

The Inspection of Public Records and why it matters

Who we are and what we are asking for

Vermont's journalism community, including the Vermont Journalism Alliance, the Vermont Press Association, the Vermont Association of Broadcasters, with support from the national Reporters Committee for the Freedom of the Press is calling on the Vermont Legislature to defend the First Amendment by reinforcing a precedent set by the Vermont Supreme Court that protects the public's right to inspect records.

The Vermont Journalism Alliance, is an affiliation of online, print and broadcast media, including VTDigger, VPR, Seven Days, WCAX, The Valley News and The Stowe Reporter group.

This testimony is submitted by Anne Galloway, founder of VTDigger.

What is inspection of records?

Under the Vermont Public Records Act, and backed by a recent high court decision, members of the public have the right to inspect records without paying fees for copying.

What did the Vermont Supreme Court decide?

In *Doyle v. Burlington Police Department*, the Vermont Supreme Court has clearly stated that the law does not allow government to charge for public inspection of records.

The ruling has the force of law: No charge for inspecting records, or for making your copies or scans using a cellphone or other device.

I quote my colleague, Tom Kearney, editor of the Stowe Reporter, when I say, "It's outrageous that Attorney General T.J. Donovan — the state government's top lawyer — is refusing to accept a ruling by the Vermont Supreme Court."

Kearney goes on to say in an editorial that VTDigger, the Stowe Reporter and its affiliates in Chittenden and Lamoille counties are publishing today that "the court ruling confirmed that people have a right to inspect public records for free, and then went further: They can make their own copies — photos or scans — without paying a fee. If you want the public agency to

make copies for you, then you have to pay for those copies. But there is no charge for inspecting records, or for making your own copies or scans.

Fees limit access to records taxpayers have already paid for.

Most fees are related to government attorneys redacting documents. In the case of the EB-5 scandal, the Vermont Attorney General's office at one point asked for \$200,000 for records. Each organization in the Vermont Journalism Alliance has faced tens of thousands of dollars in fees simply to find out the truth about what government workers, who are supported with taxpayer dollars, have been doing on behalf of the public.

When government hides, real people suffer.

People have suffered abuses at the hands of state government, and over and over again the Vermont Attorney General's response is to block access to records regardless.

The result? Corruption in state government continues unabated.

By withholding records, the Vermont Attorney General has enabled state actors to perpetrate cover ups and crimes.

Let me give you an example: the recent revelations of prison misconduct.

Donovan knew about abuses at the women's prison, Chittenden Regional Correctional Facility, in May of 2017, according to Seven Days, and yet did nothing to stop it.

In fact, Donovan has helped to cover up abuses by signing off on settlements and turning a blind eye to the underlying causes of the case.

In addition, Donovan has fought VTDigger for 16 months over records pertaining to alleged misconduct involving a former superintendent of the women's prison and Southern State Correctional Facility.

If the Edward Adams records had been released in September 2018, reforms of the prison system could have been expedited by the Legislature a year ago, resulting in fewer people -- correctional officers and inmates -- suffering abuse and sexual harassment, as detailed in the expose recently published by Seven Days about pervasive misconduct permitted by the Department of Corrections.

That disclosure would have been a significant step toward protecting the right of inmates and workers to a safe environment and would have likely led to critical reforms 12 months prior that would have prevented more harm and initiated an immediate benefit to the public and the correctional system.

Instead, TJ Donovan tolerated the misconduct and put the protection of misbehaving state workers ahead of the safety of inmates and guards and the public's right to know.

Instead, Donovan spent taxpayer dollars fighting VTDigger in court over the Edward Adams records. And what did we fight about? A Vaughn index. That's a fancy word for a list of records pertaining to a records request and a citation of the exemptions the Vermont Attorney General's office was using to block those records.

Did you know that the definition of a Vaughn index is built into the Vermont Public Records Act?

Under state statute, government must release a list of all of the records responsive to a request.

Instead, Donovan forced us to relitigate a fundamental tenet of state statute. This is a pattern that has been repeated over and over again by the Vermont Attorney General's office in response to requests.

There were ongoing delays. Donovan's staff made bogus arguments in court.

Ultimately, it took us 10 months to get a Vaughn index. It was only released after the Seven Days story came out and we asked Mike Smith, the secretary of the Agency of Human Services, for the listing.

And the fight isn't over. We still have not received records that would explain why employees at Southern State filed complaints against Superintendent Adams.

The jury is out on when we will learn the truth about what misconduct Adams may have been involved in for years -- both at the Chittenden correctional facility and Southern State in Springfield -- contributing to a culture of abuse, drug use and humiliation of inmates and correctional officers.

The VAG has fought VTDigger with taxpayer dollars for documents that were created with taxpayer dollars. Meanwhile, VTDigger has incurred thousands in legal fees so far -- on this one case -- with no end in sight.

More than 550 local vendors and contractors were out \$12M during state coverup of EB-5

Donovan has also fought the release of EB-5 records tooth and nail.

Here, too, Vermonters have directly suffered, in this case business owners and workers.

For three years, 42 contractors were owed more \$7 million for work performed at Burke Mountain Resort and Jay Peak. About \$5 million was owed to 513 vendors in the Northeast Kingdom.

VTDigger heard from contractors and vendors who weren't getting paid, but could get no information from the state.

In the interest of helping Vermont business people, investors and the public at large better understand what was going on, we requested records pertaining to the state's role in the fraud in June 2015 -- 10 months before lawsuits were filed against the developers. The request was ignored for four months before it was denied. We appealed and received 30 pages of correspondence between state officials and a principal of the Jay Peak projects.

At one point, as we continued to push for state records, the Vermont Attorney General's office told us we would need to commit to \$200,000 in cash in advance before they would begin the process of redacting the records.

Why were we determined to get the records? Because the state of Vermont, including Gov. Peter Shumlin, the commerce agency and employees of the Vermont EB-5 Regional Center, knew in the summer of 2014 about the Jay Peak fraud and yet kept that information under wraps from contractors and vendors who continued to provide services to the developers -- wholly unaware that they would likely suffer in the process.

It wasn't until April 2017 that vendors and contractors got their money back. In the interim, local companies begged banks for extended lines of credit, shed workers or went out of business altogether.

The Jay Peak developers misused \$200 million over 10 years. Vermont's politicians and state workers were deeply involved in promoting the projects.

The U.S. Citizenship and Immigration Service closed down the Vermont EB-5 program. In a final administrative decision terminating the center

issued in September 2019, USCIS said the record shows that the state knew the Jay Peak fraudsters "may have engaged in wrongdoing concerning the Jay Peak Projects, but did not share such information with USCIS until 2016, after SEC initiated its action."

Also this fall, the Vermont Supreme Court ruled that an investor lawsuit alleging gross negligence against the two former directors of the Vermont EB-5 Regional Center can move ahead.

And yet, four years after the Securities and Exchange Commission shut down the Jay Peak projects, the Vermont Attorney General continues to refuse to release records pertaining to what the state knew when.

VTDigger has sued over records twice, and in mediation last summer learned through a third party investigation paid for by the state that four months of records involving James Candido, a former regional center director, are missing.

Donovan's denial of records -- using an expansive interpretation of the relevant litigation exemption -- is perpetuating a state cover up of illegal activity at Jay Peak Resort.

Four and a half years after placing that first public records request, VTDigger still has not obtained access to documents that would show whether role officials in the Vermont EB-5 program were grossly negligent in their handling of the Jay Peak projects.

In an editorial, my colleague Tom Kearney has written a summary of the Vermont EB-5 records saga that I quote here:

Fees have become a significant obstacle to reviewing Vermont's public records. Increasingly, agencies have been charging huge fees — thousands of dollars — to cover staffing costs to prepare records for public viewing.

Exhibit A is VTDigger, which fought a lonely battle to prove that the Jay Peak EB-5 expansion projects were a fraud. A fraud indeed: Millions of investors' dollars were swindled, the chief architect of the scam went to jail and had to forfeit \$81 million, and the federal government shut down the Vermont EB-5 Regional Center for utter incompetence. All this emerged from Digger's reporting over a period of years, when the state fought tooth

and nail to avoid handing over documents in the case. It took request after request, and heavy legal fees, for Digger to get part of what it needed.

When the facts finally started to emerge, you'd think the attorney general's office would have smelled the rat, and investigated what happened. It didn't. Rather, it was federal officials who pursued the details about the scandal that occurred right under the noses of Vermont's most prominent politicians.

Meanwhile, the state used a lawsuit filed in the case as an excuse not to disclose documents detailing how the fraud went on for a decade. Once that lawsuit was settled, Donovan still kept the records secret, because the screwed-over investors in Jay Peak had filed a suit of their own. Litigation, y'know.

Also conveniently, the case was settled before any sworn statements were taken from witnesses, so state officials involved in the EB-5 program did not have to testify under oath about their actions. Those depositions also would have become public.

And now, after years of foot-dragging, the state says some crucial records have vanished.

With that grim record involving state documents, you'd think the state's top legal officer would try to make amends. You'd think the state government might feel a sense of shame. You'd think the state would try to restore public confidence, and make it easier for people to see what their government is doing in their name.

But, to the contrary, Donovan not only has the gall to defy the Supreme Court, but he's lobbying the Legislature to enact fees for viewing and copying public records.

Access to public records should not be an issue at all. They're the public's records, and they should be managed for the public. Most public agencies in Vermont already do it. And, since most public records are electronic, it's easy to store them properly. All it requires is good management. If an agency's recordkeeping is sloppy, the public shouldn't have to pay for that incompetence.

T.J. Donovan thinks that making public records readily available is somehow a diversion from the attorney general's work. In fact, it's part of the job.

Why free public inspection is critical to our democracy.

The cost to government of making records available to the public is a small price to pay for protecting the public.

We all know that sometimes government fails people. That's inevitable. Governments are human organizations.

What isn't inevitable is the government's response. Vermont state government and municipalities are in the habit of hiding bad behavior, mistakes and embarrassing situations the public has a right to know about.

Open government is good government. Government records are the people's documents. The public has a right to easy access, so that people can understand what their government is doing.

Fees are a convenient way to limit access.

Access to records is critical to our democracy and the fundamental notion that government is answerable to the people.

Accountability to the people is built into the Vermont Constitution.

"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 all times, in a legal way, accountable to them."

That accountability is built into the overarching language of the Vermont Public Records statute, Title 1, 315.

"Officers of the 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."

Is charging for records really a problem?

The public comes last when state agencies design new computer systems. Most systems are designed for the ease of the agency — not for easy access by the public. That is an afterthought.

Since most records are electronic now, it's easy to store public records properly -- and deliver them to the public quickly.

State government has powerful tools to search records. The Vermont Attorney General's office can conduct keyword searches for personal information for redaction in a matter of seconds.

Public agencies should manage their records so they're readily available to the public. The staff time/dollars required to make public records available are simply the cost of government doing business (and the cost of wielding huge power over Vermont and Vermonters). The public should not pay the price for bad records management.

Any financial burden that disclosure imposes on taxpayers is easily outweighed by the public benefit of ready access to government records.

Agencies should not be able to charge money to do what they should have done in the first place: Keep public records separate from records exempt from disclosure.

Reference information about public inspection:

Vermont Constitution

<https://legislature.vermont.gov/statutes/constitution-of-the-state-of-vermont/>

Title 1, 315

<https://legislature.vermont.gov/statutes/section/01/005/00315>

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<https://vtdigger.org/2019/09/13/supreme-court-decides-public-inspections-of-bodycam-footage-should-be-free/>

<https://vtdigger.org/2016/12/29/unpaid-bills-prove-hardship-contractors-northeast-kingdom-eb-5-projects/>

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