

## MEMORANDUM

**To:** Standing Committees of the Vermont House of Representatives and Senate  
**From:** Public Records Legislative Study Committee  
**Date:** January 2013 (*DRAFT update - 10/30/13*)  
**Re:** Recommended checklists of issues to consider when reviewing exemptions to the Public Records Act, or a grant of rulemaking authority to create new exemptions to the PRA

In its second annual report, the Public Records Legislative Study Committee (“Committee”) recommended that the standing committees of the House and Senate use checklists when reviewing either (A) an exemption to the Public Records Act (“PRA”), or (B) a grant of rulemaking authority to an agency to adopt rules creating an exemption to the PRA. The Committee also requests that persons testifying before the Committee about whether existing exemptions should be retained, repealed, or modified, consider the checklist prior to testifying.

### A. REVIEW OF EXEMPTIONS

#### \_\_\_ 1. Is the exemption necessary and justified?

\_\_\_ Does the need for the record to be exempt from public inspection and copying outweigh the policy in favor of open access to public records?

\_\_\_ Is the subject of the exemption already protected by another exemption? (Even if so, there might be reasons to retain the exemption with an appropriate cross-reference).

#### \_\_\_ 2. Is the language of the exemption clear, and tailored to the exemption’s purpose?

The language of the exemption should not be so broad that it exempts records that do not need to be withheld to serve the purpose of the exemption, or so narrow that it fails to exempt records which should be withheld to achieve the purpose of the exemption.

\_\_\_ Is the scope of the exemption expressed in clear and unambiguous language?

#### \_\_\_ 3. Should the exemption be categorical, or content-based?

Should a record or information related to a subject matter be exempt as a category, or should a record or information be exempt based on a particular content-based test? For example, social security numbers and in some contexts, medical records, are exempt as a category, whereas the trade secret and crime detection and investigation exemptions provide that records meet certain substantive tests to be exempt.

#### \_\_\_ 4. Is the intent to exempt only certain information (so that redaction may be required), or to exempt an entire document that relates to a certain subject?

Compare 1 V.S.A. § 317(c)(41), which exempts entire “documents” reviewed by the Victims’ Compensation Board, with 1 V.S.A. § 317(c)(25), which exempts passwords, access codes, and similar information.

#### \_\_\_ 5. Should the exemption be limited in duration?

Unless an exemption is expressly limited in duration, courts may interpret it to be perpetual. In some cases, it may be appropriate for confidentiality to be removed after a certain number of years, or after a triggering event (*e.g.*, after an agency brings an enforcement action).

\_\_\_ **6. Is the goal of the exemption to prohibit an agency from releasing certain records, or merely to allow an agency, at its discretion, to withhold certain records?**

\_\_\_ If the goal is to prohibit the release of certain records, uniform language should be used specifying that the record[s] “shall be exempt from public inspection and copying under the Public Records act and shall not be released.”

*Note:* Consider whether a specific penalty should be established for the intentional or negligent release of such records, and whether a private person can enforce the prohibition. *See, e.g.*, 18 V.S.A. § 1001(e). Absent a specific penalty, the only recourse for a person affected by disclosure may be through a common law tort suit.

\_\_\_ If the goal is only to authorize an agency, *at its discretion*, to withhold certain records, uniform language should be used specifying that the record[s] “[is/are] exempt from public inspection and copying under the Public Records Act.”

\_\_\_ **7. If the record “shall not be released,” should there be exceptions authorizing disclosure to particular persons or under particular circumstances?**

\_\_\_ Should the public agency be authorized to disclose the record to specified persons for certain purposes, *e.g.*, to law enforcement in the exercise of their duties?

\_\_\_ Is the exemption intended to benefit a person, and if so, should that person be able to waive confidentiality?

\_\_\_ If a person is authorized to receive a record under an exception to the exemption for a specific purpose, should the person be authorized to use the record only for the specified purpose, and be prohibited from further disclosure of the record?

\_\_\_ Should government entities be authorized to share records amongst each other?

\_\_\_ *If applicable:* Is there a rational basis for limiting the exception to specified persons, but not to other similarly situated persons?

\_\_\_ **8. Is the exemption required under federal law, a multi-jurisdictional compact, or an agreement with a national or multistate regulatory entity?**

\_\_\_ If an exemption is required under these circumstances, consider whether to cite to the relevant federal law, compact, or agreement, or to incorporate the substantive provisions of the law, compact, or agreement into the exemption.

\_\_\_ *If applicable:* Does the exact language of a federal law, compact, or agreement need to be used, or is there flexibility to tailor it to Vermont statutes if appropriate?

\_\_\_ **9. Should the record also be protected from subpoena and discovery in litigation?**

A record’s status as confidential or exempt from public inspection and copying does not necessarily shield it from subpoena or discovery in litigation. If the General Assembly intends the record to be privileged from subpoena or discovery in litigation, the exemption should specifically express this intent; however, depending on the circumstances, a litigant may have a constitutional right to discovery of records.

## **B. REVIEW OF GRANT OF RULEMAKING AUTHORITY TO CREATE A PRA EXEMPTION**

### **\_\_\_ 1. Is the exemption authorized to be adopted by rule necessary and justified?**

\_\_\_ Does the need for the record to be confidential outweigh the policy in favor of open access to public records?

\_\_\_ Is the subject of the exemption already protected by another exemption? (Even if so, there might be reasons to authorize the rulemaking with an appropriate cross-reference).

### **\_\_\_ 2. Do circumstances justify the creation of an exemption through agency rulemaking, instead of through an enactment of the general assembly?**

The General Assembly should delegate the authority to create a PRA exemption through rulemaking only under appropriate circumstances, *e.g.*, the subject of the exemption involves complex or detailed questions that an agency is better-positioned to resolve.

### **\_\_\_ 3. Is the grant of rulemaking authority specific and unambiguous?**

The grant of rulemaking authority to create an exemption to the PRA should be specific and unambiguous, providing guidance to the agency concerning the subject matter and scope of the exemption). A vague grant of legislative authority may raise constitutional issues, and increases the risk that an agency will propose a rule inconsistent with legislative intent.

### **\_\_\_ 4. Does the rulemaking meet the requirements of 2 V.S.A. § 205(a), which requires the General Assembly to express its intent in the legislation?**

### **\_\_\_ 5. Is the grant of rulemaking authority narrowly tailored to meet the purposes of confidentiality, in accordance with legislative intent?**

The language of the rulemaking authority should not be so broad so as to authorize rulemaking beyond the scope needed to serve the purpose of the exemption, or so narrow as to preclude rulemaking needed to achieve the purpose of the exemption.

### **\_\_\_ 6. Should the agency be directed to adopt rules creating an exemption that is limited in duration?**

Unless an exemption is expressly limited in duration, courts may interpret it to be perpetual. In some cases, it may be appropriate for confidentiality to be removed after a certain number of years, or after a triggering event (*e.g.*, after an agency brings an enforcement action).

### **\_\_\_ 7. Should the agency be directed to adopt exceptions to the exemption?**

\_\_\_ The General Assembly should consider specifying criteria for the agency to consider in adopting any exceptions to an exemption.