Corporate Disclosure Statement

None of the *amici* has a parent corporation.

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Motion of Vermont Journalism Trust, New England First Amendment Coalition, and The Vermont Press Association for permission to file incorporated amicus brief in support of Appellant Reed Doyle

Vermont Journalism Trust, New England First Amendment Coalition, the Vermont Press Association (*"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 City of Burlington, has consented to this filing.

Statement of Interest of *Amici Curiae* Vermont Journalism Trust, the New England First Amendment Coalition, and the Vermont Press Association

Vermont Journalism Trust is a nonprofit organization 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 New England First Amendment Coalition is a broad-based organization of lawyers, journalists, historians, librarians, academics and private citizens, 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.

Together, the Amici have a powerful interest in the outcome of this case. The right to inspect as a part of the right to access agency documents and records is an indispensable component of the journalistic process. It is through the free and open examination of records that journalists

can sift through voluminous details and independently gather key information and facts about an emerging story. Without open access, journalists would be left to rely on the good graces of interested officials who would act as gate-keepers for the information. In such cases, the journalist would not be able to make his or her own determination about which records were important. It would become cost-prohibitive. This serves neither the press nor the public

For news organizations, access to information in bulk—i.e., the right to examine records—is often more important than the right to obtain physical copies of that information. Determining what is news worthy begins with determining what records exist regarding a particular event, person, or entity. Casting these wide nets merely to review or inspect records is essential to news gathering and is entirely distinct from obtaining copies of key documents once they are deemed important. To learn the details of governmental actions news organizations must cast these wide nets frequently, so even relatively modest fees imposed for inspection of records would quickly accumulate and hobble the reporting capability of small and non-profit newspapers, including many members of the *Amici*.

The *Amici* respectfully submit that this Court should overturn the judgment below for the reasons set forth in the Appellant's brief. The *Amici* are filing this brief to address an issue not directly presented by the Appellant's argument, but that is important to consider in the Court's resolution of the case: That the right to inspect documents without charge to the citizen requesting access is a long-held and valuable right that citizens and journalists alike have long relied on to hold public officials to account.

The *Amici* submit that the Court should not abandon its method of examining the plain meaning of a statute and construing it in the light most likely to achieve open government.

Honoring the plain meaning of the right to inspect documents without charge is a power increasingly important to our democracy in the digital age.

STATEMENT OF ISSUES FOR REVIEW, STATEMENT OF THE CASE AND STATEMENT OF FACTS

For the purposes of this Appeal, the *Amici* entirely adopt the Appellant's issues for review, Statement of the Case and Statement of Facts.

SUMMARY OF THE ARGUMENT

Access to public documents are the vena cava of an open society. Without this access, citizens must rely on the statements of public officials to learn what their government is doing. To ensure citizens have access to public documents, Chapter I, Article 6 of the Vermont Constitution guarantees that" all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." These rights are incorporated into the PRA. *See* 1 V.S.A. § 315 ("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. . . .").

The appropriate analysis is contained in the text of the PRA itself and as set forth by Judge Geoffrey Crawford in *Vermont State Employees' Ass'n v. Vermont Agency of Natural Resources*, No. 517-7-10 Wncv, 2011 WL 121649 (Vt. Super. Ct. Jan. 6, 2011), that the Legislature had no intention to conflate "inspection" with "copying" and that "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 setting."

While the process of providing public records for inspection entails some monetary costs, the Vermont Legislature has time and again made the policy choice to have taxpayers bear the

burden of those costs rather than shift expenses to the individual requester. The language of the PRA bears out this policy choice and courts must honor it.

ARGUMENT

I. VERMONT HAS LONG FAVORED PUBLIC ACCESS TO GOVERNMENT DOCUMENTS

The right to access to public documents is enshrined in Article I, Chapter 6 of the Vermont Constitution: "all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." 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).

These rights carried forth as a statute, the Access to Public Records Act ("PRA") spells out its legislative purpose:

> 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.

In effect, the PRA was intended to "mirror the constitutional right of access." *Caledonian Record Pub. Co. v. Walton,* 154 Vt. 15, 21, 573 A.2d 296, 300 (1990). For that reason, 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,* 174 Vt. 341, 345, 816 A.2d 448, 452 (2002). The PRA is intended to be "liberally construed to implement this policy." 1 V.S.A. § 315; *see also Price v. Town of Fairlee*, 2011 VT 48,¶ 13, 190 Vt. 66, 26 A.3d 26 (collecting cases);

Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 106, 624 A.2d 857, 861 (1993) (the provisions of the PRA are to be "construed liberally" in favor of disclosure).

In construing the statute, this Court "presume[s] that language is inserted in a statute advisedly." *Trombley*, 160 Vt. at 104, 624 A.2d at 860. That is, the Court will not interpret a statute "in a way that renders a significant part of it pure surplusage[,]" id., and the entire subject matter should be read together, *Munson v. City of Burlington*, 162 Vt. 506, 509, 648 A.2d 867, 869 (1994). Finally, the Court does "not read extra conditions into a statute unless they are necessary to make the statute effective." *Smith v. Desautels*, 2008 VT 17, ¶ 18, 183 Vt. 255, 953 A.2d 620.

The trial court here has taken the opposite tack. By collapsing the meaning of "inspect" into "copy," the court reads out the entire meaning of Section 316(a). The court's mistake is clear at page 5 of its Order. Rather than apply the plain meaning of the statute, the trial court imported the definition of "copying" found in Section 316(c) into the word "inspect" found in Section 316(a), the subsection concerning when a citizen requests the right to inspect documents. By doing so, the court rendered "inspect" superfluous because Section 316(a) also includes the word "copy." 1 V.S.A. § 316(a) ("Any person may **inspect or copy** any public record of a public agency as follows.") (emphasis added). Such a misreading poses a deep danger to a right that is critical to the state's media and citizens.

Moreover, this conflation of "inspect" with the right to copy is not supported by the Public Records Act or Vermont case law. Under 1 V.S.A. § 315, the Legislature has stated that the purpose of the act is to allow the "free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution." 1 V.S.A. § 315 (emphasis added).

In *Matte v. City of Winooski*, 129 Vt. 61, 64, 271 A.2d 830, 831–32 (1970), this Court ruled that the right of inspection was of "vital importance" and came from the common law, which

"established the right in all citizens to inspect the public records and documents made and preserved by their government when not detrimental to the public interest." In *Matte*, this Court distinguished between the right to inspect, which was held by the citizens, and the right to control and preserve the records and determine the method of copying, which lay with the public officer charged with records keeping. *Id*. This distinction is important because the act of copying is something inherently controlled by the record keeper and involves additional resources, but the right to inspect and review the records in person at the public office is an inherent right of the citizenry and a necessary function of record keeping, the cost of which cannot be passed along to individual citizens any more than a record keeper could charge a requestor for the vault in which the records are kept. Since *Matte*, the Legislature has continued to distinguish between the authority to charge for copies, *see* 1 V.S.A. § 316(b) and (c), and the right to free and open inspection for which the Public Records Act has never authorized a charge.

While not binding, Judge Crawford persuasively synthesizes this analysis in his decision regarding the Vermont State Employees' Association's request for documents from the Vermont Agency of Natural Resources. *Vermont State Employees' Ass'n v. Vermont Agency of Natural Resources*, No. 517-7-10 Wncv, 2011 WL 121649 (Vt. Super. Jan. 6, 2011). In this case, Judge Crawford looked at the plain language of 1 V.S.A. § 316, which authorizes charges for making copies. Section 316(c) allows for charges when copies are made, when new public records are generated in response to a request, and when a requestor asks for a copy in a non-standard format. In no case, notes Judge Crawford, does Section 316 or any other part of the PRA allow an agency to charge for providing the record for inspection. From this lack of statutory authority, Judge Crawford looks to the historic precedent of the Act, which expressly recognizes a governmental cost attaches to the rights recognized. "[T]he 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." *Id*.

Judge Crawford's analysis is consistent with both the plain language of the PRA and the historic view of this Court in separating inspection rights from copying costs. It is also an essential embodiment of the Vermont Constitution's charge to make inspection of government **free** and open to the public. Vt. Const., ch. I, art. 6 (emphasis added). For these reasons, the *Amici* request that the Court distinguish this portion of the trial court's decision and clarify that the right to inspection shall be had free of charge to the public.

II. THE LEGISLATURE TIME AND AGAIN MADE THE POLICY CHOICE NOT TO PASS ON TO THE INDIVIDUAL REQUESTER THE COSTS ASSOCIATED WITH INSPECTION

Across the nation, states have wrestled with the policy question of who should pay for staff time and other costs of providing public records to those who request them. Though there are only essentially two choices of who should pay for such costs—taxpayers or the individual requester—state legislatures have taken "widely different approaches" to resolving the tension between guarantee of public access to information and the financial burden of producing that information. *Tae Ho Lee, Public Records Fees Hidden in the Law: A Study of Conflicting Judicial Approaches to the Determination of the Scope of Imposable Public Records Fees*, 21 COMM. L. & POL'Y 251, 251-53 (Spring, 2016). For example, several states have created hyper-specific cost-recovery provisions, enumerating each task of the document production process for which the government may and may not charge a fee. See, e.g., Mich. Comp. Laws Ann. § 15.234; Utah Code Ann. § 63G-2-203. Other state statutes provide vague guidance as to what fees are permissible to charge for what tasks. See, e.g., Ohio Rev. Code Ann. § 149.43 (B)(1) (requiring government officials to

provide copies of records "at cost").[1] Given the idiosyncratic approaches to public records fees across states, this Court should look carefully at Vermont's own history of policy relating to public records as reflected in legislative action and the State Constitution.

As the Appellant details in his principal brief, the Vermont General Assembly considered amending the PRA on multiple occasions to allow governmental entities to charge individual requesters for costs associated with providing records for inspection. But the General Assembly rejected these proposed amendments to the statute's cost-recovery provisions even as it updated the statute to comport with the digital age and the advent of electronic records. Consistent with the Vermont Constitution's mandate to allow "free . . . examination" of public records, the General Assembly chose to allocate public records costs between the government and the citizenry such that only fees associated with copying records could be passed on to the requester. This Court must respect the General Assembly's clear policy decision even if a different cost allocation may seem beguiling in a particular case.

III. VERMONT MEDIA AND CITIZENS RELY ON THE INSPECTION PROVISION FOR ACCESS TO DOCUMENTS

A small democracy that aims to keep its public officials accountable must allow its citizens to inspect public documents without charge. The statutory right to inspect these documents without charge allows all citizens to participate in this right. In this manner, the right to inspect is akin to a public library, allowing a citizen to enter a public office and look at the books stored there. Even

[1] Because this statute did not specifically allow fees to be imposed for labor costs involved in complying with public records requests, the Ohio Supreme Court interpreted the law not to allow such charges. *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 640 N.E.2d 174, 180 (Ohio 1994) ("Ohio does not specify any charge for search and/or review time in [its public records statute]. . . . Since [government employees] are already compensated for performing their duties, and responding to public records requests is merely another duty, the cost set forth in [the public records statute cost-recovery provision] should not include labor costs regarding employee time.").

though a public official may be tasked with retrieving, preparing, or reviewing those works, the official, like a librarian, is already paid by taxpayers for being on duty.

Further, the right to inspect public documents acts as a leveler. With it, inquisitive small media enjoy the same advantage as deeper-pocketed news organizations, and poor citizens are on the same level as the wealthy.

Yet time and again, state and local officials misread the meaning of Sections 315(a) and 316(c) to charge citizens for this right. And as the instant case demonstrates, once a public agency charges a fee, the cost may halt the citizen's inquiry in its tracks. See also *John Bender, Solid-Gold Photocopies: A Review of Fees for Copies of Public Records Established Under State Open Records Laws*, 29 URB. LAW. 81, 117 (Winter, 1997) (concluding that fees charged for electronic copies of records across the nation have "functioned as a barrier to access to public records in a number of cases").

Most officials have recognized the importance of the right to inspect and given journalists across the state open access to inspect official records that have shown improper conduct by officials. For example, a Vermont state trooper cheated on overtime to fatten his pension, leading to the Legislature changing the pension law so that in the future such proceeds would be forfeit. This story was uncovered by Journalist Michael Donohue's request to inspect records. And just as important, curious citizens have examined public records without charge, and then informed journalists of the results, leading to major stories that have held officials to account for their actions.

Unfortunately, the news media in all four corners of the State have also had experience with misreading of this law. Mr. Donohue, writing for small weekly newspapers in 2018, sought City of Burlington records on sewage dumping into Lake Champlain, and was blocked by a charge

of more than $600 for the inspection. The Vermont Journalism Trust, the Burlington Free Press, and WCAX news, among others investigating the EB-5 scandal at Jay Peak, have been closed out largely due to a concern by the state about reviewing the volume of documents involved. VtDigger and other journalists have sought inspection of records regarding the town clerk scandal in Coventry, Department of Agriculture records, and elsewhere, only to be rebuffed with demands for high costs for "copying" these records. While some of these requests are eventually negotiated or resolved, others are simply dropped for lack of resources. The result in the former is that the inspection process is curtailed, limited, or delayed. In the latter cases, the investigation and review are stymied.

The important, common factor in each of these situations is the ability to inspect. On the surface, the key records are not always apparent. A specific request is not going to yield the documents that open-up the story, and often, as in the EB-5 matter, the story is as much about the absence of other documents as what can be found. Journalists cannot know the whole story until they see the whole range of potentially relevant documents. That means inspecting a wide-range of records. If the cost of making those records are put entirely or largely on the requestor, such inspections will become cost prohibitive and will effectively shut down journalists' efforts to investigate and to understand an issue concerning government. The practical effect will be a chilling of the free and open review of governmental records. Such a decision is in derogation of the Vermont Constitution and lacks any statutory authority.

As a practical and fundamental matter, open government is meaningless unless there is someone to open the books and peruse the records. This is the work of the fourth estate. Journalists in Vermont regularly require free and open access to a wide array of public records, and the inspection process allows them to narrow their research and ultimately their requests to a smaller, more reasonable batch of documents. For decades, this process has largely governed Vermont

public record laws. Even in days when records meant paper records, file rooms, indexes, and costly retrieval processes. In today's world of electronic information, record retrieval is easier, scanning and reviewing documents can be done electronically. The ability to inspect has never been so straightforward.[2] At the same time, more and more records are being generated and the need to inspect widely has never be as great. The ability of a journalist to find the needle in the haystack puts him or her in position of Maxwell's Demon, and their ability to freely inspect and sort is critical.[3]

CONCLUSION

For all these reasons, the *Amici* respectfully request that this Court reverse the Superior Court's decision and order that Appellant Doyle be provided the right to inspect the videotape at issue here without cost.

Dated at Montpelier, Vermont, this 28th day of January, 2019.

By: _____

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[2] The Vermont Attorney General's Office has embraced this concept by creating a searchable, online open government site where the results of public records requests are posted online to enable the general public access to inspect this information. See *Office of the Vermont Attorney General*, *Open Government Page*, available at https://ago.vermont.gov/open-government/ (last visited Jan. 28, 2019).

[3] Scottish mathematician James Clerk Maxwell created a thought experiment to show how the second law of thermodynamics might be violated by allowing a "demon" to control a gate between two chambers in order to sort out fast and slow-moving particles. This process of "sorting" would create energy but would occur without energy and therefore violate the law of entropy. See https://www.auburn.edu/~smith01/notes/maxdem.htm (last visited Jan. 28, 2019) (explaining Maxwell's demon). Information theory, however, has shown that the idea of sorting is itself a use of energy and its function creates its own entropy. *Anindita Dunn, The Paradox of Truth, the Truth of Entropy*, available at http://www.pynchon.pomona.edu/entropy/paradox.html (Apr. 9, 1995) (discussing entropy and Maxwell's Demon in the context of Thomas Pynchon's Crying of Lot 49).

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Certificate of Compliance

Counsel for Appellees hereby certifies the following pursuant to V.R.A.P. Rule 32(a)(7)(A):

The principal brief I have filed on behalf of my client is in compliance with V.R.A.P. 32(a)(7)(A). My brief uses 12-point font and contains no more than 9,000 words. Specifically, as determined by Microsoft Word the brief contains 3,589 words exclusive of the Statement of Issues, Table of Contents, Table of Authorities, and signature blocks.

Dated at Montpelier, Vermont, this 28th day of January, 2019.

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