

## **Public Records Act Exemptions: Process for Referral and Review by the House and Senate Committees on Government Operations**

### **I. Overview**

In 2010 and 2011, there was significant debate among legislators, the press, and others regarding the Vermont Public Records Act (PRA). The debate focused on the numerous exemptions in statute to public review of records under the PRA. In response, the Vermont General Assembly enacted Act No 59 of 2011 (Act 59). Among other PRA changes, Act 59 established a legislative public records study committee (Study Committee) to review the PRA and its numerous exemptions.

In fulfillment of its charge, the Study Committee is reviewing each PRA exemption. Every year the Study Committee is informed of new PRA exemptions added in the previous legislative session. In 2011, the Study Committee initially identified 239 PRA exemptions. In 2012, the Study Committee identified 249 exemptions. In 2013, several exemptions were repealed and multiple exemptions removed from the list. Nevertheless, new exemptions were added in 2013, and currently there are 243 listed exemptions. Many of the new exemptions do not follow a consistent format or are duplicative of existing exemptions and, thus, arguably are unnecessary.

The House and Senate Committees on Government Operations both have jurisdiction over public records issues.<sup>1</sup> However, the public records jurisdiction of the Government Operations Committees does not ensure review of PRA exemptions, especially when an exemption is added or amended in a larger bill with a subject matter generally unrelated to public records. In these circumstances, the Government Operations Committees are left uninformed of a proposed PRA exemption or amendment and cannot provide input on the exemption's nature, format, or need.

If the Government Operations Committees did learn of a proposed PRA exemption or amendment, the committees could, arguably, move for commission of a bill to committee for review. In most instances, formal commission of a bill could cause delay, and the Chairs of the Government Operations Committees do not want to encumber the legislative process. However, informal input from the Government Operations Committees could help reduce the number of enacted PRA exemptions, or at least ensure that exemptions are consistently drafted or amended.

This document proposes a process through which the Government Operations Committees are informed of a proposed PRA exemption or substantive amendment. Under the proposal, when a committee vote on a bill containing a PRA exemption or substantive amendment is imminent, the Legislative Council attorney drafting the bill shall confer with the chair of the committee of jurisdiction regarding the exemption and this process. The chair of jurisdiction then could confer with the chair of Government Operations, or after approval of the chair of jurisdiction, the attorney drafting the bill could inform the Legislative Council PRA attorneys of the exemption. The PRA attorneys then would inform the chair of the respective Government Operations Committee.

Under this process, the chair of the Government Operations committee could confer with the chair of jurisdiction and evaluate whether and how the Government Operations Committee would provide input. This process would be similar to the informal House process for review of the establishment of state entities, such as boards; a process which works well, results in oversight and consistency in creation of entities, and does not unnecessarily delay legislative action. A PRA exemption review process hopefully would be similarly successful.

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<sup>1</sup> See House Rule 25 and Senate Rule 24.

## II. Details of Process for Government Operations Review of PRA Exemptions

### A. Drafting Process—Prior to Bill Introduction

- Under Legislative Council policy, an attorney drafting a bill should confer with the Legislative Council attorney with jurisdiction over a subject matter if the bill will address that subject matter.
- This referral allows the attorney with jurisdiction to provide input prior to bill introduction.
- Currently, an attorney drafting a PRA exemption in a bill is supposed to contact Helena Gardner—the attorney with PRA jurisdiction—before sending the bill to the bill sponsor.
- Helena provides guidance regarding format, consistency with existing language, and whether the subject matter of the proposed exemption is addressed by an existing PRA exemption.
- Under the Legislative Council referral process, the Government Operations Committee chairs are not informed of the proposed PRA exemption because the content of the draft bill is confidential until the member who requested the draft bill introduces it.
- The Legislative Council referral process prior to bill introduction would not change.

### B. Committee Markup of PRA Exemption

- If Committee markup of a bill proposes to add a PRA exemption that was not in the bill as introduced, the drafting attorney should consult with Helena Gardner regarding the exemption's format and consistency. Helena can also comment on whether an existing exemption may apply.
  - Helena would not inform the Government Operations chair unless the conditions below are met.

### C. Imminent Committee Passage of PRA Exemption

- When Committee passage of a bill that contains a PRA exemption is imminent—e.g. when the Committee is scheduled to vote on the bill—the attorney drafting the bill will confer with the Committee chair (chair of jurisdiction) regarding the PRA exemption and this process.
- The chair of jurisdiction could then confer with the chair of Government Operations; **or**—
  - With the approval of the chair of jurisdiction, the attorney drafting the bill could inform Helena Gardner, and Helena would inform the chair of Government Operations.

### D. Input from Government Operations Committee

- The chair of jurisdiction and the chair of Government Operations could confer regarding whether and to what extent the Government Operations Committee would review the PRA exemption.
- Except for special circumstances, the Government Operations Committee: 1) would not take formal possession of the bill; 2) would informally review the bill; and 3) would provide recommendations regarding the proposed PRA exemption to the chair of jurisdiction.