

WILLIAM V. DEPAULO, ESQ.

May 27, 2008

Jonathan S. Deem, Esq.
Deputy General Counsel
Governor's Office
Capitol Complex
Charleston, WV

BY HAND

Re: FOIA Request for Records

Dear Mr. Deem:

Thank you for your response this past Friday to the Sierra Club FOIA request for records in pertaining to the application for a certificate of public convenience and necessity filed with the Public Service Commission in Case No. 07-0508-E-CN on March 30, 2007 by the Trans-Allegheny Interstate Line Company (TrAILCo). We appreciate your waiver of the cost of reproduction.

In the May 17, 2008 FOIA request, the Sierra Club requested that, in the event you asserted that certain documents were exempt from disclosure, you nonetheless prepare what is generally referred to as a *Vaughn* index, i.e., a document-by-document listing of the documents asserted to be exempt, along with enough information from which the claim of exemption could be assessed.

Typically that information has been held to include, at a minimum, the following:

- (1) an index of all requested documents which reflects the date, author, addressee, number of pages, and subject matter of the requested document;
- (2) a statement of the exemption you deem to be applicable to each requested record;
- (3) a statement with particularity of the reason why such exemption is applicable to each requested record;

Regarding the assertion of FOIA exemptions, your May 23, 2008 letter states in its entirety: "Further, please note that certain documents have been withheld because they contain deliberative and/or attorney-client privileged material and are exempt from disclosure under W. Va. Code § 29B-1-4."

Your assertion of privileges is inadequate to demonstrate the correctness of your claim of exemption. In Syllabus Point 3 of *Daily Gazette Co. v. West Virginia Dev. Office*, 198 W. Va. 563 (1996), the Supreme Court held that:

3. When a public body asserts that certain documents in its possession are exempt from disclosure under W. Va. Code, 29B-1-4(8) [1977], on the ground that those documents are "internal memoranda or letters received or prepared by any public body," the public body must produce a Vaughn index named for Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974). The Vaughn index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reasons why W. Va. Code, 29B-1-4(8) [1977] is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. The Vaughn index need not be so detailed that it compromises the privilege claimed. The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt.

Daily Gazette Co. v. West Virginia Dev. Office, 198 W. Va. 563 (1996)(emphasis added).

In 2004, the Supreme Court held in *Farley v. Worley*, 215 W. Va. 412 (2004) that the requirement of a Vaughn index applied to documents withheld under a claim of exemption, regardless of the exemption asserted. See Syllabus Point 6, *Farley v. Worley*, 215 W. Va. 412 (2004).

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Although *Farley v. Worley* leaves open the possibility of not fulfilling the requirement of a *Vaughn* index until after litigation has been commenced, we have no interest in commencing needless litigation. If you will simply provide an adequate *Vaughn* index now, i.e., one that allows us to conclude that a valid assertion of a proper privilege has been made with respect to each document claimed to be exempt, litigation may be avoided.

We recognize that a *Vaughn* index need not disclose so much information as destroy the privilege. However, the summary assertion of exemption under § 29B-1-4 for “deliberative and/or attorney-client privileged” material does not provide sufficient information to permit us to conclude that the asserted exemption applies to the records withheld.

Accordingly, on behalf of the Sierra Club, Inc., I respectfully request that you now provide an index of all documents withheld as exempt that satisfies the purpose of *Vaughn* recognized by the West Virginia Supreme Court.

Again, thank you for your cooperation to date and your continuing attention to this matter.

Very truly yours,

William V. DePaulo

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