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all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.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.

[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.

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);

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

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 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. §§ 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.

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.