Anne Galloway's testimony regarding the Vermont Public Records Act, House Government Operations 01.21.21

Hello everyone. Thank you for inviting me to speak with you today.

My name is Anne Galloway. I'm the executive director of the Vermont Journalism Trust and the editor in chief of VTDigger.

I appreciate the opportunity to provide you with suggestions related to VTDigger's experience with the Vermont Public Records Act.

Last year I spoke about the need to protect public inspection of records. My opinion on that matter has not changed.

A Vermont Supreme Court ruling made free public inspection, including copies using a cellphone, the law. 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.

VTDigger has been engaged in four records lawsuits over the past five years.

Our most recent is a third attempt at litigation over documents that would help to explain the role public officials played in the Jay Peak fraud case. Documents in that matter have been withheld for nearly seven years under the overly broad relevant litigation exemption.

In our second round of EB-5 litigation, mediation was used as a new vehicle to deny and delay access to records. In two instances, we were able to prove that the AG's production of records was incomplete. In the final analysis, we were told by the AG's office that four months of correspondence involving a former director of the Vermont EB-5 Regional Center had been destroyed. That mediation took nine months and paved the way for the AG's refusal to pay our attorneys fees.

Now it appears the AG's office is attempting the same costly and time-consuming mediation tactic again in the third lawsuit.

In a separate case involving the Vermont Department of Corrections, we settled in December on legal fees with the Vermont Attorney General's office over records pertaining to alleged misconduct by a former superintendent of the Southern State Correctional Facility in Springfield.

Under the Vermont Public Records Act, records requests are supposed to be expedited in the interest of public trust. The case took 27 months to litigate.

In January 2020, Mike Smith, the secretary of the Agency of Human Services, urged DOC and the AG's office to release the records. At that point, we had been engaged in more than a year

of legal wrangling. When we finally obtained the documents, pages were missing and the communications provided were heavily redacted.

We pressed on and litigated over the redactions. Ed Adams, the superintendent in question, gave DOC permission to disclose the documents, and yet the AG's office persisted in litigating the case.

Ultimately, the litigation took more than 2 years and cost the AG's office $36,000 in fees for our related expenses. It is unknown how much the AG spent on defending the case.

In September, Judge Timothy Tomasi ruled that the redacted records be released.

Tomasi chastised the state for using an internal rule that had not gone through the administrative rulemaking process to block access to the documents.

The state had argued that an exemption to the Vermont Public Records act extended to documents deemed by “rule” to be confidential by the state Department of Human Resources. Tomasi disagreed with the state. “These are internal operating policies of the department,” Tomasi wrote in a decision. “There is no indication that they were intended to operate as generally applicable exemptions under the PRA [Public Records Act].”

While we faced a legal wall of opposition from the AG's office, in the end, after 23 months of litigation, we learned that the documents had little news value. It took us another four months to recover our legal costs.

No other news organization in the state has the resources and appetite to continue to fight this kind of denial. Most news organizations would — and routinely do — just give up or avoid making requests in the first place, particularly given the financial challenges plaguing the industry.

Litigation is a time-consuming and expensive way in which to resolve records disputes and has been used by the AG's office to delay the public's right to know.

In order to reduce unnecessary and costly litigation, I propose the following changes to the Vermont Public Records Act:

1. Maintain the integrity of the public inspection precedent.

2. Clarify that mediation is not an appropriate solution for records disputes. The AG's office has used mediation as a vehicle for delaying and denying access to records. Unlike other areas of the law, public records disclosures are supposed to be expedited and subject to judicial review in camera. There is no place for mediation here. It's not that complicated: Records not subject to exemption must be released expeditiously with the least amount of redaction under the law.

3. Clarify the agency's responsibility under 1 VSA 318(b)(2)(B), which states that whenever the agency withholds records, it must "include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial."

   A. First, it should be clear that this provision requires to wholesale withholdings as well as redactions (i.e., partial withholding or full withholding).

   B. Second, agencies routinely list an exemption without any explanation of how or why that exemption applies to the record unless and until the requester appeals to Superior Court. The administrative review process should involve divulging to the requester some basic information about the nature and/or content of the responsive record. Ideally, this provision would require the agency to produce a Vaughn index. Otherwise the requester has no information on which to decide whether it should sue, and the requester is forced to file suit just to find out whether there is any colorable basis for withholding at all.

4. Prohibit agencies from adopting internal policies or directives that purport to limit access to records, such as those that label certain types of records confidential. Judge Tomasi's ruling on the DHR personnel manual underscores the fact that policies or directives that do not go through formal rulemaking do not qualify as exemptions to the PRA, and they do not provide a legal basis for withholding records. However, such policies and directives confuse custodians of records, who think they can rely on such directives. And when these directives exist in written form, they invite attorneys to rely on them in defending an agency's decision to withhold, which leads to unnecessary and costly litigation. About 10 years ago, the Vermont ACLU estimated that rulemaking had added 500 to 600 exemptions to the Public Records Act, exemptions that appear nowhere in state law. Surely, that number has only risen. Lawmakers, not agencies, should decide which public records are exempt from disclosure. The Public Records Act should be amended to say: Agency rules shall not be more restrictive than the law itself.

Thank you again for your kind attention. I'd be more than happy to answer any questions.