Vermont General Assembly

115 State Street • Montpelier, VT 05633-5301 • (802) 828-2231 • Fax: (802) 828-2424

MEMORANDUM

To: Rep. Bill Lippert, Chair, House Committee on Judiciary
Sen. Dick Sears, Chair, Senate Committee on Judiciary

From: Members of the Public Records Study Committee

Date: January #, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Study Committee or Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.

Over the last several years, the Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the relevant committees of jurisdiction.

Below is a description of several exemptions that the Committee recommended be reviewed by the House and Senate Committees on Judiciary.

We thank you in advance for considering our recommendations.

1 V.S.A. § 317(c)(18) (Department of Public Safety internal investigations)

1 V.S.A. § 317(c)(18) exempts from public inspection and copying "records of the office of internal investigation of the Department of Public Safety, except as provided in 20 V.S.A. § 1923."[1]

The Office of Internal Investigation is charged in 20 V.S.A. § 1923 with investigating (or causing to be investigated) all allegations of misconduct by members of the Department of Public Safety, and with maintaining a written log with respect to each allegation of misconduct.

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[1] 20 V.S.A. § 1923 provides in relevant part:
"(d) Records of the office of internal investigation shall be confidential, except:
(1) The state police advisory commission shall, at any time, have full and free access to such records; and
(2) The commissioner shall deliver such materials from the records of the office of internal investigation as may be necessary to appropriate prosecutorial authorities having jurisdiction; and
(3) The state police advisory commission shall, in its discretion, be entitled to report to such authorities as it may deem appropriate, or to the public, or to both, to ensure that proper action is taken in each case.

Because 1 V.S.A. § 317(c)(18) exempts records related to alleged misconduct by State police officers and other Department of Public Safety officers and employees, the Committee recommended that your committees review this exemption.

1 V.S.A. § 317(c)(24) (deliberations of agencies acting in judicial or quasi-judicial capacity)

1 V.S.A. § 317(c)(24) exempts records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity. At its October 31, 2014 meeting, the Committee heard from several witnesses and received written testimony on this exemption, some in support of and others in opposition to retaining the exemption in its existing form. Supporters opined that the exemption enables quasi-judicial decision-makers to engage in frank, uninhibited discussions and information-gathering, and is consistent with an exemption to the Open Meeting Law for public bodies engaged in deliberations in connection with quasi-judicial proceedings. Opponents offered that the grounds for many decisions vital to individuals' lives are worked out during the course of quasi-judicial proceedings, and that the public officers making such decisions should be accountable for the process by which they arrive at such decisions.

During the testimony on this exemption, it became apparent that users of the exemption have different interpretations concerning its scope. One witness indicated that the exemption would cover almost any written materials related to a quasi-judicial decision-making process, while another witness seemed to articulate a narrower view that the only written material prepared for discrete deliberative sessions would be exempt.

Because the Committee lacked time to resolve these varying interpretations or the competing policy arguments, it recommended that this exemption be reviewed by your committees.

3 V.S.A. §§ 163–64 (adult and juvenile diversion records)

3 V.S.A. § 163 authorizes and governs the operation of a juvenile court diversion project, and 3 V.S.A. § 164 authorizes and governs the operation of an adult court diversion project. Both sections broadly provide that information gathered during a diversion process be held "strictly confidential" and not released without the participant's prior consent. The adult diversion provision provides exceptions to this confidentiality which the juvenile diversion provision does not include, including authorizing the prosecuting attorney to release information to a victim upon a showing of legitimate need and subject to an appropriate protective agreement defining the purpose for which the information is being released.

During testimony on these provisions, the Committee learned that, despite the lack of parallel language in the juvenile diversion provision, victims of participants in juvenile diversion are afforded the same rights of access as are victims of participants in adult diversion. The witnesses recommended (or did not object to) amending 3 V.S.A. § 163 to clarify the rights of victims in the juvenile diversion context, and the Committee recommended that your committees consider such an amendment. The Committee also heard conflicting testimony as to whether DUI

offenders are eligible for adult diversion, and therefore also notes that your committees may wish to clarify this issue.

4 V.S.A. § 608(c) (proceedings of the Judicial Nominating Board, including candidate information)

4 V.S.A. § 608 governs the conduct of the Joint Committee on Judicial Retention. Subsection (c) provides that information obtained from members of the Vermont bar and the public on the performance of a judge or justice "shall be confidential until the committee commences its hearings under this subsection." Subsection (d) provides in part that "[c]opies of written comments received by the committee shall be forwarded to the judge, the justice, or the magistrate. A judge, a justice, or a magistrate seeking retention has the right to a reasonable time period to prepare and present to the committee a response to any testimony or written complaint adverse to his or her retention and has the right to be present during any public hearing conducted by the committee."

The Committee did not understand how to read these two provisions together. If the information is confidential until the Committee on Judicial Retention has a hearing, then is it prohibited from sending the information to the judge, justice, or magistrate seeking retention prior to his or her hearing? If so, then is the Committee required to take up the retention at a subsequent hearing, so the judge, justice, or magistrate has a "reasonable time to prepare and present a response"? If not, should the language be clarified?

Because the Committee was unable to answer these questions, it recommended that your committees review this provision to determine whether it is workable or ought to be clarified.

12 V.S.A. § 1614 (confidential communications made by a victim of sexual or domestic assault to a crisis worker)

12 V.S.A. § 1614(b) establishes the following privilege:

> (b) A victim receiving direct services from a crisis worker has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the victim to the crisis worker, including any record made in the course of providing support, counseling or assistance to the victim.

Unlike the attorney-client privilege, the language of the above victim-crisis worker privilege appears to apply only to communications that flow in one direction—those "made by the victim to the crisis worker"—and not to communications from the crisis worker to the victim.

In addition, unlike the health care worker-patient privilege, 12 V.S.A. § 1614(b) includes no exception language that would authorize a crisis worker to fulfill mandatory child abuse reporting responsibilities.

Because these issues raise policy concerns that fall outside the scope of the Committee's jurisdiction, the Committee recommended that your committees review 12 V.S.A. § 1614 to determine whether its plain language matches up with its intended scope and to determine

whether adding exception language to address the mandatory reporting issue would be appropriate.

12 V.S.A. §§ 7106 and 7108 (Windsor County Youth Court proceedings)

12 V.S.A. chapter 216 establishes the Windsor County Youth Court and governs its operations. Its provisions include 12 V.S.A. §§ 7106 and 7108, which govern the confidentiality of proceedings and records of the Windsor County Youth Court.

In 2014, the Committee heard testimony that the Windsor County Youth Court is defunct. However, the Committee did not feel comfortable recommending repeal of 12 V.S.A. §§ 7106 and 7108 (or of chapter 216 in its entirety), as any such recommendation falls under the jurisdiction of the your committees.

Instead, the Committee recommended that your committees review whether the Windsor County Youth Court is permanently defunct and, if so, whether 12 V.S.A. chapter 216 should be repealed. If chapter 216 is recommended to be repealed, the Committee further recommends that language be added to address, and to preserve, the confidentiality of existing Windsor County Youth Court records.[2]

13 V.S.A. § 3504(g) (information collected in support of investigations regarding illness, disease, or death likely to have been caused by a weapon of mass destruction)

13 V.S.A. § 3504 requires health care providers to report to the Commissioner of Health cases of illnesses, diseases, injuries, or death likely to be caused by a weapon of mass destruction; pharmacists to report unusual or increased prescription requests or unusual trends in pharmacy visits "that may result from bioterrorist acts, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins"; and veterinarians and livestock owners to report animal diseases (or suspected diseases) that "can result from bioterrorism, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins...."

Subsection (g) of this section provides that "[i]nformation collected pursuant to this section and in support of investigations and studies undertaken by the commissioner in response to reports made pursuant to this section shall be privileged and confidential" but that "[t]his subsection shall not apply to the disclosure of information to a law enforcement agency for a legitimate law enforcement purpose."

At its October 10 meeting, the Committee heard from witnesses from the Departments of Health and of Public Safety to learn if this provision had been used and, if so, if the Departments viewed the language as preventing all investigation information from being released for all time. At this hearing, questions arose as to:

i. whether investigations under this section should be subject to the same standards as criminal detection and investigation standards generally, under 1 V.S.A. § 317(c)(5);
ii. whether the exemption should be time-limited; and

[2] Counsel for the Public Records Study Committee can provide appropriate session law language.

iii. whether the definition of "weaponized biological or biologic warfare agents" at 13 V.S.A. § 3501, which is itself used in the definition of "weapon of mass destruction," should be updated.

Because these questions more properly fall under the purview of the committees of jurisdiction, the Committee recommended that your committees (as well as the Senate Committee on Health and Welfare and the House Committee on Health Care) review 13 V.S.A. §§ 3501 and 3504 in light of the questions above to determine if any amendments would be appropriate.

14 V.S.A. § 2 (wrapped wills until delivered to a person entitled to receive it or until disposed of according to law; index of wills)

14 V.S.A. § 2 governs the form, confidentiality, and cataloguing of wills deposited with the Probate Division of the Superior Court. The Committee heard testimony that the language of § 2 that appears to prevent courts from confirming or denying that a will has been deposited does not reflect actual practice, and suggested that it would make sense to permit an heir to inquire as to the existence of a will upon furnishing a death certificate. The Committee also raised a question as to whether an agent under a power of attorney should be permitted to obtain a copy of a will during the testator's life. Because these policy issues fall outside the scope of the Committee's jurisdiction, it recommended that they be reviewed by your committees.

14 V.S.A. §§ 3067(e) and 3068(e) (guardianship proceedings for mentally disabled person; evaluation and hearing records)

AND

18 V.S.A. §§ 9306(c) and 9309(b) (guardianship proceedings for developmentally disabled person; evaluation and hearing records)

14 V.S.A. §§ 3067 and 3068 are provisions in a subchapter that governs petitions for guardianship and guardianship proceedings in the case of persons alleged to have "significantly subaverage intellectual functioning which exists concurrently with deficits in adaptive behavior" or a "physical or mental condition that results in significantly impaired cognitive functioning."

14 V.S.A. § 3067 specifies that when a petition for guardianship, or a motion for modification or termination, has been filed, the Court shall order an evaluation of the respondent. The section further specifies the required contents of the evaluation, and with regard to its release, subsection (e) provides in part:

> Regardless of whether the report of the evaluator supports or does not support guardianship, the court shall provide a copy of the evaluation to the respondent, the respondent's attorney, the petitioner, the guardian upon appointment, and any other individual, including the proposed guardian, determined by the court to have a strong interest in the welfare of the respondent. The evaluation shall remain confidential, and recipients of the evaluation are prohibited from sharing the evaluation.

14 V.S.A. § 3068 addresses the conduct of guardianship hearings. Subsection (a) specifies who may attend, and provides that the "court may exclude any person not necessary for the

conduct of the hearing on motion of the respondent." Subsection (e) is the sole provision that addresses the records of the hearing, and it provides:

> If upon completion of the hearing and consideration of the record the court finds that the respondent is not a person in need of guardianship, it shall dismiss the petition and seal the records of the proceeding.

A separate chapter in Title 18, chapter 215, governs petitions for guardianship and guardianship proceedings in the case of persons alleged to have developmental disabilities. 18 V.S.A. § 9306 requires the Commissioner of DAIL upon receiving a guardianship petition from Superior Court to arrange for a comprehensive evaluation of the respondent, and describes generally what the evaluation must contain and when it must be completed. With regard to release of the evaluation, subsection (c) states:

> The department shall send a copy of the evaluation to the court, the state's attorney, the director of guardianship services, and to counsel for the respondent. The evaluation is a confidential document, and shall not be further disclosed by the court and the parties without the consent of the respondent or a person authorized to act on behalf of the respondent, except that the department shall release the evaluation to a developmental services agency, if necessary, for the purpose of obtaining or improving services to the person.

18 V.S.A. § 9309 addresses the conduct of guardianship hearings under chapter 215. With regard to the confidentiality of the hearings themselves, and hearing records, subsections (b) and (d) provide in relevant part:

> (b) [text omitted]. The general public shall be excluded from hearings under this chapter, and only the parties, their counsel, the interested person who requested the filing of the petition, witnesses and other persons accompanying a party for his or her assistance, and such other persons as the court finds to have a proper interest in the case or in the work of the court may be admitted by the court. The proceedings of the hearing shall be confidential, and a record of the proceedings may not be released without the consent of the respondent or the respondent's guardian.
> * * *
> (d) If, upon completion of the hearing and consideration of the record, the court finds that the respondent is not a person in need of guardianship, as defined in subdivision 9302(5) of this title, it shall dismiss the petition and seal the records of the proceedings.

Read together, and individually, these Title 14 and Title 18 provisions addressing guardianship evaluations and guardianship hearings raise a number of questions:

i. Why does 14 V.S.A. § 3067(e) prohibit the respondent, i.e. the subject of the evaluation, from sharing it? By contrast, 18 V.S.A. § 9306 authorizes release of an evaluation with the consent of the respondent or a person authorized to act on behalf of the respondent.
ii. Why is the confidentiality of guardianship hearings addressed so differently in 14 V.S.A. § 3068(e) and 18 V.S.A. § 9309?
iii. Do the sealing requirements of 14 V.S.A. § 3068(e) and 18 V.S.A. § 9309(d) in the case of dismissed petitions mean that the respondent cannot access the hearing records?

At its October 10, 2014 meeting, the Committee heard from a Vermont Legal Aid attorney and the Director of the Office of Public Guardian on these provisions. However, the Committee determined that addressing the above questions lay outside the scope of its charge, and instead recommended that your committees (as well as the Senate Committee on Health and Welfare and the House Committee on Human Services) review these sections in light of the questions above to determine if any clarifications or amendments would be appropriate.

15 V.S.A. § 307 (voluntary acknowledgement of parentage forms; records on file with the court in parentage action that contain Social Security numbers)

Under 15 V.S.A. § 307, in any case in which the parents of a child are not married, the parents may acknowledge parentage by signing a Voluntary Acknowledgement of Parentage Form ("Form"). Under 15 V.S.A. § 307(a), the Form is confidential, although it may be disclosed as provided in 15 V.S.A. § 307(c).

The Committee heard testimony questioning whether the Form needs to be confidential, and noting that other states have repealed confidentiality provisions related to such forms.

The Committee understands that keeping the Form confidential may provide an incentive for some parents to acknowledge parentage when they otherwise would not if the form was public. Because the policy decision of whether the Form should remain confidential is an issue more appropriately addressed by the committees of jurisdiction, the Committee recommended that your committees (as well as the House Committee on Human Services and the Senate Committee on Health and Welfare) review 15 V.S.A. § 307 to address this issue.

18 V.S.A. § 4474d (records of persons registered as medical marijuana patients or dispensaries or persons registered as a caregiver of a medical marijuana patient)

With regard to records related to persons registered as medical marijuana patients, dispensaries, or caregivers, 18 V.S.A. § 4474d(a) requires the Department of Public Safety to "maintain and keep confidential, except as provided in subsection (b) of this section and except for purposes of a prosecution for false swearing under 13 V.S.A. § 2904, the records of all persons registered under this subchapter or registered caregivers in a secure database accessible by authorized department of public safety employees only." Subsection (d) authorizes rulemaking.

In summer 2013, questions arose concerning the confidentiality of records related to dispensary applicants—as opposed to records of dispensaries once registered.

After hearing from several witnesses and reviewing the relevant language of the laws governing marijuana dispensaries and DPS's rulemaking authority, Committee members concluded that the confidential status of dispensary application materials and the scope of DPS's rulemaking authority is unclear. As a result, the Committee recommended that your committees (as well as the Senate Committee on Health and Welfare and the House Committee on Human Services) review such laws to determine whether and how provisions concerning the confidentiality of dispensary applications should be clarified.

18 V.S.A. ch. 204 (proceedings related to the sterilization of persons with an intellectual disability)

18 V.S.A. chapter 204 addresses the requirements for voluntary and involuntary sterilizations of a person with an intellectual disability. Under 18 V.S.A. § 8709, a person with an intellectual disability denied voluntary sterilization, or a parent, guardian, or relative of that person, may petition the Superior Court on the basis that the person needs of sterilization. 18 V.S.A. §§ 8711 and 8712 govern the proceedings of such a hearing and the Court's finding and order. 18 V.S.A. § 8713 provides that all such sterilization proceedings are closed to the public and the records sealed unless requested to be opened by the person subject to the proceedings.

During the testimony provided to the Committee regarding the exemption in 18 V.S.A. § 8713 for records of sterilization proceedings, questions were posed regarding whether sterilizations of persons under 18 V.S.A. chapter 204 still occur and, if so, how such proceedings are monitored and tracked. Because the records are sealed, Committee members were concerned that the State lacked the information necessary to determine if sterilization proceedings remained a necessary or useful authority.

However, because review of such an issue likely would address issues outside the scope of the charge of the Committee, it recommended that your committees (as well as the Senate Committee on Health and Welfare, and the House Committee on Human Services) review the requirements of 18 V.S.A. chapter 204 regarding sterilization to consider the extent to which the chapter is still needed and to discuss with the judiciary a method for tracking or accounting for the number and type of sterilization proceedings in the State.

20 V.S.A. §§ 2056–2056h (records of the Vermont Crime Information Center)

20 V.S.A. §§ 2056–2056h consist of several provisions that address access to records of the Vermont Crime Information Center (VCIC). The Committee heard from the Director of VCIC, who answered many of its questions about the scope and type of records that VCIC maintains, how criminal records are shared across jurisdictions, and the user agreements that govern the conduct of users of criminal history and criminal conviction records.

The Committee noted an inconsistent use of terminology across these sections. Section 2056a defines "criminal history record" for the purpose of section 2056a, and section 2056c defines the narrower term "criminal conviction record" for the purpose of section 2056c. Later in the chapter, sections 2056e and 2056g refer to a "Vermont criminal record" in the text of each statute, and in the section headings refer to "criminal history records." The Committee therefore recommended that your committees review these sections for consistency in the use of terminology. In addition, the Committee noted that this chapter contains several sections that specify the circumstances and conditions of release of criminal records in various contexts, but that section 2056 appears to confer broad discretion on the Commissioner of Public Safety to release information maintained by VCIC. The Committee noted that the broad language of section 2056 may be inconsistent with the overall statutory scheme of this section, and therefore also recommended that it be reviewed by your committees.

23 V.S.A. § 1607 (data collected with automated license plate recognition systems)

23 V.S.A. § 1607 regulates the use of Automated License Plate Recognition (ALPR) Systems for legitimate law enforcement purposes as well as the release, retention, and disposition of ALPR data. Under subsection (c), active ALPR data may only be accessed and used by a law enforcement officer for a legitimate law enforcement purpose, and historical ALPR data may only be transmitted to and used by a law enforcement officer who has a legitimate law enforcement purpose. This provision is scheduled to be repealed on July 1, 2015.

The Committee does not object to the substance of this section. If it is repealed, however, then the limitations on release of this data would no longer exist. The Committee recommends that your committees (as well as the Committees on Transportation) review this section to determine whether it should continue in effect on and after July 1, 2015, and the sunset provision likewise repealed.

33 V.S.A. § 4105 (information obtained by the Office of Child Support to establish, modify, or support a child support or parental rights order)

Under 33 V.S.A. § 4105, the Office of Child Support may subpoena from any person or business "any information needed to establish, modify, or enforce a child support or parental rights and responsibilities order" and may request such information from "all governmental officials, departments and other governmental agencies of this state without a subpoena." Subject to certain exceptions, information furnished to the Office of Child Support may be made available only to the person requesting the Office's services or the person's attorney, the person to whom the information relates, and the Family Division of the Superior Court. "Any other use of the information shall be prohibited."

The Study Committee recognized the policy need for information submitted to the Office of Child Support to be confidential, but did not have sufficient information to determine whether the exceptions to the confidentiality were appropriate in scope and whether additional exceptions should apply. Because the policy of whether and how much of child support information should be confidential extends into a subject matter beyond the scope of the Committee's jurisdiction, it recommended that your committees (as well as the House Committee on Human Services and the Senate Committee on Health and Welfare) review 33 V.S.A. § 4105 to determine whether the scope of confidentiality under this section is appropriate or should be amended.

33 V.S.A. § 4913(e) (name of person reporting abuse of child)
AND
33 V.S.A. § 6903(c) (identity of person reporting suspected abuse of a vulnerable adult)

Under 33 V.S.A. § 4913, the name and identifying information of a person reporting the abuse of a child or any person mentioned in the report are confidential, unless the person consents to disclosure, a judicial proceeding results from the report, a court finds that the report was not made in good faith, or a review has been requested under 33 V.S.A. § 4916a.

Likewise, under 33 V.S.A. § 6903, the name of a person reporting abuse of an elderly or disabled person is confidential unless the person consents to disclosure, a judicial proceeding results from the report, or a court finds that the report was not made in good faith.

The Committee acknowledged the need for the confidentiality of such information. However, the Committee also noted that 33 V.S.A. §§ 4913 and 5903 may not sufficiently address bad faith reports of abuse, including the process and remedy that a person subject to a bad faith report may follow to obtain the reporter's name. Because this issue extends outside the scope of the Committee's jurisdiction, it recommended that your committees (as well as the House Committee on Human Services and the Senate Committee on Health and Welfare) review 33 V.S.A. §§ 4913 and 5903 to determine whether they should be amended to include a clear process by which a person subject to a bad faith claim of abuse may obtain the name of a person who filed the bad faith report.

STATE OF VERMONT

MEMORANDUM

To: Rep. Ann Pugh, Chair, House Committee on Human Services
Sen. Claire Ayer, Chair, Senate Committee on Health and Welfare

From: Public Records Study Committee

Date: January #, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Study Committee or Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.

Over the last several years, the Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the relevant committees of jurisdiction.

Below is a description of several exemptions that the Committee recommended be reviewed by the House Committee on Human Services and the Senate Committee on Health and Welfare.

We thank you in advance for considering our recommendations.

14 V.S.A. §§ 3067(e) and 3068(e) (guardianship proceedings for mentally disabled person; evaluation and hearing records)
AND

18 V.S.A. §§ 9306(c) and 9309(b) (guardianship proceedings for developmentally disabled person; evaluation and hearing records)

14 V.S.A. §§ 3067 and 3068 are provisions in a subchapter that governs petitions for guardianship and guardianship proceedings in the case of persons alleged to have "significantly subaverage intellectual functioning which exists concurrently with deficits in adaptive behavior" or a "physical or mental condition that results in significantly impaired cognitive functioning."

14 V.S.A. § 3067 specifies that when a petition for guardianship, or a motion for modification or termination, has been filed, the Court shall order an evaluation of the

respondent. The section further specifies the required contents of the evaluation, and with regard to its release, subsection (e) provides in part:

> Regardless of whether the report of the evaluator supports or does not support guardianship, the court shall provide a copy of the evaluation to the respondent, the respondent's attorney, the petitioner, the guardian upon appointment, and any other individual, including the proposed guardian, determined by the court to have a strong interest in the welfare of the respondent. The evaluation shall remain confidential, and recipients of the evaluation are prohibited from sharing the evaluation.

14 V.S.A. § 3068 addresses the conduct of guardianship hearings. Subsection (a) specifies who may attend, and provides that the "court may exclude any person not necessary for the conduct of the hearing on motion of the respondent." Subsection (e) is the sole provision that addresses the records of the hearing, and it provides:

> If upon completion of the hearing and consideration of the record the court finds that the respondent is not a person in need of guardianship, it shall dismiss the petition and seal the records of the proceeding.

A separate chapter in Title 18, chapter 215, governs petitions for guardianship and guardianship proceedings in the case of persons alleged to have developmental disabilities. 18 V.S.A. § 9306 requires the Commissioner of DAIL upon receiving a guardianship petition from Superior Court to arrange for a comprehensive evaluation of the respondent, and describes generally what the evaluation must contain and when it must be completed. With regard to release of the evaluation, subsection (c) states:

> The department shall send a copy of the evaluation to the court, the state's attorney, the director of guardianship services, and to counsel for the respondent. The evaluation is a confidential document, and shall not be further disclosed by the court and the parties without the consent of the respondent or a person authorized to act on behalf of the respondent, except that the department shall release the evaluation to a developmental services agency, if necessary, for the purpose of obtaining or improving services to the person.

18 V.S.A. § 9309 addresses the conduct of guardianship hearings under chapter 215. With regard to the confidentiality of the hearings themselves, and hearing records, subsections (b) and (d) provide in relevant part:

> (b) [text omitted]. The general public shall be excluded from hearings under this chapter, and only the parties, their counsel, the interested person who requested the filing of the petition, witnesses and other persons accompanying a party for his or her assistance, and such other persons as the court finds to have a proper interest in the case or in the work of the court may be admitted by the court. The proceedings of the hearing shall be confidential, and a record of the proceedings may not be released without the consent of the respondent or the respondent's guardian.
> * * *
> (d) If, upon completion of the hearing and consideration of the record, the court finds that the respondent is not a person in need of guardianship, as defined in subdivision 9302(5) of this title, it shall dismiss the petition and seal the records of the proceedings.

Read together, and individually, these Title 14 and Title 18 provisions addressing guardianship evaluations and guardianship hearings raise a number of questions:

i. Why does 14 V.S.A. § 3067(e) prohibit the respondent, i.e. the subject of the evaluation, from sharing it? By contrast, 18 V.S.A. § 9306 authorizes release of an evaluation with the consent of the respondent or a person authorized to act on behalf of the respondent.
ii. Why is the confidentiality of guardianship hearings addressed so differently in 14 V.S.A. § 3068(e) and 18 V.S.A. § 9309?
iii. Do the sealing requirements of 14 V.S.A. § 3068(e) and 18 V.S.A. § 9309(d) in the case of dismissed petitions mean that the respondent cannot access the hearing records?

At its October 10, 2014 meeting, the Committee heard from a Vermont Legal Aid and the Director of the Office of Public Guardian on these provisions. However, the Committee determined that addressing these questions lay outside the scope of its charge, and instead recommended that your committees (as well as the Committees on Judiciary) review these sections in light of the questions above to determine if any clarifications or amendments would be appropriate.

15 V.S.A. § 307 (voluntary acknowledgement of parentage forms; records on file with the court in parentage action that contain Social Security numbers)

Under 15 V.S.A. § 307, in any case in which the parents of a child are not married, the parents may acknowledge parentage by signing a Voluntary Acknowledgement of Parentage Form ("Form"). Under 15 V.S.A. § 307(a), the Form is confidential, although it may be disclosed as provided in 15 V.S.A. § 307(c).

The Committee heard testimony questioning whether the Form needs to be confidential, and noting that other states have repealed confidentiality provisions related to such forms.

The Committee understands that keeping the Form confidential may provide an incentive for some parents to acknowledge parentage when they otherwise would not if the form was public. Because the policy decision of whether the Form should remain confidential is an issue more appropriately addressed by the committees of jurisdiction, the Committee recommended that your committees (as well as the Committees on Judiciary) review 15 V.S.A. § 307 to address this issue.

18 V.S.A. §§ 1091–99 (mandated venereal disease testing)

When the Committee reviewed confidentiality provisions related to mandated venereal disease testing in Fall 2011, it heard testimony that the authority of the Board of Health to require venereal disease testing may be antiquated and no longer necessary. Because any recommendation to repeal such authority was not within the scope of the Committee's charge, it recommended that these provisions be reviewed by your committees.

18 V.S.A. § 4474d (records of persons registered as medical marijuana patients or dispensaries or persons registered as a caregiver of a medical marijuana patient)

With regard to records related to persons registered as medical marijuana patients, dispensaries, or caregivers, 18 V.S.A. § 4474d(a) requires the Department of Public Safety to "maintain and keep confidential, except as provided in subsection (b) of this section and except for purposes of a prosecution for false swearing under 13 V.S.A. § 2904, the records of all persons registered under this subchapter or registered caregivers in a secure database accessible by authorized department of public safety employees only." Subsection (d) authorizes rulemaking.

In summer 2013, questions arose concerning the confidentiality of records related to dispensary applicants—as opposed to records of dispensaries once registered.

After hearing from several witnesses and reviewing the relevant language of the laws governing marijuana dispensaries and DPS's rulemaking authority, Committee members concluded that the confidential status of dispensary application materials and the scope of DPS's rulemaking authority is unclear. As a result, the Committee recommended that your committees (as well as the Committees on Judiciary) review such laws to determine whether and how provisions concerning the confidentiality of dispensary applications should be clarified.

18 V.S.A. ch. 204 (proceedings related to the sterilization of persons with an intellectual disability)

18 V.S.A. chapter 204 addresses the requirements for voluntary and involuntary sterilizations of a person with an intellectual disability. Under 18 V.S.A. § 8709, a person with an intellectual disability denied voluntary sterilization, or a parent, guardian, or relative of that person, may petition the Superior Court on the basis that the person needs of sterilization. 18 V.S.A. §§ 8711 and 8712 govern the proceedings of such a hearing and the Court's finding and order. 18 V.S.A. § 8713 provides that all such sterilization proceedings are closed to the public and the records sealed unless requested to be opened by the person subject to the proceedings.

During the testimony provided to the Committee regarding the exemption in 18 V.S.A. § 8713 for records of sterilization proceedings, questions were posed regarding whether sterilizations of persons under 18 V.S.A. chapter 204 still occur and, if so, how such proceedings are monitored and tracked. Because the records are sealed, Committee members were concerned that the State lacked the information necessary to determine if sterilization proceedings remained a necessary or useful authority.

However, because review of such an issue likely would address issues outside the scope of the charge of the Committee, it recommended that your committees (as well as the Committees on Judiciary) review the requirements of 18 V.S.A. chapter 204 regarding sterilization to consider the extent to which the chapter is still needed and to

discuss with the judiciary a method for tracking or accounting for the number and type of sterilization proceedings in the State.

33 V.S.A. § 4105 (information obtained by the Office of Child Support to establish, modify, or support a child support or parental rights order)

Under 33 V.S.A. § 4105, the Office of Child Support may subpoena from any person or business "any information needed to establish, modify, or enforce a child support or parental rights and responsibilities order" and may request such information from "all governmental officials, departments and other governmental agencies of this state without a subpoena." Subject to certain exceptions, information furnished to the Office of Child Support may be made available only to the person requesting the Office's services or the person's attorney, the person to whom the information relates, and the Family Division of the Superior Court. "Any other use of the information shall be prohibited."

The Study Committee recognized the policy need for information submitted to the Office of Child Support to be confidential, but did not have sufficient information to determine whether the exceptions to the confidentiality were appropriate in scope and whether additional exceptions should apply. Because the policy of whether and how much of child support information should be confidential extends into subject matter beyond the scope of the Committee's jurisdiction, it recommended that your committees (as well as the Committees on Judiciary) review 33 V.S.A. § 4105 to determine whether the scope of confidentiality under this section is appropriate or should be amended.

33 V.S.A. § 4913(e) (name of person reporting abuse of child)
AND
33 V.S.A. § 6903(c) (identity of person reporting suspected abuse of a vulnerable adult)

Under 33 V.S.A. § 4913, the name and identifying information of a person reporting the abuse of a child or any person mentioned in the report are confidential, unless the person consents to disclosure, a judicial proceeding results from the report, a court finds that the report was not made in good faith, or a review has been requested under 33 V.S.A. § 4916a.

Likewise, under 33 V.S.A. § 6903, the name of a person reporting abuse of an elderly or disabled person is confidential unless the person consents to disclosure, a judicial proceeding results from the report, or a court finds that the report was not made in good faith.

The Committee acknowledged the need for the confidentiality of such information. However, the Committee also noted that 33 V.S.A. §§ 4913 and 5903 may not sufficiently address bad faith reports of abuse, including the process and remedy that a person subject to a bad faith report may follow to obtain the reporter's name. Because this issue extends outside the scope of the Committee's jurisdiction, it recommended that

your committees (as well as the Committees on Judiciary) review 33 V.S.A. §§ 4913 and 5903 to determine whether they should be amended to include a clear process by which a person subject to a bad faith claim of abuse may obtain the name of a person who filed the bad faith report.

33 V.S.A. § 6321(c) (information received or compiled by DAIL with respect to individuals using attendant care services)

Under 33 V.S.A. § 6321, information received or compiled by the Department of Disabilities, Aging, and Independent Living (DAIL) "with respect to an individual using attendant care services shall be confidential."

In its 2013 interim report, the Study Committee acknowledged that some information related to individuals using attendant care should be confidential, and that federal law may require some of the information to be confidential.

However, as currently drafted, 33 V.S.A. § 6321 appeared to the Committee to be overbroad, and to afford little opportunity for meaningful oversight of DAIL's management of the Attendant Care Services Program. As a result, the Committee recommended that your committees review 33 V.S.A. § 6321 to determine if it is overbroad and in need of revision.

33 V.S.A. § 7112 (complaints of abuse of person receiving care from nursing facilities; identity of long-term care residents)

33 V.S.A. § 7112 governs the confidentiality of information received by DAIL in connection with its licensing and supervision of long-term care facilities. Subsection (a) of this section provides that information DAIL receives "through filed reports, inspection, or as otherwise authorized under this chapter, except information that pertains to unsubstantiated complaints or the identity of residents and complainants, shall be made available to the public." (emphasis added).

Subsection (b) of this section expands upon the limitation on release of information pertaining to residents and complainants:

> (b) Prior to release of information, the Commissioner shall consult with representatives from the nursing home industry and the Office of State Long-Term Care Ombudsman to develop:
>
> (1) Guidelines for the release of information to the public that ensure the confidentiality and privacy of complainants and individuals who are receiving or have received care or services in nursing facilities in conformance with state and federal requirements.

In the Fall of 2012, the Study Committee heard testimony that the Guidelines referenced in subdivision (b)(1) did not exist, and recommended that 33 V.S.A. § 7112 be amended to repeal subdivision (b)(1).

During the 2014 session, the House Committee on Government Operations became aware of the varied views of the State Long Term Care Ombudsman and a DAIL representative as to whether and how 33 V.S.A. § 7112 is consistent with existing practice and with federal law. As a result of this additional information, the Study Committee concluded that further review of this section is outside the scope of its jurisdiction, and now recommends instead that this section be reviewed by your committees.

STATE OF VERMONT

MEMORANDUM

To: Sen. Tim Ashe, Senate Committee on Finance

Rep. Bill Botzow, House Committee on Commerce and Economic Development

From: Public Records Study Committee

Date: January #, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.

Over the last several years, the Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the relevant committees of jurisdiction.

Below is a description of two exemptions that the Committee recommended be reviewed by the Senate Committee on Finance and the House Committee on Commerce and Economic Development.

We thank you in advance for considering our recommendations.

9 V.S.A. § 2440(d),(f), and (g) (general prohibition on disclosing Social Security numbers to the public; request for redacted record; records of investigation of violations of provisions related to Social Security number protection)

9 V.S.A. § 2440 is a lengthy provision known as the Social Security Number Protection Act (Act). Subsection (d) of this section governs the duties of the State and its agencies and political subdivisions, and any agent or employee thereof, in connection with Social Security numbers collected from individuals. Subsection (e) lists exceptions to the requirements of subsection (d). Among these exceptions is subdivision (e)(6), which allows a State agency or political subdivision to continue a practice in place prior to January 1, 2007, that is inconsistent with the requirements of subsection (d), provided that certain conditions are satisfied.

Subsection (f) confers on "any person" a right to request that a town clerk or clerk of court redact the person's Social Security number (and various other identifiers) from official records available on a public website. The request itself must include specific information and is a public record, but "access [to it] shall be restricted to the town clerk, the clerk of court, their staff, or upon order of the court."

Subsection (g) provides for enforcement of the Act by the Attorney General and State's Attorney (and the Department of Financial Regulation in the case of persons licensed or registered by DFR). Subdivision (3) addresses the right of a law enforcement agency and the Department of Public Safety to designate as confidential information that the agency or Department provides to the AG or state's attorney.

The Committee found that the language of this section generally makes Social Security numbers—as well requests to town clerks under subsection (f) and investigation records under subsection (g)—exempt from public inspection and copying under the Public Records Act. However, the Committee also found that the exempt status of these records probably should be clarified. In addition, Sen. Jeanette White found the exception authorized under subdivision (e)(6) of the section to be troubling.

Because the Act is a complex piece of legislation with many interrelated parts, and passage of the Act involved the consultation of many interested parties, the Committee declined to make specific recommendations to amend the Act. It found, however, that the time has come to take a fresh look at the Act, and recommended that your committees (as well as the Committees on Government Operations) review this section.

32 V.S.A. § 5930a(h) (information submitted by a business to the Economic Progress Council)

32 V.S.A. § 5930a establishes the Vermont Economic Progress Council and governs its award of tax stabilization agreements and exemptions as well as Vermont employment growth incentives. Subsection (h) creates a public records exemption for "information and materials submitted by a business concerning its income taxes and other confidential financial information," except that such information may be shared with JFO and the Auditor of Accounts. Subsection (h) goes on to prohibit JFO and the Auditor from disclosing any "proprietary business information...."

The Committee was unsure whether the references to "confidential financial information" and "proprietary business information" are intended to refer to the same information. Therefore, the Committee recommended that your committees (as well as the Senate Committee on Economic Development, Housing and General Affairs) review the language of 32 V.S.A. § 5930a(h) for internal consistency.

Vermont Legislative Council

115 State Street • Montpelier, VT 05633-5301 • (802) 828-2231 • Fax: (802) 828-2424

MEMORANDUM

To: Rep. [NAME], Chair, House Committee on Health Care
Sen. Claire Ayer, Chair, Senate Committee on Health and Welfare

From: Public Records Study Committee

Date: January #, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.

Over the last several years, the Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the relevant committees of jurisdiction.

Below is a description of an exemption that the Committee recommended be reviewed by the House Committee on Health Care and the Senate Committee on Health and Welfare.

We thank you in advance for considering our recommendation.

13 V.S.A. § 3504(g) (information collected in support of investigations regarding illness, disease, or death likely to have been caused by a weapon of mass destruction)

13 V.S.A. § 3504 requires:

- health care providers to report to the Commissioner of Health cases of illnesses, diseases, injuries, or death likely to be caused by a weapon of mass destruction;
- pharmacists to report unusual or increased prescription requests or unusual trends in pharmacy visits "that may result from bioterrorist acts, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins"; and
- veterinarians and livestock owners to report animal diseases (or suspected diseases) that "can result from bioterrorism, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins…."

Subsection (g) of this section provides that "[i]nformation collected pursuant to this section and in support of investigations and studies undertaken by the commissioner in

response to reports made pursuant to this section shall be privileged and confidential" but that "[t]his subsection shall not apply to the disclosure of information to a law enforcement agency for a legitimate law enforcement purpose."

At its October 10 meeting, the Committee heard from witnesses from the Departments of Health and of Public Safety to learn if this provision had been used and, if so, if the Departments viewed the language as preventing all investigation information from being released for all time. At this hearing, questions arose as to:

i. whether investigations under this section should be subject to the same standards as criminal detection and investigation standards generally, under 1 V.S.A. § 317(c)(5);
ii. whether the exemption should be time-limited; and
iii. whether the definition of "weaponized biological or biologic warfare agents" at 13 V.S.A. § 3501, which is itself used in the definition of "weapon of mass destruction," should be updated.

Because these questions more properly fall under the purview of the committees of jurisdiction, the Committee recommended that your committees (as well as the Committees on Judiciary) review 13 V.S.A. §§ 3501 and 3504 in light of the questions above to determine if any amendments would be appropriate.

STATE OF VERMONT

MEMORANDUM

To: Rep. Donna Sweaney, Chair, House Committee on Government Operations

Sen. Jeanette White, Chair, Senate Committee on Government Operations

From: Public Records Study Committee

Date: January #, 2015

Subject: Public Records Act exemptions

As you are aware, the Public Records Study Committee (Study Committee or Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act (PRA or Act), and recommending whether each exemption should be amended, repealed, or kept in its existing form. In addition, the Committee was authorized to review the Act as a whole.

Over the last several years, the Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the Committees on Government Operations, and has likewise identified an issue under the Public Records Act that would best be reviewed by your committees.

We thank you in advance for considering our recommendations to review the exemptions and issue described below.

1 V.S.A. § 317(c)(10) (lists of names, the disclosure of which violates a right to privacy or produces gain)

1 V.S.A. § 317(c)(10) exempts from public inspection and copying "lists of names compiled or obtained by a public agency when disclosure would violate a person's right to privacy or produce public or private gain; provided, however, that this section does not apply to lists which are by law made available to the public, or to lists of professional or occupational licensees."

The Committee heard from witnesses about a Superior Court and a Supreme Court case interpreting this exemption, and from witnesses that this exemption is most likely to be claimed by Agencies possessing lists which may be of commercial value, *e.g.* lists of licensed hunters, dairy farmers, or maple syrup producers.

This exemption does not define what constitutes "public or private gain." Further, the exemption appears to require inquiry into the motive of the requester, which is inconsistent with Supreme Court caselaw stating that a requester's motive is irrelevant under the Public Records Act. In addition, the plain language of the exemption appears only to extend to a requester's name—and does not explicitly extend to associated personal information such as that person's contact information or address.

The Committee lacked time to delve further into these issues, and therefore recommended that this exemption be reviewed by your committees.

1 V.S.A. § 317(c)(21) (Vermont Life subscription lists)

Under 1 V.S.A. § 317(c)(21), lists of names compiled or obtained by Vermont Life Magazine for the purpose of developing and maintaining a subscription list are confidential "but may be sold or rented in the sole discretion of the magazine provided such discretion is exercised to promote the magazine's financial viability and in accordance with guidelines adopted by the magazine's editor."

At the Study Committee's November 30, 2012 meeting, ACCD's General Counsel recommended that this exemption be expanded to include customer lists, since on its face it only addresses subscribers, and recommended that the committee hear from representatives of Vermont Life.

The Study Committee noted the lack of standards governing the magazine's discretion to sell or rent subscription lists, and did not hear from Vermont Life representatives on ACCD's recommendation. It found that the question and recommendation raised extended into subject matter beyond the scope of its jurisdiction. As a result, it recommended that your committees (as well as the House Committee on Commerce and Economic Development and the Senate Committee on Economic Development, Housing and General Affairs) review 1 V.S.A. § 317(c)(21) to determine whether it should be expanded to include customer lists and amended to further specify the magazine's discretion to rent or sell customer information. Further, because 1 V.S.A. § 310(c)(10) (described above) already addresses an exemption for lists of names, the Committee recommended that the substance of this exemption be consolidated into § 317(c)(10).

4 V.S.A. § 740 (Supreme Court records subject to confidentiality requirements)

4 V.S.A. § 740 authorizes the Supreme Court by administrative order or directive to prepare, maintain, record, index, docket, preserve, and store court records and provide certified copies of them upon request, "subject to confidentiality requirements of law or court rules."

This section appears to broadly authorize the Supreme Court to adopt rules requiring that certain Court records be confidential, yet does not include a standard or guiding policy for the adoption of such rules. The breadth of this provision and the lack of any

standard or policy may be appropriate, but the Committee lacked the time to consider this issue further. Instead, it recommended that your committees, in consultation with the Committees on Judiciary, review the language of this section to determine if its breadth and absence of a standard or guiding policy is appropriate.

9 V.S.A. § 2440(d),(f), and (g) (general prohibition on disclosing Social Security numbers to the public; request for redacted record; records of investigation of violations of provisions related to Social Security number protection)

9 V.S.A. § 2440 is a lengthy provision known as the Social Security Number Protection Act (Act). Subsection (d) of this section governs the duties of the State and its agencies and political subdivisions, and any agent or employee thereof, in connection with Social Security numbers collected from individuals. Subsection (e) lists exceptions to the requirements of subsection (d). Among these exceptions is subdivision (e)(6), which allows a State agency or political subdivision to continue a practice in place prior to January 1, 2007, that is inconsistent with the requirements of subsection (d), provided that certain conditions are satisfied.

Subsection (f) confers on "any person" a right to request that a town clerk or clerk of court redact the person's Social Security number (and various other identifiers) from official records available on a public website. The request itself must include specific information and is a public record, but "access [to it] shall be restricted to the town clerk, the clerk of court, their staff, or upon order of the court."

Subsection (g) provides for enforcement of the Act by the Attorney General and State's Attorney (and the Department of Financial Regulation in the case of persons licensed or registered by DFR). Subdivision (3) addresses the right of a law enforcement agency and the Department of Public Safety to designate as confidential information that the agency or Department provides to the AG or state's attorney.

The Committee found that the language of this section generally makes Social Security numbers—as well requests to town clerks under subsection (f) and investigation records under subsection (g)—exempt from public inspection and copying under the Public Records Act. However, the Committee also found that the exempt status of these records probably should be clarified. In addition, Sen. Jeanette White found the exception authorized under subdivision (e)(6) of the section to be troubling.

Because the Act is a complex piece of legislation with many interrelated parts, and passage of the Act involved the consultation of many interested parties, the Committee declined to make specific recommendations to amend the Act. It found, however, that the time has come to take a fresh look at the Act, and recommended that your committees (as well as the House Committee on Commerce and Economic Development and the Senate Committee on Finance) review this section.

Should the PRA should be amended to clarify its application to contracts between a public agency and private entity for the performance of a governmental function?

Act No. 59 authorized the Study Committee to review whether the PRA should be amended to clarify its application to contracts between a public agency and a private entity for the performance of a governmental function.[1] In Fall 2011, the Committee heard testimony regarding the application of the PRA to government contractors. Because this issue has significant implications for other areas of government and law, such as corrections and health care, the Committee took no final position regarding the application of the Act to contractors. Instead, it recommended in its January 2012 report that your committees review the issue further in coordination with other jurisdictional committees.

Since its January 2012 recommendation, a Superior Court case was decided that adopted a "functional equivalency" test to determine whether a government contractor constitutes a "public agency" subject to the Public Records Act. In *Prison Legal News v. Corrections Corp. of America*,[2] Judge Bent applied the four-factor test[3] in holding that Corrections Corporation of America, a for-profit corporation in the business of operating prisons, is a public agency subject to Vermont's Public Records Act.

As a result of this decision, the Committee revises its recommendation to note that this case should be considered as part of any review by your committees.

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[1] *See* 2011 Acts and Resolves No. 59, Sec. 11(c)(4).

[2] Docket No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Jan. 9, 2014).

[3] The non-exclusive factors are: "(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government." These factors are considered cumulatively, with no single factor being essential or conclusive.

STATE OF VERMONT

MEMORANDUM

To: Rep. Patrick Brennan, Chair, House Committee on Transportation
Sen. Richard Mazza, Chair, Senate Committee on Transportation

From: Public Records Study Committee

Date: January #, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Committee) was created in 2011 and charged with reviewing all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.

Over the last several years, the Committee has fulfilled its charge and, in doing so, has concluded that some exemptions raise issues more appropriately addressed by the relevant committees of jurisdiction.

Below is a description of two exemptions that the Committee recommended be reviewed by your committees.

We thank you in advance for considering our recommendations.

23 V.S.A. § 104 (motor vehicle records and photos)

23 V.S.A. § 104 addresses motor vehicle records and the confidentiality of photographs. It came to the Committee's attention that this provision may not reflect the full scope of confidentiality requirements under the federal Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–25. As a result, the Committee recommended that your committees consider whether 23 V.S.A. § 104 should be updated.

23 V.S.A. § 1607 (data collected with automated license plate recognition systems)

23 V.S.A. § 1607 regulates the use of Automated License Plate Recognition (ALPR) Systems for legitimate law enforcement purposes as well as the release, retention, and disposition of ALPR data. Under subsection (c), active ALPR data may only be accessed and used by a law enforcement officer for a legitimate law enforcement purpose, and

historical ALPR data may only be transmitted to and used by a law enforcement officer who has a legitimate law enforcement purpose. This provision is scheduled to be repealed on July 1, 2015.

The Committee does not object to the substance of this section. If it is repealed, however, then the limitations on release of this data would no longer exist. The Committee recommends that your committees (as well as the Committees on Judiciary) review this section to determine whether it should continue in effect on and after July 1, 2015, and the sunset provision likewise repealed.

Vermont General Assembly

115 State Street • Montpelier, VT 05633-5301 • (802) 828-2231 • Fax: (802) 828-2424

MEMORANDUM

To: Christopher D. Winters, Director, Office of Professional Regulation
Colin Benjamin, Counsel, Office of Professional Regulation

From: Members of the Public Records Study Committee

Date: November #, 2014

Subject: 3 V.S.A. § 131 (complaints and other records produced or acquired in connection with the regulation of professions) and 26 V.S.A. § 75(d) (information submitted for peer reviews of licensed public accountants)

The Public Records Study Committee (Committee) is charged with reviewing all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.

At its September 15, 2014 meeting, the Committee reviewed two exemptions related to the work of the Office of Professional Responsibility.

(1) 3 V.S.A. § 131

As you're aware, 3 V.S.A. § 131 addresses the confidentiality of complaints about licensees of regulated professions as well as related investigation and disciplinary records. Subsection (d) appears to be intended to create a broad cloak of confidentiality over such records, and subsections (c) and (e) to provide exceptions to the broad cloak of confidentiality, describing when the Secretary or State or OPR must release certain information and records. Subsection (g) appears to "clarify" the scope of the cloak of confidentiality.

However, as drafted, the language of this section was confusing to the Committee, and did not appear to match up with its intent. Subsection (d) establishes the cloak of confidentiality for "disciplinary complaints, proceedings or records….", and subsection (g) references "disciplinary complaints." However, a complaint is not properly described as "disciplinary" until an investigation is completed and a decision is made to take disciplinary action. Likewise, the reference to "disciplinary … records" appears intended to encompass "investigatory files", which are referenced in subsection (e), but again, investigation records are not properly characterized as disciplinary until an investigation is complete and a decision is made to take disciplinary action. Finally, subsection (g) refers to the "confidentiality and privileged status" of information protected under subsection (d), but the subsection does not address whether a court may order discovery of such records.

The Committee believes that the language of this section may benefit from clarification, and therefore requests that OPR consider technical corrections in its annual housekeeping bill recommendations for 2015.

(2) 26 V.S.A. § 75

26 V.S.A. § 75(d) provides that "[i]nformation submitted for peer reviews [of licensed public accountants] is exempt from public disclosure under 1 V.S.A. § 317(c)(3) and (6)." The latter cross-references—1 V.S.A. § 317(c)(3) and (6)—are provisions of the Public Records Act which exempt the following from public inspection and copying:

> (3) records which, if made public pursuant to this subchapter, would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the State;
>
> * * *
>
> (6) a 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;

If the intent of 26 V.S.A. § 75(d) is to broadly exempt records related to peer reviews of licensed public accountants, then its language is likely too narrow.

During August 2014, legislative counsel contacted counsel to the Board of Public Accountancy (Board) about the scope of records intended to be covered under 26 V.S.A. § 75(d). Counsel offered to testify before the Committee with the Chair of the Board concerning 26 V.S.A. § 75(d).

Because of time pressures, and because the Committee finds the application and intended scope of 26 V.S.A. § 75(d) to be confusing on its face, the Committee elected not to schedule counsel and the Chair of the Board to testify. Instead, the Committee requests OPR to consider whether the existing language of 26 V.S.A. § 75(d) accurately describes the scope of public accountant peer review records intended to be exempt from disclosure under the Public Records Act and, if it does not, to recommend language in its annual housekeeping bill to amend 26 V.S.A. § 75(d).