

A Rough Guide to Vermont Public Records¹

New England First Amendment Institute 2022

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1. Is the entity holding the record a “public agency”?

Those entities bound by the public records act comprise “any agency, board, department, commission, committee, branch, instrumentality, or authority of the state,” and “any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the state,” i.e., municipalities (towns, cities, school districts, supervisory unions, fire districts, etc.) and counties.²

Examples

A municipal police department yes.
The state human resources dep’t yes.
Santa’s Land in Putney no.
A private contractor performing a gov’t functiondepends.³
The United States Department of Transportation no.

2. Is the record sought a “public record”?

Public records are “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.”⁴

Examples

Police blotter yes.
Instant messages b/t selectboard members re. town governance yes.
Love notes between state employees sent via state computer systems no.
Text messages among legislators re. pending bill yes.
Tax returns of candidate for lieutenant governor no.

3. Has the agency given you one of the five permissible responses?

Here are the only permitted responses to a public records request:

- (a) here’s the record you asked for;
- (b) there is no such record;⁵
- (c) the record is in use right now, but we can give it to you within a week;⁶
- (d) some bizarre circumstance has occurred, and we will respond in ten days;⁷ or
- (e) the record (or parts of it) is exempt, and here is why.⁸

Examples of Responses to a Records Request

“Sorry, all requests must be in writing.” wrong.
“Giving that out would just stir up trouble.” wrong.
“Larry told me not to.” wrong.

²1 V.S.A. § 317(a)(2).

³ See *Human Rights Defense Ctr. v. Correct Care Solutions LLC*, 2021 VT 63 (holding that private entity providing comprehensive health care services to people incarcerated by the state is an “instrumentality” within the meaning of the PRA and therefore subject to the PRA); *McVeigh v. Vt. Sch. Bds. Ass’n*, 2021 VT 86 (rejecting “functional equivalent” approach for determining when a private entity falls within the PRA but applying a similar set of factors to determine whether the entity is an “instrumentality” of government within the meaning of the PRA).

⁴ 1 V.S.A. § 317(b); see also *Toensing v. Attorney General*, 2017 VT 99 (definition of “public record” “includes digital documents stored in private accounts, but . . . it extends only to documents that otherwise meet the definition of public records”).

⁵ *Id.* § 318(b)(4).

⁶ *Id.* § 318(b)(1).

⁷ *Id.* § 318(b)(5).

⁸ *Id.* § 318(b)(2) (custodian must provide certification identifying records withheld, stating the asserted statutory basis for denial, and providing brief statement of reasons and supporting facts for denial), (e) (agency cannot withhold entire record on the ground that some part of it is exempt).

“Why do you need that?” wrong.⁹
“A flood destroyed the building and we need ten days.” OK.

4. Has the agency claimed an exemption?

A public agency withholding any part of a record on the basis of a claimed exemption must identify what is being withheld, the exemption claimed, and “a brief statement of the reasons and supporting facts for denial.”¹⁰ Consider follow-on requests to ascertain whether the exemption claimed has any basis – more on this later.

Examples

“We have redacted one paragraph of medical information b/c of Exemption 7.” OK.
“We have withheld one black binder full of papers.” wrong.
“We have withheld one record because of Exemption 5.” wrong.

5. Is the agency charging you money?

Public agencies may charge for making paper copies of records if (a) the agency does the copying (b) using the agency’s equipment.¹¹ They may collect postage for mailing the records. Public agencies may also charge “the cost of staff time associated with complying with a request for a copy of a public record” if (a) assembling the records to be copied takes more than a half-hour, (b) the agency agrees to create a new public record, or (c) the agency agrees to provide records in “a nonstandard format.”¹² Note that this applies only to requests for copies of records, not requests to inspect but not take possession of records.¹³ Public agencies may withhold a copy from a requester until charges are paid.¹⁴ Charges for the media onto which copies are made must be the “actual cost” of the media, as set by the Secretary of State for state agencies or the selectboard for municipalities.¹⁵

Examples

Charging \$0.15 for a single-sided copy of a three-page document OK.
Charging \$0.15 + \$1.20 in staff time for one-sided copy of a three-page document wrong.
Agency will not release records until charges are paid OK.
Charging for attorney time to review and redact a document for inspection contested.

6. Not satisfied, and planning on going to court?

If the public agency claims a record (or part thereof) is exempt, its response must provide the names and titles of the those responsible for the denial and notify the requester of the right to appeal to the head of the agency.¹⁶ Requesters must go through the motions of an administrative appeal prior to filing suit. If, after the pointless administrative appeal, you plan on going to court, write a story about it (especially if you prevail or either party appeals to the state supreme court), and call NEFAC and/or me. If you appeal without a lawyer, you run a significant risk of making bad law.

⁹ *Finberg v. Murnane*, 159 Vt. 431 (1992) (requester’s identity/motive irrelevant when weighing access to records).

¹⁰ 1 V.S.A. § 318(b)(2), (e).

¹¹ *Id.* § 316(b).

¹² *Id.* § 316(c).

¹³ The Vermont Supreme Court has recently affirmed that the ability to assess staff-time charges applies only to requests for copies of records and not to requests to inspect records, regardless of whether the agency makes a copy of the record in order to redact it. *Doyle v. Burlington Police Dep’t*, 2019 VT 66.

¹⁴ *Id.* § 316(b),(c).

¹⁵ *Id.* § 316(d), (e). If a municipality has failed to set its own fee schedule after holding a public hearing on the subject, then the Secretary of State’s fee schedule controls. *Id.* § 316(e).

¹⁶ *Id.* § 318(b)(2).

Exemptions

Exemptions from the public records act constitute the only permissible reason for the withholding of records from a requester. Exemptions permit – but do not necessarily *require* – a public agency to withhold the record. There are 240 exemptions at last count. Exemptions are strictly construed against the public agency, which means that an exemption only applies to the items that are spelled out in the exemption. An exemption permitting the withholding of records relating to sheep, for example, will not apply to goats, notwithstanding their similarities. And, any doubts as to the exemption’s applicability are decided in favor of the requester. This should mean that if there is a genuine debate about whether the exemption applies, a court would hold that it does not.¹⁷

Generally, when faced with an exemption claim that involves an agency holding back whole documents (instead of redacting out exempt information), you can try a few things to resolve the dispute:

(1) remind the agency that it is required to provide a list of what’s being withheld (*i.e.*, a description of the records), and a statement of reasons why the exemption cited applies to each.¹⁸ Even if the descriptions turn out not to be great, just having the public agency make the list can help resolve disputes, because the agency will realize that a lot of the stuff it is withholding is unjustifiable.

(2) if possible, request blanks or samples of the withheld records. For instance, if a police department denies your request for a use of force report, ask for a blank use of force report. Once you get the blank one, you can negotiate over redaction of the withheld documents by going field by field: “so, you’re saying that the date of the incident is exempt? Are you saying that the supervisor’s signature is exempt? Are you saying that the type of force used is exempt?” The agency will often realize that its withholding claim is ridiculous, and that most of the records can be released with redactions.

¹⁷ *E.g.*, *Price v. Town of Fairlee*, 2011 VT 48, ¶ 13.

¹⁸ 1 V.S.A. § 318(b)(2).

Commonly Encountered Exemptions

Exemption 4: privilege (most commonly attorney-client privilege)

Applies to records that, if revealed, “would cause the custodian to violate any statutory or common law [*i.e.*, court-created] privilege.”¹⁹ Typically, the privilege cited will be the attorney-client privilege, as when a selectboard claims that email messages with the town attorney may be withheld under Exemption 4.²⁰ Generally speaking, the attorney-client privilege shields (1) private communications (2) between an attorney and a client (3) during the course of representation (4) for the purpose of furthering the representation. So you may want to ask about what attorney(s) wrote or received the withheld records, who else has seen them, what format the records are in, etc.

Examples

An email neither written by nor addressed to an attorney not privileged
A memo written by an attorney to a client and distributed to third parties, such as
 people at unrelated agencies, or sent out as a press release not privileged
A text between an attorney and client about going out for drinks probably not privileged
A document from a person who is an attorney but is not the agency’s attorney not privileged

Exemption 5: police records

Police records “dealing with the investigation and detection of crime” may not be withheld unless they meet certain criteria. Records deal with the investigation and detection of crime if they focus on specific and potentially unlawful conduct by a particular person.²¹

If the records do so, they may be withheld if release (1) could reasonably be expected to interfere with enforcement proceedings, (2) would deprive a person of their right to a fair trial, (3) could create an unwarranted invasion of personal privacy, (4) would identify a confidential source, (5) would disclose techniques for law enforcement investigations that are not already known to the public, or (6) would endanger the safety of a person.²²

But, even if the records meet one of the withholding criteria, the record must be released if it (1) shows “the initial arrest of a person,” including a ticket, citation, or traffic complaint, (2) reflects a criminal charge, or (3) relates to “the management and direction of a law enforcement agency.”²³ A person has been arrested for purposes of Exemption 5 when s/he has been restrained in a way and for a time suggesting that s/he was at the mercy of the police, *whether or not* the police tell the person that s/he is under arrest or claim that they never arrested the person.²⁴ Information reflects the management and direction of a police agency when it shows policies, practices, guidelines, or other information demonstrating how the agency structures its business, including how it responds to citizen complaints and employee discipline.²⁵

¹⁹ 1 V.S.A. § 317(c)(4).

²⁰ The doctor-patient privilege is another example of something that could give rise to an Exemption 4 claim, but it is the rare case that a public agency will have such records.

²¹ See *Rutland Herald v. City of Rutland*, 2012 VT 26, ¶¶ 29-31.

²² 1 V.S.A. § 317(c)(5)(A).

²³ *Id.* § 317(c)(5)(B).

²⁴ *Galloway v. Town of Hartford*, 2012 VT 61, ¶¶ 12-13.

²⁵ See *Rutland Herald*, 2012 VT 26, ¶¶ 33-37.

Police Records: Are the Following Exempt?

A town clerk's records about a diesel spill no.
A psychiatrist's report concluding that a criminal defendant is not competent yes.
Policies and procedures governing police officer discipline no.
Emails dealing with an agency's plans to bring civil lawsuits no.
County prosecutor's files about upcoming prosecutions probably yes.
Records showing names of cops who have been arrested for domestic violence no.
Reports showing witnesses to a gas station drive-off probably no.
Files showing witnesses to a gang execution probably yes.

Exemption 7: personal records

Note that Vermont's personal privacy exemption protects personal records, not *personnel* records. Many, many public agencies can't be bothered to read carefully and take the position that anything in a personnel file is off-limits. The exemption only covers that information that conveys "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," and even then, the court must balance the privacy interest against the public interest in disclosure.²⁶

Examples: Is the Following Information Exempt?

Information showing that a public official was fired for watching porn at work no.
Emails about how a town clerk is chronically absent from work due to alcoholism partly.
Text messages about how a state trooper propositions female motorists for sex on duty no.
A person's social security number yes.
A convicted felon's DNA sequence yes.
A gov't settlement agreement showing the name of a sexual harassment victim partly.
Video of police beating a naked arrestee partly.
Video of police beating a naked arrestee, if requested by the arrestee probably no.

Exemption 14: records relevant to pending litigation

This broad exemption applies to records that are in some way relevant to a pending litigation to which the agency is a party—but only until the earlier of a ruling by the court in which the litigation is pending that the records are discoverable or the litigation ends.

Examples: Is the Following Information Exempt?

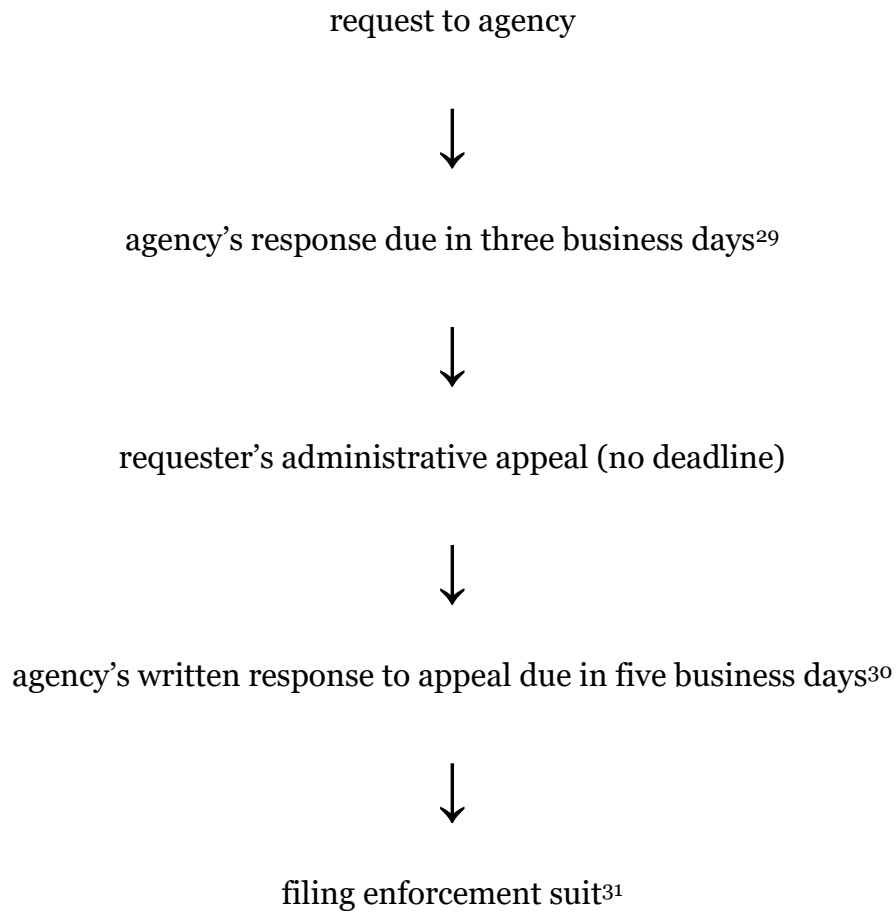
Agency employee emails about contract terms when the agency is suing to enforce the contract.....likely.
Records voluntarily produced w/o court order to opposing parties in litigation.....arguably no.²⁷
Police dep't command protocol while requester is fighting traffic ticket in court.....likely no.²⁸

²⁶ *Trombley v. Bellows Falls Union High Sch. Dist.* No. 27, 160 Vt. 101, 110 (1993); *Kade v. Smith*, 2006 VT 44, ¶¶ 12-14.

²⁷ *Vt. Journalism Trust v. ACCD*, No. 338-10-20 Wncv, 2021 WL 4189807 (Vt. Super. July 13, 2021) (holding that records must be produced to records requester after being produced in litigation, as exemption's purpose no longer served by continued withholding).

²⁸ *Shlansky v. City of Burlington*, 2010 VT 90.

Public Records Timeline



Note that a requester's hands are not tied if an agency just ignores the request. A requester may skip directly to filing suit "if the agency fails to comply within the applicable time limit provisions" of the Access to Public Records Act,³² *i.e.*, has blown either the response or appeal deadlines. If preparing to file suit, make sure that you have either (1) gone through the appeal procedure, or (2) that the agency has failed to adhere to a deadline. If neither of those two things is true, your suit will be dismissed as premature.³³

²⁹ 1 V.S.A. § 318(a), (b).

³⁰ *Id.* § 318(c)(1).

³¹ Some argue that there is a 30-day deadline to file suit after an appeal is denied, but the statutory language is unclear, and the Supreme Court has not ruled on the question. The best practice is to file within 30 days to avoid any problems or additional briefing.

³² *Id.* § 318(a)(2).

³³ *E.g.*, *Bain v. Clark*, 2012 VT 14, ¶ 5.