STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 349-6–16 Wncv

Energy & Environment Legal Institute, et al.	)
	)
Plaintiffs,	)
	)
v.	)
	)
The Attorney General of Vermont, et al.	)
	)
Defendant.	)

PLAINTIFFS' MOTION TO COMPEL

NOW COME the Plaintiffs and move to compel Defendant William Sorrell to attend another deposition pursuant to VCRP Rule 37(a), and request a hearing for proper relief as contemplated by VCRP Rule 37(a)(4) and/or Rule 37(b)(2). In support of this motion, Plaintiffs state as follows:

1. Defendant Sorrell failed to appear at a properly noticed deposition in this matter on October 4, 2017.
2. The Court granted a Motion to Compel Sorrell's appearance and testimony on October 4, 2017. Plaintiffs then re-noticed a deposition for October 23, 2017 after which Sorrell filed a Motion for a Stay and for an Interlocutory Appeal.
3. On October 18, 2017, this Court denied the Motion for an Interlocutory Appeal, but granted in part the Motion for a Stay. This Court also limited the topic of Sorrell's deposition to address "the extent to which [Sorrell] has documents on his private email account or computer that relate to the specific records request at issue in this case."
4. This Court's October 18, 2017 Order also contemplated that the Supreme Court might soon provide "guidance" that would resolve some of the issues in this case. Counsel

interpreted the Court's order as referring to the *Toensing v. Attorney General* matter, which the Supreme Court subsequently decided on October 20, 2017. **Ex.A** (decision is still subject to revision for typographical or other errors and not yet formally published).

5. The Supreme Court ruled that documents on private accounts can meet the definition of a "public record" under the PRA, and that it is an agency's burden "to ask specified state employees to provide public records from their personal accounts" in response to a PRA request. *Id.*, para 1. The Supreme Court did not address the Attorney General's desire to impose a burden shifting requirement for such a search of personal email accounts, instead ruling "We need not decide whether to formally adopt the burden-shifting advocated by the AGO." *Id.*, para. 34.
6. The Supreme Court in no way indicated that the agency's lawful burden under the PRA "to ask specified state employees" about records stored on private accounts ended the ability of a Plaintiff to pursue civil discovery that is generally available in all civil matters. The Supreme Court did not overrule *Finberg v. Murnane*, 159 Vt. 431, 623 A.2d 979, 983 (Vt., 1992), or *Gendreau v. Gorczyk*, 161 Vt. 595 (1993), both of which remain controlling law and dictate that PRA Plaintiffs are entitled to the "full application" of the civil rules.
7. It is unreasonable to assume that without directly addressing *Finberg* or *Gendreau*, the Vermont Supreme Court somehow overruled them. "[T]he doctrine of stare decisis is of fundamental importance to the rule of law. ... any departure from the doctrine of stare decisis demands special justification." *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 752 N.E.2d 962. Justice Frankfurter opined that *stare decisis* should be abandoned only "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." Helvering v. Hallock, 309 U.S.

at 119, 60 S.Ct. 444, 84 L.Ed. 604. Justice Scalia takes a pragmatic approach, believing that a precedent should be abandoned only where the rule is "wrong in principle," "unstable in application," and undermined by various exceptions and contradictions. *United States v. Dixon* (1993), 509 U.S. 688, 709-711, 113 S.Ct. 2849.

8. On October 23, 2017, Sorrell appeared at a deposition in this case, but refused to answer questions or otherwise provide information relating to "the extent to which [Sorrell] has documents on his private email account or computer that relate to the specific records request at issue in this case" as contemplated by the plain meaning, or even any reasonable reading, of this Court's October 18, 2017 Order.

9. Specifically, the request at issue in this case contained four "search terms": Pawa, Frumhoff, @ag.ny.gov, and @democraticags.gov.

10. Examples of this refusal include that Sorrell refused to answer what his role was in processing the Plaintiffs' PRA request for such records, which by this Court's Order implicates at least one non-official account in his name and under his custody and control. **Ex. B** (Transcript at 9:16 - 11:4).

11. As with all the following examples, this information would inform a determination as to "the extent to which [Sorrell] has documents on his private email account or computer that relate to the specific records request at issue in this case." Sorrell refused to answer:

    - what records he turned over to the Attorney General's Office ("AGO"). *Id.* at 14:5.
    - whether he withheld any potentially responsive records. *Id.* at 14:2 - 14:18.
    - whether the AGO had turned over to Plaintiffs all records which he had turned over to the AGO. *Id.* at 14:11- 14:18.
    - when records were turned over from a personally-controlled account to the AGO. *Id.* at 13:4 - 14:4 and 38:13 - 39:4.

- whether a keyword search of his email account for the word "Pawa" returned any results. *Id.* at 16:5- 17:14.

- whether he corresponded with Matthew Pawa about the business of the State of Vermont on his personal account. *Id.* at 16:11 - 26:16.

- whether a keyword search of his email account for the word "Frumhoff" obtained any results. *Id.* at 17:21-18:1.

- whether he corresponded with Peter Frumhoff about the public business of the State of Vermont on his personal email account. *Id.* at 26:17 - 26:23.

- whether he located any emails containing the keyword "@ag.ny.gov." *Id.* at 18:4-18:7.

- whether he corresponded with any of a list of individuals who had @ag.ny.gov email accounts during the relevant time period, relating to the public business of the State of Vermont. *Id.* at 21:23 - 26:8.

- whether he located any emails containing the keyword "@democraticags.org." *Id.* at 18:8 - 18:16.

- whether his search was conducted based upon personal knowledge or any training. *Id.* at 18:17 - 18:24.

- whether emails that are stored in his trash folder remain there forever, whether they are automatically purged, or whether they are removed by manual action. *Id.* at 18:25 - 21:6.

- whether any records were located in the Trash folder. *Id.* at 35:18 - 35:22.

- whether governmental records containing the four search terms at issue in the Plaintiffs' PRA request were ever destroyed. *Id.* at 21:12 - 21:23.

- what steps he took to preserve records relating to the Plaintiffs' request when he left office as Attorney General of Vermont. *Id.* at 27:4 - 27:15

- whether it was his pattern and practice to delete or not to delete, work-related emails on his non-official account(s) during the relevant time period. *Id.* at 33:14 - 34:11.

- whether he conducted public business containing the four search terms in the Plaintiffs' PRA request on his Gmail account. *Id.* at 35:9-35:17

12. As a result of Sorrell's refusal to answer these questions, Plaintiffs cannot assess the search quality or whether Sorrell located all responsive records that may exist. This

information is reasonably necessary to inform a determination as to "the extent to which [Sorrell] has documents on his private email account or computer that relate to the specific records request at issue in this case."

13. Because of Sorrell's refusal to answer questions relating to the whether he located any records relating to the Plaintiffs' PRA request, whether such records could have been deleted, whether any records were withheld, or even when the search of his personal account was conducted, the October 23, 2017 deposition failed to answer questions the Court contemplated in its October 18, 2017 Order.

14. Accordingly, this Court should order Sorrell to sit for another deposition, order he reimburse the Plaintiffs their costs of the October 23 deposition, and compel Sorrell to answer questions relating to "the extent to which [Sorrell] has documents on his private email account or computer that relate to the specific records request at issue in this case," which inherently contemplates what records relating to Plaintiffs' request remain on his personal email accounts, what records may have been removed from those account, and what subset of records may or may not have been turned over to the Plaintiffs and other related questions as noted, *supra*.

Dated at Charlotte, Vermont this 25th day of October 2017.

Energy & Environmental Legal Institute
Free Market Environmental Law Clinic

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Certificate of Service

I hereby certify that on this 25th day of October 2017, I served this pleading by First Class Mail to the following:

William E. Griffin
Chief Assistant Attorney General
David Boyd
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier Vermont 05609-1001

Dated at Charlotte, Vermont this 25th day of October 2017.

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Exhibit A

2017 VT 99

No. 2017-090

Brady C. Toensing

v.

The Attorney General of Vermont

Supreme Court

On Appeal from
Superior Court, Chittenden Unit,
Civil Division

June Term, 2017

Robert A. Mello, J.

Brady C. Toensing of diGenova & Toensing, Washington, D.C., for Plaintiff-Appellant.

Thomas J. Donovan, Jr. Attorney General, and Benjamin D. Battles, Solicitor General, Montpelier, for Defendant-Appellee.

Robert B. Hemley of Gravel & Shea, P.C., Burlington, and Timothy Cornell of Cornell Dolan, P.C., Boston, Massachusetts, for Amici Curiae Vermont Journalism Trust, Caledonian-Record Publishing Co., New England First Amendment Coalition, The Vermont Press Association, and Da Capo Publishing, Inc.

PRESENT: Reiber, C.J., Skoglund, Robinson, Eaton and Carroll, JJ.

¶ 1. **ROBINSON, J.** At issue in this appeal is whether, under the Vermont Access to Public Records Act (PRA), a government agency must ask state employees to determine whether they possess public records in digital form in their personal accounts when a requester specifically requests communications between specified state employees and third parties, including records that can be found only in the individual state employee's personal account. We conclude that the PRA's definition of "public record" includes digital documents stored in private accounts, but emphasize that it extends only to documents that otherwise meet the definition of public records.

On the facts of this case, the agency was required to ask specified state employees to provide public records from their personal accounts in response to plaintiff's public records request. Accordingly, we reverse and remand.

¶ 2. The undisputed facts are as follows. On May 12, 2015, plaintiff Brady Toensing submitted a PRA request to then-Attorney General William Sorrell. Among other things, plaintiff requested responsive records from "January 1, 2012 to present" from eleven employees and officials in the Office of the Attorney General (AGO). In particular, he asked for: "[a]ny and all communications with or documents related to" forty-four individuals and entities and "communications received from or sent to" any email addresses with one of four domain names. Plaintiff's request stated that "[t]hese requests include, but are not limited to, communications received or sent on a private email account . . . or private text messaging account." Plaintiff submitted a revised request on December 11, 2015, that requested records from "January 1, 2011 to present" from nine state employees and officials and asked for "[a]ny and all communications with and documents related to" twenty-seven individuals and three domain names. Per an agreement with plaintiff, the AGO retained an outside contractor at plaintiff's expense to conduct a search of the State's Microsoft Exchange Enterprise Vault to identify emails responsive to plaintiff's request.

¶ 3. The contractor the AGO hired to search for records identified 13,629 responsive emails in the state system, which it consolidated into 1129 email chains. The AGO produced records on a rolling basis from February 5, 2016, through April 28, 2016. The AGO's final response, embodied in a letter from Chief Assistant Attorney General William Griffin, identified the responsive documents the AGO had provided, and described the documents it had withheld on the ground that they were not public records or were public records exempt from disclosure under the PRA.

¶ 4. In May, plaintiff wrote Chief Assistant Attorney General Griffin indicating that during the course of his numerous communications with the AGO, he had emphasized that his request encompassed communications sent to and received from the private accounts of the identified state employees, but that it did not appear that the nine AGO employees had searched for and produced responsive emails and text messages from their personal accounts. He added that, if the AGO was denying his request to the extent it included responsive records and text messages in personal accounts, the AGO should treat his letter as an administrative appeal of that denial.

¶ 5. After plaintiff confirmed that the only ground for appeal he was asserting in connection with the AGO's response to the records request was the AGO's refusal "to produce, or even search for, responsive public records that may be kept on private email or text messaging accounts," Deputy Attorney General Susanne Young denied plaintiff's administrative appeal. The denial rested on three bases. First, that the PRA only addresses records generated or received by a public agency, and does not extend to private accounts or electronic devices that are not accessible to the agency. Second, there is no basis to conclude that the Legislature would have expected state agencies to conduct searches of the private accounts of state officials and employees, given the law's attempt to balance the interest of public accountability against privacy interests. Third, even assuming that an agency may be obligated in some cases to attempt to search a private account, plaintiff did not provide a sufficient justification for his request in this case.

¶ 6. Plaintiff filed an action in the superior court seeking declaratory and injunctive relief in connection with the AGO's denial. Among other things, he sought a declaration that responsive records "that are related in any way to the individual's employment at the state agency" are public records subject to release under the PRA, "regardless of whether those records are stored on a government or private account." He further requested a declaration that the PRA "requires a good-faith search for records" and that the AGO must release the requested records "or segregable

portions thereof subject to legitimate exemptions." He sought an injunction compelling the AGO "to produce (or order its employees to produce) all records responsive to plaintiff's [PRA] requests, subject to legitimate withholdings." The AGO conceded in its answer that it had declined to search private e-mail or text messaging accounts in response to plaintiff's public records request.

¶ 7. In August, the AGO filed a motion for summary judgment, arguing that communications stored on private email and text messaging accounts are not public records under the PRA. If the court determined that information stored in private accounts was subject to the PRA, the AGO argued that an individual who requests public records stored in private accounts should have to show, first, that agency business was conducted using private accounts and, second, that a search of those accounts was necessary to review agency action. In his opposition, plaintiff emphasized that on the record in this case, asking employees to search their own accounts for responsive records, and then disclosing those records, with an index of those withheld on account of exemptions, would be sufficient to meet the state's obligation to conduct a good faith "search" in response to his records request.

¶ 8. The trial court granted the AGO's motion in February 2017. The court concluded that the PRA only applies to public records "of a public agency," and that accordingly "a record must be in the custody or control of the agency to be subject to search or disclosure." The court added that subjecting personal accounts to the PRA would lead to the invasion of the privacy of state employees and officials, and that implementation of such a requirement would raise practical concerns. It acknowledged that allowing state officials and employees to avoid the PRA by communicating through private accounts "is a serious and, frankly, disturbing concern," but determined that it was up to the Legislature to resolve this problem.

¶ 9. On appeal, plaintiff argues that communications related to agency business but stored in private accounts are public records subject to the PRA. He argues that the language of the PRA as well as public policy support this position. He also contends that the PRA places the

full burden of proving that a search for responsive records was reasonable on the agency conducting the search, and that placing any burden on the requester to make a threshold showing that public records are stored in private accounts before the agency is required to ask employees if they have public records stored on private accounts would be contrary to the language of the statute and legislative intent.

¶ 10. The AGO has shifted its argument on appeal, and no longer contends that records that otherwise fit the definition of public records are not subject to the public records law when they are stored in private accounts. Instead, the AGO maintains that in this case it was not required to take any steps to identify potentially responsive public records found on private accounts of state employees, and that its process for responding to plaintiff's request was sufficient.

¶ 11. When reviewing a trial court's grant of summary judgment, we "apply the same standard as the trial court." Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 9, 177 Vt. 287, 865 A.2d 350. Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a).

¶ 12. On this summary judgment record, we conclude that records produced or acquired in the course of agency business are public records under the PRA, regardless of whether they are located in private accounts of state employees or officials or on the state system. We further conclude that in this case, where plaintiff specifically seeks specified communications to or from individual state employees or officials, regardless of whether the records are located on private or state accounts, the AGO's obligation to conduct a reasonable search includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to plaintiff's request. We consider each conclusion in turn.

I. The Scope of the PRA

¶ 13. The PRA does not exclude otherwise qualifying records that are located in private accounts of state employees or officials. Our conclusion is based first and foremost on the

definition of "public records" in the PRA, the liberal construction to which that statute is subject, and other provisions in the statute that reinforce our understanding. Moreover, the statutory purpose of the PRA supports this interpretation. Persuasive analyses from numerous state and federal courts further buttress our analysis, as do considerations of sound public policy. Although the focus of this appeal is the relationship between the PRA and records located in private accounts of state employees and officials, we note that the definition of public record, while quite broad, is not so broad as to encompass many of the records sought by plaintiff in this case. For that reason, our holding does not impinge on the reasonable privacy expectations of state employees.

¶ 14. The definition of "public record" in the PRA does not exclude otherwise qualifying records on the basis that they are located in private accounts. When construing a statute, our goal is to effectuate the intent of the Legislature. Wesco, Inc., 2004 VT 102, ¶ 14. We first look to the statute's language because we presume that the Legislature "intended the plain, ordinary meaning of the adopted statutory language." Id. The PRA defines "public records" as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). We have previously described this definition as "sweeping." Herald Ass'n, Inc. v. Dean, 174 Vt. 350, 353, 816 A.2d 469, 473 (2002) (quotation omitted). The "determinative factor" in the question of what constitutes a public record is "whether the document at issue is 'produced or acquired in the course of agency business.' " Herald Ass'n, Inc., 174 Vt. at 354, 816 A.2d at 473 (quoting 1 V.S.A. § 317(b)). The PRA does not define "public record" in reference to the location or custodian of the document, but rather to its content and the manner in which it was created. Cf. Trombley v. Bellows Fall Union High Sch. Dist. No. 27, 160 Vt. 101, 108, 624 A.2d 857, 862 (1993) (rejecting argument that documents were exempt from disclosure based on location in confidential disciplinary files because documents must be evaluated "based on their content rather than where they are filed").

¶ 15. This construction is consistent with the Legislature's intent that we construe the PRA liberally in favor of disclosure. See 1 V.S.A. § 315(a) (providing that "the provisions of this subchapter shall be liberally construed"); Rueger v. Nat. Res. Bd., 2012 VT 33, ¶ 7, 191 Vt. 429, 49 A.3d 112 ("In conducting our analysis, we are mindful that the PRA represents a strong policy favoring access to public documents and records." (quotation omitted)). The Legislature expressly mandated that "it is in the public interest to enable any person to review and criticize [government] decisions even though such examination may cause inconvenience or embarrassment," and we construe the statute in light of this purpose. 1 V.S.A. § 315(a).

¶ 16. Our conclusion is further supported by a PRA provision that acknowledges that a state agency may need additional time to search for and collect the requested records "from field facilities or other establishments that are separate from the office processing the request." 1 V.S.A. § 318(a)(5)(A). "Other establishments" is an undefined term, but this provision suggests that in some circumstances a public record may be located outside of the public agency itself. See Bud Crossman Plumbing & Heating v. Comm'r of Taxes, 142 Vt. 179, 185, 455 A.2d 799, 801 (1982) (explaining that statutes should be construed with others as part of one system).

¶ 17. Other state courts have interpreted similar public records laws to extend to records stored in private accounts. Although these decisions involve different statutes with distinct requirements, they rely on considerations that also apply to the Vermont PRA and their reasoning accordingly adds some persuasive validation to our interpretation of Vermont's public records law. For example, the California Supreme Court in City of San Jose v. Superior Court recently reasoned that agencies themselves "cannot prepare, own, use, or retain any record" because "[o]nly the human beings who serve in agencies can do these things." 389 P.3d 848, 855 (Cal. 2017).[1] It

[1] The California Supreme Court issued this opinion during the pendency of this appeal. The trial court here relied on the intermediate court of appeal decision, City of San Jose v. Superior Court, 225 Cal. App. 4th 75 (2014), to support its conclusion that documents stored in private

concluded that, because an agency "can act only through its individual officers and employees," documents "prepared by a public employee conducting agency business has been 'prepared by' the agency within the meaning of [the PRA] even if the writing is prepared using the employee's personal account." Id. The court rejected the argument that documents in personal accounts are beyond the agency's control and therefore not subject to the PRA. It recognized that documents do not lose their status as public records only because " 'the official who possesses them takes them out the door.' " Id. at 857 (quoting Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d 145, 149 (D.C. Cir. 2016)); see also Nissen v. Pierce Cty., 357 P.3d 45, 52, 54 (Wash. 2015) (concluding that records on private cell phones are subject to PRA because agencies "act only through their employee-agents" and therefore "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record prepared, owned, used, or retained by" the agency (quotation omitted)). But see In re Silberstein, 11 A.3d 629, 633 (Pa. 2011) (concluding with respect to records in individual township commissioner's personal email account that "unless the [records] were produced with the authority of [the township], as a local agency, or were later ratified, adopted or confirmed by [the township], said requested records cannot be deemed public records within the meaning of [the public records law] as the same are not of the local agency" (quotation omitted)).

¶ 18. Likewise, federal courts applying the federal Freedom of Information Act (FOIA) have concluded that documents in private accounts may be subject to disclosure under FOIA. See Rutland Herald v. Vt. State Police, 2012 VT 24, ¶ 68, 191 Vt. 357, 49 A.3d 91 (Dooley, J., concurring in part and dissenting in part) (considering federal court decisions construing FOIA in interpreting analogous provisions in Vermont PRA). In Competitive Enterprise Institute v. Office of Science and Technology Policy, the D.C. Circuit considered a FOIA request for records relating

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accounts could not be subject to the PRA. The California Supreme Court reversed that opinion on appeal.

to public business located in a private email account maintained by the director of the Office of Science and Technology. 827 F.3d 145 (D.C. Cir. 2016). The agency declined to produce the record on the ground that the records were "beyond the reach of FOIA" because they were in an account under the control of a private organization. Id. at 147. The D.C. Circuit rejected this claim, explaining that records do not lose their agency character just because the official who possesses them takes them out the door. Id. at 149. Considering the purpose of FOIA, the court reasoned,

> If a department head can deprive the citizens of their right to know what [the] department is up to by the simple expedient of maintaining . . . departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at [the department head's] daughter's house and then claiming that they are under her control.

Id. at 150; see also Competitive Enter. Inst. v. U. S. Envtl. Prot. Agency, 12 F. Supp. 3d 100, 122 (D.D.C. 2014) (explaining that agency was not required to disclose employees' personal email addresses since FOIA requesters "can simply ask for work-related emails and agency records found in the specific employees' personal accounts" and "need not spell out the email addresses themselves").

¶ 19. In fact, even the federal cases upon which the AGO relies in arguing for a burden-shifting test with respect to an agency's obligation to search for public records stored in private accounts support the conclusion that such records are, in fact, public records. See Hunton & Williams v. U.S. Envtl. Prot. Agency, 248 F. Supp. 3d 220, 237-38 (D.D.C. 2017) (noting that agencies performed searches of personal email accounts of individual employees when specific facts indicated that particular employee had used personal email account for agency business); Wright v. Admin. for Children and Families, No. 15-218, 2016 WL 5922293, at *8 (D.D.C. Oct. 11, 2016) (acknowledging that agency employees' communications on nonagency accounts may

constitute "agency records" subject to FOIA). As noted above, the AGO has conceded this point on appeal.

¶ 20. Strong public policy reasons support the conclusion that electronic information stored on private accounts is subject to disclosure under the PRA. The purpose of the PRA is to ensure that citizens can "review and criticize" government actions. 1 V.S.A. § 315(a). That purpose would be defeated if a state employee could shield public records by conducting business on private accounts. See Wesco, Inc., 2004 VT 102, ¶ 14 ("[W]e favor interpretations of statutes that further fair, rational consequences, and we presume that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences." (quotation omitted)). And we are mindful that the PRA gives effect to the philosophical commitment to accountability reflected in Article 6 of the Vermont Constitution. See Rutland Herald, 2012 VT 24, ¶ 39 (recognizing that PRA is Legislature's means of executing broad principles articulated in Article 6 of Vermont Constitution); Vt. Const. ch. I, art. 6 ("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 at all times, in a legal way, accountable to them.").

¶ 21. "If communications sent through personal accounts were categorically excluded from [the state public records law], government officials could hide their most sensitive, and potentially damning, discussions in such accounts." City of San Jose, 389 P.3d at 858. Wide access to records created in the course of agency business is crucial to holding government actors accountable for their actions. Exempting private accounts from the PRA would "not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private." Id. (quotation omitted); see also Nissen, 357 P.3d at 53 ("If the PRA did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily

operation of government."). For the above reasons, we conclude that the PRA applies to public records that are stored in private accounts.

¶ 22. We emphasize, however, that in order to qualify as a public record, a document must have been "produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). Although this is a broad test, it is far narrower than suggested by plaintiff, and does not reach all records that are responsive to plaintiff's expansive public records request. With reference to nine identified state officials and employees, plaintiff sought "[a]ny and all communications with or documents related to the following individuals." On its face, this request purports to reach many records that are not public, including communications among the identified individuals that were not produced or acquired in the course of agency business. Likewise, throughout his correspondence with the AGO, in his pleadings in this case, and in his brief on appeal, plaintiff appears to seek a judgment that he is entitled to any records "that are related in any way to the individual's employment at the state agency," or that "any records, regardless of where they are stored, which are related in any way to public business or created as a result of the employee's employment are producible." These statements do not reflect the statutory definition of public records, and our decision today should not be construed to expand the reach of the PRA to reach nonpublic records located in private accounts. See Herald Ass'n Inc., 174 Vt. at 357, 816 A.2d at 476 (acknowledging that PRA "applies only to records generated in 'the course of agency business' "); cf. Nissen, 357 P.3d at 54 ("[E]mployees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary. None of these examples would result in a public record . . . . "). Our holding that records located in private accounts may be public records does not mean that the PRA

purports to reach anything other than public records—those "produced or acquired in the course of public agency business"—that are located in private accounts.[2]

¶ 23. We emphasize this limit to the reach of our holding because nothing in the PRA suggests that the Legislature intended to subject nonpublic communications by state employees or officials to public scrutiny, and any such invasions would raise substantial privacy concerns. State policy on internet use puts state employees on notice that employees with state email accounts must not routinely use personal email accounts to conduct state business without approval from the Secretary of Administration, and specifically notifies employees that "a 'public record' is any record produced or acquired in the course of agency business, regardless of whether the record resides in a state-provided system or personal account." Electronic Communications and Internet Use, Personnel Policy 11.7, http://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_11.7_ELECTRONIC_COMMUNICATIONS_AND_INTERNET_USE.pdf [https://perma.cc/NP9H-UN23] (emphasis added). The policy explains, "Any public record contained in a non-state-provided system (email or otherwise) is subject to Vermont's Access to Public Records Act." Treating a record produced or acquired in the course of agency business as a public record, regardless of where situated, does not impinge on the reasonable privacy expectations of state employees who are on notice that they should not generally be conducting public business through private

[2] In his complaint in this case, and in his brief on appeal, plaintiff highlights a particular email between former Attorney General Sorrell and a registered lobbyist that plaintiff obtained through other channels. He apparently highlights this email in support of a request he made after the December 2015 revised records request for additional emails between Attorney General Sorrell and the individual. In ruling on plaintiff's appeal with respect to the applicability of the PRA to emails found in private accounts, the AGO determined that the private email exchange about a public event after the fact did not constitute agency business. The AGO's analysis did not turn solely on the fact that the email was located in a private account. Although plaintiff references this email exchange in his complaint and brief, we understand him to be doing so as a means of illustrating what he believes to be the perils of categorically excluding emails in private accounts from the definition of public records. We do not understand him to have challenged the AGO's determination that by its nature this email is not a public record.

accounts. But suggesting that nonpublic records in private accounts of state employees are subject to public disclosure—or even disclosure to the State itself—would raise a host of concerns about the contractual and potentially constitutional privacy interests of state employees, would not further the public policy of open government, and would expand the PRA beyond its intended purpose.

II. The AGO's Obligation in Responding to Plaintiff's Request

¶ 24. We conclude on the record of this case, where plaintiff specifically seeks specified communications to or from individual state employees or officials regardless of whether the records are located on private or state accounts, that the AGO's obligation to conduct a reasonable search includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to plaintiff's request. In reaching this conclusion, we consider the language of the PRA, practical factors, the burden-shifting framework that the AGO advocates, its application to the record of this case, the conflicting interests at stake, and persuasive authority from other states.

¶ 25. The PRA itself offers few clues as to the specific responsibilities of a state agency in responding to a public records request that may include records located in the personal accounts of state employees or officials. The statute simply provides, "[u]pon request, the custodian of a public record shall promptly produce the record for inspection." 1 V.S.A. § 318(a). It does not describe the process by which the custodian is to gather, review, and disclose the records, although the statute does contemplate that an individual at the agency will assume ultimate responsibility for the gathering of relevant records, identification of exemptions, and disclosure to the requester. See id. § 318(a)(2) (requiring custodian to certify any exemptions claimed by identifying records withheld and basis for denial); § 318(a)(4) (requiring custodian to certify in writing when requested record does not exist); see also Pease v. Windsor Dev. Review Bd., 2011 VT 103, ¶¶ 17-19, 190 Vt. 639, 35 A.3d 1019 (mem.) (concluding that municipal development review board

properly responded to public records request through custodian, rather than through individual responses from each DRB member and noting that "a custodian [is] one 'who ha[s] it within their power to release or communicate public records' " (quoting Mintus v. City of West Palm Beach, 711 So.2d 1359, 1361 (Fla. Dist. Ct. App. 1998) (per curiam))).

¶ 26. As a practical matter, the steps required to reasonably compile requested public records likely vary depending upon the nature of the request. In some cases, centralized electronic searches of agency records in an email system, document management application, or database within specified parameters may be the primary or even exclusive means of compiling responsive public records. In other circumstances, electronic searching may take place in a decentralized way, with individual employees searching their own state digital accounts. In yet other cases, many of the responsive records will exist only in hard copy, and someone must search through the appropriate file or files. Sometimes the relevant records, whether electronic or hard copy, are likely to be centralized; in others, they may be dispersed among multiple individual systems. And, per the discussion above, in some cases responsive public records may be located outside state accounts or the four walls of the public agency. Because public records requests can take so many forms, it would be impracticable to try to delineate specific steps required to comply with each and every public records request.

¶ 27. To fill this void, the AGO urges this Court to adopt a burden-shifting test applied by some federal courts under FOIA. To prevail on summary judgment with respect to a FOIA dispute, the defending agency must show that it has conducted a search "reasonably calculated to uncover all relevant documents." Morley v. C.I.A., 508 F.3d 1108, 1144 (D.C. Cir. 2007) (quotation omitted). The agency need not search "every record system" for the requested documents, but it must conduct a good faith, reasonable search of those systems of records likely to possess the requested records." Hunton & Williams, 248 F. Supp. 3d at 235 (quotation omitted); see also Wright, 2016 WL 5922293, at *8. Once the agency has provided the court a reasonably

detailed affidavit describing its search, the burden shifts to the FOIA requester to produce "countervailing evidence" suggesting that a genuine dispute of material fact exists as to the adequacy of the search. Hunton & Williams, 248 F. Supp. 3d at 236 (quotation omitted).

¶ 28. As applied to personal email accounts of state employees, the AGO urges us to adopt a presumption that agency records are unlikely to exist on the agency employees' personal accounts. The AGO contends that a requester can satisfy its burden to present "countervailing evidence" as to the adequacy of an agency's search by identifying evidence that a specific private email address has been used for agency business, but that mere speculation that private email accounts were used does not require the agency to perform a search. Id.; see also Wright, 2016 WL 5922293, at *8-9.

¶ 29. We recognize the conflicting interests that inform the AGO's analysis. The PRA aims to uphold the accountability of the public servants to whom Vermonters have entrusted our government. The statute clearly asserts the Legislature's interest in enabling "any person to review and criticize" the decisions of government officers "even though such examination may cause inconvenience or embarrassment." 1 V.S.A. § 315(a). It recognizes that providing for free and open examination of public record promotes values of constitutional significance. Id. (citing Vt. Const. ch. I, art. 6). But the Legislature has also recognized that "[a]ll people . . . have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer." Id. Any discussion of requiring, or even allowing, a public agency to "search" the private email accounts of its employees would trigger privacy concerns of the highest order.

¶ 30. But we must bear in mind the "search" at issue in this case, which really isn't a "search" at all. Plaintiff has not argued that the AGO should, or even could, compel individual employees to hand over their smartphones or log-in credentials for their personal email accounts in response to his public records request. He has made the far more modest claim that the AGO

should ask the identified employees to turn over any public records responsive to plaintiff's request that are in their personal email or text message accounts.[3] In the context of this case, that request would not intrude at all on the privacy of the nine state officials or employees involved. The AGO would not have incidental access to any nonpublic texts, emails or other documents in the employees' accounts; the only records the employees would be asked to provide to the AGO would be those that are public records responsive to plaintiff's request. And of those, any public records that are subject to exemption from disclosure, in part or as a whole, would be redacted or withheld by the AGO and included in its itemized list of exempt or partially exempt documents. The notion that state employees have a privacy interest in records that are by law public records—those produced or acquired in the course of agency business—is incongruous.

¶ 31. Courts in at least two other states have adopted an approach similar to that advocated by plaintiff. In Nissen, the Washington Supreme Court considered a request pursuant to that state's public records law for disclosure of text messages sent or received by a prosecutor in his official capacity. 357 P.3d at 49-50. The court first concluded that Washington's public records law reached records "prepared, owned, used, or retain[ed]" by state employees in the course of their jobs, including the work product of public employees found on their personal cell phones such as text messages. Id. at 52-53, 55-56. Considering the mechanics of searching for and obtaining public records stored by or in the control of an employee, the court recognized the competing interests discussed above. The court noted that an individual has no constitutional privacy interest in a public record, but recognized that a state employee may have strong constitutional rights in information that is comingled with those public records. Id. at 56

[3] As noted above, plaintiff has actually made a somewhat broader claim about what the AGO should ask of its employees. See supra, ¶ 22. The important point for the purpose of the discussion here is that plaintiff has not argued that the AGO should physically search its employees' private accounts but, rather, that the AGO should ask employees to search their own accounts.

(describing wealth of personal information accessible through modern mobile devices). On the other hand, the court concluded that the statutory mandate providing for "full access to information concerning the conduct of government on every level" required that the public have some way to obtain public records created and exchanged on personal cell phones. Id. (citation omitted). The court rejected the notion that the public records law created a "zero-sum choice between personal liberty and government accountability," and held that "an employee's good-faith search for public records on his or her personal device can satisfy an agency's obligation under [the public records act]." Id. at 56-57.

¶ 32. With respect to judicial review of an agency's response to a public records request, the court concluded that "[t]o satisfy the agency's burden to show it conducted an adequate search for records," it would permit employees to submit an affidavit with facts sufficient to show that the information withheld was not a public record. Id. at 57. As long as the affidavits "give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search" under the public records law. Id. When done in good faith, this procedure, the court opined, "allows an agency to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees." Id.

¶ 33. More recently, the California Supreme Court relied in part on Nissen when adopting its own method for searching private accounts. City of San Jose, 389 P.3d at 860-61. The court concluded that documents that otherwise meet the California public records act's definition of "public records" do not lose this status because they are located in an employee's personal account and provided guidance for conducting searches in light of the need to balance privacy and disclosure interests. Id. at 857, 860. The court acknowledged that California's public records act did not explain how agencies were to search private accounts, but noted that "[s]ome general principles have emerged." Id. at 860. It explained that "[a]s to requests seeking public records

held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question" and the agency "may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive materials." Id. (emphasis in original). The court noted that federal courts applying FOIA had approved of this method, as long as the employees have been properly trained in segregating personal and public records, and followed the Washington Supreme Court and federal courts in concluding that as long as the employee provides an affidavit describing the employee's manner of searching in sufficient detail to show that the employee is not withholding public records, the agency's search is adequate. Id. at 860-61.

¶ 34. We find the reasoning of the California and Washington Supreme Courts persuasive. We conclude that the critical question in this case is whether the AGO conducted a search that was reasonably calculated to uncover all relevant public records. We need not decide whether to formally adopt the burden-shifting advocated by the AGO because we conclude that even with a burden-shifting framework, the AGO's search for responsive public records must be adequate in the first instance. We decline to adopt a legal presumption that, in the absence of specific evidence provided by the requester, no state business has been conducted through private accounts. Instead, we conclude that in this case the AGO's search will be adequate if the specified officials and employees are trained to properly distinguish public and nonpublic records, the agency asks them to in good faith provide any responsive public records from their personal accounts, and they respond in a manner that provides reasonable assurance of an adequate search. This might be as simple as an affirmation that the employee, without exception, has not produced or acquired any records in personal accounts in the course of agency business, or that the employee has identified all potentially responsive records through a specified word search, and has segregated and disclosed all records produced or acquired in the course of agency business as opposed to communications of an exclusively personal nature.

¶ 35. We note that plaintiff has advocated a framework that requires an agency to provide a sworn affidavit from each employee who conducts a search of personal accounts for public records in connection with a public records request. We do not adopt this requirement in cases like this in which there is no evidence that an employee has public records in personal accounts. In response to a public records request, a public agency must undertake a reasonable search to identify and disclose responsive, nonexempt public records. In the absence of any evidence suggesting that an employee is conducting agency business through personal accounts, an agency may reasonably rely on the representations of its employees.[4] In fact, agencies likely rely on their employees' representations routinely in the context of searches of agency records. That is, an agency's search of its own records may take the form of individual employees or officials searching their paper or digital files in their agency account or office, providing responsive records to the custodian of records, and representing that their search is complete. In cases in which governing policies prohibit the conduct of public business on personal accounts and there is no evidence that employees or officials have used their personal accounts to conduct public business, we decline to impose a higher burden on them when searching their personal files than applies to their search of records accessed through agency accounts or hard copies located in agency files.[5]

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[4] Whether an agency may in its own discretion require its employees to sign an affidavit is not before us. We decide only that under these circumstances the PRA does not require affidavits.

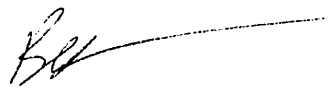
[5] We recognize that the cases we have relied upon do impose such a requirement. However, the Washington Supreme Court called for an affidavit in part because its public records statute expressly contemplates judicial review of agency actions taken pursuant to the public records law based solely on affidavits. See Nissen, 357 P.3d at 57; Wash. Rev. Code Ann. 42.56.550(3) (2017). Moreover, in that case the fact that the prosecutor was conducting official business using his personal cell phone to send and receive text messages was established. We do not address here the burden on an agency to establish an adequate search with respect to public records in the personal accounts of agency employees or officials in cases in which there is evidence of employees or officials conducting public business through personal accounts.

¶ 36. Accordingly, if, in addition to searching the AGO's own records as it has done, the AGO has policies in place to minimize the use of personal accounts to conduct agency business, provides the specified employees and officials adequate guidance or training as to the distinction between public and nonpublic records, asks them to provide to the AGO any responsive public records in their custody or control, receives a response and brief explanation of their manner of searching and segregating public and nonpublic records, and discloses any nonexempt public records provided, its search will be adequate. This approach strikes a balance between protecting the privacy of state workers and ensuring the disclosure of those public records necessary to hold agencies accountable.

¶ 37. In light of the above analysis, we direct the AGO to complete an adequate search in response to plaintiff's records requests consistent with our analysis, and remand this case to the trial court for completion of the AGO's response as well as consideration of attorney's fees.

Reversed and remanded for further proceedings.

FOR THE COURT:



Associate Justice

Exhibit B

STATE OF VERMONT
SUPERIOR COURT CIVIL DIVISION
WASHINGTON UNIT DOCKET NO. 349-6-16Wncv

ENERGY & ENVIRONMENT LEGAL INSTITUTE, et al.,
Plaintiffs,
v.
THE ATTORNEY GENERAL OF VERMONT, et al.,
Defendants.

DEPOSITION
OF
WILLIAM H. SORRELL
Taken on October 23, 2017, at 9:05 AM
600 Blair Park
Williston, Vermont

APPEARANCES:

MATTHEW D. HARDIN, ESQ., 314 W. Grace #308, Richmond, Virginia 23220; and BRADY TOENSING, ESQ., diGenova & Toensing, 1776 K Street, NW, Suite 737, Washington, DC 20006; on behalf of the Plaintiffs.

MEGAN SHAFRITZ, ESQ., Assistant Attorney General, 109 State Street, Montpelier, Vermont; and BRIDGET ASAY, ESQ., Stris & Maher, 28 Elm Street, Montpelier, Vermont; on behalf of the Defendants.

ALSO PRESENT: Brian Landrum, Law Clerk

REPORTER: Sherri L. Bessery, RMR, CRR

DEPOS UNLIMITED, INC.
P.O. Box 4595
Burlington, Vermont 05406-4595
(802) 658-1188
depos@together.net

INDEX

Exhibit	Marked For Identification

* * *

IT IS HEREBY STIPULATED AND AGREED BY AND between counsel that notice of the taking of the deposition has been given; that qualifications of the Notary Public shall be waived; and that all objections except as to the form of the question shall be reserved to the time of trial.

* * *

WILLIAM H. SORRELL,
having been duly sworn by the Notary Public, testified as follows:

EXAMINATION BY MR. HARDIN:

MS. SHAFRITZ: So before this starts, if it's okay, let me just say that we're here today because Mr. Sorrell's deposition was noticed and the Superior Court denied the Motion to Quash.

However, following that ruling the Supreme Court issued a decision describing when it would be appropriate to include employee personal e-mails in an Agency's response to a public records request and setting a protocol for how that would happen. The court's opinion as we read it clearly establishes that the Agency asks the specified employees to conduct a search and can rely on those results. The court's opinion doesn't contemplate depositions of employees, and we don't feel depositions are appropriate under the Supreme Court's procedure. But given the unique procedural circumstances of this case, we're here.

But in light of the court's opinion,

Mr. Sorrell had the opportunity to conduct a search of his personal e-mail account using the search terms and the time frame of the request in this case. He provided to the Attorney General's Office anything he thought could remotely be in the ballpark of having been produced or required in the course of Agency business; and likewise, given the support turnaround time, and in the interest of being over-inclusive, the Attorney General's Office is producing, I have documents here, a set of documents that, again, could evenly possibly be considered to be public records.

And I'll just note that it consists entirely of DAGA announcements and e-mails relating to their events, almost all of which have actually already been produced from Mr. Sorrell's State account. So given that they're essentially duplicates of documents that were already produced, and given that Mr. Sorrell has no objection, we're producing them.

So I don't really know if there's anything more to be done at the deposition.

In our view there's no longer any purpose to the deposition. But if there is anything remaining to go over in the deposition, our view is that given the prescription of the Supreme Court and the Superior Court, the scope is, is very narrow.

MR. HARDIN: I have a question for you before we begin. You said there was a supplemental search conducted of the gmail account, I presume. Was it a supplemental search to turn over all government records to the AG's Office, or a supplemental search for this request, these particular records to be turned over to the AG's Office?

MS. SHAFRITZ: As I said, Mr. Sorrell had an opportunity to conduct a search using the search terms.

MR. HARDIN: Using the search terms, okay.

MS. SHAFRITZ: And for the time frame for this particular request pursuant to, you know, as the Supreme Court described.

MR. HARDIN: Okay. That's what I'm trying to clarify.

MS. SHAFRITZ: Sure.

MR. HARDIN: We're just talking about this, we're not talking about sort of a global everything. All right.

MS. SHAFRITZ: So are we -- is this good?

MR. HARDIN: I think we, we still have questions to ask, and our interpretation of the Supreme Court's decision is quite different from yours. Our interpretation of the Supreme Court's ruling is that it is an Agency's burden to ask its employees where records might be found, and I think we agree on that. Our interpretation is that the civil rules still apply such that an Agency can ask, and indeed it is an Agency's obligation to ask, but that does not foreclose the discovery process or a plaintiff from requesting.

So we still believe that questions today are appropriate within the order of the Superior Court and consistent with the opinion of the Supreme Court.

MS. SHAFRITZ: Well let's see what those questions are, we'll see where we -- how that goes.

MR. HARDIN: Are we good to go, Brady? Do you have anything to add?

MR. TOENSING: No, we're good.

EXAMINATION BY MR. HARDIN:

Q. Okay. So let's start with deposition procedure. My understanding is that based on the, based on the Superior Court's order, this deposition is limited. Ordinarily objections would have been made on the record and the questions would be answered anyway; I understand that's somewhat modified by Supreme Court's -- or by the Superior Court's orders.

I don't know, has Mr. Sorrell ever attended a deposition before?

MS. SHAFRITZ: I'm going to object; that's beyond the scope of the Superior Court and the Supreme Court's order.

Q. Okay. Is there anything which would prevent him from giving true and correct testimony today, any impairment, medical or otherwise?

MS. SHAFRITZ: I'll also object to that.

MR. HARDIN: Do you believe that it is appropriate to answer that question subject

to the objection, or are you instructing your client not to answer that question?

MS. SHAFRITZ: We'll take a minute.

(A brief pause occurred.)

MS. SHAFRITZ: Can you repeat the question so we have it clear?

Q. Is there any impairment, medical or otherwise, today which would prevent you from giving true, correct and accurate testimony?

A. No.

Q. Thank you. Have you read the Vermont Public Records Act?

MS. SHAFRITZ: Objection.

MR. HARDIN: Is that one you're going to instruct him not to answer?

MS. SHAFRITZ: Yup.

Q. Okay. What is your role in responding to requests under the Vermont Public Records Act?

MS. SHAFRITZ: Objection. The, you know, the Superior Court was very clear that, and to the extent that the court's order still applies in light of the Supreme Court's decision, but that the scope of the deposition is limited to the extent to which Mr. Sorrell has documents in personal e-mail

accounts that are public records related to this specific records request at issue. So to the extent you've got those questions, he can answer them.

MR. HARDIN: So you're instructing him not to answer that one as well?

MS. SHAFRITZ: Yeah.

MR. HARDIN: Just to clarify. Okay. And going forward I mean, I expect we -- we obviously disagree about the scope of the Supreme Court and the Superior Court's order. So I mean, if, if you object, if you can just go ahead and say whether you're instructing him to answer or not, it might speed things along, just as a suggestion.

Q. What is his role in responding to this particular Public Records Act request as modified I understand it on September 19, 2016?

MS. SHAFRITZ: I'll object; I'm not sure I understand that question.

Q. The Energy and Environment Legal Institute submitted a request pursuant to Public Records Act on May the 6th of 2016; it was subsequently modified on May the 18th of 2016, and again on September the 2nd of 2016. What was General

Sorrell's role in responding to that request?

MS. SHAFRITZ: Same objection.

MR. TOENSING: Megan, and I'm sorry, it's a little bit muddled. If you -- so if you're saying same objection, does that mean you're -- are all your objections instructing him not to answer?

MR. HARDIN: I think she's saying she doesn't understand the question. Is that what you're objecting to?

MS. SHAFRITZ: My objection is that that question is beyond the scope of the Supreme Court's order regard -- order, and the Superior Court's order regarding this deposition.

MR. HARDIN: So I have a copy of the request; and what I'm, what I'm trying to ascertain -- I understood it you didn't understand the question; so I was going to provide the request and say what was his role in responding to this request right here.

Are you -- is that a question you're not going to instruct him to answer, or is that something that would be helpful to

clarify my question?

MS. SHAFRITZ: No, that's beyond, the question is beyond the scope, so we're instructing him not to answer.

MR. HARDIN: Okay.

Q. General Sorrell, were you aware that public records that may be housed on your private accounts were requested by the Energy and Environment Legal Institute or the Free Market Environmental Law Clinic?

MS. SHAFRITZ: Sorry, say that again.

Q. Was General Sorrell aware that public records which may be housed on his non-governmental email accounts were requested by the Energy and Environment Legal Institute or the Free Market Environmental Law Clinic?

MS. SHAFRITZ: What time frame are you talking about?

Q. It was the September 2 request that I was referring to a minute ago. Was General Sorrell aware -- the original request was made the 6th and subsequently modified on September the 2nd. But was he aware of the request and that it included public records which may have been housed on a non-governmental e-mail account?

MS. SHAFRITZ: I'm going to object to that question. I think even the Superior Court's order before the, you know, prior to the Supreme Court's decision was very clear that Mr. Sorrell could be asked if he has public records, or if he has records, you know, related to those specific requests. All of your other questions are beyond that scope so I'm going to instruct him not to answer.

Q. Did the Attorney General at any time disclose responsive records to the Attorney General's Office for disclosure to the Plaintiffs in this case, the Energy and Environmental Legal Institute or the Free Market Environmental Law Clinic?

MS. SHAFRITZ: Which? Which? Are you referring to Mr. Sorrell?

MR. HARDIN: Yes, I'm referring to Mr. Sorrell.

Q. Did Mr. Sorrell at any time disclose records to the Attorney General's Office for them to turn over to the Plaintiffs in this case, or to the Plaintiffs directly? Did he at any time disclose records?

MS. SHAFRITZ: If you understand the question, you can answer it.
A. I provided e-mails to my attorneys.
Q. When?
MS. SHAFRITZ: Objection. That gets into --
MR. HARDIN: Are you instructing him not to answer?
MS. SHAFRITZ: Yeah; that gets to attorney-client privilege and work product doctrines, in addition to the beyond the scope. We've produced every possible public record that's something that could be considered produced required in the course of Agency business from Mr. Sorrell's private account related to this public records request.
MR. HARDIN: So the Attorney General's Office's position I suppose, I'm asking you as counsel, is that it is not something we can inquire into, when records were produced or to whom?
MS. SHAFRITZ: Correct.
MR. HARDIN: That you're only going to instruct him to answer that he produced

records?
MS. SHAFRITZ: That's subject to attorney-client privilege and for the other reasons that I gave.
Q. What records did he produce?
MS. SHAFRITZ: Objection.
MR. HARDIN: Same, you're instructing him not to answer on that?
MS. SHAFRITZ: Same; yup, same objection.
Q. Were the records that were handed to me a moment ago the entirety of records that were produced?
MS. SHAFRITZ: Objection; same reason.
MR. HARDIN: Instructing him not to answer?
MS. SHAFRITZ: Instructing him not to answer that.
Q. All right. Did Mr. Sorrell personally search any e-mail accounts for responsive records?
A. Yes.
Q. Just one, or more than one?
MS. SHAFRITZ: More than one what?
Q. E-mail account. How many e-mail accounts

are we talking about? One, more than one?
MS. SHAFRITZ: Objection. Mr. Sorrell's personal e-mail accounts, what they are is beyond the scope of this deposition.
Q. How was that search conducted of whatever e-mail accounts are involved?
A. I had the requested search terms and the relevant time frames in mind, and I plugged in individually the four search terms and the time frame. Included not only documents that were, would have been in my Inbox, but in Trash or Spam. Conducted the search, got the results, and turned them over to counsel.
Q. It was a keyword search?
A. Yes.
Q. Okay. Do you remember what the keywords were?
A. Pawa, Frumhoff, @ag.ny.gov, @democraticags.org.
Q. Do you know what Pawa is?
MS. SHAFRITZ: Objection.
MR. HARDIN: Are you instructing him not to answer because it's outside the scope?

MS. SHAFRITZ: Beyond the scope.
Q. All right. So you searched for the word Pawa?
A. Yes.
Q. Did the word Pawa appear in your search results?
MS. SHAFRITZ: Objection. He doesn't have to testify other than to the, other than the fact that he turned over documents. It's beyond the scope. To get into asking him about the contents of his private e-mail accounts is beyond the scope of this deposition; the Supreme Court was very clear on that.
MR. HARDIN: All right. So I just want to clarify the objection for the record. So Pawa was a search term; he said he searched for the word Pawa, and you're instructing him not to answer whether he found anything under the word Pawa?
MS. SHAFRITZ: Correct.
Q. Did the attorney --
MS. SHAFRITZ: You have the documents that we produced.
MR. HARDIN: That you produced. And I

-- I mean, the problem is you're refusing to answer questions about the search process; you're just saying we gave you stuff. And I understand that we're going to end up arguing over that; it's just I have to build the record.

MS. SHAFRITZ: He's testified as to the search process, and I think the Supreme Court is very clear that no one is entitled to ask a State employee about their private e-mail accounts, what may be found there, what may be not, as long as they've done the search and turned over any possible public records.

Q. Did you search for the word Frumhoff?

A. Yes.

Q. Did you obtain or produce any records containing the word Frumhoff?

MS. SHAFRITZ: Objection; compound. Well if it's a compound question.

Q. Did Frumhoff appear in the search results?

MS. SHAFRITZ: Objection; same objection.

MR. HARDIN: You're instructing him not to answer?

MS. SHAFRITZ: Beyond the scope. Yes.

Q. Did you search for the phrase @ag.ny.gov?

A. Yes; I've so testified.

Q. Did you find anything when you used that keyword?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. Did you search for the phrase @democraticags.org?

A. Yes.

Q. Did you find anything?

MS. SHAFRITZ: Objection. Same objection; instruct him not to answer.

MR. HARDIN: And you're instructing him not to answer?

MS. SHAFRITZ: Yes.

Q. Did you conduct this search based on your own knowledge, or were you trained in how to conduct this search?

MS. SHAFRITZ: Objection.

MR. HARDIN: Instructing him not to answer again?

MS. SHAFRITZ: Instructing him not to answer, yeah.

Q. All right. Do e-mails in your Trash

folder stay there forever?

MS. SHAFRITZ: Objection. Again, the contents of his private e-mail account is not subject to deposition.

Q. I'm just asking about the technology of how, how it works; do they stay there, do they disappear, do they get deleted? My Trash folder gets deleted every 30 days by software. I'm just asking the records themselves, I'm not asking what was there, I'm just saying is everything that was there still there?

MS. SHAFRITZ: The question is still overbroad. Under Judge Teachout's order the deposition is limited to records that may or may not have been in his account responsive to the time frame of the request.

MR. HARDIN: And your position is it doesn't matter if records may have disappeared through software or other means since, since the request was processed or before the request was processed?

MS. SHAFRITZ: That's not what you asked.

MR. HARDIN: Well you've said that I can't ask when the request was processed;

you think that's outside the scope, correct?

MS. SHAFRITZ: Yup.

MR. HARDIN: Okay. And I can't ask when records may have disappeared from the request, or from the, from the e-mail folder, you believe that's outside the scope as well; is that your position?

MS. SHAFRITZ: Sorry, I lost the, I lost the -- will you say that one again?

MR. HARDIN: All right. E-mails that are in General Sorrell's private e-mail account, I asked do they stay there forever or are they ever removed either by software or by manual action. You instructed him not to answer that question is my understanding; is that correct?

MS. SHAFRITZ: Yeah, the process of his private e-mail account is beyond the scope of the deposition.

Q. Did General Sorrell ever erase or destroy any governmental records on his gmail or other account?

MS. SHAFRITZ: Objection. He's -- again, the question is, is too broad. Judge Teachout said you could inquire relating to

the specific time frame of your document request.

MR. HARDIN: So you're instructing him not to answer that question, to clarify?

MS. SHAFRITZ: I'm instructing him not to answer the broad question, yes.

Q. Were any governmental records belonging to or otherwise controlled by General Sorrell ever destroyed?

MS. SHAFRITZ: I'm objecting to that, to that question.

Q. Were any governmental records belonging to or controlled by General Sorrell containing either of the four search terms, Pawa, Frumhoff, @ag.ny.org, or @democraticags.org, ever destroyed?

MS. SHAFRITZ: Again, objection to that question; it's beyond the scope. Also I think the term governmental records is vague.

MR. HARDIN: You're instructing him not to answer?

MS. SHAFRITZ: Yes.

Q. Did General Schneiderman ever correspond with Eric Schneiderman on any non-governmental

account?

MS. SHAFRITZ: Say that again.

Q. Did General Sorrell ever correspond with Eric Schneiderman on any non-governmental account?

MS. SHAFRITZ: Objection; that's beyond the scope of the deposition

MR. HARDIN: You're instructing him not to answer?

MS. SHAFRITZ: Yes.

Q. Did General Sorrell ever correspond with Eric Schneiderman about governmental business on any non-governmental account?

MS. SHAFRITZ: That's also -- objection. Also beyond the scope; instruct him not to answer.

Q. Did General Sorrell ever correspond with Tasha Bartlett on any non-governmental account relating to the public business of the State of Vermont?

MS. SHAFRITZ: Objection; beyond the scope of the request. Instruct him not to answer.

Q. Did General Sorrell ever correspond with Christina Harvey in the New York Attorney

General's Office on any non-governmental account relating to the public business of Vermont?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. How about Damien LaVera, did he ever correspond with Damien LaVera relating to the public business of Vermont?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you correspond with Damien LaVera on any non-governmental account relating to public business of Vermont?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you ever correspond with Dan Lavoie on any non-governmental account relating to the public business of Vermont?

MS. SHAFRITZ: Objection, and I instruct him not to answer. And this is, this is well beyond the scope of even Judge Teachout's order.

MR. HARDIN: So I'll, I'll note for the record all of these individuals have @ag.ny.gov email addresses, which is why I'm asking whether there was correspondence

relating to them because it would have been responsive to the request.

To move the deposition along, I have about six more names that I'd like to ask him about. And if you'd like to instruct him not to answer on all six names, at least the record will be clear.

Q. General Sorrell, did you ever correspond with Brian Mahanna, who was Chief of Staff and Deputy Attorney General in New York, on any non-governmental account relating to the public business of the State of Vermont?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you ever correspond with Michael Meade, who was Director of Inter-governmental Affairs in the New York Attorney General's Office relating to the public business of the State of Vermont on any of your non-governmental accounts?

MS. SHAFRITZ: Objection; beyond the scope, instruct him not to answer.

Q. General Sorrell, did you ever correspond with Natalia Salgado, who was Director of Advocacy in the New York Attorney General's

Office relating to the public business of the State of Vermont on any of your non-governmental accounts?

MS. SHAFRITZ: Objection; beyond the scope. I instruct him not to answer.

Q. General Sorrell, did you ever correspond with Eric Soufer, that, S-O-U-F-E-R, who was Communications Director in the New York Attorney General's Office about Vermont's public business on any of your non-governmental accounts?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you ever correspond with Lemuel Srolovic, that's S-R-O-L-O-V-I-C, who was Bureau Chief of the Environmental Protection Bureau in New York, on any of your non-governmental accounts relating to the public business of the State of Vermont?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you ever correspond with Monica Wagner, who was Deputy Bureau Chief of the Environmental Protection Bureau in New York relating to the public business of the State of Vermont on any of your non-governmental

accounts?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. Last one. General Sorrell, did you ever correspond with Peter Washburn, who was Policy Advisor in the New York Attorney General's Office relating to the public business of the State of Vermont on any of your non-governmental accounts?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you ever correspond with Matthew Pawa on any of your non-governmental accounts relating to public business of the State of Vermont?

MS. SHAFRITZ: Objection; instruct him not to answer.

Q. General Sorrell, did you ever correspond with Peter Frumhoff of the Union of Concerned Scientists related to the public business of the State of Vermont on any of your non-governmental accounts?

MS. SHAFRITZ: Objection; I instruct him not to answer.

Q. General Sorrell, when you left office what steps did you take to ensure all records relating

to your tenure in office were preserved?

MS. SHAFRITZ: Objection; that's beyond the scope of this deposition.

Q. General Sorrell, when you left office what steps did you take to ensure that records relating to a May 6th request as subsequently revised by the Plaintiffs in this case were preserved?

MS. SHAFRITZ: That's also beyond the -- I object; it's also beyond the scope of the deposition for this witness.

MR. HARDIN: You're instructing him not to answer? Just to be clear.

MS. SHAFRITZ: Yes; instructing him not answer.

Q. Did you preserve records in your capacity as Attorney General pursuant to a records retention schedule or other policy?

MS. SHAFRITZ: Objection; that's, the Office's retention policies are beyond the scope of this deposition.

MR. HARDIN: So you're instructing him not to answer the question?

MS. SHAFRITZ: Yes, I am.

MR. HARDIN: Can we take a five-minute

recess?

MS. ASAY: Sure.

(A brief recess was taken.)

MS. SHAFRITZ: Just before, I just wanted to mention that you had been asking some questions about deleting e-mails that were, were too broad and beyond the scope of this deposition in our opinion.

However, Mr. Sorrell would be prepared to state that to the best of his knowledge, he has not deleted any e-mails containing the search terms at issue here that were dated within the time frame of the request. If that's a question you wanted to ask him, he would be prepared to answer that question.

Q. General Sorrell, did you ever delete any e-mails containing the four search terms at issue in this request?

MS. SHAFRITZ: Objection. It's got to be limited to the time frame of the, or dated within the time frame of the request.

Q. Did you ever delete any e-mails containing the four search terms at issue in this request as between the time period of January 1 -- or

January 9, 2016 through February 29, 2016, or March 31, 2016 through the date the request was processed?
A. No.
Q. Do you know when the date the request was processed was?
MS. SHAFRITZ: Objection.
MR. HARDIN: Are you instructing him not to answer that question?
MS. SHAFRITZ: Yeah; the date that the --
MR. HARDIN: Well the time period covered is through the date of the processing of the request, as the Attorney General's Office says in its own letter to me dated September 19th. How can he say he doesn't know whether emails were deleted in the covered time period if he doesn't know when the covered time period is?
MS. SHAFRITZ: Well he can answer whether he deleted any e-mails. That was your question; right?
MR. HARDIN: Yes.
Q. General Sorrell, did you delete any e-mails between, containing these four search

terms, dated between March 31, 2016 and the date the request was processed?
MS. SHAFRITZ: By the Attorney General's Office? The request was processed by the Attorney General's Office? Or --
MR. HARDIN: Yeah, I'm asking about did General Sorrell delete any records. So, sure, did General Sorrell delete any records between March 31, 2016 and the date the request was processed by the Attorney General's Office?
MS. SHAFRITZ: You can ask him about e-mails that were -- that are responsive to your request. In other words, the request asks for e-mails that are dated between a certain time period.
MR. HARDIN: Yes; there's, there's two time periods; January 1 -- or January 9 through February 29, and then March 31 through the date of processing. So that's our problem, is we're not nailing down March 31 through when.
MS. SHAFRITZ: Hold on.
MR. HARDIN: I mean, here, here's the letter that the Attorney General's Office

sent me.
MS. SHAFRITZ: It's not through the date of processing. The date of processing, it's through April, April 17th.
MR. HARDIN: Where is April 17th?
MS. SHAFRITZ: Here we go. That's the request at issue.
MR. HARDIN: The previous paragraph says the date of processing; did you see that? The previous paragraph, last sentence.
MS. SHAFRITZ: But the September 2nd revision revised it down, revised the request; that's the request that was responded. The September 2nd revision revised, further revised the request and set the time period from January 9, 2016 to February 29, 2016 and then March 31st, 2016 through April 17th, 2016. This wasn't a request for e-mails from, you know, years and years of e-mails.
Q. General Sorrell, did you delete any e-mails containing the four search terms at issue in the request as modified on September 2 between March the 31st of 2016 and April the 17th of

2016?
MS. SHAFRITZ: That were dated between those dates?
Q. That were dated between those dates?
A. No.
Q. On what basis do you conclude that you have not deleted any e-mails between those dates? Do you, do you just not remember, was it a policy or practice? On what basis do you answer that question No?
A. For part of that time I was in China without access to gmail. And when I returned from China in early April through that date in April I, I did not delete any e-mails from within the relevant time frame containing any of the four search terms.
Q. So to clarify, just to make sure, my understanding is that you went to China in 2017.
MS. SHAFRITZ: Are you asking him, you're asking him how he --
MR. HARDIN: How he knows he didn't delete stuff.
MS. SHAFRITZ: How he knows he didn't delete the e-mails that are dated between that, that point in time?

MR. HARDIN: So this is a 2016 date; I think he was answering on based on on 2017, so that's, that's why I'm asking how does he know March 31 of 2017 and April 17 of 2016.

MS. SHAFRITZ: Mr. Sorrell is prepared to testify that to the best of his knowledge he hasn't deleted any of those e-mails that you're asking about; that's the extent of his knowledge.

MR. HARDIN: Are you instructing him not to answer on what he bases that answer?

MS. SHAFRITZ: He's basing it on the best of his knowledge.

Q. General Sorrell, on what do you base your answer that you did not delete e-mails between that time period?

A. The relevant e-mails in the relevant time frame.

Q. Was it your pattern and practice between that relevant time frame not to delete any e-mails or not to delete work related e-mails? What was your pattern and practice during that time period?

MS. SHAFRITZ: Objection to the extent that you're asking about his practice with

regard to his private e-mail account; that's beyond the scope of this deposition.

Q. Was his pattern and practice relating to public records on his non-governmental account between March the 31st of 2016 and April the 17th of 2017?

MS. SHAFRITZ: Objection; still beyond the scope of this deposition.

MR. HARDIN: Are you instructing him not to answer?

MS. SHAFRITZ: Yes.

MR. HARDIN: We have a few more just to clear up the record. I expect objections; and if you do, if you just want to say you instruct him not to answer, that will make it quicker.

Q. What private e-mail accounts do you have, General Sorrell?

MS. SHAFRITZ: You can answer.

A. In what time frame?

Q. In the time period January 9, 2016 through February 29 of 2016 or March the 31st of 2016 through April the 17th of 2016.

A. I had a gmail account; and a very old Comcast account that I have not used for years.

Q. I take it from that answer did you, did you only use the gmail account for public business?

MS. SHAFRITZ: Objection.

Q. Did you conduct public business on the gmail account?

MS. SHAFRITZ: Objection; beyond the scope of this deposition.

Q. Did you conduct public business including the words Pawa, Frumhoff, @ag.ny.gov or @democraticags.org on the gmail account?

MS. SHAFRITZ: Objection; beyond the scope of this deposition.

MR. HARDIN: Are you instructing him not to answer?

MS. SHAFRITZ: Instruct you not to answer that question.

Q. Did any responsive records that I was handed a moment ago come from the Trash folder on gmail?

MS. SHAFRITZ: Objection; instruct him not to answer that question.

Q. Did anyone else have access to the non-governmental accounts you mentioned a moment ago, which is to say the Comcast account and the gmail

account?

MS. SHAFRITZ: Objection. Instruct him not to answer; it's beyond the scope.

Q. General Sorrell, did you initiate or receive government-related communications on your gmail account?

MS. SHAFRITZ: Objection. Instruct him not to answer; beyond the scope.

Q. General Sorrell, how did you limit the scope of the keyword search that you described earlier today to include only dates within the range specified by the request, the dates we've read several times? I can read them again if you want. If you want me to rephrase the question, I can.

A. I want to talk to my counsel for a second.

(A brief recess was taken.)

MS. SHAFRITZ: Once we're all set, can we just have the question one more time?

(The reporter read back the question: General Sorrell, how did you limit the scope of the keyword search that you described earlier today to include only dates within the range specified by the request, the dates we've read several times?)

A. Gmail has a search feature of within a time frame of the date you plug in. And I think it's within one day, a week, two months, six months or a year, something like that. And I chose a date in early April -- or excuse me, early January, before the 9th of January, and did within six months of that date.
Q. So your search was over-inclusive?
A. Yes.
MS. SHAFRITZ: With regard to date range.
MR. HARDIN: With regard to date range, yes. I'm just asking, there's no way we could have left out anything, is that six-month date range. All right. Ms. Shafritz, is it?
MS. SHAFRITZ: Shafritz.
MR. HARDIN: Shafritz, all right. The court's order says that the scope of the deposition is limited to discovering only the extent to which he, meaning General Sorrell, has documents and correspondence on his private e-mail account and computer that relate to the specific public records request in this case. Were your objections

and instructing him not to answer based only upon the Superior Court's order, or based on any particular part of the Supreme Court's order?
MS. SHAFRITZ: The objections are based on both the Superior Court's order and the Supreme Court's decision setting forth the protocol for how an employee's personal e-mail account could be searched for records and have those records produced in response to an Agency's -- or a public records request to the Agency.
MR. HARDIN: To confirm, you encouraged him or instructed him not to answer earlier when these records were turned over; is that correct?
MS. SHAFRITZ: Was that a question that you asked?
MR. HARDIN: Yeah, I'm asking you whether you instructed him not to answer when he turned records over to the Office of the Attorney General?
MS. SHAFRITZ: That would be, I don't know if you asked that question, it would be covered by the attorney-client privilege and

work product doctrine.
MR. HARDIN: So if I asked it again, you would tell him not to answer again?
MS. SHAFRITZ: I would.
MR. HARDIN: All right. And it is your interpretation --
MS. SHAFRITZ: And beyond the scope of the deposition.
MR. HARDIN: And it is your interpretation that the Superior Court's order prohibits that question?
MS. SHAFRITZ: And the Supreme Court's juris prudence on this topic.
Q. General Sorrell, can you describe the process by which you filtered from the over-inclusive date range that you mentioned earlier records which fell outside the date range specified by the request?
MS. SHAFRITZ: Can you read that one more time?
(The reporter read back the question: General Sorrell, can you describe the process by which you filtered from the over-inclusive date range that you mentioned earlier records which fell outside the date

range specified by the request?)
MS. SHAFRITZ: I think he's described the, he's described the search that, that he's done and you have the documents as a result. You can answer that, that question if you like.
A. Work documents, e-mails, and I just looked at the dates and included, made note of all of those responses to the particular search terms within the relevant dates of January 9th to February 29th and March 31 to April 20.
Q. Okay. So initially you searched for six months of records; is that correct?
A. Within six months of a date between January 1 and January 8th, I don't remember exactly, but before January 9th.
Q. And you looked at the dates on the e-mail to determine whether to turn over records returned by that six-month search?
A. To provide those to counsel, yeah; um-hum.
MR. HARDIN: I don't think we have anything else today.
MS. SHAFRITZ: Okay, great.

(The deposition was concluded at

approximately 9:51 AM.)

William H. Sorrell

Subscribed and sworn to before me this day of , 2017.

Notary Public

CERTIFICATE

I, Sherri L. Bessery, RMR, CRR, Notary Public within and for the State of Vermont, do hereby certify that I reported the foregoing deposition of William H. Sorrell, taken on October 23, 2017.

I further certify that said witness was duly sworn to tell the truth, the whole truth and nothing but the truth, and that the foregoing was taken by me stenographically and thereafter reduced to writing, and the foregoing 41 pages are a full and true copy of said testimony to the best of my ability.

I further certify that I am in no way related to any parties hereto nor interested in the outcome of said cause.

Dated at Burlington, Vermont, this 23rd day of October 2017.

Sherri L. Bessery, RMR, CRR
Notary Public
Commission Expires 2/10/19