AMERICAN CIVIL LIBERTIES UNION of VERMONT

TO: House Government Operations Committee
FROM: Allen Gilbert, executive director, ACLU-VT
DATE: Jan. 28, 2014
RE: Whistleblower protection alternatives

The ACLU continues to feel that no changes are needed to protect whistleblowers' identity. We feel that legitimate privacy interests are protected under the existing 1 VSA 317 c 7 personal records privacy statutory exemption and under the case law that has developed around the exemption.

To us, the discussion the committee is now having is at the core of the approach the legislature wishes to take in dealing with access to public records and with privacy rights. It is a difficult and challenging discussion.

The legislature has typically used a "categorical" approach to defining exemptions and privacy – that is, the legislature has added specific exemptions for specific categories of records, often in response to requests from specific departments or officials. The result has been the creation of myriad exemptions – approximately 260, I believe, is the most recent count.

For a few exemptions, a "balancing test" approach rather than a "categorical" approach has been used. Sometimes this approach has been chosen by the legislature and is written into statute, other times it is part of case law developed by the courts. An example of a balancing test created by the legislature is the police records exemption (1 VSA 317 c 5). An example of a balancing test created by the courts and existing in case law is the personal records exemption (1 VSA 317 c 7).

A balancing test applies a principle to find a balance between two competing interests (typically, the competing interests are the public's right to know vs. individual privacy rights). This is done to acknowledge that not all public records situations are black-and-white. Sometimes a determination must be made whether access should be granted or denied.

The subjectivity of the balancing test approach does not provide the certainty that a categorical exemption approach does. Yet there's a danger that a categorical exemption can be too broad and can shield records from the public when there is no reason for secrecy. The damage is diminished public confidence in government's actions.

Several years ago, in response to public concern over the large number of exemptions and how they can hinder access to public records, the legislature began a comprehensive review of all the exemptions, to see if they could be winnowed, consolidated, or some eliminated.

This effort has been difficult, for a number of reasons. But the chief reason has often been the tension between the two approaches to constructing exemptions – through numerous specific categorical exemptions or through establishing general principles that are used to weigh competing interests in specific areas.

Alternatives 1-3 in the document prepared by Legislative Council continue the categorical approach. Alternative 4 acknowledges the general balancing test approach and how it is applied. Again, as I have testified to the committee, we believe it is unnecessary to make changes to the current statute in order to protect the identity of whistleblowers when there is a legitimate privacy interest at stake. We believe the case law that has developed from a number of Vermont Supreme Court decisions provides a solid footing for applying the balancing test. While public officials may want the cut-and-dry certainty that a categorical exemption provides, such certainty often comes at the price of diminished public access to records that do not need to be withheld and should not be.

If the committee is to pursue any of the alternatives, we would recommend pursuing the first alternative. It is most narrow in scope of the four alternatives, and it accomplishes the original goal of protection of private information of persons who contact the auditor's office with a complaint.