

To: Molly Bachmann, General Counsel, Department of Taxes
From: Helena Gardner, Legislative Counsel
Re: Act 23 Questionnaire: tax-related exemptions

1) Consolidated PRA exemption for tax returns and related records

1 V.S.A. § 317(c)(6) and 32 V.S.A. § 3102 both address the confidentiality of tax returns and related records. 1 V.S.A. § 317(c)(6) applies broadly to the Vermont Department of Taxes as well as records “submitted by a person to any public agency....” This subdivision lists as exempt “a tax return and related documents, correspondence and certain types of substantiating forms” but does not further define these terms.

By contrast, 32 V.S.A. § 3102 applies to tax “return or return information” and specifically defines the terms “return” and “return information.” Unlike 1 V.S.A. § 317(c)(6), this section extends only to such records and information in the possession of officers, employees, and agents of the Department of Taxes, and in the possession of persons to whom Vermont law authorizes or requires the Commissioner to divulge return or return information. Also unlike 1 V.S.A. § 317(c)(6), this section specifies the many circumstances when the Department may or must share tax return and return information.

In *Finberg v. Murnane*,¹ the Vermont Supreme Court held that the names and addresses of taxpayers subject to Burlington’s business gross receipts tax were not exempt from public inspection and copying under 1 V.S.A. § 317(c)(6).² This information was held by the City of Burlington, and not the Department of Taxes, so 1 V.S.A. § 317(c)(6) was the applicable exemption, not 32 V.S.A. § 3102. Although under 32 V.S.A. § 3102’s definition of “return information,” the names and addresses of taxpayers are clearly exempt, the Court declined to read this definition into 1 V.S.A. § 317(c)(6). The Court reiterated that Public Records Act exemptions are narrowly construed, and noted that 1 V.S.A. § 317(c)(6) and 32 V.S.A. § 3102 “are applicable to different taxing authorities and different taxing schemes.”

Although 1 V.S.A. § 317(c)(6) and 32 V.S.A. § 3102 may apply to different taxing authorities, clarifying the interplay of these two sections would be useful, since 1 V.S.A. § 317(c)(6) does extend to tax returns in the custody of the Department of Taxes. As a result, the Public Records Study Committee (“Committee”) is considering recommending that 1 V.S.A. § 317(c)(6) be amended as follows:³

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

* * *

(6)(A) tax return and return information in the custody of the Vermont Department of Taxes or an agent thereof, or divulged to a public agency by the

¹ 159 Vt. 431 (1992).

² At the time of the *Finberg* decision, the text of 1 V.S.A. § 317(c)(6) was at 1 V.S.A. § 317(b)(6). I will refer to the exemption as 1 V.S.A. § 317(c)(6).

³ I am also sending this language to Karen Horn of VLCT for review.

Department of Taxes in accordance with law, to the extent provided under 32 V.S.A. §§ 3102 and 5939; or

(B) a other tax return and related documents, correspondence, and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont Department of Taxes or submitted by a person to any public agency in connection with agency business;

Questions:

- Do you object to any or all of the above draft language, and if so, why?
- Does the draft language reflect a misunderstanding of how 1 V.S.A. § 317(c)(6) and 32 V.S.A. § 3102 interplay?
- 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 exemption for taxpayer inventories of taxable property

Two PRA exemptions relate to taxpayer inventories of taxable property. The Committee is considering recommending a draft consolidated exempt that addresses both:

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

* * *

(#) taxpayer inventory information, to the extent provided in 32 V.S.A. §§ 3411 and 4009;

Questions:

- What is the scope of the records obtained by the Property Valuation and Review Division from local officials, referenced at 32 V.S.A. § 3411(4)? Is this subdivision intended to refer only to the taxpayer inventory information described in 32 V.S.A. ch. 129, subch. 1?
- *Depending on your answer to the first question:* does the draft consolidated exemption above make sense?

3) Revised and consolidated personal records exemption

As you probably know, 1 V.S.A. § 317(c)(7) is the general Public Records Act 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.’”⁴ 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.”⁵

⁴ *Kade v. Smith*, 180 Vt. 554, 557 (2006) (quoting *Trombley v. Bellows Falls Union High School District*, 160 Vt. 101 (1993)).

⁵ *Id.*

Not surprisingly, the General Assembly has decided that certain records implicating personal privacy should be categorically exempt from public inspection and copying, and not subject to a balancing test.

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.

These categories would include a new (c)(7)(C) for records related to an individual's personal financial records and a new (c)(7)(D) for records implicating personal privacy that the General Assembly has previously decided should be 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) records relating to an individual's personal finances:

(i) to the extent specified in 15 V.S.A. § 662 and Rule 4 of the Vermont Rules for Family Proceedings (affidavits of income and assets); 16 V.S.A. § 2943 (income certificates and reports made to the Vermont Student Assistance Corporation); 31 V.S.A. § 674(L1I) (financial and other personal records produced or acquired by Tri-State Lottery Commission); and 33 V.S.A. § 3102(f) (records obtained by the Department of Taxes related to individuals' applications for assistance);

(ii) if disclosure of the record would constitute a clearly unwarranted invasion of personal privacy;

(D) records the disclosure of which would cause an unwarranted invasion of personal privacy, to the extent provided in 24 V.S.A. § 1884 (books of registry held by municipal treasurer or other designated registrar); 32 V.S.A. § 983 (books of registry held by the State Treasurer or other designated registrar);
[cross references from other titles omitted for brevity]

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?