

To: John Zicconi, Executive Secretary, Transportation Board
CC: John Dunleavy
From: Helena Gardner, Legislative Counsel
Re: Act 23 Questionnaire: T-board related exemptions

1) Amend 5 V.S.A. § 3452?

During the November 1, 2013 meeting of the Public Records Study Committee, questions arose about the applicability of the confidentiality provisions of 5 V.S.A. § 3452 when the owner of railroad infrastructure is the State. A question also was raised about why compensation and benefits of a railroad's directors, officers, and employees and financial standing would be confidential even if the railroad were a publicly traded company.

These issues and questions might best be addressed by simply repealing 5 V.S.A. § 3452(b), provided that 1 V.S.A. § 317(c) is amended to clarify that trade secrets must not be disclosed unless specifically authorized by law.¹ The effect of repealing § 3452(b) would be that the confidentiality of railroad trade secrets would be governed by 1 V.S.A. § 317(c)(9) with the exception specified at 5 V.S.A. § 3452(c). Given the interpretation of 1 V.S.A. § 317(c)(9) in *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341 (2002) that the balance sheets, cash flow statements, revenue histories, assets and liabilities, statements of retained earnings, names of current and potential shippers, etc. of closely held rail corporations are exempt from public inspection and copying if they meet the tests of 317(c)(9), it would appear that the specificity of 5 V.S.A. § 3452(b) may not be required.

As a result, the Committee is considering recommending that 5 V.S.A. § 3452(b) be repealed. I did not find any federal law or regulation that would prevent this repeal.

Questions:

- Would you oppose the repeal of 5 V.S.A. § 3452(b), and if so, why?
- Would you recommend amending 5 V.S.A. § 3452(b) to address the two issues described in the first paragraph above?
- Are you aware of any federal law or regulation that governs confidentiality of a State's supervision and inspection of railroad records?

2) Consolidated trade secret/confidential business information exemption.

As noted above, 1 V.S.A. § 317(c)(9) is the Public Records Act's (PRA) general trade secret exemption. This exemption is not categorical: it requires a showing that the purported trade secret "gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it..." As a result, certain parties may prefer the categorical language of 5 V.S.A. § 3452(b)(1)–(3).

As an alternative to recommending that of 5 V.S.A. § 3452(b) be repealed, the Committee is considering recommending that 5 V.S.A. § 3452 be listed in a revised 1 V.S.A. § 317(c)(9)

¹ As noted below, the Committee may recommend that 1 V.S.A. § 317(c)(9) itself be clarified.

which preserves the status quo, *i.e.* the distinction between categorical and non-categorical protection for different types of business information:

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

* * *

(9)(A) confidential business records or information, to the extent provided in 5 V.S.A. § 3452 (information concerning railroad management and the condition of railroad equipment) [citations to other exemptions omitted for brevity]; and

(B) trade secrets and confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern or their agents, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it, except that the disclosures required by 18 V.S.A. § 4632 shall not be included in this subdivision;

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) Amend 9 V.S.A. § 4100b?

Under C.V.R. 14-010-020 § 14 (“Pre-hearing procedure”), parties are required to serve the parties and the Board a pre-trial memorandum. It appears that a pre-trial conference may address topics other than settlement. Section 14 states that “conference discussions concerning settlement shall remain confidential....” (emphasis added).

The Committee is considering recommending that the scope of confidentiality at 9 V.S.A. § 4100b(e) likewise be clarified, along with its status as a PRA exemption, as follows:

(e) The ~~board~~ Board shall be empowered to determine the location of hearings, appoint persons to serve at the deposition of out-of-state witnesses, administer oaths, and authorize stenographic or recorded transcripts of proceedings before it. Prior to the hearing on any protest, but no later than 45 days after the filing of the protest, the ~~board~~ Board shall require the parties to the proceeding to attend a prehearing conference in which the chair or designee shall have the parties address the possibility of settlement. If the matter is not resolved through the conference, the matter shall be placed on the ~~board's~~ Board's calendar for hearing. Conference discussions and records concerning settlement shall remain confidential, shall be

exempt from public inspection and copying under 1 V.S.A. 317(c)(#)², and shall not be disclosed or used as an admission in any subsequent hearing.

Questions:

- Do you oppose this amendment, and if so, why?
- If you oppose only the language but not the concept of the amended language, could you suggest improved language?

4) Consolidated settlement and mediation exemption

Several PRA exemptions protect records related to settlement discussions and mediation proceedings. The Committee is considering recommending a consolidated exemption as follows:

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

* * *

(#) records related to settlement discussions or mediation, to the extent provided at 9 V.S.A. § 4100b (motor vehicle franchise disputes; settlement discussions of parties before Transportation Board); 9 V.S.A. § 4555(b) (Human Rights Commission; settlement discussions); 12 V.S.A. § 4634 (report filed in connection with mandatory mediation program in mortgage foreclosure actions); 12 V.S.A. § 7015 (medical malpractice pre-suit mediation);

Questions:

- Do you object to the above draft consolidated exemption?
- If you object to the language, but not to the concept of the consolidated exemption, could you suggest alternative language?

² See item #4 below for the proposed new consolidated 317(c)(#) provision that addresses settlement and mediation records.