

## Act 23 of 2013: Project Scope

### A. Overview of Act 23<sup>1</sup>

Act 23:

- directs the Office of Legislative Council to prepare a draft bill listing all exemptions to the Public Records Act (PRA) in one statutory provision of the PRA, and to amend existing PRA exemptions scattered throughout the Vermont Statutes Annotated in order to cross-reference back to the draft list of exemptions.
- directs Legislative Council staff, in preparing the bill, to consolidate exemptions that relate to the same subject matter into a single exemption if consolidation does not alter the substance of an exemption, and to prepare for the Study Committee's review a list of exemptions for which consolidation may be appropriate, but for which consolidation would potentially alter the substance of an exemption.

### B. Goals of, and Issues Raised by, the Act 23 Project

The goals of the Act 23 project include:

- **Accessibility:** making it easy for members of the public who do not have ready access to hard copies of the Vermont Statutes Annotated to find all exemptions to the PRA in the PRA itself.
- **Transparency:** making more transparent the number of PRA exemptions that address unique subjects.
- **Improved Review Process:** when new exemptions are discussed (or existing exemptions amended) in future years, Legislative Council staff and committees of jurisdiction will more readily be able to identify whether a “new” exemption actually needs to be created, and be more likely draft such exemptions after considering the policy choices made in existing exemptions that address the same subject.

Different additional goals might be served, and issues raised, by the Act 23 project, depending on how it is implemented. It might be implemented:

1. to not include in the Act 23 bill any consolidation of exemptions if consolidation would potentially alter the substance of an exemption; (“No Substantive Consolidation”)
2. in all cases, to consolidate exemptions in the Act 23 bill even if the effect would be to potentially alter the substance of an exemption; (“Complete Substantive Consolidation”)
3. to consolidate some but not other exemptions in the Act 23 bill where the effect of consolidation would be to potentially alter the substance of an exemption (“Partial Substantive Consolidation”).

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<sup>1</sup> Act 23 is available at <http://www.leg.state.vt.us/docs/2014/Acts/ACT023.pdf>

**Examples of exemptions for which consolidation would be substantive are on p. 4.**

Under the “No Substantive Consolidation” option:

- various committees of jurisdiction would not need to spend much time reviewing the Act 23 bill, because it would not alter the substance of exemptions.

Under the “Complete Substantive Consolidation” option:

- the substantive consolidation of exemptions would help rationalize exemptions that have arisen over the years that relate to the subject matter, but that were usually drafted by various attorneys and reviewed by various committees without regard to similar existing exemptions, and are inconsistent in ways that are hard to explain or justify. However, because some statutes address unique situations, including federal law requirements, across-the-board consolidation likely is inappropriate.
- various committees of jurisdiction may need to spend significant time reviewing the Act 23 bill, because it would potentially alter the substance of exemptions.

The “Partial Substantive Consolidation” option would fall between these two extremes.

**C. Possible approach; questions**

1. If an exemption is a candidate for consolidation, but consolidation is arguably substantive, the Public Records Study Committee can ask agencies appearing before it whether (and why) they would object to consolidation. Legislative counsel can follow up with agencies that have already testified and coordinate the project overall.
2. Where the study committee determines that consolidation is not appropriate, but exemptions relate to the same subject matter, the exemption can be split into two subparts. For example, 1 V.S.A. § 317(c)(9), the general trade secret exemption, can be re-drafted as follows:

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

\* \* \*

(9)(A) trade secrets, including 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, except that the disclosures required by 18 V.S.A. § 4632 shall not be included in this subdivision; and

(B) any other confidential business or financial information or records, to the extent specified in [list of exemptions not appropriate for consolidation];

3. As you will see when you hear ANR's testimony, ANR has proactively suggested eliminating some exemptions if the general trade secret exemption is updated. The trade secret exemption is scheduled to be discussed at the committee's November 1 meeting. Similarly, DFR personnel have received a letter asking them to consider whether various consolidations are appropriate.
4. **Question:** Does the committee want to keep the Act 23 consolidation bill separate from the bill to implement the committee's 2011–2013 recommendations? If the Act 23 bill becomes substantive in nature, staff recommends one bill.
5. **Question:** What is the timing of when the committee wants to see the Act 23 consolidation bill? There are many moving pieces, including discussion of the personal records exemption at the committee's 3d meeting.

## Appendix A: Examples of Possible Substantive Consolidation Candidates

### 1. Trade secrets

Many PRA exemptions relate to confidential business information. The PRA itself includes 1 V.S.A. § 317(c)(9), a general trade secret exemption that reads:

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

\* \* \*

(9) trade secrets, including 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*, except that the disclosures required by 18 V.S.A. § 4632 shall not be included in this subdivision; [emphasis added].

Notice that this exemption requires certain substantive standards to be met. The trade secret must be known only to certain individuals within a company, and give its owner a business advantage over competitors. Staff interprets 1 V.S.A. § 317(c)(9) to require redaction of trade secret information, not to protect the entirety of any record that happens to include trade secret information.

However, scattered throughout the Vermont Statutes Annotated are PRA exemptions that are either written broadly so as to apparently protect business information regardless of whether it meets the (c)(9) standards noted above, or contains standards somewhat different than the (c)(9) standards noted above. In addition, it is not always clear whether the exemptions require redaction or not. Did the committees that created these exemptions deliberately choose NOT to rely on (c)(9)? The answer to that question often is unknown. Are there good legal or policy reasons why various business records should be subject to different standards? A few (of many) examples of such exemptions are pasted below:

#### **a. 3 V.S.A. § 2222b(c): Plans submitted to secretary of administration for construction or installation of cables, wires, or telecommunications facilities**

(c) Deployment tracking.

(1) Not later than 30 days after the effective date of this act, all persons proposing to construct or install Vermont cables, wires, or telecommunications facilities as defined in 30 V.S.A. § 248a(b)(1) shall file plans with the secretary if the construction or installation relates to the deployment of broadband infrastructure and is funded in whole or in part pursuant to the American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, or by funds granted or loaned by the state of Vermont or one of its instrumentalities.

(2) The plans filed pursuant to subdivision (1) of this subsection shall include data identifying the projected coverage area, the projected average speed of service, service type, and the anticipated date of completion in addition to identifying the location and routes of proposed cables, wires, and telecommunications facilities, and shall be updated every 90 days.

(3) The secretary shall use the information provided pursuant to this subsection in performing the duties set forth in subsection (b) of this section.

(4) The secretary shall keep confidential the plans submitted to him or her under this subsection except that, pursuant to a nondisclosure agreement, the secretary may disclose the information to the Vermont Center for Geographic Information created under 10 V.S.A. § 122 or to some other person or entity for the purpose of aggregating the information. Information so disclosed shall remain confidential.

**b. 6 V.S.A. § 484(a): Records acquired by the agency of agriculture, food and markets regarding the purchase and sale of maple products**

(a) The secretary may, by rule, require all licensed dealers or processors to maintain specific records for the purchase and sale of maple products. Those records shall be kept in a full and accurate manner and shall be made available to the secretary or his inspector upon request. The secretary shall use those records only for purposes of administering this chapter, or for other law enforcement purposes, and shall otherwise keep them confidential.

**c. 10 V.S.A. § 563: Air contaminant source reports submitted to the agency of natural resources that relate to production, sales figures, or production processes**

(a) Confidential records. Any records or other information furnished to or obtained by the secretary concerning one or more air contaminant sources, which records or information, as certified by the owner or operator, relate to production or sales figures or to processes or production unique to the owner or operator or which would tend to affect adversely the competitive position of the owner or operator, shall be only for the confidential use of the secretary in the administration of this chapter, unless the owner or operator shall expressly agree to their publication or availability to the general public. Nothing herein shall be construed to prevent the use of the records or information by the secretary in compiling or publishing analyses of summaries relating to the general condition of the outdoor atmosphere: provided that the analyses or summaries do not identify any owner or operator or reveal any information otherwise confidential under this section.

(b) Penalty. A person who knowingly violates this section shall be fined not to exceed \$100.00.

**2. Medical records**

Many PRA exemptions relate to medical records or information. The PRA's general "personal records" exemption, 1 V.S.A. § 317(c)(7), refers to exempting "medical or psychological" facts:

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

\* \* \*

(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 or her designated representative;

This exemption has been interpreted by the courts to require a balancing of public and private interests for the exemption to be properly invoked. Although this issue has never been decided by a court, it could be interpreted to require the redaction of medical records so as to exclude only personally identifiable medical or health information.

Scattered throughout the Vermont Statutes Annotated are many other PRA exemptions that address medical records. These exemptions apparently are not subject to the 1 V.S.A. § 317(c)(7) balancing test, and it is unclear in some cases whether the records in their entirety should be withheld, or subject to redaction. Are these differences among medical records exemptions based on consistent policy decisions? Would it make sense to have one consolidated exemption that addresses medical records in a clear, consistent manner? Examples of medical records exemptions drafted in different, apparently inconsistent ways are pasted below.

**a. 1 V.S.A. § 317(c)(39): Records held by the agency of human services or DFR that include prescription information containing patient-identifiable data**

(39) records held by the agency of human services or the department of financial regulation, which include prescription information containing patient-identifiable data, that could be used to identify a patient;

**b. 18 V.S.A. § 7103: Mental health records other than an order of a court or documents authorized for disclosure**

(a) All certificates, applications, records, and reports, other than an order of a court made for the purposes of this part of this title, and directly or indirectly identifying a patient or former patient or an individual whose hospitalization or care has been sought or provided under this part, together with clinical information relating to such persons shall be kept confidential and shall not be disclosed by any person except insofar:

(1) as the individual identified, the individual's health care agent under section 5264 of this title, or the individual's legal guardian, if any (or, if the individual is an unemancipated minor, his or her parent or legal guardian), shall consent in writing; or

(2) as disclosure may be necessary to carry out any of the provisions of this part; or

(3) as a court may direct upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make disclosure would be contrary to the public interest.

**c. 33 V.S.A. § 6705: Medical treatment records obtained by the department of Vermont health access or designee when subrogated to the rights of an individual to which the department provided medical assistance**

(a) Upon furnishing medical assistance under chapter 19 of this title to any individual, the department of Vermont health access shall be subrogated, to the extent of the expenditure for medical care furnished, to any rights such individual may have to third party reimbursement for such care.

(b) The department of Vermont health access or its designee shall be entitled to obtain from any medical service provider any records of the treatment of any individual covered by subsection (a) of this section which are in any way relevant to the treatment paid for through medical assistance without regard to any other privilege or right of confidentiality or privacy which may exist. The department shall ensure that any records obtained are not released to any other individual, agency or other entity except insofar as is necessary to pursue the department's rights of subrogation.