

Applying the Litigation Exception to the Public Records Act

In a recent decision, the Vermont Supreme Court clarified that the litigation exception to the Public Records Act must be narrowly applied to documents related or pertinent to ongoing litigation. *Shlansky v. City of Burlington and Burlington Police Department*, 2010 VT 90.

After receiving a speeding ticket in Burlington, David Shlansky sent the City a public records request. The Burlington Police Chief denied inspection of some of the requested documents, asserting they were exempt under the Public Records Act's litigation exception. The litigation exception applies to "records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation." 1 V.S.A. § 317(c)(14).

Mr. Shlansky appealed the City's denial to superior court. The superior court ordered the City to produce an itemized list of the withheld information. Among the items the City continued to withhold were documents specifically related to Mr. Shlansky's traffic stop including an incident report, ticket history, motor vehicle record, and an audio recording; documents related to the citing officer and his personnel record including training reports, certificates and awards, a job description, correspondence, evaluations, and citizen complaints; and a Burlington Police Department Directive titled "Command Protocol & Department Rules."

The superior court concluded that Mr. Shlansky's record request fell within the Act's litigation exception and held that he could not use the Public Records Act to obtain records that were denied him under the discovery process available through the Judicial Bureau where his speeding ticket was being contested. Mr. Shlansky appealed this ruling to the Vermont Supreme Court, arguing that the documents were not exempt because they were not discoverable in the traffic court case and therefore the litigation exemption did not apply.

The Supreme Court noted that it could not make a connection between the general administrative materials that the City withheld, such as the departmental command protocol and rules and Mr. Shlansky's individual traffic ticket. Nor could it discern how these documents were "at issue" in the plaintiff's traffic ticket case. The purpose of the litigation exception, stated the Court, is to place a temporary restriction on the release of documents while litigation was pending to allow the presiding court to retain control over issues regarding the production of documents relevant to the case and to avoid disadvantaging public agencies as parties to a lawsuit.

Any exception to the Act must be construed strictly against the record custodian and any doubt resolved in favor of disclosure. Therefore, the City – seeking to withhold these documents under the litigation exception – was obligated to demonstrate that the documents were "related or pertinent" to Mr. Shlansky's ongoing litigation. Given that the documents withheld by virtue of Mr. Shlansky's traffic ticket would have to be withheld from every requestor while his litigation was pending, and given the large number of speeding tickets routinely processed by Burlington, the City could effectively withhold documents like the departmental command protocol Mr. Shlansky sought from every requestor indefinitely – effectively undermining the Act's policy favoring public disclosure – if Burlington was allowed to apply the litigation exception broadly.

Mr. Shlansky also complained that the City's response two weeks after his initial request violated the Public Records Act's requirement that "if the custodian considers the record to be exempt ... the custodian shall so certify in writing," and that this should be done "within two business days." 1 V.S.A. § 318(a)(2). The statute allows extension of the time if "unusual circumstances" exist. 1 V.S.A. § 318(a)(5).

According to the Court, a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failing to comply with the provision. Because the Public Records Act provides no punitive consequence for failing to comply with the time requirement, but does specify a remedy such as a deemed approval, the two-day deadline is directory rather than mandatory. If a record request is not timely filled, it is deemed denied and the requestor may grieve the denial by filing an action in superior court. 1 V.S.A. § 319(a).

The *Shlansky* decision provides municipalities some new clarity in understanding the Public Records Act litigation exception: The exception is temporarily and narrowly applied to documents related or pertinent to litigation to which the public agency is a party. Its purpose is to allow the presiding court to retain control over issues regarding the production of these documents and to avoid disadvantaging municipalities as parties to a lawsuit. The decision also clarifies that if a record request is not filled in a timely manner, the requestor's remedy is to grieve the denial by filing an action in superior court. A copy of the decision is at info.libraries.vermont.gov/supct/current/op2009-291.html

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