



## STATE OF VERMONT

### MEMORANDUM

To: Rep. Donna Sweaney, Chair, House Committee on Government Operations  
Sen. Jeanette White, Chair, Senate Committee on Government Operations

From: Public Records Study Committee

Date: February 12, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Study Committee or Committee) was created in 2011, and was charged with reviewing all of the statutory exemptions to the Public Records Act (PRA) and recommending whether each exemption should be amended, repealed, or kept in its existing form. The Study Committee's term expired on January 15 of this year.

In fulfilling its charge, the Study Committee reviewed approximately 250 exemptions, and concluded that some raised issues that would be more appropriately addressed by the relevant committees of jurisdiction of the House and Senate.

Below is a description of several exemptions that the Study Committee recommended be reviewed by your committees.

If your committee reviews some or all of these exemptions and recommends amending any, H.18 (An act relating to Public Records Act exemptions) may be an appropriate vehicle for an amendment, depending on the timing of your recommendation.

We thank you in advance for your consideration.

**1 V.S.A. § 317(c)(10) (lists of names, the disclosure of which violates a right to privacy or produces gain)**

1 V.S.A. § 317(c)(10) exempts from public inspection and copying "lists of names compiled or obtained by a public agency when disclosure would violate a person's right to privacy or produce public or private gain; provided, however, that this section does not apply to lists which are by law made available to the public, or to lists of professional or occupational licensees."

The Committee heard from witnesses about a Superior Court and a Supreme Court case interpreting this exemption, and from witnesses that this exemption is most likely to be claimed by Agencies possessing lists which may be of commercial value, *e.g.* lists of licensed hunters, dairy farmers, or maple syrup producers.

This exemption does not define what constitutes “public or private gain.” Further, the exemption appears to require inquiry into the motive of the requester, which is inconsistent with Supreme Court caselaw stating that a requester’s motive is irrelevant under the Public Records Act. In addition, the plain language of the exemption appears only to extend to a requester’s name—and does not explicitly extend to associated personal information such as that person’s contact information or address.

The Committee lacked time to delve further into these issues, and therefore recommended that this exemption be reviewed by your committees.

**1 V.S.A. § 317(c)(12) (records concerning formulation of policy, where disclosure would violate a right to privacy)**

1 V.S.A. § 317(c)(12) exempts records concerning formulation of policy where disclosure “would constitute a clearly unwarranted invasion of personal privacy.”

The Committee noted that this exemption is arguably inconsistent with the 2006 amendments to 1 V.S.A. § 317(c)(4) which eliminated the common law deliberative process privilege, although the elements of the latter are less stringent than 1 V.S.A. § 317(c)(12). Members also raised the question of whether this exemption is needed; witnesses noted that this exemption is rarely used. However, the Committee ran out of time to gather the information needed to recommend whether this exemption should be repealed, amended, or kept in its existing form, and so recommended that it be reviewed by your committees.

**1 V.S.A. § 317(c)(21) (Vermont Life subscription lists)**

Under 1 V.S.A. § 317(c)(21), lists of names compiled or obtained by Vermont Life Magazine for the purpose of developing and maintaining a subscription list are confidential “but may be sold or rented in the sole discretion of the magazine provided such discretion is exercised to promote the magazine’s financial viability and in accordance with guidelines adopted by the magazine’s editor.”

At the Study Committee’s November 30, 2012 meeting, ACCD’s General Counsel recommended that this exemption be expanded to include customer lists, since on its face it only addresses subscribers, and recommended that the committee hear from representatives of Vermont Life.

The Study Committee noted the lack of standards governing the magazine’s discretion to sell or rent subscription lists, and did not hear from Vermont Life representatives on ACCD’s recommendation. It found that the question and recommendation raised

extended into subject matter beyond the scope of its jurisdiction. As a result, it recommended that your committees (as well as the House Committee on Commerce and Economic Development and the Senate Committee on Economic Development, Housing and General Affairs) review 1 V.S.A. § 317(c)(21) to determine whether it should be expanded to include customer lists and amended to further specify the magazine's discretion to rent or sell customer information. Further, because 1 V.S.A. § 310(c)(10) (described above) already addresses an exemption for lists of names, the Committee recommended that the substance of this exemption be consolidated into § 317(c)(10).

**1 V.S.A. § 317(c)(24) (deliberations of agencies acting in judicial or quasi-judicial capacity)**

1 V.S.A. § 317(c)(24) exempts records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity. At its October 31, 2014 meeting, the Committee heard from several witnesses and received written testimony on this exemption, some in support of and others in opposition to retaining the exemption in its existing form. Supporters opined that the exemption enables quasi-judicial decision-makers to engage in frank, uninhibited discussions and information-gathering, and is consistent with an exemption to the Open Meeting Law for public bodies engaged in deliberations in connection with quasi-judicial proceedings. Opponents offered that the grounds for many decisions vital to individuals' lives are worked out during the course of quasi-judicial proceedings, and that the public officers making such decisions should be accountable for the process by which they arrive at such decisions.

During the testimony on this exemption, it became apparent that users of the exemption have different interpretations concerning its scope. One witness indicated that the exemption would cover almost any written materials related to a quasi-judicial decision-making process, while another witness seemed to articulate a narrower view that the only written material prepared for discrete deliberative sessions would be exempt.

Because the Committee lacked time to resolve these varying interpretations or the competing policy arguments, it recommended that this exemption be reviewed by your committees (and the Committees on Judiciary).

**3 V.S.A. § 316 (records of the Department of Human Resources designated by rule)**

3 V.S.A. § 316 states that records of the Department of Human Resources (DHR) are public records, "except such records as the rules may properly require to be held confidential for reasons of public policy...."

The Committee heard from a representative of DHR on this exemption, and learned that the Department has never adopted rules under this section to designate records as confidential. The representative indicated that the Department would oppose repeal of this rulemaking authority, however, unless the personal records exemption of the Public

Records Act (1 V.S.A. § 317(c)(7)) was suitably amended to address specific categories of employee-related records.

The Committee was troubled by the open-ended nature of the grant of rulemaking authority in 3 V.S.A. § 316, and the lack of policy standards to guide any rulemaking initiated by DHR. However, the Committee ran out of time to gather information sufficient to recommend the repeal or amendment of this section, and therefore recommends that it be reviewed by your committees.

**4 V.S.A. § 740 (Supreme Court records subject to confidentiality requirements)**

4 V.S.A. § 740 authorizes the Supreme Court by administrative order or directive to prepare, maintain, record, index, docket, preserve, and store court records and provide certified copies of them upon request, “subject to confidentiality requirements of law or court rules.”

This section appears to broadly authorize the Supreme Court to adopt rules requiring that certain Court records be confidential, yet does not include a standard or guiding policy for the adoption of such rules. The breadth of this provision and the lack of any standard or policy may be appropriate, but the Committee lacked the time to consider this issue further. Instead, it recommended that your committees, in consultation with the Committees on Judiciary, review the language of this section to determine if its breadth and absence of a standard or guiding policy is appropriate.

**9 V.S.A. § 2440(d),(f), and (g) (general prohibition on disclosing Social Security numbers to the public; request for redacted record; records of investigation of violations of provisions related to Social Security number protection)**

9 V.S.A. § 2440 is a lengthy provision known as the Social Security Number Protection Act (Act). Subsection (d) of this section governs the duties of the State and its agencies and political subdivisions, and any agent or employee thereof, in connection with Social Security numbers collected from individuals. Subsection (e) lists exceptions to the requirements of subsection (d). Among these exceptions is subdivision (e)(6), which allows a State agency or political subdivision to continue a practice in place prior to January 1, 2007, that is inconsistent with the requirements of subsection (d), provided that certain conditions are satisfied.

Subsection (f) confers on “any person” a right to request that a town clerk or clerk of court redact the person’s Social Security number (and various other identifiers) from official records available on a public website. The request itself must include specific information and is a public record, but “access [to it] shall be restricted to the town clerk, the clerk of court, their staff, or upon order of the court.”

Subsection (g) provides for enforcement of the Act by the Attorney General and State's Attorney (and the Department of Financial Regulation in the case of persons licensed or registered by DFR). Subdivision (3) addresses the right of a law enforcement agency and the Department of Public Safety to designate as confidential information that the agency or Department provides to the AG or state's attorney.

The Committee found that the language of this section generally makes Social Security numbers—as well requests to town clerks under subsection (f) and investigation records under subsection (g)—exempt from public inspection and copying under the Public Records Act. However, the Committee also found that the exempt status of these records probably should be clarified. In addition, Sen. Jeanette White found the exception authorized under subdivision (e)(6) of the section to be troubling.

Because the Act is a complex piece of legislation with many interrelated parts, and passage of the Act involved the consultation of many interested parties, the Committee declined to make specific recommendations to amend the Act. It found, however, that the time has come to take a fresh look at the Act, and recommended that your committees (as well as the House Committee on Commerce and Economic Development and the Senate Committee on Finance) review this section.

**13 V.S.A. § 3504(g) (information collected in support of investigations regarding illness, disease, or death likely to have been caused by a weapon of mass destruction)**

13 V.S.A. § 3504 requires health care providers to report to the Commissioner of Health cases of illnesses, diseases, injuries, or death likely to be caused by a weapon of mass destruction; pharmacists to report unusual or increased prescription requests or unusual trends in pharmacy visits “that may result from bioterrorist acts, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins”; and veterinarians and livestock owners to report animal diseases (or suspected diseases) that “can result from bioterrorism, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins....”

Subsection (g) of this section provides that “[i]nformation collected pursuant to this section and in support of investigations and studies undertaken by the commissioner in response to reports made pursuant to this section shall be privileged and confidential” but that “[t]his subsection shall not apply to the disclosure of information to a law enforcement agency for a legitimate law enforcement purpose.”

At its October 10 meeting, the Committee heard from witnesses from the Departments of Health and of Public Safety to learn if this provision had been used and, if so, if the Departments viewed the language as preventing all investigation information from being released for all time. At this hearing, questions arose as to:

- i. whether investigations under this section should be subject to the same standards as criminal detection and investigation standards generally, under 1 V.S.A. § 317(c)(5);
- ii. whether the exemption should be time-limited; and
- iii. whether the definition of “weaponized biological or biologic warfare agents” at 13 V.S.A. § 3501, which is itself used in the definition of “weapon of mass destruction,” should be updated.

Because these questions more properly fall under the purview of the committees of jurisdiction, the Committee recommended that your committees (as well as the Senate Committee on Health and Welfare, the House Committee on Health Care, and the Committees on Judiciary) review 13 V.S.A. §§ 3501 and 3504 in light of the questions above to determine if any amendments would be appropriate.