STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 22-CV-1904

FRANKLIN D. AZAR & ASSOCIATES, P.C.,
Plaintiff,

v.

VERMONT DEPARTMENT OF FINANCIAL REGULATION,
Defendant.

RULING ON THE STATE'S MOTION TO DISMISS

This is an unusual public records case. See 1 V.S.A. §§ 315–320 (Public Records Act or PRA). There is no doubt that Mr. Antonio Linares, on behalf of Plaintiff–Requester Franklin D. Azar & Associates, P.C. (a law firm) submitted a public records request to Defendant the Vermont Department of Financial Regulation on May 18, 2022, that DFR possesses responsive records, that DFR denied all access to those records, that Azar sought administrative review, that the request was fully denied on administrative review, and that Azar then filed this case to challenge the denial. Despite the presence of all the basic rudiments of an ordinary public records challenge, the State has filed a Rule 12(b)(6) motion to dismiss for failure to state a claim, arguing that the complaint and its attachments alone demonstrate that the requested documents are confidential under 8 V.S.A. § 23 (records of investigation confidential) and thus are exempt from production under 1 V.S.A. § 317(c)(1) (exemption for records "that by law are designated confidential").[1] While a factual record, once developed, may eventually support the State's position under Rule 56, the complaint and attachments are insufficient to do so under Rule 12(b)(6).

Azar sought the following:

- Written, electronic, and telephonic communications from January 1, 2013, through December 1, 2018, between the office of the Insurance Division of the Vermont Department of Financial Regulation (including but not limited to, Commissioner Michael S. Pieciak, Deputy Commissioner Christine Rouleau, and senior staff) and any of the following:
  - o United Services Automobile Association (USAA) NAIC # 25941)
  - o USAA Casualty Insurance Company (NAIC # 25968)
  - o USAA General Indemnity Company (NAIC # 18600)
  - o Garrison Property and Casualty Insurance Company (NAIC # 21253)

[1] The State also argues that the documents are exempt under 1 V.S.A. § 317(c)(4) (exemption for privileged records), but it is unnecessary to address that now.

●The complete file regarding the investigation by the Insurance Division of the Vermont Department of Financial Regulation, which began on May 16, 2016, regarding violations of state insurance regulations by United Services Automobile Association.
●The matter regarding United Services Automobile Association with Docket no. 17-010-1.

The request presumably was prompted by a publicly available stipulation and consent order from 2018 between DFR and the respondents described above, entities falling within DFR's regulatory authority. The consent order is attached to the complaint. It reveals on its face that it followed an investigation into certain of the respondents' trade practices. See 8 V.S.A. §§ 4721–4728 (insurance trade practices). It states that "Respondents have agreed to enter into this Stipulation and Consent Order with the Department on the terms and conditions hereinafter set forth in lieu of proceeding with a hearing." Order ¶ 15 at 4.

Because the pleadings indicate that there was an investigation, and the parties eventually entered into a Consent Order to avoid a hearing, the State argues that responsive records therefore must be confidential under 8 V.S.A. § 23. Section 23(b) provides: "Regardless of source, all records of investigations, including information pertaining to a complaint by or for a consumer, and all records and reports of examinations by the Commissioner, whether in the possession of a supervisory agency or another person, shall be confidential and privileged, shall not be made public, and shall not be subject to discovery or introduction into evidence in any private civil action."

Azar argues that the State should be estopped from arguing that § 23 applies in this case because the records custodian originally denying its request purported to rely on the confidentiality provision of 8 V.S.A. § 3687(a) rather than § 23. Section 3687 does not apply in this case, and DFR clearly identified § 23 as the basis for confidentiality on administrative review. Nevertheless, Azar asks the court to fossilize DFR's initial response and not permit it to revise the basis for denial.

Nothing in the PRA supports doing so. Vermont's PRA gives records custodians little time to think: responses to requests generally are required within 3 business days. 1 V.S.A. § 318(a). Often, agencies are juggling multiple, sometimes unwieldy requests at the same time. Administrative review of the initial decision is available. 1 V.S.A. § 318(c). The entire point of administrative review is to give the agency an opportunity to take a second look at its first decision and revise as necessary. This process would be largely pointless if the record custodian's initial decision cemented the agency's ultimate response. The court declines to estop the State from relying on § 23 in this case.

Azar also argues that if § 23 bars access to quasi-judicial records, then it violates the First Amendment. The court declines to wade into that matter at this time. See *Lague, Inc. v. State*, 136 Vt. 413, 416 (1978) ("Constitutional questions will not be considered where their decision is not necessary to a final determination of the case."). Azar broadly argues that if administrative records are quasi-judicial in nature, then there necessarily is a First Amendment right of public access. Generally, a quasi-judicial action "is one in which all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of procedure; and that no one deprived of

such rights is bound by the action taken." *Goddard v. City of Albany*, 684 S.E.2d 635, 638 (Ga. 2009); see also *Frawley v. Police Com'r of Cambridge*, 46 N.E.3d 504, 514 (Mass. 2016) ("[W]hen assessing whether a proceeding is quasi-judicial, 'we have looked to the form of the proceeding . . . and the extent to which that proceeding resembles judicial action.'" (citation omitted)). Section 23 applies to investigative records, not quasi-judicial records. Hence, even if Azar has the expansive constitutional right it asserts, any conflict with § 23 would seem to be unlikely and is wholly uncertain on this record.

The State's motion to dismiss must be denied for a more fundamental reason. The pleadings do not indicate whether, in denying Azar's request, DFR ever complied with 1 V.S.A. § 318(b)(2)(A), implying that it did not.[2] That mandatory provision requires an agency, when denying a records request, to identify the records that are being withheld. DFR never identified the records that it has withheld. The State's argument that any such records necessarily and properly fall within the scope of the confidentiality provision at 8 V.S.A. § 23 is impossible to navigate currently because there is no way to tell what responsive records DFR possesses, and there are insufficient facts available to assay whether they are exempt. To be sure, Azar's request seems highly likely to encompass investigative records within the scope of § 23. But its request is potentially much broader than that.

Order

For the foregoing reasons, the State's motion to dismiss is denied. Within ten (10) business days, the parties shall agree upon and submit to the Court a proposed scheduling order for this case.

SO ORDERED this 12th day of October, 2022.

Robert A. Mello
Superior Judge

[2] Note that 1 V.S.A. § 318(b)(2)(A) does not expressly require production of a more complex *Vaughan* index that may become necessary in ensuing litigation. However, there is no statutory exception permitting an agency to simply not identify records being withheld in the course of denying a records request.