AMERICAN CIVIL LIBERTIES UNION of VERMONT

TO: **Legislative Public Records Study Committee**
FROM: **Allen Gilbert, executive director, ACLU-VT**
DATE: **Oct. 30, 2014**
RE: **PRA Exemptions for Review in 2014**

Thank you for the opportunity to provide the views of the American Civil Liberties Union of Vermont regarding the Public Records Act exemptions identified for review in 2014. We have only commented on the exemptions that we feel deserve closer review; a number of these exemptions are ones that the committee itself has already tagged for further review. We will provide more detailed comments when these exemptions are re-examined by the committee, or when they are taken up by committees of jurisdiction during the legislative session.

Generally speaking, we feel that the work of the committee has taken a direction set by acceptance of an approach the legislature adopted many years ago and continues to pursue. That approach has been to create many narrow exemptions for specific categories of records rather than broad exemptions that can be applied to many categories of records.

Often the narrow exemptions have been created in response to requests from officials within government, or within the industries regulated by government, for specific protections so if someone sued for access to a specific record or category of records, officials would be able to point to a specific statute sanctioning non-disclosure. Indeed, the state Attorney General's Office has been advising state agencies that the agencies NEED these specific exemptions, or the AG can't defend them successfully against lawsuits. A general exemption isn't felt to be good enough.

You saw this happen this past session when the state auditor's office sought and won a specific exemption preventing disclosure of the identity of whistleblowers making complaints to the auditor. The ACLU testified the exemption was unnecessary, that the current 1 VSA 317 (c)(7) exemption already allows non-disclosure in certain circumstances where privacy is warranted. But that argument was rejected, and a new, very specific exemption covering a very narrow category of records was created.

Beyond the issue of adding yet another exemption to an already large number of exemptions, creating such a narrow exemption also establishes as a matter of state policy that the public can never have a legitimate right to know the identity of someone filing a complaint with the auditor's office. To our mind, this is a precarious policy. A broad exemption [such as 1 VSA 317 (c)(7)] that employs a balancing test avoids such a foregone conclusion, recognizing that some situations require a balancing of the public's right to know and an individual's legitimate right to privacy.

The other result of creating specific individual exemptions rather than relying on broad general exemptions is the one that many people (especially members of the press) felt was the reason the committee was created – to reduce the large number of exemptions (believed at the time to be about 240) that had been created over the years. Such a large number of exemptions invites the conclusion -- fair or not -- that the Public Records Act is being used to shield documents from public disclosure rather than to ensure disclosure of most documents. It is difficult to rebut this conclusion, especially as even more exemptions have been enacted since the committee's creation.

I've attended nearly all of the study committee's meetings over the past four years. To my mind, the most positive thing that could happen at this point is that the committee ask the legislature to establish by House/Senate rule or by statute that no additional exemptions be added to the state's public records laws without review by the House and Senate Government Operations committees. This will not reduce the number of existing exemptions, and it may not derail very many new ones. But at least it will shine a light on the new ones being created. The committee has been discussing this proposal.

Similarly, a rule or statute should be adopted that exemptions cannot be created through the rule-making process without review and approval by the Government Operations committees. The study committee has been discussing this as well. It is important that this issue is taken up because at this point no one knows how many exemptions exist in rules. The study committee has only been examining exemptions that exist in statutes. If a review process for new exemptions by rule were in place, the legislature and public would at least be aware of new exemptions being created outside of statute.

The committee, with the assistance of Legislative Council, has put a tremendous amount of time into review of the exemptions to the Public Records Act. It has been a heroic effort, with much learned. Thank you.

Below are the ACLU's comments regarding specific exemptions. The numbers are those assigned by Legislative Council.

1. 1 V.S.A. § 313(a): Minutes of executive sessions. We agree with the committee that the language isn't clear. Another reason for further review is that changes may be needed because of the new "cure" language in the open meetings bill passed last session.

3. 1 V.S.A. § 317(c)(12): Records concerning formulation of policy, where disclosure would violate a right to privacy. It is our understanding that a deliberative process privilege is now not allowed for the legislature and the executive branch. The logic, then, in allowing it for other public bodies or agencies, such as school boards or local administrative departments, eludes us. To some extent, this exemption raises the same questions as **Exemption 6, the exemption allowing "municipal inter- and intra-departmental communications preliminary to a policy determination."** Again, the logic behind not allowing deliberative process for legislators and state administrators but granting it for local board members and local administrators eludes us.

4. 1 V.S.A. § 317(c)(14): Records relevant to litigation. We believe this exemption is over-broad, unnecessary, and should be repealed. Once litigation begins, specific records whose disclosure might compromise the legal proceedings or the rights of the parties involved can be ordered sealed by the court. Other records whose disclosure won't compromise the proceedings should remain accessible to the public. This exemption currently works as an indiscriminate screen denying the public information about the actions of government officials. The screen must be applied in a more discriminating fashion, which a court can do.

5. 1 V.S.A. § 317(c)(15): Records relating to contract negotiations. We take this exemption to mean that only records leading up to the negotiation of contracts are exempt; once negotiated, the contract is accessible. We worry that comparisons of bids, however, cannot always be easily made if records other than the negotiated contract are not available. An approach more fine-tuned than a broad categorical exemption seems appropriate here.

6. See comment at Exemption 3.

7. 1 V.S.A. § 317(c)(24): Deliberations of agencies acting in judicial or quasi-judicial capacity. We agree that this exemption needs further review.

9. 3 V.S.A. § 316: Records of the Department of Human Resources where public policy properly requires them to be confidential. We agree that this exemption is difficult to interpret and needs further review.

50. 13 V.S.A. § 3504(g): Information collected in support of investigations or studies by the Commissioner of Public Safety regarding illness, disease, or death likely to have been caused by a weapon of mass destruction. We agree that the language of this exemption is not clear and that the exemption needs further review by the health committees.