



July 9, 2014

Chris Recchia  
Commissioner,  
Vermont Public Service Department

By email to: Chris Recchia, [chris.recchia@state.vt.us](mailto:chris.recchia@state.vt.us)

Re: Public Record Request Appeal

Dear Commissioner Recchia:

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 Public Service Department on March 19, 2014 and April 1, 2014 (request attached); and
2. NESCOE on March 19, 2014 (request attached)

Request of Public Service Department

As stated by Mr. Springer in his email response of April 9, 2014:

“The Department has also determined that certain documents in our possession are responsive, but exempt from disclosure under 1 VSA 317 (c)(1) and (4) Executive Privilege. These documents are communications between the Department and the Governor’s Office; communications between Chris Recchia (or his designee) in his role as the Governor’s designated manager for NESCOE, representing the Governor in discussions with other states and their designated gubernatorial-appointed managers; and weekly reports from the Department to the Governor.

The Department also has determined that we have additional documents in our possession that are responsive, but exempt from disclosure under several provisions including 1 VSA 317 (c)(1) and (4) Executive Privilege, 1 VSA 317 (c)(1) (confidential by law), (14) (litigation), and 15 (negotiation of contracts). These include communications regarding FERC and Public Service Board filings, NESCOE contracts, and some analyses regarding regional energy markets.”

CLF appeals the determination to withhold documents and requests that the withheld documents be provided to CLF. 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 Department 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. For any claim of privilege by law separate from executive privilege, kindly identify the litigation under which any document is withheld pursuant to 1 V.S.A § 317(c)(14), and kindly identify any contract the negotiation of which is claimed to preclude disclosure of any document withheld pursuant to 1 V.S.A § 317(c)(15).

Request of NESCOE

CLF also appeals to you as the appointed Vermont representative 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, and with Governor Shumlin's office. (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 Vermont's representative to NESCOE and the head of the Vermont department under which these functions fall, 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,

A handwritten signature in black ink that reads "Sandra Levine". The signature is written in a cursive, flowing style.

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

Enclosures:

- CLF Public Record Request to Public Service Department (4/1/14)
- 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 Governor Shumlin's office (7/9/14).

cc: Darren Springer (Public Service Department)  
Heather Hunt (NESCOE)  
Elizabeth Miller (VT Governor Shumlin's Office)