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MEMORANDUM

OFFICE OF THE ATTORNEY GENERAL

TO: John Kessler, General Counsel  
FROM: William Rice, A.A.G. *WRH*  
RE: Your March 9, 2000, Request for Opinion Concerning  
Confidentiality of Financial Information Requested by the State  
Auditor  
DATE: April 20, 2000

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**I. SUMMARY DETERMINATIONS**

A. It is difficult to express opinions as to categories of documents, or information.

B. Income tax documents are likely confidential.

C. Under the so-called National Parks test, it appears that many documents within the nine categories you have listed would be considered confidential within the meaning of 32 V.S.A. §5930a(h).

D. Assuming that a reviewing court adopts the Critical Mass reformulation of the National Parks test, it would likely apply the revised test here because most of the documents in question appear to have been voluntarily submitted. Under Critical Mass it is quite possible that many of the documents will be found to be of a kind that would customarily not be released to the public by the person from whom they were obtained and, therefore, would be considered confidential within the meaning of 32 V.S.A. §5930a(h).

E. Several of the exceptions to the State Access to Public Records and Documents law may apply to many of the records in question.

**II. YOUR INQUIRY**

You have asked for an opinion concerning the confidentiality of certain categories of information in connection with the current audit of the Vermont Economic Progress Council. It is my understanding that the Council has provided copies of the documents in question to the Vermont Auditor of Accounts pursuant to a letter from the Auditor establishing a procedure for handling the documents.

You are seeking a determination of the applicability of state confidentiality statutes to various categories of documents. The nine types of documents the Council believes to be confidential are: 1. applications, 2. cost-benefit model results, 3. staff reports on each application, 4. annual gross sales, 5. number of jobs to be created, 6. wage measure data, 7. employee benefits provided, 8. applicants' "but-for" statements, and 9. yearly investment schedules.

### III. THE LAW

#### A. Confidential Financial Information/Tax Materials.

You correctly note in your memorandum that Vermont law provides for the confidentiality of certain documents held by the Council. As discussed in your Memorandum, 32 V.S.A. §5930a(h) provides:

Information and materials submitted by a business applicant concerning its income taxes and other confidential financial information shall not be subject to public disclosure under the state's public records law in Title 1, chapter 5.

Clearly, under this section, a member of the public may not compel the release of an applicant's income tax documents. The statute also exempts "confidential financial information" from public disclosure. This is a class of documents that is not expressly exempted by the State Access to Records law, 1 V.S.A. §317(c). The term does have a well-defined meaning under the Federal FOIA statutes, however. Although federal law is not controlling, it may be used as an aid to interpret State law. See e.g. Killington, Ltd. v. Lash, 153 Vt. 628 (1990).

The test most commonly cited for determining whether a document contains confidential financial information is found in the matter of National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) which described the application of the exemption found in 5 U.S.C. §552(b)(4) of the federal Freedom of Information Act.

Commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770. Under National Parks, a showing of actual competitive harm is not required. Timken Co. v. U.S. Customs Service, 491 F.Supp. 557, 559 (D.D.C.

1980). This test has been adopted by the 2<sup>nd</sup> Circuit Court of Appeals. United Technologies Corp. v. F.A.A., 102 F.3d 688 (2d Cir. 1996).

Examples of situations where a release of documents has been ruled to create a risk of substantial harm to the competitive position of the company providing the documents include: *securities trading strategies* (Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979) (an Exemption 5 case)); *item pricing* (McDonnell Douglas Corp. v. N.A.S.A., 180 F.3d 303 (D.C. Cir. 1999)); *design drawings* (United Technologies Corp. v. F.A.A., 102 F.3d 688 (2<sup>nd</sup> Cir. 1996)); *development project* (Nadler v. F.D.I.C., 92 F.3d 93 (2<sup>nd</sup> Cir. 1996)); *appraisal documents* (Calhoun v. Lyng, 864 F.2d 34 (5<sup>th</sup> Cir. 1988)); *industry proposed alternatives and trade sources* (Board of Trade v. C.F.T.C., 627 F.2d 392 (D.C. Cir. 1980)); *profit rate, loss data, expenses, projected scrap rate* (Gulf & Western Indus. v. Department of Energy, 615 F.2d 527 (DC App. 1980)); *report on adverse impact to employees from downsizing* (McDonnell Douglas Corp. v. E.E.O.C., 922 F.Supp. 235 (D. MO. 1996)); *financial information relevant to company financial status and financing* (National Broadcasting Co. v. U.S. Small Business Admin., 836 F.Supp. 121 (D.N.Y. 1993)); *higher profit categories, profit margin, production costs, distribution network, and discount formulas* (Timken Co. v. Customs Service, 491 F.Supp. 557 (D.D.C. 1980)); *promotional plans and employee training data* (Burroughs Corp. v. Brown, 501 F.Supp. 375 (E.D.VA. 1980)(rev'd on other grounds)); *discussion of legal positions between public and private attorneys* (Miller Anderson v. Department of Energy, 499 F. Supp. 767 (D.OR. 1980)); *margins of profit, supplier list, contracts with suppliers, freight costs, inventory, price structure and customer contracts* (Braintree Electric Light Dept. v. Department of Energy, 494 F.Supp. 287 (D.D.C. 1980)); *contract bidder's financial data* (BDM Corp. v. Small Business Admin, Civ. No. 80-1180 (D.D.C. 1980)); *commercial and financial information contained in a loan progress report* (Comstock International, Inc. v. Export-Import Bank, 464 F.Supp. 804 (D.D.C. 1979)); *production, overhead, operating costs, levels of profit, sales and pricing data* (Fisher v. Renegotiation Board, 355 F.Supp. 1171 (D.D.C. 1973)); *natural gas reserves* (Union Oil Co. v. F.P.C., 542 F.2d 1036 (9<sup>th</sup> Cir. 1976)); *cost and profit figures* (Fenster v. Fletcher, Civ. No. 822-71 (D.D.C. 1971)); and finally *audit results, financial and pricing computations* (Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507 (D. Kan. 1984). See also O'Reilly, Federal Information Disclosure §14.12 (2d Ed. 1999); 139 A.L.R Fed. 225 (1997).

It should be noted that the D.C. Circuit Court of Appeals modified the National Parks test in Critical Mass Energy Project v. N.R.C., 975 F.2d 871 (DC Cir. 1992). In that case, the appellate court ruled that commercial or financial information which was voluntarily submitted by a private person is confidential if it is the kind of information that would customarily not be released to the public by the person from whom the information was obtained. "It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability

to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release." Id. at 879.

The D.C. Circuit Court of Appeals describes the test as being objective. Under Critical Mass, it will be the government agency's burden to demonstrate the custom of the entity which provided the documents. It should be noted that the Circuit Court will continue to apply National Parks in cases where the documents were provided to a government agency under compulsion.

The Critical Mass test has not been universally accepted. O'Reilly, Federal Information Disclosure §14.11A (2d Ed. 1999). The Second Circuit has recognized that the D.C. Circuit amended the National Parks test, but found that the amendment was not applicable in that particular case. Nadler v. Federal Deposit Insurance Corp., 92 F.3<sup>rd</sup> 93, fn. 1 (2d Cir. 1996). Since the 2<sup>nd</sup> Circuit did not criticize the Critical Mass decision, it would not seem unreasonable to believe that it would apply the test in an appropriate case.

## **B. General Vermont Access Exemptions.**

You also correctly note that several exemptions to the State's access to records law may apply to these documents. Generally, exceptions to the public access law should be construed strictly against the custodians of the records and any doubts should be resolved in favor of disclosure. In relying on an exception to disclosure under this subchapter, an agency cannot discharge the burden to sustain its action by conclusory claims or pleadings; it must make a specific factual record necessary to support the exception claim. Trombley v. Bellows Falls Union High School District No. 27, 160 Vt. 101 (1993). Having said that, the relevant portions of 1 V.S.A. §317(c) provide:

(c) The following public records are exempt from public inspection and copying:

(1) records which by law are designated confidential or by a similar term;

\* \* \* \*

(6) a tax return and related documents, correspondence and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont department of taxes or submitted by a person to any public agency in connection with agency business;

(7) personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency, information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his designated representative;

\* \* \* \*

(9) trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or 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;<sup>1</sup>

#### IV. LAW APPLIED TO THE INQUIRY

##### A. National Parks Analysis

It does not appear that the Council is asserting the first prong of the National Parks test in this instance. In other words, the Council has not argued that release of the documents would impair the Council's ability to obtain necessary information in the future. The Council does, however, assert the second part of the test and contends that release of the documents will likely "cause substantial harm to the competitive position of the person from whom the information was obtained."

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<sup>1</sup> It does not appear that the exemption and exception to the exemption contained in subsection (22) apply here. That subsection provides: "any documents filed, received, or maintained by the agency of commerce and community development with regard to administration of 32 V.S.A. chapter 151, subchapters 11C and 11D (new jobs tax credit; manufacturer's tax credit), except that all such documents shall become public records under this section subchapter (sic) when a tax credit certification has been granted by the secretary of administration, and provided that the disclosure of such documents does not otherwise violate any provision of Title 32."

Application of this test will likely require the examination of individual documents and consultation with the affected entity. It may be possible, for example, to redact portions of documents and release the remainder. In view of the difficulty of applying the test to categories of documents, I will only be able to respond in general terms.

In your memorandum, you cite the following categories of documents as being confidential:

1. **Application**

You indicate that the application consists of financial data and a narrative that includes information related to the company's business plan and investment strategies for the next five to seven years. Some applications include disclosure of trade secrets or confidential production data.

Accepting the Council's categorization of the information in the applications, it would seem that trade secrets and confidential production data would fall within the substantial harm portion of the National Parks test. Assuming that the company in question is in a competitive industry, it is hard to imagine how it would not be harmed by having a competitor learn its trade secrets and confidential production data. I believe that business plans and investment strategies, projecting five to seven years into the future, would also generally fall within the second prong of the National Parks test. See e.g. Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979) (an Exemption 5 case); National Broadcasting Co. v. U.S. Small Business Admin., 836 F.Supp. 121 (D.N.Y. 1993); Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507 (D. Kan. 1984); Gulf & Western Indus. v. Department of Energy, 615 F.2d 527 (D.C. App. 1980); Comstock International, Inc. v. Export-Import Bank, 464 F.Supp. 804 (D.D.C. 1979); Timken Co. v. U.S. Customs Service, 491 F.Supp 557 (D.D.C. 1980); Braintree Electric Light Dep't v. Department of Energy, 494 F.Supp. 287 (D.D.C. 1980).

2. **Cost-Benefit Model Results**

You state that these documents are a summary of the fiscal impacts that would result to the state if the applicant completes its proposed investments. The calculations are based on financial information presented on the data forms included in the application. On a per-company basis, this information could provide a competitor information concerning future investment strategies.

Certain financial information and future investment strategies could be protected under National Parks. See response to 1.

3. **Staff Reports on Each Application**

You indicate that a summary of the narrative elements of an application is prepared by the Council's executive director and submitted to the Council members. Staff summaries include detailed information such as the project description and the applicant's response to the eight guidelines. Most, if not all, of the information is related to the applicant's business plan, investment strategies, and other financial data.

Project descriptions, business plans, investment strategies, and certain other financial data may well be considered confidential. See response to 1.

4. **Annual Gross Sales**

It is your belief that disclosure of this financial figure as it relates to non-public companies would enable competitors to evaluate market penetration as well as other aspects of an overall business plan such as introduction of a new product or service or modification or termination of an existing product or service.

Disclosure of confidential annual gross sales would appear to fall directly within the ambit of National Parks. Braintree Electric Light Dept. v. Department of Energy, 494 F.Supp. 287 (D.D.C. 1980); Comstock International, Inc. v. Export-Import Bank, 464 F.Supp. 804 (D.D.C. 1979); (Fisher v. Renegotiation Board, 355 F.Supp. 1171 (D.D.C. 1973).

5. **Number of Jobs to be Created**

You say that applicants describe the number of jobs they plan to create as part of an expansive plan, increased activity, or a research and development initiative.

Information concerning employment practices has been found to fall within the exemption. McDonnell Douglas Corp. v. E.E.O.C., 922 F.Supp. 235 (D. MO 1996); Westinghouse Electric Corporation v. Brown, 443 F Supp. 1225 (D. VA 1977); Burroughs Corp. v. Brown, 501 F.Supp. 375 (D.VA. 1980) (rev'd on other grounds); See Westinghouse Electric Co. v. Schlesinger, 542 F.2d 1190 (4<sup>th</sup> Cir. 1976).

6. **Wage Measure Data**

In your memorandum you indicate that wages are a critical element of the negotiations that occur during the hiring process.

Information concerning employment practices has been found to be confidential. See 5.

7. **Employee Benefits Provided**

You believe that information concerning the benefits provided to employees is as critical an element of the negotiations in the hiring process as wage data.

Information concerning employment practices has been found to be confidential. See 5.

8. **Applicant's "But-For" Statements**

By way of example, an applicant's "but-for" statement may commonly consist of the following information:

The investment will not take place;  
The company may relocate;  
The investment may invest somewhere else;  
Out-sourcing of production or service capacity to out-of-state companies will begin or continue;  
There is competition for investments within a multi-state corporate structure; and  
The Vermont division of a company will be closed or relocated.

This category appears to be more problematic, but might fit within some of the decisions concerning confidential finances and future plans. Again, much will depend on the individual documents. See 1.

9. **Yearly Investment Schedules**

You indicate that disclosure of a company's future investment schedules and strategies is likely to cause substantial harm to its competitive position because it would provide advanced warning to its competitors.

Yearly investment schedules would likely fall within the test. See 1.



## B. Critical Mass Analysis

Many courts have now adopted the Critical Mass review procedure. See O'Reilly, Federal Information Disclosure §14.12 (2d Ed. 1999); 139 A.L.R Fed. 225 (1997). Certainly, it is a far easier test to apply to this situation.

Assuming that a reviewing court is willing to adopt the most recent formulation from the D.C. Circuit in order to interpret 32 V.S.A. §5930a(h), it would likely find that the Critical Mass test is applicable to this situation. That is true because the documents in question were voluntarily given to the Council. It would then be up to the Council to demonstrate whether a contested document "is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v. N.R.C., 975 F.2d 871, 879 (DC Cir. 1992). Obviously, that will require the Council to coordinate with the affected entities to determine if they consider the documents in question to be confidential. If the documents are not customarily released by the submitting entity, it would appear that they would be considered to be confidential under Critical Mass.

## C. General Access Exceptions

You have also correctly noted that several exceptions found in the State Access to Public Records and Documents law may be applicable. As has been stated, the applicability of these provisions will hinge on the documents themselves. You must also keep in mind that the Vermont courts interpret the provisions of the Act liberally in favor of the requesting parties. See Trombley v. Bellows Falls Union High School District No. 27, 160 Vt. 101 (1993).

1 V.S.A. §317(c)(1) covers records which "by law are designated confidential or by a similar term". Obviously, all records which are made confidential by 32 V.S.A. §5930a(h) will also be unaccessible under this provision of the Access law.

I am not certain that the Council receives copies of tax forms from applicants. In the event that they do obtain tax documents, those materials are covered not only by the express terms of 32 V.S.A. §5930a(h), but also by 1 V.S.A. §317(c)(6). Please note, however, that this exception does not cover the name and address of the taxpayer. Finberg v. Murnane, 159 Vt. 431 (1992).

The exemption contained in 1 V.S.A. §317(c)(7) may be somewhat problematic in this context. It exempts "personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency, information in any files relating to

personal finances, medical or psychological facts concerning any individual or corporation; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his designated representative". (emphasis added).

The Vermont Supreme Court has interpreted the exemption to apply "only to documents that reveal intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends." Trombley v. Bellows Falls Union High School District No. 27, 160 Vt. 101 (1993). It is my best judgment that the Court would not apply this formulation to an access case involving corporate financial records. If the Court did apply the Trombley test here, the documents would likely not be found to be exempt from disclosure under §317(c)(7). I believe that it is more likely that the Court would employ a balancing test: "[t]he Legislature's statement of policy, however, provides that it must balance the right of persons 'to privacy in their personal ... pursuits' against the need for 'specific information ... to review the action of a governmental officer.'" Id. at 309-310 quoting from 1 V.S.A. § 315. It is possible that the Court could fashion a test comparable to National Parks, which would require a similar analysis to that already discussed.

Finally, you indicate that there are trade secrets contained within the documents. Pursuant to 1 V.S.A. §317(c)(9) "trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or 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" are not subject to disclosure under the State Access to Public Records and Documents law. Documents will have to be reviewed individually to determine whether they are exempt under this subsection of the statute. It appears that input from the document provider will be necessary in order to make a final determination.

## V. CONCLUSION

Generally, it has been my experience that it is difficult to apply access to records principles to a class of documents. It is very likely that it will be necessary to review the documents at issue individually in order to determine whether the confidentiality provisions of the various statutes apply.

Clearly, the Legislature intends that tax records remain confidential. It has provided for exemptions to public access to such records not only in the general State Access to Public Records and Documents law (1 V.S.A. §317(c)(6)), but also in the statute specifically applicable to these records. 32 V.S.A. §5930a(h).

32 V.S.A. §5930a(h) also applies to “confidential financial information.” Under the so-called National Parks test, it appears that many documents within the nine categories you have listed would be considered confidential within the meaning of 32 V.S.A. §5930a(h). Under that test, the documents are considered to be confidential if the agency can show that release of the may cause substantial harm to the competitive position of the person from whom the information was obtained.

In a recent reformulation of the National Parks test, the D.C. Circuit has stated that commercial or financial information which was voluntarily submitted by a private person is confidential if it is the kind of information that would customarily not be released to the public by the person from whom the information was obtained. Critical Mass Energy Project v. N.R.C., 975 F.2d 871 (D.C. Cir. 1992). Thus, if the records at issue are not considered public by the submitting business, they would be considered to be confidential under the D.C. Circuit’s interpretation of federal FOIA law.

Finally, certain exemptions to the State access to records law may also apply: records which “by law are designated confidential or by a similar term” (1 V.S.A. §317(c)(1)); tax records (1 V.S.A. §317(c)(6)); “information in any files relating to personal finances . . . concerning any individual or corporation” (1 V.S.A. §317(c)(7)); and trade secrets (1 V.S.A. §317(c)(9)).

Hopefully, this information and analysis is of some use to your agency and to the office of the Auditor of Accounts. Please let me know if I can be of further assistance.

cc: Ed Flanagan, Auditor  
Paul Gillies, Esq.