, 411 A.2d 1351, 1352 (Vt. 1980)("The maxim embodied in Article 6 is nevertheless given effect through multifarious legislative enactments.").

A public record is defined in the Act as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). This is a definition of public record that is intended to be "sweeping in scope." *Herald Ass'n,* 816 A.2d at 474. In analyzing whether a document should be considered a public record in *Herald Ass'n*, this Court focused on whether the document was "produced or acquired in the course of agency business." *Id., citing* 1 V.S.A. § 317(b).

Applying that analysis to the documents sought in this case, the Court should similarly ask whether they are "produced or acquired in the course of agency business." In that vein, there can be little question that the documents sought were created in the course of business, as the request was for documents that related to actual and potential agency business. Thus, they are so, nearly by definition, and the Superior Court did not deny this.

Instead of applying the plain meaning of the statute to the facts, however, the Superior Court imported Section 316(a), providing citizens to access to any "public record of a public agency," into the definition of

document found in Section 317(b). Superior Court Ruling at 2. In doing so, the Superior Court found that public records that have been created or acquired in the normal course of business still are not disclosable unless they also only are "of a public agency." In that sense, the Superior Court undertook a property rights analysis of that meaning, concluding that a document could only be "of a public agency" if it was in possession or control of it.

But even that crabbed interpretation does not stand up to scrutiny. Vermont has adopted the Restatement (Second) of Agency's vicarious liability elements in Section 228(2), and considers the conduct of an employee to fall outside the scope of employment only if it is "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Jane Doe v. Forrest,* 853 A.2d 48, 54-55 (Vt. 2004).

Similarly, under the rules of discovery, Vt. R. Civ. P. 34(a) treats items within a party's possession, custody, *or* control as discoverable. In determining "control," this Court has stated that the key question is "whether the party from whom the materials are sought has the practical ability to obtain those materials." *Castle v. Sherburne Corp.,* 446 A.2d 350, 354 (Vt. 1982).

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On that score, in other situations where the AGO has been more kindly disposed, it has sought and obtained emails from employees that were on private servers in response to a PRA request. Report at 8 fn 4. Clearly, emails that are agency business are within the AGO's control or ability to obtain those materials, even when they are located off the AGO's property.

And the documents sought here are, nearly by definition, exclusively concerning agency business. According to Mr. Toensing's Opening Brief, he requested communications between lobbyists and an unnamed Senator and senior Assistant Attorneys General and Attorney General William Sorrell. Nevertheless, the only reason the AGO refused to search these custodians' private emails and text messages was that they are located on private servers, and this was also the sole question that the Superior Court considered. Ruling at 2.

Put in a different light, this Court has stressed that its "overall approach to cases arising under the Public Records Act is similar to that for open meeting law cases." *Trombley v. Bellows Falls Union High School Dist.*, 624 A2d 857, 861 (Vt. 1993). Can there be any question that public officials could be exempt from the open meeting law, simply because the meeting was held in a private house instead of government property? Not at

all, because the Court would look instead at the substance of the discussion. The same rationale should apply here.

A. The Superior Court's Ruling Erred In Two Important Ways.

In holding that private accounts and devises are beyond the scope of the PRA, the Superior Court relied on three faulty premises. First, privacy rights are not implicated in the issue. Second, implementation of such a search and disclosure is no concern here.

1. Privacy Rights Are Not Implicated Here.

The Public Records Act does not provide an explicit privacy proviso in the exemption language of the PRA. *Trombley v. Bellows Falls Union H.S. Dist.*, 624 A.2d 857, 863 (Vt. 1993). Instead, the statute requires a balancing between the right of persons to "have privacy in their personal...pursuits against the need for specific information to review the action of a governmental officer." *Id.* (cleaned up)

Nevertheless, the AGO and the Superior Court seem to believe that privacy rights are sufficiently threatened by a rule requiring the production of agency documents contained in private emails and texts that all of these documents should receive blanket protection from the public, even in the face of the clear goals of public accountability and information embodied in

the PRA. Ruling at 3. But government intrusion should not have been a concern because Mr. Toensing had requested that the custodians themselves search their emails and text messages.

It is true that any of these communications could implicate privacy rights, or, for that matter, any of the other exceptions to the PRA. This also holds true for communications that came from the AGO's own email. And like the office email, these communications could be excluded if the agency meets its heavy burden of showing that they contain "intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends." *Id.*

But this would require a fact-specific, individualized determination, not a blanket exclusion. *Norman v. Vermont Office of Court Admin'r,* 844 A.2d 769, 772 (Vt. 2004). Even upon such a showing, the appropriate remedy for any privacy or other concerns would be to redact or, where necessary, exclude the particular communication. *Rutland Herald v. Vermont State Police,* 49 A.3d 91, 101 (Vt. 2002).

The Superior Court's solution – walling off all communications that would otherwise be producible, simply because they are on private accounts – is entirely too sweeping and not supported in the statute. And of course, if

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any employees should be concerned about the prospect of a citizen gaining access to communications on their private accounts, there is a simple solution. They can simply choose not to use their private accounts for agency business and confine all such business to their agency email systems.

2. Implementation Is No Concern Here.

The Superior Court posited that the implementation of an order for such a search would be too difficult to be practicable. Ruling at 3. That does not stand up to scrutiny. It is no more burdensome for an agency to order an employee to search his or her private emails and texts for responsive documents than it is to perform the same action on agency-owned emails and texts. An employee could avoid such an obligation altogether simply by avoiding discussing agency business on private systems.

Finally, the Superior Court inferred from a lack of instructions in the PRA on how to implement such a search that the Legislature could not have intended that the law should reach private emails and texts. However, implying a meaning from the silence of a statute in this fashion runs directly contrary to a court's primary task to "interpret the statute as a whole, looking to the reason and spirit of the law and its consequences and effects to reach a fair and rational result." *In re Margaret Susan P.*, 733

A.2d 38, 46 (Vt. 1999), *citing cases*. As explained above, the Superior Court's interpretation of the statute clashes against the reason and spirit of the law. And as shown below, the consequences and effects of that decision prevent a fair and rational result.

III. WALLING OFF FROM PUBLIC SCRUTINY ALL AGENCY COMMUNICATIONS MADE ON PRIVATE EMAIL ADDRESSES AND TEXTS WILL DEVASTATE THE RIGHT OF CITIZENS TO OBTAIN INFORMATION AND MAKE OFFICIALS ACCOUNTABLE.

The United States Freedom of Information Act, 5 U.S.C. § 552, is an analogue to the PRA. *New England Coalition v. Office of Gov.*, 670 A.2d 815, 817 (Vt. 1995). In July, the nation's second highest court considered a similar issue to the one here. It concluded:

> [A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency. This seems to us to be the only resolution that makes sense...If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, [the right to know] is hardly served. It would make as much sense to say that the department head could deprive requesters of hard-

> copy documents by leaving them in a file at his daughter's house and then claiming that they are under his control."

Competitive Enterprise v. Office of Science and Technology, 827 F.3d 145, 50 (D.C. Cir. 2016)

The Superior Court reviewed that opinion and remarked, "To be sure, the idea that state officials and employees can avoid valid public records requests merely by conducting work-related communications on private e-mail and text messaging accounts is a serious and, frankly, disturbing concern." Ruling at 7.

Nevertheless, the Superior Court allowed exactly that scenario, and, oblivious to the obvious violence the opinion wreaks on the PRA, the Court's Ruling now stands as the law of the state. And so, as the Superior Court recognized, any state or local official in Vermont can now avoid public disclosure simply by communicating on private accounts. Rather than presumptively belonging to the public, the Ruling places the public's access to documents purely within the discretion of public officials. This ruling thus guts the central purpose of the PRA and leaves state officials entirely in control of their own accountability.

The Court should apply the definition of "public record" it asserted in *Herald Ass'n, Inc. v. Dean* to all documents, regardless of where they are

produced or stored. Doing so will elevate the substance of a communication above its form where the PRA is concerned, and require agency employees who have chosen to use their private communication channels for agency business to search these channels, and produce relevant documents as requested.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that this Court reverse the Superior Court's decision and require the nine AGO staff to search their private communications channels for any responsive communications or represent that none exist. If responsive documents are located, they should be produced, or pursuant to 1 V.S.A. § 319(a) reviewed by the Court *in camera* to determine whether they must be produced.

Certificate of Compliance

Pursuant to Vt. R. App. P. 29(C) and 32(D), I hereby certify that the above brief complies with the word limit set forth in Vt. R. App. P. 32(7).

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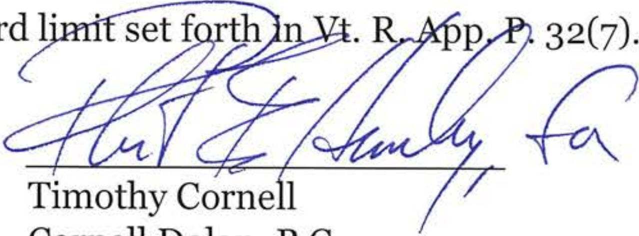

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