

# Vermont General Assembly

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all of the statutory exemptions to the Public Records Act, and recommending whether each exemption should be amended, repealed, or kept in its existing form.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