



For a thriving New England

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July 9, 2014

Elizabeth Miller  
Chief of Staff  
Office of the Governor Peter Shumlin  
109 State Street, Pavilion  
Montpelier, VT 05609

By email to: Elizabeth Miller, [elizabeth.miller@state.vt.us](mailto:elizabeth.miller@state.vt.us)

Re: Public Record Request Appeal

Dear Ms. Miller:

Pursuant to 1 V.S.A. sec. 318(c)(1) Conservation Law Foundation (CLF) appeals the withholding of documents requested by CLF of:

1. the Vermont Governor's Office on March 19, 2014 (request attached); and
2. NESCOE on March 19, 2014 (request attached).

Request of Vermont Governor's office

In response to CLF's request, Ms. London stated in an email dated April 9, 2014:

“I have withheld certain potentially responsive records as exempt from disclosure pursuant to 1 VSA 317(c)(1) and (c)(4) because they are executive privileged communications containing policy advice for the Governor. These are emails: (a) between and among Elizabeth Miller, representing the Governor as his designated NESCOE manager, legal counsel for the Department of Public Service, DPS Regional Policy Director Ed McNamara, the governor-designated NESCOE managers from other states, and NESCOE staff, and (b) emails and weekly reports between and among Elizabeth Miller, in her capacity as Chief of Staff, Chris Recchia as Commissioner of Public Service, other members of the Governor's senior staff, and the Governor. Certain emails also contain attorney-client communications and are exempt pursuant to 1 VSA 317(c)(3) and (c)(4).

If you feel any records have been wrongfully withheld, you may appeal to Elizabeth Miller at [Elizabeth.Miller@state.vt.us](mailto:Elizabeth.Miller@state.vt.us).”

CLF appeals the determination to withhold documents and requests that the withheld documents be provided to CLF. CLF has also filed appeals with Chris Recchia and with Heather Hunt. A copy of those appeals is attached.

For any documents that continue to be withheld, CLF requests an individual privilege log so that we may understand how any claim of privilege applies to the withheld document.

*Policy favors disclosure*

The policy of Vermont's Access to Public Records law is "to provide for free and open examination of records." 1 V.S.A. § 315. The access to records law "is to be construed liberally" in favor of the right to access documents. *Finberg v. Murnane*, 159 Vt. 431, 434 (1992); *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, 106 (1993). Against this liberal policy, executive privilege only "protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security." *Killington v. Lash*, 153 Vt. 628, 636 (1990). The privilege is qualified, not absolute, and requires balancing the interests of confidentiality against those of disclosure. *Id.* at 637-38.

*Communications with NESCOE not protected*

Documents exchanged between Vermont state employees and NESCOE do not fall within any privilege. Rather than constituting sensitive intragovernmental communications that require a mantle of secrecy, Vermont's communications with NESCOE are, in whole or in part, conducted by employees who are not high-level members of the Governor's office and concern communications with employees of other states that may not share the same decisional interests as Vermont. *See id.* (addressing intragovernmental communications at state level) and *Center for Intern. Env. Law v. Office of U.S. Trade Rep.*, 237 F.Supp.2d 17, 26 (D.C. 2002) (communication between U.S. and another member country of U.S. Trade Rep not privileged because each member promoting own interests despite goal of cooperation). Because each member state of NESCOE has its own interests as its paramount concern, documents shared through NESCOE are not privileged. *Id.*

*Documents shared with other states and with VT Public Service Board not protected*

Documents exchanged between Vermont state employees and employees of other states as well as documents shared with the Vermont Public Service Board do not fall within any privilege. As with communications with NESCOE, these are not intra or intergovernmental communications requiring secrecy. Other states provided documents in response to CLF record requests that the Department withheld, recognizing that the exchange of documents between states is not protected. *See id.* (no privilege where each member promotes own interest). The Vermont Public Service Board does not serve in a function as a high-level member of the Governor's staff but serves an independent adjudicatory function. 30 V.S.A. §§ 3, 9, 209. Documents shared with the Board are not protected.



### *Factual information not protected*

Executive privilege does not protect documents that contain purely factual data prepared for intra- or inter-office use which would not compromise military or state secrets. *Armstrong Bros. Tool Co. v. United States*, 463 F. Supp. 1316, 1320 (U.S. Cust. Ct. 1979). The withheld documents that contain purely factual information are not protected by executive privilege and should be disclosed.

### *Need for public access*

The large-scale regional policies on transmission and gas pipeline infrastructure that have been and are being considered among the New England states and NESCOE have broad public policy implications extending beyond the executive purview of Vermont's Governor and his close staff. The broad reach of these policies emphasize the need for public access and weigh against any claim of privilege.

### *Privilege log*

CLF requests that you provide all the withheld documents. To the extent the Governor's office continues to claim privilege with respect to certain documents, CLF requests that the withheld documents be specifically identified, including the date, the subject or title of the document, the persons in possession of the document or included in any communication, and the specific privilege claimed for each document.

### Request of NESCOE

CLF also appeals to you as the office making the appointment for Vermont to NESCOE, the withholding of documents requested from NESCOE. (See attached request to and response from NESCOE). CLF has also filed an appeal with NESCOE. (Attached)

NESCOE serves a public function and functions as an arm of Vermont state government. *See e.g., Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont*, FERC Dt. No. EL04-112-000 (July 7, 2005) (Governors petition FERC in 2004 to form NESCOE to in part investigate and report to New England Governors on policy questions related to siting of interstate transmission facilities); *New England Governors' Commitment to Regional Cooperation on Energy Infrastructure Issues* at p. 2 (directing state staff to work together with NESCOE to take all necessary steps to meet common needs and goals concerning energy infrastructure). It is obligated to comply with Vermont's access to records laws. *See, e.g., Prison Legal News v. Corrections Corp. of America*, No. 332-5-13 Wncv (Vt. Sup. Ct., Jan. 10, 2014). As the office appointing Vermont's representative to NESCOE, CLF requests that you ensure NESCOE's compliance with Vermont's Access to Public Records law so that CLF is provided the records identified in the attached request to NESCOE.



Thank you for your attention to this appeal. Please let me know if there is anything I can do to facilitate your response.

Sincerely,

*Sandra Levine*

Sandra Levine  
[slevine@clf.org](mailto:slevine@clf.org)

Enclosures:

- CLF Public Record Request to Vermont Governor's Office (3/19/14)
- CLF Public Record Request to NESCOE (3/19/14)
- Response from NESCOE (4/15/14)
- Public Record Request Appeal to NESCOE (7/9/14)
- Public Record Request Appeal to VT PSD (7/9/14)

cc: Chris Recchia (Public Service Department)  
Heather Hunt (NESCOE)  
Sarah London (Governor's Counsel)