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CIVIL DIVISION

Case No. 23-CV-02880  
23-CV-2008

The Stowe Reporter, LLC v. Town of Stowe  
&  
Town of Stowe v. Aaron Calvin and Vermont Community Newspaper Group, LLC

## ENTRY ORDER

*Quis custodiet ipsos custodes?*

—Juvenal, Satire VI, lines 347–48

The present matter before the Court is a question of legal interpretation. The Town of Stowe, both in its Declaratory Judgment action (23-CV-2008) and as a defense to the public records action (23-CV-2880) seeks a ruling from the Court as to whether the Town has an obligation under 20 V.S.A. § 2409 to keep the potential existence of a investigative report confidential despite a public record request by Aaron Calvin and the Stowe Reporter.<sup>1</sup> In the alternative, the parties agree that the Court may make a ruling under 20 V.S.A. § 2409(f), which allows the disclosure of information based on an order of the Court.

The undercurrent to the present legal analysis is captured in Mr. Calvin and the Stowe Reporters' filings concerning the need for the public to have information regarding the conduct, administration, and performance of local government and local government agencies. As stated above, the Mr. Calvin's and the Stowe Reporters' position is: *Who watches the watchmen?* They

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<sup>1</sup> The position that the Town takes neither confirming nor denying the existence of the report is what is known in the federal public records system as a *Glomar* response. *Electronic Privacy Information Center v. National Sec. Agency*, 678 F.3d 926, 931 n.4 (D.C. Cir. 2012) n.4 (quoting *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir.2004)). While the Court is aware that *Glomar* responses are given in Vermont public records cases on a regular basis if there is an issue of confidentiality, there is a question whether such practice conforms to the agency's obligations under 1 V.S.A. § 318(b)). While the Court does not reach this issue because of its determination of statutory intent, it does note that the refusal to confirm or deny does raise heightened issues that go beyond the question of whether or not an exemption applies and whether an agency can assert such a position where the statute does not expressly or necessarily require such a denial.

would posit that it is openness, public awareness, and access to information for the benefit of the general public that does this work by dispelling rumor, myth, conjecture, and conspiracy with the cold hard facts of objective reporting and good government process.

The Town of Stowe takes no issue with these values or positions. The Town of Stowe's concern is solely that if the confidentiality requirements of 20 V.S.A. § 2409 apply to the Town through 1 V.S.A. § 317(c)(1), and the Town releases the information, then it is in violation of its legal obligations.

The key question is whether 20 V.S.A. § 2409 applies to the Town and creates an affirmative duty of confidentiality. Two principles guide the Court's analysis of this statute. First, the Town bears the burden of establishing that any exemption applies in a public record case, such as the present one, and the Court must construe any exemption cited "strictly against the custodian of records . . . and resolve any doubts in favor of disclosure." *Rutland Herald v. Vermont State Police*, 2012 VT 24, ¶ 9 (quoting *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 10). Second, the primary goal of statutory interpretation is to "discern and give effect to the intent of the Legislature, and if the plain meaning resolves the interpretation issue, we generally look no further." *Rutland Herald*, 2012 VT 24, at ¶11 (quoting *State v. O'Neil*, 165 Vt. 270, 275 (1996) and *Sawyer v. Spaulding*, 2008 VT 63, ¶ 7).

In this case, the plain language of the 20 V.S.A. § 2409(d) list the confidentiality requirements as extending only to the Vermont Criminal Justice Council, its hearing officer, and Council staff. It does not expressly or implicitly include any reporting agencies or parties to a VCJC proceeding. The only reasonable understanding of this requirement in light of this specific enumeration of parties who bear confidentiality is that it extends to those parties alone. As the Town recognizes other confidentiality and exemption statutes have either broader definitions of who must keep information confidential ("any person) or no definition at all, in which case the Court and parties must infer from the circumstances and language.

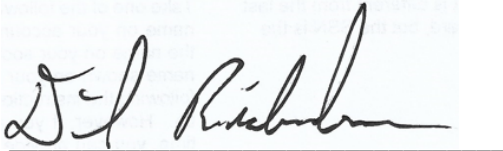
The Court does not find that 20 V.S.A. § 2403 creates a concurrent or inferential confidentiality obligation. Nothing in 20 V.S.A. § 2403 suggests that the work of reporting extends the obligation of confidentiality. Instead, the locus of the confidentiality sits with the Council who conducts and directs the investigation that may include the report generated by the Town as a mandatory reporter under 20 V.S.A. § 2403, but it likely includes additional work and

compilation that becomes separate product in and of itself. It is this process that is intended to be confidential. The fact that the town contributes material that the Council considers and keeps confidential for its own purpose does not extend this bubble of confidentiality to the Town as originator and supplier.<sup>2</sup>

This interpretation, as noted by counsel for Mr. Calvin and the Stowe Reporter, avoids a constitutional conflict, but it is also consistent with the strict construction of the statute that the Court is obligated to employ in public records cases.

Based on this, the Court concludes that the Town is not bound by the provisions of 20 V.S.A. § 2409(d) for any report that it may or may not have generated under 20 V.S.A. § 2403.<sup>3</sup> This confidentiality exemption does not apply, and by extension the exemption under 1 V.S.A. § 317(c)(1) does not apply either in this context. While this decision likely resolves the gravamen of the declaratory judgment action in 23-CV-2008, the Court will give the Parties an opportunity to confer as to next steps in the present matters and report to the Court the direction in which they wish to proceed with the remainder of the present claims.

Electronically signed on 7/26/2023 12:58 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background. A horizontal line is drawn below the signature.

Daniel Richardson  
Superior Court Judge

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<sup>2</sup> Under 20 V.S.A. § 2409(d), however, any material sent to the Town from the VCJC or its staff would carry confidentiality obligations as the the statute expressly includes material sent from the Council to other agencies or municipalities as extending and part of the confidentiality obligation, which would fall on the municipality or agency to uphold and continue.

<sup>3</sup> Since the Court has determined that 20 V.S.A. § 2409(d) does not apply, it does not reach the issue of whether it needs to issue a determination under Section 2409(f) to effectuate the release or whether such a decision would employ other factors such as a public interest balancing test or other criteria used to balance the public right to know against an individual's right to privacy.