

To: Dave Cassetty, General Counsel, Department of Financial Regulation
CC: Karla Nuissl, Assistant General Counsel, Department of Financial Regulation
From: Helena Gardner, Legislative Counsel
Re: Act 23 Questionnaire: DFR-related exemptions

1) Consolidated complaint and dispute resolution exemption

1 V.S.A. § 317(c)(26) (DFR) and (27) (Dep't of Public Service) are nearly identical exemptions related to complaints against regulated entities and associated agency-assisted dispute-resolution.

The Public Records Study Committee (“Committee”) is considering recommending that (c)(27) be repealed and effectively folded into a broadened (c)(26). The language below will also be sent to the Department of Public Service for review.

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

* * *

(26) information and records provided ~~to the department of financial regulation by an individual~~ a person to a public agency for the purposes of having the ~~department~~ the public agency assist ~~that individual~~ the person in resolving a dispute with ~~any person or company~~ a person regulated by the ~~department~~ public agency, and any information or records ~~provided by a company or any other person in~~ acquired in connection with the ~~individual's~~ dispute;

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) Consolidated medical and treatment 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 the Office of Legislative Council has been charged under Act 23 with drafting a bill listing all PRA exemptions in the PRA itself, and consolidating exemptions where appropriate, I have

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

² *Id.*

already been considering ways to possibly restructure 1 V.S.A. § 317(c)(7). In short, I am considering recommending that § 317(c)(7) be split up into 6 subdivisions.

In the case of certain records relating to individuals, the General Assembly has determined that the records should be categorically exempt, and not subject to a balancing test. As a result, several of the new subdivisions in § 317(c)(7) will reflect a categorical approach. This includes a new categorical exemption for medical and treatment records as follows:³

(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) medical and treatment records, to the extent provided in 12 V.S.A. § 1612 (patient’s privilege); 18 V.S.A. § 9414(f) (evaluation of managed care organization’s performance; medical records protected by patient’s privilege); 28 V.S.A. § 205 (confidential information revealed by offender in connection with treatment program); and 33 V.S.A. § 6705 (subrogation rights of Department of Vermont Health Access; medical treatment records)

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

* * *

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?

3) Consolidated peer review-related exemption

Three Public Records Act exemptions address the confidentiality of peer review records. The Committee is considering recommending the following consolidated exemption:⁴

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

* * *

(#) records related to peer review proceedings, to the extent specified in 18 V.S.A. § 9414(f) (evaluation of managed care organization’s performance; peer review records); 26 V.S.A. § 1443 (health services peer reviews); and 26 V.S.A. § 4190 (licensed midwives peer reviews);

Questions:

- Do you object to the draft language above, and if so why?
- If you object only to the language, but not the concept of the consolidated identifying information exemption, could you suggest improvements to the language?

³ This draft language is also being sent to Kenneth Schatz of AHS for review.

⁴ This draft language is also being sent to David Herlihy of the Board of Medical Practice for review.

4) Policy behind 18 V.S.A. § 9457—hospital financial services reporting

18 V.S.A. § 9457 exempts from public disclosure patient and health care practitioner identifying information in hospital reporting requirements.

As noted in item 2 above, I am considering recommending that 1 V.S.A. § 317(c)(7) be revised to be split into several subdivisions. The first subdivision, (c)(7)(A), would exempt individually identifiable health information as follows:

(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.

This definition mirrors the definition of “individually identifiable health information” in HIPAA regulations. I do not understand this definition to encompass identifying information of health care practitioners.

Question:

- What is the policy reason for exempting identifying information of health care practitioners? Is it an issue of an invasion of the personal privacy of health care practitioners? Or a concern about marketing to them? Both?

5) Consolidated examination and investigation records exemption

As noted in the cover memorandum, the goal of the Act 23 project is not necessarily to repeal exemptions scattered throughout the V.S.A., but instead to include a complete list of exemptions in the PRA itself (with exemptions consolidated, where appropriate), and to have the various exemptions cross reference back to that list.

As discussed at the Committee’s November 1 meeting, numerous DFR-related exemptions relate to the examination or investigation of DFR-regulated entities. You explained the rationale for keeping the variations across these exemptions intact. The Committee is considering recommending a consolidated exemption in 1 V.S.A. § 317 that is sufficiently flexible to accommodate these variations:

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

* * *

(#) records of investigations or examinations by the Department of Financial Regulation, to the extent provided in 8 V.S.A. § 23 (banks and financial institutions); 8 V.S.A. § 3574 (insurance companies); 8 V.S.A. § 3687 (insurance holding company system); 8 V.S.A. § 3840 (life settlement provider); 8 V.S.A. § 6008 (captive insurance company); 8 V.S.A. § 6048o (special purpose captive insurance company); and 8 V.S.A. § 6074 (risk retention managing general agent);

This language is based loosely on federal Freedom of Information Act Exemption 8, which exempts information “(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions....”⁵

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?

6) Consolidated exemption for records received from other jurisdictions or entities

As discussed at the Committee’s November 1 meeting, numerous DFR-related exemptions relate to the confidentiality of records received from other jurisdictions, organizations, or entities. You explained the rationale for keeping the variations across these exemptions intact. The Committee is considering recommending a consolidated exemption in 1 V.S.A. § 317 that is sufficiently flexible to accommodate these variations:

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

* * *

(#) a record received from a jurisdiction, organization, or entity under a confidentiality agreement or with notice or the understanding that it is confidential under the laws of the source jurisdiction, to the extent provided in 8 V.S.A. § 22 (Department of Financial Regulation: general sharing provision); 8 V.S.A. §§ 2561, 2768, and 2923 (National Mortgage Licensing System and Registry); 8 V.S.A. § 3571 (insurance company financial analysis ratios and examination analyses received from the National Association of Insurance Commissioners); 8 V.S.A. § 3577(1)(3) (insurance company actuarial reports, opinion summaries, work papers, and related information); 8 V.S.A. § 3588(c)(2) (insurer’s Own Risk and Solvency Assessment (ORSA) records); 8 V.S.A. § 3687(c) and (f) (records related to insurance holding company systems); 8 V.S.A. § 8308(c) (risk-based capital reports and risk based capital plans of insurers);

You may notice that several sections cited in this consolidated exemption are also cited in the draft consolidated exemptions cited in items 5 and 7, including 8 V.S.A. §§ 3577, 3588, 3687, and 8308.

⁵ 5 U.S.C. § 552(b)(8).

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?

7) Consolidated exemption for records required to be submitted by entities regulated by the Department of Financial Regulation

As discussed at the Committee’s November 1 meeting, numerous DFR-related exemptions relate to the confidentiality of records required to be submitted by entities regulated by DFR or seeking licensure from DFR.⁶ You explained the rationale for keeping the variations across these exemptions intact. The Committee is considering recommending a consolidated exemption in 1 V.S.A. § 317 that is sufficiently flexible to accommodate these variations:

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

* * *

(36)(i) ~~anti-fraud plans and summaries submitted by insurers to the Department of Financial Regulation~~ for the purposes of complying with 8 V.S.A. § 4750; and
(ii) other records required to be submitted by entities regulated by or seeking licensure from the Department of Financial Regulation, to the extent provided in 8 V.S.A. § 3561 (insurance company market conduct annual statements; medical professional liability closed claims); 8 V.S.A. § 3577 (insurance company actuarial reports, opinion summaries, work papers, and related information); 8 V.S.A. § 3588 (Insurer’s Own Risk and Solvency Assessment (ORSA) records); 8 V.S.A. § 3683 (domestic insurers; notices of divestitures, acquisitions, and mergers); 8 V.S.A. § 3683a (insurers licensed to do business but not domiciled; preacquisition notification); 8 V.S.A. § 3687(a) (insurance holding company system; registration statements, enterprise risk report, notification of certain transactions); 8 V.S.A. § 4164 (Vermont Life and Health Insurance Guaranty Association); 8 V.S.A. § 4488 (termination of agent; fraternal benefits society); 8 V.S.A. § 6002 (captive insurance company license applications); 8 V.S.A. § 8308 (risk-based capital reports and risk based capital plans of insurers);

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?

⁶ Some of these records would fall under the language of Federal Freedom of Information Act Exemption 8, “which exempts information “(8) contained in or related to examination, *operating, or condition reports* prepared by, *on behalf of, or for the use of an agency* responsible for the regulation or supervision of financial institutions....” However, it seemed to make more sense under Vermont Law to separate DFR examination and investigation records from operating and condition records of DFR-regulated entities.