



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: January #, 2015

Subject: Public Records Act exemptions

As you are aware, the Public Records Study Committee (Study Committee or Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act (PRA or Act), and recommending whether each exemption should be amended, repealed, or kept in its existing form. In addition, the Committee was authorized to review the Act as a whole.

Over the last several years, Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the Committees on Government Operations, and has likewise identified an issue under the Public Records Act that would best be reviewed by your committees.

We thank you in advance for considering our recommendations to review the exemptions and issue described below.

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)(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).

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.

Should the PRA should be amended to clarify its application to contracts between a public agency and private entity for the performance of a governmental function?

Act No. 59 authorized the Study Committee to review whether the PRA should be amended to clarify its application to contracts between a public agency and a private entity for the performance of a governmental function.¹ In Fall 2011, the Committee heard testimony regarding the application of the PRA to government contractors. Because this issue has significant implications for other areas of government and law, such as corrections and health care, the Committee took no final position regarding the application of the Act to contractors. Instead, it recommended in its January 2012 report that your committees review the issue further in coordination with other jurisdictional committees.

Since its January 2012 recommendation, a Superior Court case was decided that adopted a “functional equivalency” test to determine whether a government contractor constitutes a “public agency” subject to the Public Records Act. In *Prison Legal News v. Corrections Corp. of America*,² Judge Bent applied the four-factor test³ in holding that Corrections Corporation of America, a for-profit corporation in the business of operating prisons is a public agency subject to Vermont’s Public Records Act.

As a result of this decision, the Committee revises its recommendation to note that this case should be considered as part of any review by your committees.

¹ See 2011 Acts and Resolves No. 59, Sec. 11(c)(4).

² Docket No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Jan. 9, 2014).

³ The non-exclusive factors are: “(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.” These factors are considered cumulatively, with no single factor being essential or conclusive.