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TO: Public Records Legislative Study Committee
FROM: Karen L. Richards, Executive Director
RE: 9 V.S.A. §4555(a)
DATE: October 29, 2014

Thank you for the opportunity to discuss the confidentiality provisions of the Human Rights Commission's enabling statute. My understanding is that the Committee is seeking some clarification concerning the interplay between subsections (a) and (c) of 9 V.S.A. §4555. I am happy to answer any questions the Committee may have at the hearing.

The basic premise of VHRC confidentiality is two-fold:

Access by the General Public:

The complaint files and investigative files are confidential and the general public has no right to access that information. 9 V.S.A. §4555(a). The public does have a right of access to the determination (which we interpret to be the investigative report) and the names of the parties after the Commissioners vote to find reasonable grounds to believe that discrimination occurred. 9 V.S.A. §4555(c). Final settlements are also public documents. 9 V.S.A. §4555(b). If there is not a reasonable grounds finding, there is no right of access by the public to anything related to the case. 9 V.S.A. §4555(c).

Access by Complainants, Respondents and their Representatives:

Subsection (a) of §4555 makes it clear that the investigative file is available to the complainant, the respondent, and their attorneys. This is to ensure due process. The only information that may not be available to the parties or their attorneys is the identity of non-party witnesses if the VHRC believes

that there is good cause for protecting the witnesses' identity. The VHRC executive director makes this determination in consultation with the investigator. This often happens in school cases where both complainant students and student witnesses are identified by pseudonyms to protect their privacy and sometimes in landlord/tenant matters where witnesses fear retaliation from either the complainant or the respondent.

VHRC Rule and Practice:

The place where the VHRC has encountered some difficulty with access to its records is with regard to certain types of information that may be obtained as part of an investigation and that may not be appropriate to turn over to a complainant or respondent. This includes, but is not limited to, student names and records which are protected by federal law (Family Education Rights in Privacy Act-FERPA) and personnel records that may be obtained as part of an employment investigation. Because the VHRC statute has no exceptions, other than identity of witnesses, technically this information must be turned over to the parties upon request.

To deal with this difficult situation, the VHRC currently takes one of several approaches depending on the circumstances. We can redact, for example student or employee names from documents; we can review files but not copy them unless we need them so they do not become part of the investigative file; and/or we assist the complainant and respondent in entering into a confidentiality agreement whereby nothing can be disclosed by the complainant or respondent other than to his/her counsel.