

H. 497

I. Use of Document Sharing Platforms

(2) “Meeting” means a gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action. “Meeting” shall not mean written correspondence or an electronic communication or submission, including e-mail, telephone, teleconferencing, or editing on a document sharing platform, between members of a public body for the purpose of scheduling a meeting, organizing an agenda, distributing materials to discuss at a meeting, or collaborating on a shared document to be discussed at a meeting, provided that such a written correspondence or such an electronic communication that results in written or recorded information shall be available for inspection and copying under the public records act as set forth in chapter 5, subchapter 3 of this title.

II. Executive Session Provision; Prefatory Language

(b) A public body may only hold an executive session to consider one or more of the following:

- ~~(2)~~(1) The negotiating or securing of real estate purchase options;
- ~~(3)~~(2) The appointment or employment or evaluation of a public officer or employee, including discussion, interview, and evaluation of the merits of a candidate for public office or employment, provided that a final decision to hire or appoint a public officer or employee shall be made in an open meeting;
- ~~(4)~~(3) A disciplinary or dismissal action against a public officer or employee; but nothing in this subsection shall be construed to impair the right of such officer or employee to a public hearing if formal charges are brought;
- ~~(5)~~(4) A clear and imminent peril to the public safety;
- ~~(6)~~(5) Discussion or consideration of records or documents excepted Records exempt from the access to public records provisions of section 317 316 of this title. Discussion or consideration of the excepted record or document; provided, however, the discussion shall not itself permit an extension of the executive session to the general subject to which the record or document pertains;
- ~~(7)~~(6) The academic records or suspension or discipline of students;
- ~~(8)~~(7) Testimony from a person in a parole proceeding conducted by the parole board if public disclosure of the identity of the person could result in physical or other harm to the person;
- ~~(9)~~(8) Information relating to a pharmaceutical rebate or to supplemental rebate agreements, which is protected from disclosure by federal law or the terms and conditions required by the Centers for Medicare and Medicaid Services as a condition of rebate authorization under the Medicaid program, considered pursuant to 33 V.S.A. §§ 1998(f)(2) and 2002(c);
- (9) Municipal or school security or emergency response measures, the disclosure of which could jeopardize public safety;
- (10) After making a specific finding that premature general public knowledge would place the public body or a person involved at a substantial disadvantage:
 - (A) Contracts;

- (B) Labor relations agreements with employees;
- (C) Arbitration or mediation;
- (D) Grievances, other than tax grievances; or
- (E) SEE OPTIONS IN PART III BELOW.

III. “Pending litigation”

a. *Pending litigation* (existing language in H.497 (p.12)): “Professional legal advice in connection with pending civil litigation or a prosecution, to which the public body is a party.”

b. *Imminent litigation*. “Professional legal advice in connection with pending or imminent civil litigation or a prosecution, to which the public body is or may be a party.”

Imminent: “Ready to take place; *esp* : hanging threateningly over one’s head.” Merriam-Webster’s.

c. *In anticipation of litigation*. “Professional legal advice in anticipation of litigation or a prosecution, to which the public body is or may be a party.”

U.S. v. Adlman, 134 F.3d 1194 (2d Cir. 1998)

- “[D]ocuments should be deemed prepared ‘in anticipation of litigation,’” and thus within the scope of the work product privilege if “‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’”
- Court in *Adlman* found that attorney-prepared documents analyzing whether to engage in conduct based on the likely outcome of litigation expected to arise from the conduct is protected under the work product doctrine.

d. *Obtaining professional legal advice generally*. “Professional legal advice.”

The attorney-client privilege protects “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client....” Vt. Evidence Rule 502.

IV. Ratify or Declare Void; Cure

1 V.S.A. § 314(b)(3)(p.14):

(3) Within 14 calendar days after a public body acknowledges a violation under subdivision (1)(A) of this subsection, the public body shall cure the violation by:

(A) either ratifying, or declaring as void, any action taken at or resulting from a meeting in violation of this subchapter; and

(B) adopting specific measures that actually prevent future violations.