

To: John Kessler, General Counsel, Agency of Commerce and Community Development
From: Helena Gardner, Legislative Counsel
Re: Act 23 Questionnaire: ACCD-related exemptions

1) Consolidate 1 V.S.A. § 317(c)(10) and (c)(21)?

1 V.S.A. § 317(c)(10) generally addresses the confidentiality of lists of names compiled or obtained by a public agency and notes two exceptions. Unless a person knows to read further on in the list of exemptions, he or she might be unaware that § 317(c)(21) addresses the same subject matter, but provides an another exception to the exemption.

Last year, you recommended that § 317(c)(21) be amended to reflect its application to customer lists, but I believe these would be covered under (c)(10) if Vermont Life lists were brought under its framework.

For the sake of clarity and completeness, the Public Records Study Committee (“Committee”) is considering recommending that § 317(c)(21) be repealed, and its contents reflected in an amended § 317(c)(10):

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

* * *

(10) lists of names compiled or obtained by a public agency when disclosure would violate a person’s right to privacy or produce public or private gain; ~~provided, however, that this section does not apply to, except lists:~~
(A) which are by law made available to the public, or to lists;
(B) of professional or occupational licensees; and
(C) sold or rented in the sole discretion of Vermont Life magazine, provided that such discretion is exercised in furtherance of that magazine’s continued financial viability, and is exercised pursuant to specific guidelines adopted by the editor of the magazine;

Questions:

- Do you object to any or all of the above draft language, and if so, why?
- If you object only to the language of the draft consolidated exemption but not to the general concept, could you offer suggestions to improve the language?

2) Amending 1 V.S.A. § 317(c)(30), and moving it to a new 1 V.S.A. § 317(d)

Last year we had an email discussion about clarifying 1 V.S.A. § 317(c)(30) as follows:

(30) all code and machine readable structures of state funded and controlled state-controlled database applications structures and application code, including the vermontvacation.com website and Travel Planner application, which are known only to certain State departments engaging in marketing activities and which give the State an

opportunity to obtain a marketing advantage over any other state, regional, or local governmental or nonprofit quasi-governmental entity, or private sector entity, unless any such State department engaging in marketing activities determines that the license or other voluntary disclosure of such materials is in the State's best interests;

Question:

- Do you still support these changes to § 317(c)(30)?

Currently, the Public Records Act (PRA), unlike the federal Privacy Act,¹ does not distinguish between public records that **MUST** be kept confidential, and records that may **but are not required to be** withheld from public inspection and copying.

The Committee is considering recommending that current 1 V.S.A. § 317(c) be split into two separate lists for each category as follows:

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

* * *

(d) The following public records are exempt from public inspection and copying and may be withheld at the discretion of the public agency:

* * *

Question:

- Should § 317(c)(30) appear under the new 1 V.S.A. § 317(d)? In other words, should agencies be allowed, but not required, to withhold the records described in § 317(c)(30)?

3) Revised and 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.’”² 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.”³

The Committee is taking up this exemption at its December 13 meeting. However, because the Office of Legislative Council 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 would recognize certain categories of personal information that the

¹ 5 U.S.C. § 552a.

² *Kade v. Smith*, 180 Vt. 554, 557 (2006) (quoting *Trombley v. Bellows Falls Union High School District*, 160 Vt. 101 (1993)).

³ *Id.*

General Assembly has previously determined should be categorically exempt, while others would retain the concept of a balancing test.

Other exemptions in the list at 1 V.S.A. § 317(c) address personal privacy interests: of interest to your agency, 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,” and 1 V.S.A. § 317(c)(40) addresses records of genealogy in support of an application for tribal recognition. Also of interest to your agency is 10 V.S.A. § 531(i), which addresses employee-specific personal identifying information collected in connection with evaluating the employment training program and the workforce education and training fund.

I believe that § 317(c)(12) and (c)(40) can be repealed if 1 V.S.A. § 317(c)(7) is amended as follows, and that 10 V.S.A. § 531 is appropriate to recognize as categorically exempt:

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

* * *

(7)(A) *[text omitted – individually identifying health information]*

(B) *[text omitted – medical records categorically exempt]*

(C) *[text omitted – records relating to personal finances]*

(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); 10 V.S.A. § 531(i) (Employment Training Program and Workforce Education and Training Fund; employee-specific personal identifying information) [cross references from other titles omitted for brevity]

(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?
- If you object only to the language, but not to the concept of splitting up 317(c)(7), could you suggest improvements to the language?
- Do you object to the concept of repealing (c)(12) and (c)(40) and folding them into an amended (c)(7)?

4) Revise 10 V.S.A. § 7(b) (benchmark reports submitted by recipients of economic development assistance)

In your November 30, 2012 written submission to the Committee, you recommended that 10 V.S.A. § 7(b) be clarified.

Question:

- Does ACCD recommend a particular clarification, and if so, could you send me proposed language?