

STATE OF VERMONT
WASHINGTON, SS

PUBLIC CITIZEN, INC.
1600 20th Street, N.W.
Washington, DC 20009
Plaintiff

v.

WILLIAM SORRELL, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL of
the STATE OF VERMONT
109 State Street
Montpelier VT 05609
Defendant

Washington Superior Court
Civil Action
Docket No.

COMPLAINT UNDER VERMONT ACCESS TO PUBLIC RECORDS LAW

Plaintiff Public Citizen, by its undersigned attorneys, for its Complaint against Defendant, alleges:

NATURE OF ACTION

1. This action seeks to compel compliance with the Vermont Access to Public Records Act, 1 V.S.A. §§ 315 et. seq. Defendant has refused to disclose certain records released by pharmaceutical companies under the Vermont Pharmaceutical Marketing Act, 33 V.S.A. § 2005.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 4 V.S.A § 113, and this Court has venue pursuant to 1 V.S.A. § 319(a).

PARTIES

3. Plaintiff Public Citizen, Inc. is a national non-profit public interest organization with its principal place of business in Washington, D.C. Since its founding in 1971, Public Citizen has worked before Congress, regulatory agencies, and in the courts to

advance the interests of its members and educate the public on a wide range of consumer protection issues. Public Citizen works to promote openness and democratic accountability in government. Public Citizen's Health Research Group promotes research-based, system-wide changes in health care policy and provides oversight concerning drugs, medical devices, doctors and hospitals, and occupational health.

4. Defendant William H. Sorrell is the Attorney General of the State of Vermont. Defendant Sorrell is being sued in his official capacity as Attorney General.

FACTS

5. Vermont's Access to Public Records Act declares: "Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment." 1 V.S.A. § 315. The Act permits, "[a]ny person" to "inspect or copy any public record or document" 1 V.S.A. § 316.
6. By letter dated December 17, 2004, Public Citizen requested, pursuant to the Public Records Act, "the following information on gifts and other items provided by pharmaceutical companies to health care providers: the value, nature, and purpose of any gift, fee, payment, subsidy, or other economic benefit provided in connection with detailing, promotional, or other marketing activities by the company, directly or through its pharmaceutical marketers, to any physician, hospital, nursing home, pharmacist, health benefit plan administrator, or any other person in Vermont authorized to prescribe, dispense, or purchase prescription drugs in this state." (A copy of that letter is attached as **Exhibit 1**.)
7. By letter dated January 4, 2005, the Office of the Attorney General informed Public Citizen that it was releasing "filings from pharmaceutical companies which did not

designate their information 'trade secret,' and which are therefore not subject to the Trade Secret exemption" of the Public Records Act. (A copy of that letter is attached as **Exhibit 2**.) The Attorney General did not release those records designated trade secrets by pharmaceutical companies.

8. By letter dated May 2, 2005, the Office of the Attorney General explained to Public Citizen that it was producing and enclosing with the letter another copy of the data that was released to Public Citizen in January 2005 plus a CD containing the data for the 2003-2004 year. The letter once again informed Public Citizen that the Office of the Attorney General was only releasing the filings from pharmaceutical companies that did not designate their information "trade secret." (A copy of that letter is attached as **Exhibit 3**.)
9. By letter dated June 27, 2005, Public Citizen appealed the Office of the Attorney General's partial denial of its request. (A copy of that letter is attached as **Exhibit 4**.)
10. By letter dated July 20, 2005, the Office of the Attorney General informed Public Citizen that the May 2, 2005 letter was final and not subject to additional administrative action. (A copy of that letter is attached as **Exhibit 5**.)
11. Public Citizen has exhausted all administrative remedies to compel disclosure of the requested public records.
12. Plaintiff Public Citizen has a right to the records it seeks, and there is no legal basis for defendant's refusal to provide them to Plaintiff.

CLAIMS FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendant's failure to disclose the records requested by Plaintiff pertaining to pharmaceutical manufacturers' disclosures is unlawful;
2. Order defendant to make all the requested records available to Plaintiff

3. Award plaintiff his reasonable attorney fees and costs pursuant to 1 V.S.A. § 319(d);
and
4. Grant such other and further relief as this Court may deem just and proper.

Montpelier, Vermont
August 19, 2005

Respectfully submitted,
Biggam, Fox & Skinner
Attorneys for Public Citizens, Inc.

By: 
Ronald A. Fox



Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

December 17, 2004

Julie Brill
Assistant Attorney General
Vermont Office of the Attorney General
109 State Street
Montpelier, VT
05609-1001

Dear Ms. Brill,

On behalf of Public Citizen's Health Research Group (HRG), and pursuant to the state open records law, Vt. Stat. Ann. tit. 1 sec. 315 to 320, I request the following information on gifts and other items provided by pharmaceutical companies to health care providers, as collected under Vermont's Pharmaceutical Marketing Disclosure Law, Vt. Stat. Ann. tit. 33 sec. 2005, for the 2002-2003 reporting period: the value, nature, and purpose of any gift, fee, payment, subsidy, or other economic benefit provided in connection with detailing, promotional, or other marketing activities by the company, directly or through its pharmaceutical marketers, to any physician, hospital, nursing home, pharmacist, health benefit plan administrator, or any other person in Vermont authorized to prescribe, dispense, or purchase prescription drugs in this state. For each gift, such information should include the identities of both the donor and the recipient. We request that this information be provided in paper and electronic form to the address below.

HRG requests a waiver of all fees associated with this request because it is a non-profit, non-partisan, tax-exempt public interest organization funded by small individual contributions that educates the public about health and safety issues.

Thank you for your assistance.

Yours sincerely,

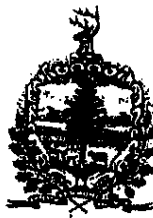
Peter Lurie, MD, MPH
Deputy Director
Public Citizen's Health Research Group

EXHIBIT / PAGE 101

WILLIAM H. SORRELL
ATTORNEY GENERAL

J. WALLACE MALLEY, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL



TEL.: (802) 828-3171
FAX: (802) 828-2154
TTY: (802) 828-3665
CIVIL RIGHTS: (802) 828-3657

<http://www.state.vt.us/atg>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER
05609-1001

January 4, 2005

Peter Lurie, MD, MPH
Public Citizen's Health Research Group
1600 20th Street NW
Washington, DC 20009-1001

Re: Public Records Request

Dear Mr. Lurie:

Enclosed please find the Vermont Attorney General's response to your request for access to public records. We are producing, and enclosing herein, a CD with the information you sought that is not subject to an exception from the Vermont Access to Public Records law. In particular, we have produced the filings from pharmaceutical companies which did not designate their information "trade secret," and which are therefore not subject to the trade secret exemption of the Access to Public Records law.

To the extent that your request has been denied, this letter constitutes final administrative action by this office. Appeal is to Superior Court under 1 V.S.A. § 319 and the Vermont Rules of Civil Procedure.

Very truly yours,

A handwritten signature in cursive script that reads "Julie Brill".

Julie Brill
Assistant Attorney General

Encl.

cc: Mike McShane, Esq.

WILLIAM H. SORRELL
ATTORNEY GENERAL

J. WALLACE MALLEY, JR.
DEPUTY ATTORNEY GENERAL

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER
05609-1001

May 2, 2005

Peter Lurie, MD, MPH
Deputy Director
Public Citizen's Health Research Group
1600 20th Street NW
Washington, DC 20009-1001

Re: Public Records Request

Dear Dr. Lurie:

Enclosed please find the Vermont Attorney General's response to your request for access to public records. We are producing, and enclosing herein, a CD with the information you sought that is not subject to an exception from the Vermont Access to Public Records law. In particular, we have produced the filings from pharmaceutical companies which did not designate their information "trade secret," and which are therefore not subject to the trade secret exemption of the Access to Public Records law. Included is another copy of data that was sent to you in January 2005 for the 2002-2003 year, and the CD for the 2003-2004 year.

To the extent that your request has been denied, this letter constitutes final administrative action by this office. Appeal is to Superior Court under 1 V.S.A. § 319 and the Vermont Rules of Civil Procedure.

Very truly yours,

A handwritten signature in cursive script that reads "Julie Brill".

Julie Brill
Assistant Attorney General

Encl.

cc: Mike McShane, Esq.



Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

June 27, 2005

William H. Sorrell
Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609

Re: Access to Public Records Act Appeal Concerning Pharmaceutical Marketing Disclosure Request

Dear Mr. Sorrell,

This is an Access to Public Records Act appeal from the partial denial of a request dated December 17, 2004, made by Peter Lurie and addressed to Julie Brill. That request noted that information on pharmaceutical marketing is collected pursuant to Vermont's Pharmaceutical Marketing Disclosure Law, 33 V.S.A. § 2005, and requested the following:

information on gifts and other items provided by pharmaceutical companies to health care providers...: the value, nature, and purpose of any gift, fee, payment, subsidy, or other economic benefit provided in connection with detailing, promotional, or other marketing activities by the company, directly or through its pharmaceutical marketers, to any physician, hospital, nursing home, pharmacist, health benefit plan administrator, or any other person in Vermont authorized to prescribe, dispense, or purchase prescription drugs in this state

By letter dated January 4, 2005, and signed by Julie Brill, your office granted the request in part and denied the request in part. The letter explained:

We are producing, and enclosing herein ... the information you sought that is not subject to an exception from the Vermont Access to Public Records law. In particular, we have produced filings from pharmaceutical companies which did not designate their information "trade secret," and which are therefore not subject to the trade secret exemption of the Access to Public Records law.

Copies of my request and the Department's January 4 denial are attached.

The Access to Public Records Act states that it is Vermont's policy "to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution." 1 V.S.A. § 315. The law is based on the belief that a "[o]fficers of government are trustees and servants of the people and it is in the public interest to enable any person to

review and criticize their decisions even though such examination may cause inconvenience or embarrassment.” *Id.* Therefore, “the provisions of [the Access to Public Records Act] shall be liberally construed with the view towards carrying out the above declaration of public policy.” *Id.*

Portions of records, however, may be withheld if they are “trade secrets.” 1 V.S.A. § 317(c)(9). Your office claims that the non-disclosed portions of the records are subject to that exemption. Although your office’s denial did not provide an inventory of the responsive documents it was holding back from disclosure, we believe that few, if any, of the documents withheld fall into a category exempted by § 317(c)(9).

Your office states that the documents that were released were those not designated “trade secrets” by the disclosing companies. By implication, those not released were designated trade secrets by the disclosing companies. Although companies may, pursuant to 33 V.S.A. § 2005(a)(3), designate information they regard as “trade secrets,” a company’s assertion that information is secret is not controlling. That is so because in order to avoid disclosure, an agency must, “mak[e] a specific factual showing and not merely ... aver[] conclusory claims.” *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 346 (2002).

We believe that no such factual showing can be made here. “Trade secret” information is, “a compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it.” 1 V.S.A. § 317(c)(9). The information sought here is not secret – at the very least, the doctors to whom gifts are given (persons outside the commercial concern) know the information. Nor does it give the owner an opportunity to obtain business advantage – competitor companies are aware of the practice of gift-giving in pharmaceutical marketing. Moreover, even when parts of records are exempt from disclosure, the agency must release non-exempt, segregable parts of the records. *See Norman v. Vt. Office of Court Adm’r*, 176 Vt. 593, 594 (2004). Even if some of the information submitted under 33 V.S.A. § 2005 by the companies who labeled their submissions “trade secrets” does, indeed, meet the definition of “trade secrets” in 1 V.S.A. § 317(c)(9), not all of the information withheld by your office meets that definition. For example, no trade secrets would even arguably be revealed by releasing the names of the companies and the amounts of their gifts and payments, but not the names of the doctors to whom they contributed.

We would appreciate a determination with respect to this appeal within five working days, as required by 1 V.S.A. § 318(a)(3).

Please contact me if I can be of further assistance.

Sincerely,

Peter Lurie, MD, MPH

Enclosures

WILLIAM H. SORRELL
ATTORNEY GENERAL

J. WALLACE MALLEY, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
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109 STATE STREET
MONTPELIER
05609-1001

July 20, 2005

Peter Lurie, MD, MPH
Public Citizen
1600 20th Street NW
Washington, DC 20009-1001

Re: Access to Public Records Act Appeal Concerning Pharmaceutical
Marketing Disclosure Request

Dear Dr. Lurie:

I am writing in response to your recent letter to Attorney General Sorrell.

A review of the record in this matter shows that on May 2, 2005 Assistant Attorney General Julie Brill sent to you a CD that contains most of the information requested. Some information has been withheld because it falls within the "trade secret" exemption to Vermont's Public Records Law. (1 V.S.A. § 317(c)(9))

The letter that you were sent dated May 2, 2005 notes that it constitutes final administrative action by the Office of Attorney General and that appeal is to Superior Court pursuant to 1 V.S.A. § 319 and the Vermont Rules of Civil Procedure. Consequently, the May 2, 2005 letter is final and not subject to additional administrative action.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael McShane", followed by a horizontal line.

Michael McShane
Assistant Attorney General

cc: Julie Brill, AAG
file