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all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.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, <u>except information that pertains to unsubstantiated complaints or the identity of residents and complainants</u>, 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.