

Agency of Natural Resources – Department of Environmental Conservation
Proposed Testimony for October 4, 2013 Hearing
Re. Public Records Study Committee

Overview

The Agency of Natural Resources – Department of Environmental Conservation (DEC), appreciates this opportunity to provide testimony to the Public Records Study Committee regarding Public Records Act (PRA) exemptions that affect our Watershed Management Division, Waste Management Division, Air Pollution Control Division and Division of Geology and Mineral Resources. DEC agrees that the review of the integrity, viability and purpose of the numerous PRA exemptions is necessary to ensure that all exemptions support the performance of government functions that rely on those exemptions, but are narrowly tailored to achieve the purpose of the PRA.

Absent changes to 1 V.S.A. § 317(c)(9) discussed below, we believe that it is necessary to retain the stand alone exemptions within the law. To address DEC concerns, DEC recommends two amendments to Section 317(c)(9):

- Clarify that the “trade secrets” exemption protects “confidential business information.” DEC notes that the term “trade secrets” is used interchangeably with “confidential business information” in common parlance, as well as certain statutes, rules or guidance documents. If the Legislature wishes those terms to be used interchangeably under this exemption, DEC recommends that the term “confidential business information” either be set forth as a synonym in the statute (“trade secrets or confidential business information, including...”) or be enumerated as a primary example to illustrate the meaning of “trade secrets” (“trade secrets, including confidential business information, formulae, ...”).
- Eliminate the requirement that information be known only to certain individuals within a commercial concern. Currently, the 317(c)(9) exemption applies to “trade secrets, including any formulae, plan, pattern, ... *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” (emphasis added). This language poses problems in situations where a business takes reasonable steps to protect confidential business information, but is required to share that information with a contractor or other third party. An example of such a situation is where Company A is constructing a new process within its plant and has hired a contractor for the construction and has protected secret information through the use of confidentiality agreements. In this situation, DEC needs to understand the new process to direct Company A on the appropriate regulations governing waste generation. Arguably, under the existing 317(c)(9), this information is not a trade secret.

The need to protect confidential business information or information shared between a firm and its suppliers/customers drives most of the exemptions provided to DEC processes. DEC can support elimination of most of those exemptions if the general exemption is amended as set forth above.

Section by Section Response

PRA Exemption – Code Section	DEC Division – Principal	Exemption Language	ANR Recommendation
<p>Mineral Records – 10 V.S.A. § 101</p>	<p>Division of Geology and Mineral Resources – Laurence Becker, State Geologist</p>	<p>Section 101 requires the division of geology and mineral resources to “maintain records of old and new information relating to the geology, mineral resources and topography of the state,” and to “make public new information resulting from research and field studies conducted by or for the division.”</p> <p>However, the section also requires the division to hold confidential “certain information provided by the mineral industries of the state ... at the industries’ request.”</p> <p>Such confidential information would be used “only for purposes and in a manner permitted by the industry.”</p>	<p>Subject to the general concerns stated in the Overview above, this specific exemption can be eliminated. A revised general exemption under 1 V.S.A. § 317(c)(9) would be sufficiently broad to allow protection of the information provided to the division of geology and mineral resources by industry.</p> <p>This change will necessitate that DEC’s General Counsel work with the division to prepare a procedure that will allow industry concerns to designate information believed to be confidential under Section 317(c)(9) when that information is submitted to the division.</p>

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Air Contaminant Source Reports – 10 V.S.A. § 563	Air Pollution Control Division – Elaine O’Grady, Director	<p>Section 563 requires that “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.”</p> <p>Notwithstanding that general disclosure prohibition, Section 563 does allow DEC to use records and information submitted by industry in order to compile or publish “analyses of summaries</p>	<p>ANR recommends retaining the PRA exemption provided under Section 563. The Air Pollution Control Division has serious concerns about the impact on data reporting to ANR if the agency is unable to protect the market analyses, customer information and sales data submitted by automobile manufacturers under Section 563 and the low emission vehicle rules in Subchapter XI of Vermont’s Air Pollution Control Regulations.</p> <p>Even were 1 V.S.A. § 317(c)(9) revised and broadened as requested in the Overview above, DEC does not believe that market analyses, customer information and sales data would be protected as a subset of trade secrets.</p>

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		relating to the general condition of the outdoor atmosphere ... [so long as] the analyses or summaries do not identify any owner or operator or reveal any information otherwise confidential under this section.”	
Water Pollution Control – 10 V.S.A. § 1259(b)	Watershed Management Division – Ernie Kelley, Manager of Wastewater Management Program	<p>Section 1259(b) requires the DEC wastewater program to make available to the public “any records, reports or information obtained under this permit program.”</p> <p>However, Section 1259(b) also requires DEC to protect as confidential records submitted under the program, “upon a showing satisfactory to the secretary that any records, reports or information or part thereof, other than effluent data, would, if made public, divulge methods or processes entitled to protection as trade secrets.”</p>	<p>Subject to the general concerns stated in the Overview above, this specific exemption can be eliminated. A revised general exemption under 1 V.S.A. § 317(c)(9) would be sufficiently broad to allow protection of the information provided to DEC’s wastewater program as required under Section 1259(b).</p> <p>This change will necessitate that DEC’s General Counsel work with the wastewater program in order to revise the Vermont Water Pollution Control Permit Regulations regarding protection of confidential information.</p> <p>Such a rule revision would necessarily specify a procedure for industry concerns to designate information</p>

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		<p>In addition, Section 1259(b) specifies that “any records, reports or information accorded confidential treatment will be disclosed to authorized representatives of the state and the United States when relevant to any proceedings under this chapter.”</p>	<p>believed to be confidential under Section 317(c)(9) when that information is submitted to the program.</p>
<p>Toxic Use and Hazardous Waste Reduction Plan – 10 V.S.A. § 6628(a)</p>	<p>Waste Management Division – George Desch, Director</p>	<p>Section 6628(a) exempts from the public records act “toxics use reduction and waste reduction plans” developed under Chapter 159 of Title 10.</p> <p>However, Section 6628 also specifies that plan summaries submitted pursuant to Section 6629 are to be considered public records.</p>	<p>Subject to the general concerns stated in the Overview above, this specific exemption can be eliminated. A revised general exemption under 1 V.S.A. § 317(c)(9) would be sufficiently broad to allow protection of the information provided to DEC’s Waste Management Division as required under Chapter 159.</p> <p>This change will necessitate that DEC’s General Counsel work with the Waste Management Division in order to ensure that the DEC procedure regarding submission of toxics use reduction and waste reduction plans and plan summaries is consistent with the general exemption.</p>

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<p>Hazardous Waste Generator – 10 V.S.A. § 6632</p>	<p>Waste Management Division – George Desch, Director</p>	<p>Section 6632 requires ANR to “adopt rules to ensure that trade secrets designated by a generator in all or a portion of the review and plans, and the report required by this subchapter, are utilized by the secretary or the department only in connection with the responsibilities of the department pursuant to this subchapter, and that those trade secrets are not otherwise disseminated by the secretary, the department, or any authorized representative of the department.”</p> <p>Section 6632 further provides that “the rules shall provide that a generator may only designate as trade secrets those that satisfy the criteria for trade secrets set forth in 18 V.S.A. § 1728(a).”</p>	<p>Subject to the general concerns stated in the Overview above, this specific exemption can be eliminated. A revised general exemption under 1 V.S.A. § 317(c)(9) would be sufficiently broad to allow protection of the information provided to DEC’s Waste Management Division as required under Chapter 159.</p> <p>This change will necessitate that DEC’s General Counsel work with the Waste Management Division in order to ensure that DEC rules regarding protection of confidential information submitted as required under Chapter 159 are consistent with the general exemption.</p>

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Mercury Lamp Manufacturers - 10 V.S.A. § 7153	Waste Management Division – George Desch, Director	<p>Section 7153 requires manufacturers of mercury-containing lamps to submit an annual report each year describing collection and disposal efforts.</p> <p>The section qualifies that “sales data and other confidential business information provided under this section shall not be subject to inspection and review pursuant to subchapter 3 of chapter 5 of Title 1 (access to public records) [and] [c]onfidential information shall be redacted from any final public report.”</p>	<p>ANR recommends retaining the PRA exemption provided under Section 7153. The Waste Management Division has serious concerns about the impact on data reporting to ANR if the agency is unable to protect the sales data submitted by mercury lamp manufacturers under Section 7153.</p> <p>Even were 1 V.S.A. § 317(c)(9) revised and broadened as requested in the Overview above, DEC does not believe that sales data would be protected as a subset of trade secrets.</p>
Oil and Gas Wells – 29 V.S.A §§ 505(b), 542, 543	Division of Geology and Mineral Resources – Laurence Becker, State Geologist	Section 505(b) requires “the making and filing of well logs, directional surveys, and reports on well location, drilling and production.” Any such data marked as “confidential” before submission to the board is to be kept confidential for two years, provided that the State	<p>DEC recommends that these statutory provisions be reviewed and revised to ensure consistent application.</p> <p>It is not clear following our review why well logs, surveys and reports under Section 505(b) would be held confidential for only two years, while the logs and reports required under Sections 542 and 543, which cover the</p>

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		<p>Geologist may access it.</p> <p>Section 542 requires well operators to keep geologic logs, “showing the character, thickness, and depth of the formations encountered in the drilling of a well and the depths at which all oil, gas, water or other substances are encountered”; and showing “whether the well is productive of oil, gas, water or other substances, the quantities thereof, and the initial pressure and production measured over a period of at least 48 hours.” Such reports are required to be held confidentially by the Board in perpetuity, except for access by the State Geologist.</p> <p>Section 543 requires “the owner, lessee, agent, employee or other person in charge of any oil and gas well within the state shall forward to the board, in the manner and form prescribed by the</p>	<p>same subjects as 505(b), are held confidential in perpetuity.</p> <p>DEC recommends a single statutory provision, either under Section 317 of Title 1, or in Chapter 14 of Title 29, that clarifies under what circumstances the board is to hold different kind of information as confidential. While trade secrets or confidential business information should be protected, the state’s interest in economic development might require that certain types of general data be released (e.g. well logs, directional surveys, well locations) to facilitate exploration and drilling in the future.</p> <p>For example, New York law protects well logs and samples, well drilling completion reports, directional surveys, annual production figures and reports for a limited time, but provides trade secret protection for detailed analysis, opinion, interpretation or evaluation of factual data. <i>See</i> http://www.dec.ny.gov/energy/1605.html.</p>

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		<p>rules of the board, a report showing the character of the well, method of operation, and total production for the preceding calendar year,” and provides that such reports will be held confidential in perpetuity.</p>	