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VERMONT LEGISLATURE'S PUBLIC RECORDS STUDY COMMITTEE

Testimony of
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1 V.S.A. 317(c)(24)

records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity

Many municipal boards and commissions act in a quasi-judicial capacity to perform some of their statutory responsibilities. After taking testimony and even allowing cross-examination of other witnesses in an open meeting, the selectboard, for example, is required to:

- Decide suspensions of liquor licenses
- Decide the disposition of a "vicious" dog
- Decide whether to lay out, alter, reclassify or discontinue a town highway
- Decide whether to suspend a liquor license
- Decide whether to remove certain appointed officials and employees from their jobs
- Decide appeals from the health officer

Other municipal boards and commissions which operate as quasi-judicial bodies include: board of tax abatement, board of civil authority, planning commission, zoning board of appeals, "appropriate municipal panels", and fence viewers.

The Vermont Supreme Court has stated the best defense for the existence and retention of this exemption in *Rueger v. Natural Resources Bd., 191 VT. 429*:

*10. **This conclusion serves the purpose of the statute**, which, as the trial court found, **is designed to protect the integrity of the judicial process. As the United States Supreme Court recognized in United States v. Morgan, when an administrative official acts in a quasi-judicial capacity, examination of his or her mental processes "would be destructive of judicial responsibility."** 313 U.S. 409, 422 (1941). "**Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected."** Id. (citations omitted); see also Thomas v. Page, 837 N.E.2d 483, 488 (Ill. App. Ct. 2005) ("It is well-settled that a judge may not be asked to testify as to his or her mental impressions or processes in reaching a judicial decision."); State ex rel. Kaufman v. Zakaib, 535 S.E.2d 727, 735 (W. Va. 2000) (holding that judicial officers may not be compelled to testify regarding their mental processes used in*

formulating official judgments or the reasons that motivate them in their official acts). This basic principle is recognized not only in § 317(c)(24) but also in the Vermont Open Meetings Law, which specifically excludes from its provisions "the deliberations of any public body in connection with a quasi-judicial proceeding." 1 V.S.A. § 312(e).

11. *The reasons for protecting such deliberations is evident. As the Page court explained:*

> ***[c]onfidential communications between judges and between judges and the court's staff certainly originate in a confidence that they will not be disclosed. Judges frequently rely upon the advice of their colleagues and staffs in resolving cases before them and have a need to confer freely and frankly without fear of disclosure. If the rule were otherwise, the advice that judges receive and their exchange of views may not be as open and honest as the public good requires. In order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public at a later date.***

Id. at 489-90 (citation and quotation marks omitted). ***This approach protects the public good, rather than the individual judges and their staffs.*** *See id. at 490 ("**If the confidentiality of these intra-court communications were not protected, judges and their staffs would be subject to the pressures of public opinion and might well refrain from speaking frankly during deliberations.**"). Similar policy concerns underlie § 317(c)(24) and protect the records at issue here.* [emphasis added]