

Testimony to Public Records Study Committee
by Allen Gilbert, executive director, ACLU-VT
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What's been happening?

Three major points:

- Most importantly, we are not aware of abuses of the new statute. It seems to be functioning without violations of privacy rights, due process rights, and so forth.
- For requestors, however – and I'm thinking mainly of the press -- we have heard that sometimes the new language has improved access while at other times it's produced something like a wack-a-mole situation. By this I mean that an exemption other than 1 VSA 317 c5 is now cited as grounds for denial. Exemptions commonly used in this way appear to be exemptions 1 VSA 317 c3 (possible violation of standards of ethics or professional conduct), 1 VSA 317 c4 (work-product privilege) and 1 VSA 317 c14 (pending litigation).
- We are not sure if redaction has been used effectively to release a record that contains information deemed exempt. This is important to explore, because one of the most important aspects of changing the 1 VSA 317 c5 exemption last year was moving from a categorical "you-can't-have-it-standard" to an access absent harm "balancing-test" standard.

Here's what we think should be considered as next steps in improving transparency and accountability in this area:

There are four things that we think need attention:

- Exemption 1 VSA 317 c7 – personal documents, but mainly as pertains to disciplinary procedures. This has sometimes been mischaracterized as preventing disclosure of any records dealing with officer conduct investigation. The Rutland Herald II decision of 2012 makes clear this is NOT the case, citing the guidelines laid out in the *Trombley* decision. The exemption itself is not necessarily faulty, so I'm not sure a legislative solution is appropriate. I just wanted to flag this.
- Exemption 1 VSA 317 c14 – litigation exemption. This should be struck. We believe this is increasingly an unusual exemption for states to have. It offers the opportunity for any record to quickly be shielded by the filing of litigation.

Related to what I was saying about Exemption 1 VSA 317 c7....

In order to restore state police misconduct records to parity with other governmental misconduct information, we think these things should be done:

- Exemption 1 VSA 317 c18 (records of the office of internal investigation of the Department of Public Safety) – strike it
- 20 VSA 1923(d) – strike it. This is the statute that creates the State Police Advisory Commission (SPAC). Striking the statute will eliminate the State Police Advisory Commission. We feel this is important to do. The extreme secrecy this statute creates around "internal" state police investigations is, as far as we can tell, unique among all public agencies

in Vermont. We see only lack of public trust resulting from this exceptional treatment. I note that the SPAC issue is tied to the broader issue of police officer accountability -- which we feel ultimately must be addressed through the establishing of a professional licensing system for police, similar to systems that are in place for 45 other professions.