

Vermont Judge's Decision Shields Telecoms, Utilities From Scrutiny

Judge Mary Miles Teachout works from the bench in Orange District Court on Dec. 19, 2008. (Valley News - Jennifer Hauck) Copyright Valley News. Michel Guite is the CEO of Vermont Telephone Company. Springfield, Vt., Thursday, November 13, 2014. (Valley News - James M. Patterson) Copyright Valley News. **Valley News, Jan 12, 2019** by John Lippman (jlippman@vnews.com)

Montpelier — A window into the operations of some of Vermont's biggest companies has closed. That's the upshot of a recent Vermont Superior Court ruling that said annual reports filed to the Department of Public Service by utilities and telecommunications companies in the state are exempt from release under the state's public records law.

The Jan. 2 decision by Washington County Superior Court Judge Mary Miles Teachout essentially means that the annual reports filed by entities that fall under DPS jurisdiction — such as telephone companies, electric utilities, natural gas companies, water companies and cable TV companies — no longer can be inspected by the public, according to Jim Porter, director of the public advocacy division with the department. "That's how I read it," Porter said.

Public utilities that operate in the state are required by law to file annual reports with DPS in order that the department can calculate a "gross receipts tax" that is used to fund the department and Public Utilities Commission. The reports can provide a broad and deep look into individual company operations because they include a wide array of financial information, reporting everything from revenues, net profit or losses, debt and number of customers.

But Teachout, in a six-page decision, ruled "the annual reports fall squarely within the definition of a tax return" and therefore "the forms are wholly exempt from public disclosure." Vermont's public records law identifies numerous instances in which state records do not have to be released to the public, including "a tax return and related documents." And because the annual reports requested by DPS are equivalent to a tax form, any information contained within them falls under the exemption from public disclosure, Judge Teachout ruled.

Previously, DPS had released redacted versions of the annual reports, which nonetheless could provide insight into the operations of the company in similar fashion to the way income statements, balance sheets and details about businesses appear in financial statements filed by public companies with the Securities and Exchange Commission.

For example, the annual report for Springfield, Vt.-based Vermont Telephone Co. regularly detailed the company's revenues, net income and how many resident and business customers its landlines served. A previous annual report filed by VTel Wireless, a subsidiary of Vermont Telephone Co. that operates a statewide wireless broadband network, included how many subscribers had signed up for the service.

In reaching her decision, Teachout rejected arguments advanced by DPS that a "substantial deference" was owed to the department based upon its "expertise" in deciding what information to release to the public and that precedents "favoring disclosure of government records to the public and of reading exemptions narrowly" were not applicable in this particular matter.

"The policy generally favoring disclosure and the narrow interpretation of exemptions is not a license to ignore the plain language of the Public Records Law," Teachout wrote, citing prior case law.

But Teachout also ruled that the Legislature's intent behind the tax exemption clause in Vermont's public records law is so unequivocal and clear that it extends to block DPS from even releasing redacted annual reports, regardless of whether the release of partial information meets with the approval of the utilities.

"Each plaintiff in these cases, when it filed its annual report, designated only certain portions as confidential. None took the position that its annual report is entirely exempt from public access," Teachout wrote. "The Department apparently implemented this practice and was willing to provide redacted versions of the annual reports rather than treat the entire reports as exempt tax returns."

Nonetheless, Teachout wrote, "the legal basis for the practice of treating selected information on tax returns as nonexempt is questionable in light of the comprehensive nature of the statutory exemption. The court cannot discern any legal basis for such a practice."

While the loss of access to state records that previously were available to the public is a blow for those seeking transparency in Vermont, even advocates for access were not faulting Teachout for the conclusions she reached.

“In this case, the court seems to be reasonably applying the law as written,” James Diaz, staff attorney with the American Civil Liberties Union of Vermont, said via email, while noting ACLU-VT has not had an opportunity to do an in-depth analysis. “It is for the Legislature to address the fact that there are too many exceptions preventing public access to important information.”

Indeed, Diaz said, the ruling emphasizes ACLU’s “hope the Legislature will heed our repeated calls to commit to serious exemption reform, namely by limiting and clarifying exemptions, and including a five-year sunset provision for every exemption.”

(Last year, Vermont Gov. Phil Scott signed into law H.910, which was crafted to open up the state’s public records laws by standardizing agency response times to requests for public records and regulating the exemptions process, nonetheless advocates for greater transparency such as ACLU VT said the final measure “falls well short” of those goals.)

Teachout’s ruling has its origins in a request made by the *Valley News* to DPS in October 2017, for the unredacted annual report filed by VTel Wireless, which operates VTel’s statewide wireless broadband network built with federal funding under the American Recovery and Redevelopment Act.

Through the so-called stimulus bill in 2010, VTel won \$116 million in federal grants and loans to blanket Vermont with improved telecom coverage.

The *Valley News* made the request to DPS because the newspaper wanted to know how many customers the wireless broadband network has signed up since it began operating in 2015. VTel has declined numerous requests by *Valley News* to disclose how many customers it has, but in early 2017 VTel reported to the Vermont House Committee on Energy and Technology that it had 3,100 wireless customers across the state, of which 2,600 were residences and 500 were commercial.

When DPS received the request from this newspaper for an unredacted copy of VTel Wireless’ 2016 annual report — the most recent then available — the department, as required, notified VTel that it intended to fulfill the request. When that happened, VTel, controlled and run by Greenwich, Conn., resident Michel Guite, made a similar request to DPS for the unredacted annual reports of other telecommunications companies that operate in Vermont, including Verizon, Cingular, Sprint and T-Mobile.

When the telecom companies were similarly notified by DPS about VTel’s request for their unredacted annual reports, the companies sought an injunction from the court to block the release. Although each filed separate injunction motions and the cases were never consolidated — because the issues in each were nearly identical the court nonetheless decided the motions jointly — each plaintiff claimed that their annual reports are tax returns exempt from disclosure and, further, that the redacted portions are off-limits under the trade secrets exemptions.

Teachout spent the bulk of her ruling discussing the procedural mechanism under which the parties agreed to have their motions reviewed and weighing the merits of the tax return claims. But by ruling that the DPS annual reports are exempt from disclosure because they are in effect tax returns, Teachout said that overrides the need “to consider that the claim that the returns qualify for a trade secrets exemption.”

June Tierney, commissioner of the Department of Public Service, said via email that DPS “appreciates the clarity Judge Teachout has provided about how to reconcile the public interest in access to agency records with the need asserted by these private companies for confidentiality in filing information with regulators that the companies deem to be commercially sensitive.”

Nonetheless, Tierney added, DPS “would have preferred a more public-access friendly outcome in this case and is disappointed that the court did not reach the core issue in dispute: namely, the applicability of the trade secrets exemption. That said, we respect the authority with which the court has rendered the decision and will be guided by it going forward.”

Vermont Secretary of State Jim Condos, who has pushed for reforming the state’s public records law to make information more available to the public, said via email through a spokesman that his office “is still reviewing the content of the ruling and its legal implications” and that “we are unable to speak directly to the ruling until we do.”

The email also said, “Transparency and access to public records is crucial to building public trust in government. ... I strongly believe that we need to leave behind the ‘deny first’ mentality that is all too pervasive when members of the public and the press request government records. Appropriate exemptions must be allowed, but I believe that agencies should always err towards transparency, and must never forget that we serve at the public’s whim, thus the records we create ultimately belong to them.”

Teachout’s ruling did appear to propose a work-around for DPS if it wanted to collect information that would not be barred ultimately from public disclosure under the tax return exemption.

She wrote that DPS could redesign the form for utilities seeking the financial information, with a new, separate form that “calls for information beyond what is required to calculate the tax.”