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CC: Rep. Donna Sweaney and Sen. Jeanette White
 Commissioner Susan Donegan, Department of Financial Regulation
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Date: October 3, 2013
Subject: Public Records Study Committee: Questions Regarding DFR Exemptions

Overview: At our September 26, 2013 meeting regarding the Public Records Study Committee’s review of DFR-related Public Records Act (PRA) exemptions, staff of the Office of Legislative Council promised to send questions in advance of the November 1, 2013 meeting of the Public Records Study Committee. Section I (p.1) raises questions related to specific DFR-related exemptions, and Section II (p.4) raises more generally applicable questions.

I. Questions About Specific Exemptions

1 V.S.A. § 317(c)(26): Information submitted to the Department of Financial Regulation (DFR) in dispute re DFR regulated entity

- Why are only complaints submitted by “individuals” confidential? Should this subdivision be amended to cover complaints submitted by “persons”?

1 V.S.A. § 317(c)(28) (records of external review of health care and mental health service decisions); **8 V.S.A. § 4089a(i)** (health care information acquired by or provided to the independent panel of mental health involved in reconsideration of a mental health review); **and 8 V.S.A. § 4089f(d)(6)** (health care information acquired by an independent external review of a health benefit plan decision to deny, terminate, or reduce health care coverage or to deny payment for a health care service)

- In Act 21, § 14 of 2011, 8 V.S.A. § 4089a(c)(7) was amended to replace “independent panel of mental health professionals” with “independent review organization.” However, subsecs. (g) and (i) were not updated with a similar substitution. Do you agree that a technical correction is needed?
- § 4089a(i) refers to the independent panel of mental health professionals (which should read the “independent review organization”?) not being a public agency. In 8 V.S.A. § 4089f, which also discusses confidentiality of the records of IROs, it does not say that IROs are not public agencies. Should these two sections be made consistent on this point?
- As a factual matter, how and when do records flow from IROs to DFR?

1 V.S.A. § 317(c)(36): Anti-fraud plans

- Should this exemption also extend to the Department of Labor, as 8 VSA § 4750(b) provides for workers’ compensation insurers to file anti-fraud plans?

8 V.S.A. § 15(b): The Commissioner of DFR can make public a portion of advisory interpretation and retain as confidential other portions

- As written, this exemption gives the Commissioner total discretion as to whether to “make public” all or part of an advisory interpretation. Would amending this provision to establish a presumption in favor of disclosure, while authorizing the Commissioner to withhold an advisory opinion if disclosure of the opinion would cause unfair prejudice or unfair advantage, create any issues?

8 V.S.A. § 22: Information acquired by DFR pursuant to a confidentiality sharing agreement when the information is designated as confidential by the furnisher of the information

- As subsec. (c) is written, it appears to give a furnisher of information unfettered discretion to designate records as confidential. Would DFR oppose the following change? “Any information furnished pursuant to this section by or to the ~~commissioner~~ Commissioner that has been designated confidential by the furnisher of the information in accordance with law shall...”

8 V.S.A. § 23: All records of investigations of banks and financial institutions licensed by DFR and all records and reports of examinations by the commissioner of DFR

- This exemption generally covers investigations and examinations of banks and financial institutions under Parts 2 and 5 of Title 8. Other sections separately address investigations and examinations of insurance companies, life settlement providers, and risk retention groups. See 8 V.S.A. §§ 3574, 3687, 3840, 4813m, 6008, 6048o, 6074. Does the confidentiality of investigation and examination records in these other contexts need to be separately addressed in these various sections, or is one consolidated exemption workable (and, if workable, preferable)?

8 V.S.A. § 3683(a)(2): Notices of divestitures, acquisitions, and mergers related to domestic insurers

- This section was substantially amended in Sec. 28 of Act 29 of 2013. The language of this section is confusing; it is difficult to parse out what is intended to be confidential. Do you agree? If so, could this be addressed in a technical correction bill?
- What is intended to be confidential under this provision?

8 V.S.A. § 3687: Records obtained in the course of an examination or investigation of an insurance holding company system; registration statements and enterprise risk report of insurers part of a holding company system; prior notification of certain transactions involving a domestic insurer and a person in holding company system

- [Depending on your response to the question with regard to 8 V.S.A. § 23]: Why are the provisions of this exemption differ from the provisions of 8 V.S.A. § 3574(d), pertaining to examination reports of insurance companies? Should one of these sections simply cross-reference the other, or should they be made consistent in some other way?
- This section was amended in Sec. 33 in Act 29 to cross-reference subdivisions 3683(b)(12) and (13), which were added in Sec. 28 of Act 29, and the meaning of what records are intended to be covered under the cross-references is unclear. Do you agree? Should this be the subject of a technical correction?

8 V.S.A. § 4488(5): Notice to DFR from a fraternal benefits society of termination of appointment of an insurance agent

- The language of this exemption differs substantially from the language of 8 V.S.A. § 4813m(f), addressing the termination of insurance agents generally and associated proceedings. Should § 4488(5) be amended to cross reference the provisions of § 4813m(f)?

8 V.S.A. §§ 6002(c)(3) (captive insurance company license applications) **and 6052(c)(2)** (risk retention group applications).

- The exemption provisions in these two sections are very different. Is there a rationale for the differences? If there is not, do you have a recommendation as how to make the two provisions consistent?

8 V.S.A. § 6008(c): Any reports, information, or documents acquired by DFR in the course of an examination of captive insurance company

- [Depending on your response to the question with regard to 8 V.S.A. § 23]: Should the language and scope of this exemption be made consistent with the language and scope of 8 V.S.A. § 6048o and 8 V.S.A. § 6074?

8 V.S.A. § 6052: Proprietary information submitted to DFR by risk retention groups

- Subsec. (d) addresses examination reports, and says that the provisions of § 6008(c) apply, except that “such provisions shall not apply to final examination reports relating to risk retention groups....” I assume the intent of this language is that final examination reports be publicly available, since § 6008(c) states that examination reports are confidential? If that is the intent, what is the reason for the difference?

8 V.S.A. § 7041(e) (records produced in the course of DFR delinquency proceeding of domestic insurer) and **§ 7043** (records related to insurance delinquency proceedings)

- What is the scope of the records intended to be confidential under this section - just minutes of/notices of the hearings? Does 1 V.S.A. § 317(c)(24) address the scope of the records intended to be confidential under this provision?
- Are records confidential under § 7041(e) already fully covered under § 7043?

9 V.S.A. § 5607: Securities documents acquired by DFR, including records related to audits, inspections, and trade secrets

- Who are the “designees” referenced in 5607(b)(6)?

II. General Questions

(A) Most DFR exemptions appear to be categorical rather than conditional.¹ *See, e.g.*, 1 V.S.A. § 317(c)(26), 8 V.S.A. § 23; 8 V.S.A. § 3561. An example of a conditional exemption is the newly amended crime detection and investigation exemption, 1 V.S.A. § 317(c)(5). *See* <http://www.leg.state.vt.us/DOCS/2014/ACTS/ACT070.PDF>. DFR has numerous exemptions for investigation and examination records,² and these exemptions appear to be categorical. Could DFR review its exemptions with an eye toward considering whether these exemptions should be conditional rather than categorical? Does DFR oppose any movement toward conditional exemptions, and if so, why?

(B) Likewise, could DFR review whether any of its exemptions should be time-limited?

(C) A recently enacted DFR exemption has 11 elements related to confidentiality (not all Public Records Act-related). 8 V.S.A. § 3588 addresses an insurer's Own Risk and Solvency Assessment (ORSA) summary report filed with DFR. Under § 3588, an ORSA report:

- 1) is confidential (§ 3588(a))
- 2) privileged (§ 3588(a))
- 3) not subject to public inspection and copying under the PRA (§ 3588(a))
- 4) not subject to subpoena (§ 3588(a))
- 5) not discoverable or admissible in any private civil action (§ 3588(a))

In addition:

- 6) neither the Commissioner nor any person acting under his or her authority is permitted or required to testify in any private civil action concerning confidential documents (§ 3588(b))
- 7) such records may be shared with other regulatory agencies and law enforcement authorities provided the recipient agrees to maintain confidentiality (§ 3588(c)(1))
- 8) the Commissioner may receive such records from other regulatory agencies and law enforcement authorities and shall maintain confidential such records received with the notice or understanding of confidentiality (§ 3588(c)(2))
- 9) the Commissioner shall enter into written agreements with other regulatory agencies and law enforcement authorities governing sharing and use of information, which agreement shall meet 6 statutory requirements (§ 3588(c)(3)(A)–(F))
- 10) no waiver of any applicable privilege shall occur as a result of disclosure of ORSA-related information to the Commissioner or a result of authorized sharing (§ 3588(e))
- 11) records in the possession of control of NAIC or a 3d party consultant are confidential as in items 1–5 above. (§ 3588(f))

¹ A conditional exemption might require a balancing of the public interest in access to a record versus the harm caused by disclosure, or a showing that disclosure creates a risk of unfair prejudice to the person to whom the record pertains or of unfair advantage to another person. If an exemption is conditional, the records at issue may be subject to redaction.

² *See* 8 V.S.A. §§ 23, 2530, 3574, 3687, 3840, 4813m, 6008, 6048o, 6074.

Questions:

- The provisions related to information sharing in 8 V.S.A. § 3588(c) and (e) largely—but not word for word—duplicate the generally applicable information sharing provisions of 8 V.S.A. § 22. In general, can and should a generally applicable provision like 8 V.S.A. § 22 be relied upon, instead of laying out much of the same material again in separate sections? Does 8 V.S.A. § 22 need to be updated to include some of the new elements found in § 3588?
- When drafting PRA exemptions, does DFR use a checklist or a similar tool in determining what confidentiality elements are needed for a particular section regarding confidentiality?
- In 2012, a trio of identical information sharing provisions was added, this time related to certain financial institutions (money services, debt adjusters, and loan servicers). See 8 V.S.A. §§ 2561, 2768, 2923. These sections are similar but not identical to 8 V.S.A. § 22. Could 8 V.S.A. § 22 have been amended to encompass this same content? Or were separate provisions needed?
- There are other examples of records that insurers are required to submit to DFR that do not contain all 11 elements found in 8 V.S.A. § 3588. *See, e.g.* 8 V.S.A. § 6002. Would it be useful to have consistency across such provisions, or is there a reason for the variations and nuances?