

To: Steve Collier, General Counsel, Department of Human Resources
From: Helena Gardner, Legislative Counsel
Re: Act 23 Questionnaire: Department of Human Resources-related exemptions

1) Consolidated “personal records” exemption

As you know, 1 V.S.A. § 317(c)(7) is an exemption for “personal records relating to an individual...” As interpreted by the Vermont Supreme Court, this exemption shields from disclosure records implicating individual privacy that would “reveal ‘intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.’”¹ The “right to privacy” must be balanced against the public interest in favor of disclosure, including the need for “specific information ... to review the action of a governmental officer.”²

The Committee is taking up this exemption at its December 13 meeting. However, because my office has been charged under Act 23 with drafting a PRA exemption consolidation bill, I have already been considering ways to possibly restructure 1 V.S.A. § 317(c)(7). In short, I am considering recommending that it be split up into 6 subdivisions. Some of these subdivisions will retain the concept of a balancing test, whereas others will recognize categories of personal records that the General Assembly has previously determined should be categorically exempt.

1. § 317(c)(7)(A) would establish a categorical exemption for personally identifiable health information;
2. § 317(c)(7)(B) would establish a categorical exemption for medical and treatment records that the General Assembly previously determined are entirely exempt;
3. § 317(c)(7)(C) would cover personal financial records;
4. § 317(c)(7)(D) would cover records implicating personal privacy that the General Assembly has previously determined should be categorically exempt;
5. § 317(c)(7)(E) would be a catchall balancing test;
6. § 317(c)(7)(F) would create an exception requiring agencies to release a “personal record” to the individual to whom the record pertains.

Below is partial draft language for a few of these subdivisions.

A. Individually identifiable health information. HIPAA regulations protect individually identifiable health information, and apply to covered entities. Depending on the context, a public agency may acquire individually identifiable health information, yet may not be a covered entity under HIPAA. The concept of protecting such information is already embedded in 1 V.S.A. § 317(c)(7), which protects “personal documents relating to an individual, including ... medical or psychological facts”, but as noted, under Vermont Supreme Court precedent, any record or information claimed exempt under 1 V.S.A. § 317(c)(7) is subject to a balancing test.

¹ *Kade v. Smith*, 180 Vt. 554, 557 (2006) (quoting *Trombley v. Bellows Falls Union High School District*, 160 Vt. 101 (1993)).

² *Id.*

I am considering recommending that, consistent with HIPAA, individually identifiable health information be categorically exempt from public inspection and copying, and not be subject to a balancing test.

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(7)(A) except as may be authorized by law, individually identifiable health information, which is information, including demographic data, that:

(i) relates to a person's past, present, or future physical or mental health or condition, the provision of health care to the individual, or the past, present, or future payment for the provision of health care to the individual; and

(ii) identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual.

* * *

Numerous PRA exemptions scattered throughout the Vermont Statutes Annotated would cross-reference back to this new 1 V.S.A. § 317(c)(7)(A), including **21 V.S.A. § 516(a)** (health care information of employees subject to drug tests).

Questions:

- Do you object to the draft language above, and if so why?
- If you object only to the language, but not to the general concept of a separate subdivision within (c)(7) for individually identifiable health information, could you suggest improvements to the language?

B. Other invasion of personal privacy concerns

In addition to 1 V.S.A. § 317(c)(7), 1 V.S.A. § 317(c)(12) exempts “records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy, if disclosed.”

The phrase “clearly unwarranted invasion of personal privacy” parallels the language of Exemption 6 of the Federal Freedom of Information Act, which exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”³ Under FOIA caselaw, Exemption 6 has been interpreted to require a balancing of the public interest in disclosure against the individual’s right to privacy. If a public interest in disclosure outweighs the privacy interest, the record should be disclosed; if the privacy interest outweighs the public interest, the record may be withheld under Exemption 6.⁴

³ 5 U.S.C. § 552(b)(6).

⁴ See Department of Justice Guide to the Freedom of Information Act, Exemption 6, available at http://www.justice.gov/oip/foia_guide09/exemption6.pdf

Although the Vermont Supreme Court appeared to recognize in one case that 1 V.S.A. § 317(c)(12) requires a balancing test,⁵ to my knowledge the Court has never opined on whether the balancing tests under 1 V.S.A. § 317(c)(7) and 1 V.S.A. § 317(c)(12) are identical.

I am considering recommending that 1 V.S.A. § 317(c)(12) be repealed, but that the existing language of 1 V.S.A. § 317(c)(7) be amended to include the “unwarranted invasion of personal privacy” language in new subdivisions (D) and (E).

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(7)(A) *[text omitted]*

(B) *[text omitted]*

(C) *[text omitted]*

(D) records the release of which constitutes an unwarranted invasion of personal privacy:

(i) to the extent provided in 10 V.S.A. § 123(c) (Geographic Information System; individual identifiers); 13 V.S.A. § 5358a(a) (Victims Compensation Board; records reviewed for approving an application for compensation); 18 V.S.A. § 1094 (petition and order for mandated venereal disease testing); 18 V.S.A. § 5112 (records related to the issuance of a new birth certificate in connection with a change of sex); 18 V.S.A. § 9719 (advance directives); 20 V.S.A. § 1941 (DNA samples and records); 21 V.S.A. § 516(b) (employee drug test results); 22 V.S.A. § 172 (library patron records); 23 V.S.A. § 1607 (data collected with automated license plate recognition systems); 30 V.S.A. §§ 7055 and 7059 (enhanced 911 database customer information; linked name and street addresses and requests to municipalities to delink the same); 33 V.S.A. § 111 (applicants for or recipients of assistance from DCF); 33 V.S.A. § 6321 (individuals using attendant care services);

(ii) records of genealogy provided in an application or in support of an application for tribal recognition pursuant to chapter 23 of this title;

(iii) records relating to the identity of library patrons;

(E) ~~personal documents~~ any other record relating to an individual, including information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency, ~~information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation~~ if disclosure of the record would constitute a clearly unwarranted invasion of personal privacy;

(F) ~~provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee a record described in this subdivision (7) shall be disclosed to the individual to whom it pertains, or to his or her designated representative, unless it is otherwise exempt from public inspection and copying;~~

Questions:

- Do you object to the draft language above, and if so why?

⁵ *Kade*, 180 Vt. at 558 n. 5.

- If you object only to the language, but not to the general concept of the proposed split-up of (c)(7) as shown above, could you suggest improvements to the language?

2) Repeal 3 V.S.A. § 316?

3 V.S.A. § 316 exempts records of the Department of Human Resources “as the rules may properly require to be held confidential for reasons of public policy....” This summer, we exchanged emails about this exemption, and you said that your Department might consider recommending repeal of the exemption depending on whether and how 1 V.S.A. § 317(c)(7) is amended.

Question:

- If 1 V.S.A. § 317(c)(7) is amended as proposed above, would your Department be able to recommend repeal of 3 V.S.A. § 316?