

Public Records Study Committee 2014 Interim Report

Pursuant to 2011 Acts and Resolves No. 59

January 2014

Legislative Council
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**Public Records Study Committee
Interim Report**

Table of Contents

Public Records Study Committee Members..... 1

Public Records Study Committee Charge 2

I. Overview 5

**II. Renewal and Review of 2012 and 2013 Recommendations of the Study
Committee..... 6**

III. Government Operations Committee Review of PRA Exemptions: Proposed Policy #

IV. Checklists for Review of New Exemptions #

V. Act 23 Project #

VI. Exemptions Reviewed in 2013..... #

VII. Protecting the Identities of Whistleblowers..... #

**Appendix A: Status of Recommendations in 2012 and 2013 Interim Reports of the
Public Records Study Committee #**

**Appendix B: Public Records Act Exemptions: Process for Referral and Review by the
House and Senate Committees on Government Operations #**

Appendix C: Checklists for Review of Exemptions #

Appendix D: Publicizing the List of PRA Exemptions and Organizing Them by Subject ... #

Appendix E: List of Exemptions Reviewed in 2013, and Recommendation..... #

Appendix F: Explanation of Recommendations on Exemptions Reviewed in 2013 #

Appendix G: Legislative Recommendations of Committee as a Draft Bill #

**Public Records Study Committee
Members**

Three members of the House of RepresentativesRep. Donna Sweaney (co-chair)

Rep. Ronald Hubert

Rep. Linda Martin

Three members of the Senate.....Sen. Jeanette White (co-chair)

Sen. Claire Ayer

Sen. Peg Flory

Public Records Study Committee Charge

No. 59 of the Acts of 2011

Sec. 11. PUBLIC RECORDS LEGISLATIVE STUDY COMMITTEE

(a) There is established a legislative study committee to review the requirements of the public records act and the numerous exemptions to that act in order to assure the integrity, viability, and the ultimate purposes of the act. The review committee shall consist of:

(1) Three members of the house of representatives, appointed by the speaker of the house; and

(2) Three members of the senate, appointed by the committee on committees.

(b) The review committee shall review the exemptions set forth in 1 V.S.A. § 317 or elsewhere in the Vermont Statutes Annotated to the inspection and copying of public records under the public records act, 1 V.S.A. chapter 5, subchapter 3. Prior to each legislative session, the committee shall submit to the house and senate committees on government operations and the house and senate committees on judiciary recommendations concerning whether the public records act and exemptions under the act from inspection and copying of a public record should be repealed, amended, or remain unchanged. The report of the committee may take the form of draft legislation.

(c) In reviewing and making a recommendation under subsection (b) of this section, the study committee may review:

(1) Whether the public records act requires revision;

(2) Whether an exemption to inspection or copying under the public records act is necessary, antiquated, or in need of revision;

(3) Whether an exemption to inspection or copying under the public records act is as narrowly tailored as possible, including the need to clarify the term “personal documents” referenced in 1 V.S.A. § 317(c)(7) in order to ensure that it does not unintentionally limit access to public records that are not personnel records; and

(4) Whether the public records act should be amended to clarify application of the act to contracts between a public agency and a private entity for the performance of a governmental function;

(5) Whether or not to authorize a public agency to charge for staff time associated with responding to a request to inspect or copy a public record, including whether an agency should be authorized to charge for the staff time incurred in locating, reviewing, or redacting a public record; and

(6) Any other criteria that assist the review committee in determining the value of an exemption as compared to the public’s interest in the public record protected by the exemption.

(7) Whether a municipality and how a municipality shall appoint or designate an official, officer, or employee responsible for advising municipal employees and any agency, board, committee, department, instrumentality, commission, or authority of the municipality regarding the requirements of the public records act and proper management of public records. As used in this subdivision, “municipality” shall mean a city, town, village or school district.

(d) In developing recommendations authorized under subsection (a) of this section, the study committee shall consult with the secretary of administration, the secretary of state, the office of

the attorney general, representatives of municipal interests, representatives of school or education interests, representatives of the media, and advocates for access to public records.

(e) The study committee shall elect co-chairs from among its members. For attendance at a meeting when the general assembly is not in session, legislative members of the commission shall be entitled to the same per diem compensation and reimbursement for actual and necessary expenses as provided members of standing committees under 2 V.S.A. § 406. The study committee is authorized to meet three times each year during the interim between sessions of the general assembly, provided that the speaker of the house and the committee on committees may authorize the study committee to hold additional meetings during the interim between sessions so that the committee may accomplish its charge.

(f) Legislative council shall provide legal and administrative services to the study committee. The study committee may utilize the legal, research, and administrative services of other entities, such as educational institutions and, when necessary for the performance of its duties, the Vermont state archives and records administration.

I. Overview

2011 Acts and Resolves No. 59, Sec. 11, established a legislative study committee to review the requirements of the Vermont Public Records Act (PRA or Act) and the numerous exemptions to the PRA in order to assure the integrity, viability, and the ultimate purposes of the Act. In fulfilling this charge, the Public Records Study Committee (Study Committee) is required to review the exemptions to inspection and copying of public records as set forth in 1 V.S.A. § 317 of the PRA¹ and elsewhere in the Vermont Statutes Annotated. Prior to each legislative session, the Study Committee is required to submit to the House and Senate Committees on Government Operations and the House and Senate Committees on Judiciary recommendations concerning whether the PRA and exemptions under the Act should be repealed or amended or should remain unchanged. This report is the third annual report to the General Assembly fulfilling the Study Committee's charge under 2011 Acts and Resolves No. 59, Sec. 11.

In 2013, the Study Committee:

- Reviewed exemptions added or substantively amended by the 2013 Acts and Resolves;
- Discussed notification to the Committees on Government Operations of new or substantively amended PRA exemptions in pending legislation;
- Approved updated checklists to assist committees in reviewing new or substantively amended PRA exemptions;
- Considered whether and how to implement 2013 Acts and Resolves No. 23 (Act 23), and solicited and considered input from agencies and interested parties on the Act 23 project;

¹ See 1 V.S.A. chapter 5, subchapter 3, for the full text of the PRA.

- Reviewed exemptions related to natural resources and historic preservation, transportation, agriculture, professions and occupations, and labor;
- Renewed its review of exemptions related to the Department of Financial Regulation; the general exemption for trade secrets (1 V.S.A. § 317(c)(9)); and the general exemption for personal records relating to an individual (1 V.S.A. § 317(c)(7)), including mechanisms to assist public agencies in complying with the PRA;
- Heard testimony on a proposed new PRA exemption to protect the identity of whistleblowers.

II. Renewal and Review of 2012 and 2013 Recommendations of the Study Committee

In its January 2012 and January 2013 Interim Reports, the Study Committee recommended that the General Assembly amend multiple PRA exemptions; that numerous other PRA exemptions be reviewed by specified committees of the Vermont General Assembly with jurisdiction over the relevant issues; that the Committees on Government Operations take up the issue of the application of the PRA to Government Contractors; that the requirement for an annual survey of municipalities by the Secretary of State be repealed; and that the coversheet requirement of the Administrative Procedure Act be amended to require agencies to identify when a PRA exemption is created in a proposed rule.

Appendix A lists these recommendations, and summarizes any actions taken related to them. Appendix A also indicates whether the Committee reaffirms or has updated its prior recommendations.

III. Government Operations Committee Review of PRA Exemptions: Proposed Policy

At its November 1, 2013 and January 9, 2014 meetings, the Study Committee renewed its discussion of policies that could be adopted to ensure that the House and Senate Committees on Government Operations are made aware of, and have an opportunity to review, new or substantively amended PRA exemptions in legislation.

In its 2013 Interim Report, the Study Committee had recommended a policy with several components which could be implemented to address the practical realities of the legislative process while also ensuring some level of review.

First, the Study Committee recommended that House and Senate rules be amended to specify that the jurisdiction of the Committees on Government Operations include public records and open meeting issues. The House and Senate rules were amended in 2013 in accordance with this recommendation. However, these rule amendments do not (and were not expected to) address review by the Committees on Government Operations when legislation includes a PRA exemption but falls under the primary jurisdiction of another standing committee.

Second, the Study Committee noted that the Committees on Government Operations could, with the consent of their leadership, announce to other committee chairs that the Committees on Government Operations will review any bill with a public records exemption through an informal process without taking possession of a bill. Finally, the Committee recommended that Legislative Council adopt a policy that an attorney drafting a Public Records Act exemption must confer with the Legislative Council Public Records Officer.

When the Study Committee took up this issue again at its October 4, 2013 meeting,

[O'GRADY completes rest].

IV. Checklists for Review of New Exemptions

In the fall of 2012, Study Committee members discussed the process for crafting well-tailored PRA exemptions in legislation, and a clear scope of rulemaking authority if an agency is to be granted authority to create a PRA exemption by rule. Committee members requested that legislative counsel prepare a checklist to guide legislative committees in their review of new (or substantively amended) PRA exemptions, as well as a checklist to assist in the review of legislation that would authorize an agency to create a PRA exemption through rulemaking. At its January 9, 2014 meeting, Committee members reviewed and approved revised checklists, which are shown in Appendix C. The co-chairs of the Study Committee stated their intent to distribute the checklists at a committee chairs meeting, and legislative counsel noted that the revised checklists will be distributed to all Office of Legislative Council attorneys.

V. Act 23 Project

During the 2013 session, the House Committee on Government Operations took up H.54, a bill to implement recommendations in the Study Committee's 2012 and 2013 Interim Reports. During the committee process, H.54 provoked a broader discussion about the organization of exemptions to the PRA.

The PRA itself lists 40 exemptions in 1 V.S.A. § 317. Legislative Council staff have identified approximately 200 additional exemptions scattered throughout the Vermont Statutes Annotated which are incorporated as PRA exemptions through 1 V.S.A. § 317(c)(1), (c)(2), and (c)(3).²

² 1 V.S.A. § 317(c)(1)–(3) state:

- (c) The following public records are exempt from public inspection and copying:
- (1) records which by law are designated confidential or by a similar term;
 - (2) records which by law may only be disclosed to specifically designated persons;

Some exemptions found in the PRA itself are quite general and require the application of tests, including the exemption for personal records at 1 V.S.A. § 317(c)(7) and the exemption for trade secrets at 1 V.S.A. § 317(c)(9). Public agencies have interpreted 1 V.S.A. § 317 to allow, but not require, them to withhold records exempt under this section.

In many cases, new PRA exemptions may have been created as a result of the uncertain scope of the general exemptions found in 1 V.S.A. § 317, the apparent discretion that agencies have to withhold or not withhold exempt records, or nuances related to the appropriate level of confidentiality that certain records should be afforded. For example, many trade secret exemptions scattered throughout the V.S.A. require agencies not to disclose specific business information (with certain exceptions), and thus offer more confidentiality protection than if the industry were required to rely on a public agency's discretion to withhold a record under 1 V.S.A. § 317(c)(9). Similarly, many exemptions scattered throughout the V.S.A. require agencies not to disclose individually identifying medical, financial, or other personal information, and thus offer more certainty of confidentiality protection than if the record were subject to a balancing test and agency discretion under 1 V.S.A. § 317(c)(7). Over time, many scattered trade secret and personal privacy-related confidentiality provisions have been added in various bills and reviewed by various committees over several decades. Unsurprisingly, this evolutionary process has resulted in exemptions that duplicate or relate to the same basic subject matter, inconsistent language, and the lack of a coherent framework, with the result that some records are accorded confidential status by a specific provision of law, whereas other similar records are exempt only under a general provision of 1 V.S.A. § 317.

(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;

To move in the direction of bringing some order to the proliferation of sometimes duplicative exemptions, to provide a framework for the review of new or amended exemptions, to shed light on the true number of distinct PRA exemptions, and to make the list of PRA exemptions more accessible to the public, the House Committee on Government Operations shifted direction with H.54. Instead of passing or marking up H.54 as introduced, the Committee passed a strike-all amendment to the bill which required the Office of Legislative Council to prepare a draft bill listing all exemptions to the PRA in one statutory provision of the PRA, and to amend existing PRA exemptions scattered throughout the V.S.A. in order to cross-reference back to the draft list of exemptions. This strike-all passed the House and Senate and became law as Act 23. Act 23 also directed Legislative Council staff, in preparing the bill, to consolidate exemptions that relate to the same subject matter into a single exemption if consolidation did not alter the substance of an exemption, and to prepare for the Study Committee's review a list of exemptions for which consolidation might be appropriate, but for which consolidation would potentially alter the substance of an exemption.

At its October 4, 2013 meeting, the Study Committee considered the best approach to implement the Act 23 project. Legislative counsel noted that the Act 23 bill would likely have a smoother committee process if it had few substantive consolidations of exemptions and instead served primarily as a means to organize and list PRA exemptions in one place. The Study Committee members generally agreed that the Act 23 bill should start primarily as a list of exemptions related to the same subject matter, and directed Legislative Counsel to prepare such a bill and questionnaires to public agencies with knowledge of the subject areas of specific

exemptions. The questionnaires also included the text of prior recommendations of the Study Committee reflected in its 2012 and 2013 Interim Reports.

The questionnaires were sent to 21 agencies in early November, with a requested response date of December 6, 2013. In addition to grouping and listing exemptions related to the same subject matter, the questionnaires reflected a draft proposal to specify which exemptions a public agency should be required to withhold, and which records could be (but were not required to be) withheld. While awaiting responses, Legislative Counsel drafted a bill with a complete list of exemptions grouped together by subject, which numbered 69, instead of the current total of 245.

All agencies that received questionnaires submitted responses prior to the Study Committee's December 13, 2013 meeting. For the most part, the agencies did not object to the proposed groupings of exemptions by subject. However, some agencies questioned the idea of creating the separate lists of mandatory and discretionary exemptions, noting that this separation would create a significant change in public records law, and would require detailed case-by-case policy analysis of which exemption should fall into which category. One agency respondent noted that if the General Assembly desired to distinguish between mandatory and discretionary exemptions, this goal would more appropriately be addressed through a separate bill, and in a section of law outside the Public Records Act. The Study Committee members agreed the Act 23 project could be significantly complicated if the Act 23 bill attempted to address the discretionary vs. mandatory exemption issue.

In addition, some respondents noted that the objectives of the Act 23 project—to provide a framework for the review of new or amended exemptions, to shed light on the true number of distinct PRA exemptions, and to make the list of PRA exemptions more accessible to the

public—could be accomplished outside a change to statutory law. Under 2011 Acts and Resolves No. 59, Sec. 12, the Office of Legislative Council was directed to compile a list of all known statutory exemptions to the PRA, to publish the list of exemptions as a statutory revision note to 1 V.S.A. § 317, and to update the list as necessary. The statutory revision note to 1 V.S.A. § 317 is only available to subscribers of the Vermont Statutes Annotated or persons who gain access to the V.S.A. at libraries. The Study Committee agreed that the list compiled by the Office of Legislative Council is not sufficient to serve the goals of the Act 23 project, but that a list of exemptions grouped by subject and required to be distributed publicly and available could achieve in part the goals of the Act 23 project.

As a result, the Study Committee determined that it would not further pursue or recommend the Act 23 bill. Instead, the Study Committee recommended that the Office of Legislative Council be directed to periodically update the list of statutory exemptions and group the list by subject and in order by title and section number, and that the list be published on the websites of the General Assembly, the Secretary of State's Office, the Attorney General's Office, and the State Library, and be distributed to the Vermont League of Cities and Towns. Draft language of this recommendation is shown in Appendix D.

VI. Exemptions Reviewed in 2013

In 2013, the Study Committee reviewed PRA exemptions related to natural resources and historic preservation, transportation, agriculture, professions and occupations, and labor. In addition, the Study Committee renewed its review of exemptions related to financial regulation, the general exemption for trade secrets (1 V.S.A. § 317(c)(9)), and the general exemption for personal records relating to an individual (1 V.S.A. § 317(c)(7)).

A table listing the exemptions reviewed, a brief description of the subject matter of the exemptions, and the Study Committee's recommendations concerning each exemption are set forth in Appendix E. A more detailed description of the rationale for the Study Committee's recommendations to amend various exemptions is set forth in Appendix F. Draft proposed legislation that would implement the Study Committee's recommendations with regard to each exemption, and that would implement prior recommendations that have not yet been enacted, is set forth in Appendix G.

1. Trade Secret Exemption, 1 V.S.A. § 317(c)(9)

At its October 4, 2013 and November 1, 2013 meetings, the Committee heard testimony from several witnesses on the general trade secret exemption found at 1 V.S.A. § 317(c)(9). This testimony supplemented discussion of the trade secret exemption at the Committee's November 30, 2012 meeting.³

In 2013, most of the testifying witnesses opined that the substance of 1 V.S.A. § 317(c)(9) works well and does not need to be revised. However, representatives of the Agency of Natural Resources recommended that if the General Assembly intends the phrase "trade secrets" to be understood to exempt "confidential business information," 1 V.S.A. § 317(c)(9) should be amended to clarify this intent.⁴ Because ANR's recommendation accords with the plain language of 1 V.S.A. § 317(c)(9), as interpreted by the Vermont Supreme Court, the Committee

³ A description of select testimony from the November 30, 2012 meeting, and the Committee's prior recommendations regarding 1 V.S.A. § 317(c)(9), are available at pp. 6–7 of <http://www.leg.state.vt.us/reports/2013ExternalReports/285233.pdf>.

⁴ Legislative counsel noted that using the phrase "trade secrets" and "confidential business information" interchangeably is consistent with the sole existing Vermont Supreme Court case interpreting 1 V.S.A. § 317(c)(9). See *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341 (2002).

agrees. Language amending 1 V.S.A. § 317(c)(9) to clarify that trade secrets means confidential business records or information is shown in Sec. 36 of Appendix G.

In addition, ANR noted that the existing requirement of subdivision 317(c)(9) that a trade secret be “known only to certain individuals within a commercial concern” poses problems when a commercial entity has shared a trade secret with a contractor or other third party. The Committee agrees that this existing language does not reflect commercial realities and is unnecessarily restrictive, and therefore recommends that it be eliminated and replaced with language requiring that the commercial entity make “efforts that are reasonable under the circumstances” to keep the information secret.⁵ Language implementing this recommendation is shown in Sec. 36 of Appendix G.

In addition, the Committee heard testimony from witnesses about the process through which trade secrets are designated by commercial entities and evaluated by public agencies. Representatives of the Department of Buildings and General Services (BGS) and of the Attorney General’s Office noted that standard Request for Proposal provisions require companies to designate trade secrets at the time of the submission of bids, but that in the event of a public records request, agencies independently review whether particular records qualify as exempt, even if a company has failed to designate a record as a trade secret. Although the process of consulting with a company about trade secrets can make it difficult to meet the Public Records Act’s time limits for responding to a records request, and the public agency is liable for attorney’s fees under 1 V.S.A. § 319(d) if a record ultimately is found not to be exempt, neither

⁵ This language is consistent with the definition of trade secret found in 9 V.S.A. chapter 143, which is derived from the Uniform Trade Secrets Act.

BGS nor the AG's Office recommended any legislation to address the trade secret designation or review process.

By contrast, Melissa Dever, a representative of a Competitive Computing, stated that companies need more guidance from public agencies about how to adequately mark submissions as confidential. Bill Reedy, Vice President and General Counsel to the Vermont State Colleges, proposed that submitting companies be required to designate trade secrets, and that the burden of defending confidentiality designations in the event of a public records request be shifted to the companies making them. Geoff Commons, Director for Public Advocacy at the Department of Public Service, did not have specific recommendations about the process for designating or claiming trade secrets, but he stated a preference that the law be changed to require a company seeking trade secrets confidentiality to designate records as such.

The Committee [NO DECISION YET - COMPLETE AFTER JANUARY 9 MEETING].

2. *Personal Records Exemption, 1 V.S.A. § 317(c)(7)*

At its December 13, 2013 meeting, the Committee heard testimony from several witnesses on the general personal records exemption found at 1 V.S.A. § 317(c)(7). The Committee first reviewed this exemption in 2011, and recommended that it be amended to list specific categories of personal information that would be categorically exempt, and that other types of personal information would continue to be subject to the balancing test created under the Vermont Supreme Court's *Trombley* case.⁶ During the 2013 session, the House Committee on Government Operations heard testimony on 1 V.S.A. § 317(c)(7), and determined that additional

⁶ See *Trombley v. Bellows Falls Union High School District No. 27*, 160 Vt. 101 (1993). The Committee's prior recommendation to amend 1 V.S.A. § 317(c)(7) can be found on pp. 43–44 of its January 2012 interim report, available at <http://www.leg.state.vt.us/reports/2012ExternalReports/276082.pdf>.

consideration of this exemption by the Committee would be appropriate. Additional review of the exemption was also prompted by the Act 23 project to develop a bill listing all PRA exemptions in the PRA itself.

At its December 13, 2013 meeting, the Committee heard testimony from Dan Barrett of ACLU-Vermont that the personal records exemption is basically working well, and does not need to be changed. He suggested that to the extent guidance is needed on application of the *Trombley* balancing test, a plain English guide for public agency officials would be preferable to attempting to identify specific types of information that should be categorically exempt. In addition, Mr. Barrett opined that the exemption should remain directory, not mandatory, because public agencies appear to have a good track record of exercising discretion with respect to sensitive personal records, and the common law tort for invasion of personal privacy offers some recourse against a public agency if it did release such records.

Steve Collier, General Counsel of the Department of Human Resources, offered a different opinion, noting that a list of categorically exempt information could probably be identified without too much trouble, and would be helpful for public agencies otherwise required to apply a very general balancing test. He made clear, however, that the Administration favors retaining a balancing test for personal information that does not fall into these categories. Bill Griffin, Deputy Attorney General, agreed that amending 1 V.S.A. § 317(c)(7) to list categorically exempt types of personal information made sense in principle.

The Committee reviewed the language of its prior recommendation, and noted that public agencies—particularly municipalities—could face challenges identifying and redacting some types of information recommended to be categorically exempt. For example, home or personal

telephone numbers may be found in a variety of municipal records; redacting these could be burdensome to municipal records custodians, and the individuals affected may have little expectation of privacy in these telephone numbers. To the extent public agencies need guidance on the application of 1 V.S.A. § 317(c)(7), guidance outside statutory changes may be a better approach than legislatively prescribed categories that may not fit all situations. At its January 9, 2014 meeting, the Study Committee considered different approaches for providing public agencies with advisory opinions or advice on the application of PRA exemptions, and it plans to obtain input on these mechanisms from interested parties during the 2014 interim.

During the December 13, 2013 meeting, legislative counsel summarized Vermont Supreme Court cases interpreting 1 V.S.A. § 317(c)(7). To qualify as exempt under subdivision 317(c)(7), a record must, as a threshold matter, reveal “intimate details” of an individual’s life, and further, the invasion of privacy occasioned by disclosure of the record must outweigh the public interest in favor of disclosure.⁷

The phrase “intimate details” is not well-defined in the Court’s cases, is subject to multiple interpretations, and is a more restrictive threshold requirement than is found in the cases interpreting the analogous federal Freedom of Information Act (FOIA) exemption.⁸ Committee members believe that the FOIA threshold requirement—that a record apply to a particular

⁷ See *Trombley v. Bellows Falls Union High School District*, 160 Vt. 101 (1993), *Kade v. Smith*, 180 Vt. 554 (2006) (mem.).

⁸ 5 U.S.C. § 552(b)(6) exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Based upon a review of the legislative history of FOIA, the U.S. Supreme Court held that Congress intended the term “similar files” to be interpreted broadly. Exemption 6 is not limited “to a narrow class of files containing only a discrete kind of personal information,” but was “intended to cover detailed Government records on an individual which can be identified as applying to that individual.” When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person’s privacy.” *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (internal citations omitted).

individual—is consistent with the plain language and intent of 1 V.S.A. § 317(c)(7), and therefore recommends that the General Assembly enact legislation to supersede the Court-created requirement that a record reveal “intimate details” of an individual’s life. However, the Committee believes that the Vermont Supreme Court’s interpretation of 1 V.S.A. § 317(c)(7) to require a balancing of privacy and public interests is necessary and appropriate, and recommends that 1 V.S.A. § 317(c)(7) be amended to incorporate the balancing test explicitly. Language implementing these recommendations is shown in Secs. 34–35 of Appendix G.

In addition, Committee members noted that the existing language of 1 V.S.A. § 317(c)(7) referencing “medical or psychological facts concerning any individual or corporation” could be construed not to protect medical or psychological information which may not constitute a “fact,” such as certain medical or psychological information communicated by a patient to a health care provider or the opinions of a health care provider. The reference to a “corporation” in this sentence also appears to be nonsensical, and the subdivision generally reads poorly and is ungrammatical. The Committee’s recommendation to address these issues is shown in Sec. 35 of Appendix G.

Finally, the Committee discussed the issue of requiring public agencies to notify an individual specifically identified in a public record prior to release of the record to another person. As the Committee discussed in Fall 2011 when it first considered 1 V.S.A. § 317(c)(7), the short timeframes within which public agencies must respond to public records requests, and the difficulty of locating individuals, may make such notifications difficult or impossible. However, the Committee strongly encourages public agencies to make such notifications whenever

feasible. The Committee also referenced the issue of clarifying an individual's right to participate as a party in a lawsuit challenging a claim that a record related to that individual is exempt under 1 V.S.A. § 317(c)(7), but did not make a recommendation on this subject.

VII. Protecting the Identities of Whistleblowers

At its December 13, 2013 meeting, the Committee heard testimony from State Auditor Doug Hoffer on the subject of protecting the identities of whistleblowers—at least until an investigation of the whistleblower's allegations is completed. Mr. Hoffer related that he was advised by the Attorney General's Office that no PRA exemption currently protects the identities of persons who report waste, fraud, or abuse to his office, and offered his view that more individuals might come forward with such reports if they could be assured that their identities would remain confidential. Although he did not recommend specific exemption language, Mr. Hoffer provided as background a copy of a federal law provision, 5 U.S.C. § 1213(h), which generally prohibits a Special Counsel from disclosing the identity of whistleblowers who are employees, former employees, or applicants for employment.

The Committee agrees that the issue of protecting the identity of persons who report waste, fraud, and abuse is important, and that encouraging such persons to come forward would be in the best interest of the State. The Committee believes that if the personal records exemption, 1 V.S.A. § 317(c)(7), is amended as recommended in Section VI of this Report, by superseding the Court-created requirement that a record must reveal "intimate details" of an individual's life to qualify as exempt under 1 V.S.A. § 317(c)(7), the identity of whistleblowers would qualify as exempt under 1 V.S.A. § 317(c)(7) under many circumstances. Federal courts have interpreted analogous federal FOIA exemptions for records the disclosure of which would invade personal

privacy to protect the identities of whistleblowers or complainants at risk of retaliation.⁹ [Insert conclusion after Jan. 9 meeting].

⁹ See, e.g., *Church of Scientology of California v. Dep't of State*, 493 F.Supp. 418, 421 (D.C.D.C. 1980) (finding FOIA exemptions 6 and 7(C) applicable to exempt identities “of third persons who provided information and participated in the investigation of the Church of Scientology”); *McCutchen v. U.S. Dep't of Health and Human Services*, 30 F.3d 183, 189-90 (D.C. Cir. 1994) (finding FOIA exemption 7(C) applicable to protect the identities of individuals who had made allegations of misconduct to the Office of Scientific Integrity, and that it therefore was unnecessary to consider whether Exemption 6 also applied).

APPENDIX A

Status of Recommendations in 2012 and 2013 Interim Reports of the Public Records Study Committee

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
1 V.S.A. § 317(c)(5) and (c)(18) (2012)	The House and Senate Committees on Judiciary should review the exemption in 1 V.S.A. § 317(c)(5) regarding criminal investigation records and the exemption in 1 V.S.A. § 317(c)(18) regarding records related to Department of Public Safety investigations in order to determine if the two exemptions should be amended or revised.	Enacted in part. Act No. 70 (S.148) of 2013 replaced the former § 317(c)(5) categorical exemption with a FOIA-derived balancing test that only exempts criminal investigation records from disclosure if production of the records would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose techniques and procedures for law enforcement investigations or prosecutions, or endanger the life or physical safety of any individual. 1 V.S.A. § 317(c)(18) was not addressed in Act 70.
1 V.S.A. § 317(c)(6) and 32 V.S.A. § 3102 (2012)	The General Assembly should clarify whether property tax adjustment information is confidential or not.	Enacted. The 2012 miscellaneous tax bill, 2012 Acts and Resolves No. 143, §§ 5 and 11 (Act 143), provided that property tax adjustment information is confidential, but a final tax bill showing only the amount due by a taxpayer is public. Under Act 143, a municipality would prepare a separate bill with the property tax adjustment information. This bill would be confidential, but the Department of Taxes and municipal officials could disclose the information to certain designated persons.
N/A (2012)	In light of the Vermont Supreme Court decision in <i>In Re: H.S. 122</i> , which held that property tax adjustment information was confidential tax return information that should not be disclosed, municipalities that previously released property tax adjustment information should be held harmless for any liability related to the	Enacted. Hold harmless language was enacted by the General Assembly in 2012 Acts and Resolves No. 70.

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
	disclosure of the information.	
1 V.S.A. § 317(c)(7) (2012)	Amend the personal records exemption under 1 V.S.A. § 317(c)(7) to clarify what constitutes personal information, including listing of several categories of information specified as personal.	Recommendation modified. The Committee's January 2012 recommendation is modified for the reasons described in Sec. VI of this 2014 interim report. See Sec. 35 of App. G for the new recommended language. (Bills were introduced in 2012 and 2013 to implement the Committee's Jan. 2012 recommendation, but were not enacted. See H.611 of 2012 and H.54 of 2013.)
1 V.S.A. § 317(c)(21) (2013)	The House Committee on Commerce and Economic Development and the Senate Committee on Government Operations should review this exemption to evaluate Vermont Life's discretion to sell or rent subscription lists and to consider ACCD's recommendation to expand the exemption to include customer lists.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees. In its Act 23 questionnaire to ACCD, the Committee proposed consolidating this exemption with 1 V.S.A. § 317(c)(10), which also addresses lists of names. This proposed consolidation is shown in Sec. 9 of App. G, and it addresses ACCD's recommendation that the exemption be expanded to include customer lists.
1 V.S.A. § 317(c)(22) (2013)	Repeal this exemption, which addresses records related to tax credits, because the underlying tax credit laws were repealed in 2006.	Recommendation reaffirmed. A bill was introduced in 2013 but was not enacted—see H.54. Sec. 8 of App. G is an intent section which states that records described in 1 V.S.A. § 317(c)(22), to the extent any still exist, will continue to be exempt after repeal of this provision.
1 V.S.A. § 317(c)(23) (2012)	Amend the university research exemption under 1 V.S.A. § 317(c)(23) to provide that certain records regarding the care of animals used for research or scientific testing shall be available for public inspection or copying.	Recommendation reaffirmed. Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. The Committee confirmed through its Act 23 questionnaires that VSC and UVM officials still support its recommended language. The recommended language is shown in Sec. 11 of App. G.

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
1 V.S.A. § 317(c)(30) (2013)	Recommend that substance of exemption for state marketing databases be preserved, but that it be reworded to be more understandable to the average reader.	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted—see H.54. The recommended language is shown in Sec. 9 of App. G.
1 V.S.A. § 317(c)(37) and 18 V.S.A. § 1917(a) (2012)	Senate Committee on Health and Welfare and House Committee on Health Care should review 1 V.S.A. § 317(c)(37) and 18 V.S.A. § 1917(a) to determine whether there is a method that allows for disclosure of reportable adverse events by health care facilities without violating federal law or the privacy of patients.	Enacted. 2012 Acts and Resolves No. 171, § 24f provides: Beginning in 2013, the community reports shall include at a minimum data from all Vermont hospitals of reportable adverse events aggregated in a manner that protects the privacy of the patients involved and does not identify the individual hospitals in which an event occurred together with analysis and explanatory comments about the information contained in the report to facilitate the public's understanding of the data.
1 V.S.A. § 317(c)(38) (2012)	Repeal the exemption in 1 V.S.A. § 317(c)(38) related to records containing prescriber-identifiable information.	Recommendation modified . Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. During its hearings on H.54, the House Committee on Government Operations determined that this exemption should be amended, but not repealed. The Committee confirmed through its Act 23 questionnaire to AHS that AHS does not oppose the amended language. See Sec. 18 of App. G for the new recommended language.
1 V.S.A. § 317(c)(40) (2013)	Clarify that this provision exempts genealogical information within applications for tribal recognition.	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted—see H.54. The recommended language is shown in Sec. 9 of App. G. The Committee confirmed through its Act 23 questionnaire to ACCD that ACCD does not oppose this recommendation.
8 V.S.A. § 4089a	Delete language of 8 V.S.A. § 4089a related to records of reviews by an independent panel of	Recommendation reaffirmed. Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. The Committee

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
(2012)	mental health care providers. The panel has been repealed and the exemption is no longer accurate.	confirmed through its Act 23 questionnaire to DFR that DFR does not oppose amending 8 V.S.A. § 4089a as proposed in the questionnaire. See Sec. 19 of App. G for the recommended language.
8 V.S.A. § 4089f (2012)	Amend exemption under 8 V.S.A. § 4089f related to records of external reviews of health care decisions to reflect that the exemption now also applies to review of mental health care services.	Recommendation reaffirmed. Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. The Committee confirmed through its Act 23 questionnaire to DFR that DFR does not oppose amending 8 V.S.A. § 4089f as proposed in the questionnaire. See Sec. 20 of App. G for the recommended language.
10 V.S.A. § 7(b) (2013)	The committees of jurisdiction should review this exemption for benchmark reports in order to address ambiguities in its language.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees. In its Act 23 questionnaire to ACCD, the Committee asked if ACCD recommended any specific fix to the ambiguous language. In its response, ACCD did not offer a specific recommendation, but did address some of the policy issues at stake.
15 V.S.A. § 307(a) (2013)	The Senate Committee on Health and Welfare and the House Committee on Human Services should review this exemption for voluntary acknowledgement of parentage forms and consider its repeal.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
16 V.S.A. § 2843(d) (2013)	Language regarding application for need-based incentive grants should be modernized and should cross-reference the existing exemption for personal information.	Recommendation modified . A bill was introduced in 2013 but not enacted—see H.54. In its Act 23 questionnaire to the Vermont Student Assistance Corporation, VSAC’s counsel recommended that this exemption be repealed and replaced with an exemption that more broadly addresses the confidentiality of personal financial information in VSAC’s custody. The Committee agrees to this recommendation, which

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
		is shown in Secs. 12-13 of App. G.
18 V.S.A. §§ 1091–1099 (2012)	The Senate Committee on Health and Welfare and the House Committee on Human Services should review the need for mandated venereal disease testing and the accompanying public records exemption.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
18 V.S.A. § 1099 (2012)	Amend the exemption under 18 V.S.A. § 1099 for venereal disease testing reports so that it is not a stand-alone exemption, but instead references the exemption in 18 V.S.A. § 1001 for communicable disease reports.	Recommendation reaffirmed, as modified . Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. In its Act 23 questionnaire response, AHS did not oppose the concept of cross-referencing 18 V.S.A. § 1001. The language is shown in Sec. 21 of App. G.
18 V.S.A. § 4474d (2013)	Committees of jurisdiction should review and clarify the confidentiality of medical marijuana dispensary application materials and/or the scope of DPS' rulemaking authority with regard to confidentiality.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
18 V.S.A. § 7103 (2012)	Amend exemption in 18 V.S.A. § 7103 regarding to whom patient information may be released to eliminate any conflict with federal law and to delete an outdated cross-reference.	Recommendation reaffirmed, as modified . Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. During hearings of the House Committee on Government Operations on H.54, the Committee refined how this section should be amended, and AHS approved this refined language in its Act 23 questionnaire response. The modified recommendation is shown in Sec. 22 of App. G.

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
18 V.S.A. ch. 204 (2012)	The House and Senate Committees on Judiciary, the Senate Committee on Health and Welfare, and the House Committee on Human Services should review the requirements in 18 V.S.A. ch. 204 regarding the voluntary and involuntary sterilizations of persons with mental retardation to consider whether the chapter is necessary or whether such proceedings are tracked in an aggregate manner.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
18 V.S.A. § 9409a (2012)	Delete exemption in 18 V.S.A. § 9409a for information submitted by health care providers regarding the reimbursement paid for the 10 most common billing codes of primary health care services.	Enacted. 2012 Acts and Resolves No. 171, § 41(b) repealed 18 V.S.A. § 9409a.
18 V.S.A. § 9418f (2012)	Delete exemption under 18 V.S.A. § 9418f for rental health plan network information submitted to DFR.	Recommendation withdrawn. Bills were introduced in 2012 and 2013 but not enacted. See H.611 of 2012 and H.54 of 2013. In its 2013 hearings on H.54, the House Committee on Government Operations heard testimony that 18 V.S.A. § 9418f(f) does not create a PRA exemption, but instead is intended to prohibit the use of a health care provider's contractual discount pursuant to a provider network contract, and determined that this provision should not be repealed.
28 V.S.A. § 204(d) (2013)	Committees of jurisdiction should review exemption to clarify who may claim and waive the "privilege" for presentence, pre-parole, and supervision reports.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
28 V.S.A. § 601(10) (2013)	Committees of jurisdiction should review exemption for inmate files in conjunction with the policies and directives adopted under the exemption to consider the appropriate breadth of the exemption, whether to require rulemaking under the APA, and the standards for the exercise of rulemaking.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
30 V.S.A. § 206 (2013)	Recommend deleting the last section of this section, as trade secrets in information required to be furnished by the Department of Public Service may be claimed exempt under 1 V.S.A. § 317(c)(9).	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted. See H.54 of 2013. See Sec. 33 of App. G for the recommended language.
33 V.S.A. § 105(b) (2013)	Amend subdivision (b)(2) regarding rulemaking authority with regard to DCF records to eliminate the third sentence.	Recommendation reaffirmed, as modified. A bill was introduced in 2013 but not enacted. See H.54 of 2013. In H.54, both the second and third sentences of subdivision (b)(2) would be deleted. See Sec. 23 of App. G for the recommended language.
33 V.S.A. § 111 (2013)	Recommend amending the exemption to eliminate the phrase “political or commercial purposes.”	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted. See H.54 of 2013. In response to the Committee’s Act 23 questionnaire, AHS did not oppose this amendment. See Sec. 24 of App. G for the recommended language.
33 V.S.A. § 304(b) (2013)	Amend subdivision (b)(2) regarding rulemaking authority with regard to DCF records to eliminate the third sentence.	Recommendation reaffirmed, as modified. A bill was introduced in 2013 but not enacted. See H.54 of 2013. In H.54, both the second and third sentences of subdivision (b)(2) would be deleted. See Sec. 25 of App. G

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
		for the recommended language.
33 V.S.A. § 908 (2013)	Recommend amending to clarify that State employee wages must be disclosed under 1 V.S.A. § 317(b).	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted. See H.54 of 2013. In response to the Committee's Act 23 questionnaire, AHS did not oppose this amendment. See Sec. 26 of App. G for the recommended language.
33 V.S.A. § 2010(e) (2013)	Recommend technical amendment to clarify that the exemption is a public record subject to an exemption.	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted. See H.54 of 2013. See Sec. 27 of App. G for the recommended language.
33 V.S.A. § 4105 (2013)	Committees of jurisdiction should review to address the language and scope of the prohibition on use of information furnished to the Office of Child Support.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees. In its Act 23 questionnaire to AHS, the Committee noted this recommendation and asked AHS to comment on the breadth of the exemption. AHS responded that the current breadth of the exemption is appropriate.
33 V.S.A. § 4913 (2013)	Committees of jurisdiction should review to consider how to address bad faith reports of child abuse.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
33 V.S.A. chapter 49 (2013)	Committees of jurisdiction should review this chapter in order to clarify and streamline the language of the exemptions in this chapter and possibly create one section in the chapter to address the confidentiality of child abuse registry information.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.

Statutory Citation (Year of Rec)	Study Committee Recommendation	Status of Recommendation
33 V.S.A. § 6321 (2013)	Committees of jurisdiction should review in order to address the appropriate scope of the exemption for records related to attendant care services.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
33 V.S.A. § 6903 (2013)	Committees of jurisdiction should review to consider how to address bad faith reports of elderly or disabled.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
33 V.S.A. § 7112 (2013)	Amend to eliminate the reference to guidelines regarding the confidentiality of unsubstantiated complaints or the identity of residents and complainants of nursing homes.	Recommendation [reaffirmed][withdrawn]. A bill was introduced in 2013 but not enacted. See H.54 of 2013. See Sec. 28 of App. G for the new recommended language.
N/A (2012)	The House and Senate Committees on Government Operations should review whether the Public Records Act should be amended to clarify application of the act to contracts between a public agency and private entity for the performance of a governmental function.	Recommendation reaffirmed. PRSC staff is not aware of any action by the committees.
N/A (2013)	The Administrative Procedure Act should be amended to require that the coversheet required to be submitted by an agency proposing a rule specify whether the proposed rule creates a PRA exemption.	Recommendation reaffirmed. A bill was introduced in 2013 but not enacted. See H.54 of 2013. See Sec. 1 of App. G for the recommended language.

APPENDIX B

Public Records Act Exemptions: Process for Referral and Review by the House and Senate Committees on Government Operations

I. Overview

In 2010 and 2011, there was significant debate among legislators, the press, and others regarding the Vermont Public Records Act (PRA). The debate focused on the numerous exemptions in statute to public review of records under the PRA. In response, the Vermont General Assembly enacted 2011 Acts and Resolves No. 59 (Act 59). Among other PRA changes, Act 59 established a legislative public records study committee (Study Committee) to review the PRA and its numerous exemptions.

In fulfillment of its charge, the Study Committee is reviewing each PRA exemption. Every year, the Study Committee is informed of new PRA exemptions added in the previous legislative session. In 2011, the Study Committee initially identified 239 PRA exemptions. In 2012, the Study Committee identified 249 exemptions. In 2013, several exemptions were repealed and multiple exemptions removed from the list. Nevertheless, new exemptions were added in 2013, and currently there are 243 listed exemptions. Many of the new exemptions do not follow a consistent format or are duplicative of existing exemptions and, thus, arguably, are unnecessary.

The House and Senate Committees on Government Operations both have jurisdiction over public records issues.¹⁰ However, the public records jurisdiction of the Committees on Government Operations does not ensure review of PRA exemptions, especially when an exemption is added or amended in a larger bill with a subject matter generally unrelated to public records. In these circumstances, the Committees on Government Operations are left uninformed of a proposed PRA exemption or amendment and cannot provide input on the exemption's nature, format, or need.

If the Committees on Government Operations did learn of a proposed PRA exemption or amendment, the committees could, arguably, move for commission of a bill to committee for review. In most instances, formal commission of a bill could cause delay, and the Chairs of the Committees on Government Operations do not want to encumber the legislative process. However, informal input from the Committees on Government Operations could help reduce the number of enacted PRA exemptions, or at least ensure that exemptions are consistently drafted or amended.

This document proposes a process through which the Committees on Government Operations are informed of a proposed PRA exemption or substantive amendment. Under the proposal, when a committee vote on a bill containing a PRA exemption or substantive amendment is imminent, the Legislative Council attorney drafting the bill shall confer with the chair of the committee of jurisdiction regarding the exemption and this process. The chair of jurisdiction then could confer with the chair of Government Operations, or after approval of the chair of jurisdiction, the attorney drafting the bill could inform the Legislative Council PRA attorneys of the exemption. The PRA attorneys then would inform the chair of the respective Committee on Government Operations.

Under this process, the chair of the Committee on Government Operations could confer with the chair of jurisdiction and evaluate whether and how the Committee on Government Operations would

¹⁰ See House Rule 25 and Senate Rule 24.

provide input. This process would be similar to the informal House process for review of the establishment of State entities, such as boards; a process which works well, results in oversight and consistency in creation of entities, and does not unnecessarily delay legislative action. A PRA exemption review process hopefully would be similarly successful.

II. Details of Process for Government Operations Review of PRA Exemptions

A. Drafting Process—Prior to Bill Introduction

- Under Legislative Council policy, an attorney drafting a bill should confer with the Legislative Council attorney with jurisdiction over a subject matter if the bill will address that subject matter.
- This referral allows the attorney with jurisdiction to provide input prior to bill introduction.
- Currently, an attorney drafting a PRA exemption in a bill is supposed to contact Helena Gardner—the attorney with PRA jurisdiction—before sending the bill to the bill sponsor.
- Helena provides guidance regarding format, consistency with existing language, and whether the subject matter of the proposed exemption is addressed by an existing PRA exemption.
- Under the Legislative Council referral process, the Committee on Government Operations chairs are not informed of the proposed PRA exemption because the content of the draft bill is confidential until the member who requested the draft bill introduces it.
- The Legislative Council referral process prior to bill introduction would not change.

B. Committee Markup of PRA Exemption

- If Committee markup of a bill proposes to add a PRA exemption that was not in the bill as introduced, the drafting attorney should consult with Helena Gardner regarding the exemption’s format and consistency. Helena can also comment on whether an existing exemption may apply.
 - Helena would not inform the Government Operations chair unless the conditions below are met.

C. Imminent Committee Passage of PRA Exemption

- When Committee passage of a bill that contains a PRA exemption is imminent—e.g., when the Committee is scheduled to vote on the bill—the attorney drafting the bill will confer with the Committee chair (chair of jurisdiction) regarding the PRA exemption and this process.
- The chair of jurisdiction could then confer with the chair of Government Operations; **or**
 - With the approval of the chair of jurisdiction, the attorney drafting the bill could inform Helena Gardner, and Helena would inform the chair of Government Operations.

D. Input from Government Operations Committee

- The chair of jurisdiction and the chair of Government Operations could confer regarding whether and to what extent the Committee on Government Operations would review the PRA exemption.

- Except for special circumstances, the Committee on Government Operations: 1) would not take formal possession of the bill; 2) would informally review the bill; and 3) would provide recommendations regarding the proposed PRA exemption to the chair of jurisdiction.

APPENDIX C

Checklists for Review of Exemptions

To: Standing Committees of the Vermont Senate and House of Representatives
From: Public Records Legislative Study Committee
Date: January 9, 2014
Re: Recommended checklists of issues to consider when reviewing exemptions to the Public Records Act, or a grant of rulemaking authority to create new exemptions to the PRA

In its third annual report, the Public Records Legislative Study Committee (“Committee”) recommended that the standing committees of the House and Senate use checklists when reviewing either (A) an exemption to the Public Records Act (“PRA”), or (B) a grant of rulemaking authority to an agency to adopt rules creating an exemption to the PRA. The Committee also requests that persons testifying before the Committee consider the checklist prior to testifying about whether existing exemptions should be retained, repealed, or modified.

A. REVIEW OF EXEMPTIONS

__ 1. Is the exemption necessary and justified?

Does the need for the record to be exempt from public inspection and copying outweigh the policy in favor of open access to public records?

Is the subject of the exemption already protected by another exemption? (Even if so, there might be reasons to retain the exemption with an appropriate cross-reference).

__ 2. Is the language of the exemption clear, and tailored to the exemption’s purpose?

The language of the exemption should not be so broad that it exempts records that do not need to be withheld to serve the purpose of the exemption, or so narrow that it fails to exempt records which should be withheld to achieve the purpose of the exemption.

Is the scope of the exemption expressed in clear and unambiguous language?

__ 3. Should the exemption be categorical, or content-based?

Should a record or information related to a subject matter be exempt as a category, or should a record or information be exempt based on a particular content-based test? For example, Social Security numbers and in some contexts, medical records, are exempt as a category, whereas the trade secret and crime detection and investigation exemptions provide that records meet certain substantive tests to be exempt.

__ 4. Is the intent to exempt only certain information (so that redaction may be required), or to exempt an entire document that relates to a certain subject?

Compare 1 V.S.A. § 317(c)(41), which exempts entire “documents” reviewed by the Victims’ Compensation Board, with 1 V.S.A. § 317(c)(25), which exempts passwords, access codes, and similar information.

___ **5. Should the exemption be limited in duration?**

Unless an exemption is expressly limited in duration, courts may interpret it to be perpetual. In some cases, it may be appropriate for confidentiality to be removed after a certain number of years, or after a triggering event (*e.g.*, after an agency brings an enforcement action).

___ **6. Is the goal of the exemption to prohibit an agency from releasing certain records, or merely to allow an agency, at its discretion, to withhold certain records?**

___ If the goal is to prohibit the release of certain records, uniform language should be used specifying that the record[s] “shall be exempt from public inspection and copying under the Public Records Act and shall not be released.”

Note: Consider whether a specific penalty should be established for the intentional or negligent release of such records, and whether a private person can enforce the prohibition. *See, e.g.*, 18 V.S.A. § 1001(e). Absent a specific penalty, the only recourse for a person affected by disclosure may be through a common law tort suit.

___ If the goal is only to authorize an agency, *at its discretion*, to withhold certain records, uniform language should be used specifying that the record[s] “[is/are] exempt from public inspection and copying under the Public Records Act.”

___ **7. If the record “shall not be released,” should there be exceptions authorizing disclosure to particular persons or under particular circumstances?**

___ Should the public agency be authorized to disclose the record to specified persons for certain purposes, *e.g.*, to law enforcement in the exercise of their duties?

___ Is the exemption intended to benefit a person, and if so, should that person be able to waive confidentiality?

___ If a person is authorized to receive a record under an exception to the exemption for a specific purpose, should the person be authorized to use the record only for the specified purpose, and be prohibited from further disclosure of the record?

___ Should government entities be authorized to share records among one another?

___ *If applicable:* Is there a rational basis for limiting the exception to specified persons, but not to other similarly situated persons?

___ **8. Is the exemption required under federal law, a multi-jurisdictional compact, or an agreement with a national or multistate regulatory entity?**

___ If an exemption is required under these circumstances, consider whether to cite to the relevant federal law, compact, or agreement, or to incorporate the substantive provisions of the law, compact, or agreement in the exemption.

___ *If applicable:* Does the exact language of a federal law, compact, or agreement need to be used, or is there flexibility to tailor it to Vermont statutes if appropriate?

___ **9. Should the record also be protected from subpoena and discovery in litigation?**

A record's status as confidential or exempt from public inspection and copying does not necessarily shield it from subpoena or discovery in litigation. If the General Assembly intends the record to be privileged from subpoena or discovery in litigation, the exemption should specifically express this intent; however, depending on the circumstances, a litigant may have a constitutional right to discovery of records.

B. REVIEW OF GRANT OF RULEMAKING AUTHORITY TO CREATE A PRA EXEMPTION

___ **1. Is the exemption authorized to be adopted by rule necessary and justified?**

___ Does the need for the record to be confidential outweigh the policy in favor of open access to public records?

___ Is the subject of the exemption already protected by another exemption? (Even if so, there might be reasons to authorize the rulemaking with an appropriate cross-reference).

___ **2. Do circumstances justify the creation of an exemption through agency rulemaking instead of through an enactment of the general assembly?**

The General Assembly should delegate the authority to create a PRA exemption through rulemaking only under appropriate circumstances, *e.g.*, the subject of the exemption involves complex or detailed questions that an agency is better positioned to resolve.

___ **3. Is the grant of rulemaking authority specific and unambiguous?**

The grant of rulemaking authority to create an exemption to the PRA should be specific and unambiguous, providing guidance to the agency concerning the subject matter and scope of the exemption. A vague grant of legislative authority may raise constitutional issues, and increases the risk that an agency will propose a rule inconsistent with legislative intent.

___ **4. Does the rulemaking meet the requirements of 2 V.S.A. § 205(a), which requires the General Assembly to express its intent in the legislation?**

___ **5. Is the grant of rulemaking authority narrowly tailored to meet the purposes of confidentiality, in accordance with legislative intent?**

The language of the rulemaking authority should not be so broad so as to authorize rulemaking beyond the scope needed to serve the purpose of the exemption, or so narrow as to preclude rulemaking needed to achieve the purpose of the exemption.

___ **6. Should the agency be directed to adopt rules creating an exemption that is limited in duration?**

Unless an exemption is expressly limited in duration, courts may interpret it to be perpetual. In some cases, it may be appropriate for confidentiality to be removed after a certain number of years, or after a triggering event (*e.g.*, after an agency brings an enforcement action).

___ **7. Should the agency be directed to adopt exceptions to the exemption?**

___ The General Assembly should consider specifying criteria for the agency to consider in adopting any exceptions to an exemption.

APPENDIX D**Publicizing the List of PRA Exemptions and Organizing Them by Subject**

Sec. X. 1 V.S.A. § 317(d) is added to read:

(d) On or before December 1, 2014, the Office of Legislative Council shall compile a list of all Public Records Act exemptions found in the Vermont Statutes Annotated. In compiling the list, the Chief Counsel or designee shall consult with the Attorney General's office. The list shall be updated no less often than every two years, and shall be arranged by subject area, and in order by title and section number. The list, and any updates thereto, shall be posted on the websites of the General Assembly, the Secretary of State's Office, the Attorney General's Office, and the State Library, and shall be sent to the Vermont League of Cities and Towns.

APPENDIX E

List of Exemptions Reviewed in 2013, and Recommendation

No.	Cite	Description	Recommendation
<i>I. Natural Resources</i>			
1	1 V.S.A. § 317(c)(20)	Information regarding location of archaeological sites	Correct error in cross-reference.
2	10 V.S.A. § 101	Geology and mineral information submitted to the Division of Geology and Mineral Services by the mineral industry, if the industry requests confidentiality	In subdiv. (6), delete language related to making public and keeping confidential certain mineral and geology information.
3	10 V.S.A. § 123	Vermont Geographic Information Service; individual identifiers of persons supplying data	Retain exemption in existing form.
4	10 V.S.A. § 563	Air contaminant source reports submitted to the Agency of Natural Resources (ANR) that relate to production, sales figures, or production processes, the disclosure of which would adversely affect the competitive position of the source owner or operator	Retain exemption in existing form.
5	10 V.S.A. § 1259(b)	Reports submitted to ANR as part of a water pollution control permit when disclosure would divulge a trade secret	Add reference to trade secret standard at 1 V.S.A. § 317(c)(9) and delete extraneous language.
6	10 V.S.A. § 5410	All information regarding the location of endangered species sites	Retain exemption in existing form.
7	10 V.S.A. § 6628(a)	Toxic use reduction and hazardous waste reduction plans	Delete language stating that such plans received by ANR are not public records, and clarify that they are exempt from public inspection and copying under 1 V.S.A. § 317(c)(9) and shall not be disclosed.

No.	Cite	Description	Recommendation
8	10 V.S.A. § 6632	Trade secrets included in hazardous waste generator reports submitted to ANR	Add reference to trade secret standard at 1 V.S.A. § 317(c)(9) and delete extraneous language.
9	10 V.S.A. § 7153	Sales data and other confidential business information submitted to ANR by manufacturers of mercury-containing lamps	Retain exemption in existing form.
10	22 V.S.A. § 761	Information regarding location of archaeological sites	Retain exemption in existing form.
II. Transportation/Motor Vehicles			
11	5 V.S.A. § 3452	Information provided by railroads to the Agency of Transportation (AOT) or the Transportation Board	Retain exemption in existing form.
12	9 V.S.A. § 4100b	Pre-hearing conference discussions of parties before the Transportation Board	Clarify that “settlement communications,” not “conference discussions,” shall remain confidential and be exempt from public inspection and copying.
13	19 V.S.A. § 2603	Financial information, trade secrets, or other business information customarily regarded as confidential when submitted to AOT as part of an application for qualification for design-build contracts	Retain exemption in existing form.
14	19 V.S.A. § 2604	Conceptual submissions and responses in application for design-build contracts	Retain exemption in existing form.
15	19 V.S.A § 2606(a)	Technical and price proposals during evaluation of design-build contract applications	Retain exemption in existing form.
16	23 V.S.A. § 104	Motor vehicle records; photo images of person	Committees on Transportation should review exemption for consistency with the Drivers Privacy Protection Act, 18 U.S.C. § 2721 <i>et seq.</i>

No.	Cite	Description	Recommendation
17	23 V.S.A. § 707	Driver training school records of instructor's name, instruction license number, type of instruction given, and how much instruction was given	Exemption is overbroad: amend to state that only individually identifying information about students may be confidential.
III. Agriculture			
18	6 V.S.A. § 61	Identity of persons, households, or businesses providing agricultural information to the Agency of Agriculture, Food and Markets	Repeal confidentiality provision after consolidating its substance into a new exemption in 6 V.S.A. ch. 1.
19	6 V.S.A. § 484	Records acquired by the Agency of Agriculture, Food and Markets regarding the purchase and sale of maple products	Repeal confidentiality provision after consolidating its substance into a new exemption in 6 V.S.A. ch. 1.
20	6 V.S.A. § 1039	Information acquired by the Agency of Agriculture, Food and Markets regarding pesticide trade secrets or financial information	Repeal after consolidating its substance into a new exemption in 6 V.S.A. ch. 1.
21	6 V.S.A. § 1815	Information acquired by the Northeast Dairy Compact Commission and its staff	Retain exemption in existing form.
22	6 V.S.A. § 2766	Any identifying information acquired by the Agency of Agriculture, Food and Markets or Attorney General regarding rbST inspection and reporting	Repeal after consolidating its substance into a new exemption in 6 V.S.A. ch. 1.
23	6 V.S.A. § 2936(b)	Reports from milk handlers acquired by the Vermont Milk Commission	Repeal after consolidating its substance into a new exemption in 6 V.S.A. ch. 1.

No.	Cite	Description	Recommendation
<i>IV. Professions and Occupations/Labor</i>			
24	21 V.S.A. § 710(c)	Name or contact information of an individual who has alleged to the Department of Labor (DOL) that an employer has made a false statement or misclassified an employee	Retain exemption in existing form.
25	21 V.S.A. § 1035(c)	Financial information submitted to DOL by employee leasing companies	Retain exemption in existing form.
26	21 V.S.A. § 1314	Information obtained by the DOL regarding the unemployment benefit rights of an individual	Retain exemption in existing form.
27	26 V.S.A. § 82	Confidential information obtained by a public accountant in the course of a professional engagement	Remove from the list of exemptions; not applicable to a public agency.
28	26 V.S.A. § 1318	Disciplinary complaints, proceedings, or records of the Board of Medical Practice when not required to be released by statute; investigatory files of the Board which have not resulted in a charge of unprofessional conduct; and work product of Board attorney	Retain exemption in existing form.
29	26 V.S.A. § 1353(6)	The results of a mental, physical, or medical knowledge and skill evaluation that the Board of Medical Practice requires a licensee to complete	Retain exemption in existing form.
30	26 V.S.A. § 1443	Proceedings, reports, and records of health services peer review committees	Retain exemption in existing form.
31	26 V.S.A. § 4190(b)	Written comments related to peer reviews required by rules governing licensed midwives	Retain exemption in existing form.

No.	Cite	Description	Recommendation
<i>V. General Trade Secret Exemption</i>			
32	1 V.S.A. § 317(c)(9)	Trade secrets	Amend to clarify that “trade secrets” means “confidential business records or information,” and delete requirement that purported trade secret be known only to certain individuals within a commercial concern, replacing it with the requirement that the commercial concern make efforts reasonable under the circumstances to keep it secret.
<i>VI. DFR Exemptions</i>			
33	1 V.S.A. § 317(c)(26)	Information submitted to the Department of Financial Regulation (DFR) in dispute regarding a DFR regulated entity	Amend to substitute “person” for “individual.”
34	1 V.S.A. § 317(c)(36)	Anti-fraud plans	Amend by striking reference to DFR.
35	8 V.S.A. § 15(b)	Advisory interpretations	Retain exemption in existing form.
36	8 V.S.A. § 22	Information acquired by DFR from other agencies and jurisdictions	Retain exemption in existing form.
37	8 V.S.A. § 23	Records of investigations of banks and financial institutions licensed by DFR and all records and reports of DFR examinations	Retain exemption in existing form.
38	8 V.S.A. § 2530(j)	Information obtained during an examination or investigation by DFR of persons engaged in, or applying for a license to engage in, money transmission, check cashing, or currency exchange	Remove from list of exemptions; not separate from 8 V.S.A. § 23.
39	8 V.S.A. § 3561	All market conduct annual statements and other information filed by insurance companies with DFR	Retain exemption in existing form.
40	8 V.S.A. § 3574(d)	DFR examination reports of insurance company	Retain exemption in existing form.

No.	Cite	Description	Recommendation
41	8 V.S.A. § 3577	Actuarial reports, actuarial opinion summaries, work papers, and any other information provided to DFR in connection with the actuarial report, work papers, or actuarial opinion summary	Retain exemption in existing form.
42	8 V.S.A. § 3588	Insurer's Own Risk and Solvency Assessment (ORSA) summary report filed with DFR	Retain exemption in existing form.
43	8 V.S.A. § 3683(a)(2)	Notices of divestitures, acquisitions, and mergers related to domestic insurers	DFR agrees with the Committee that this provision is unclear, and stated that it would "review this section and propose technical corrections for clarity."
44	8 V.S.A. § 3683a(c)	Preacquisition notification of any acquisition in which there is a change in control of an insurer licensed to do business in this State, but not domiciled in this State	Retain exemption in existing form.
45	8 V.S.A. § 3687	Records obtained in the course of an examination or investigation of an insurance holding company system; registration statements and enterprise risk report of insurers part of a holding company system; prior notification of certain transactions involving a domestic insurer and a person in holding company system	DFR agrees with the Committee that the cross-reference to subdivisions 3683(b)(12) and (13) is unclear and stated that it would "review and propose technical corrections as needed for clarity."
46	8 V.S.A. § 3839	Trade secret information included in a life settlement provider's annual statement to DFR	Amend to add cross-reference to 1 V.S.A. § 317(c)(9).
47	8 V.S.A. § 3840	Investigation and examination reports related to financial condition or market conduct of life settlement provider	Retain exemption in existing form.

No.	Cite	Description	Recommendation
48	8 V.S.A. § 4488(5)	Notice to DFR from a fraternal benefits society of termination of appointment of an insurance agent	Amend to strike the phrase “deemed a privileged communication” and insert in lieu thereof “ <u>confidential and privileged and treated as provided in subsection 4813m(f) of this title.</u> ”
49	8 V.S.A. § 4813m(f)	Record acquired by DFR that is furnished by an insurer, producer, or employee when obtained by DFR in an investigation of an insurer’s termination of the appointment, employment, contract, or other business relationship with a person licensed as an insurance producer	Retain exemption in existing form.
50	8 V.S.A. § 6002(c)	Information submitted to DFR in captive insurance company applications for licenses	Retain exemption in existing form.
51	8 V.S.A. § 6008(c)	Any reports, information, or documents acquired by DFR in the course of an examination of captive insurance company	Retain exemption in existing form.
52	8 V.S.A. § 6048o	Records of special purpose financial captive insurance company obtained in the course of an examination	Retain exemption in existing form.
53	8 V.S.A. § 6052	Proprietary information submitted to DFR by risk retention groups	Retain exemption in existing form.
54	8 V.S.A. § 6074	Reports, work papers, recorded information, and documents produced or acquired by DFR in the course of the examination of a risk retention managing general agent	Retain exemption in existing form.
55	8 V.S.A. § 7041(e)	Records produced in the course of DFR supervision proceeding of domestic insurer	Amend to clarify that this section also pertains to records of hearings.

No.	Cite	Description	Recommendation
56	8 V.S.A. § 7043	Records related to insurance supervision and delinquency proceedings	Retain exemption in existing form.
57	8 V.S.A. § 8308	Risk-based capital reports and risk-based capital plans of insurers filed with DFR	Retain exemption in existing form.
58	9 V.S.A. § 5607	Securities documents acquired by DFR, including records related to audits, inspections, and trade secrets	Retain exemption in existing form.
<i>VI. Personal Record Exemption</i>			
59	1 V.S.A. § 317(c)(7)	Personal records relating to an individual	Restructure the provision to be less confusing and correct grammatical issues; specify that balancing test applies to records relating to a particular individual; amend the reference to “medical and psychological facts.”

APPENDIX F

Explanation of Recommendations on Exemptions Reviewed in 2013

I. Natural Resources-Related Exemptions

At its October 4, 2013 meeting, the Study Committee reviewed nine exemptions related to natural resources programs. ANR offered written and oral testimony that if the general trade secret exemption, 1 V.S.A. § 317(c)(9), were amended to clarify that the phrase “trade secrets” includes confidential business information, and were amended to eliminate the requirement that trade secrets be known only to certain individuals within the commercial concern, it could recommend eliminating four exemptions in Title 10 as duplicative. The Committee also heard testimony from the State Archeologist with regard to information regarding the location of archeological sites.

1. *1 V.S.A. § 317(c)(20)—information regarding location of archeological sites.*

1 V.S.A. § 317(c)(20) exempts “information which would reveal the location of archeological sites and underwater historic properties, except as provided in 22 V.S.A. § 762.” The cross-reference to 22 V.S.A. § 762 is incorrect; this section concerns the right of the State to conduct field investigations on sites owned or controlled by the State. As noted by the State Archeologist, the appropriate cross-reference is to 22 V.S.A. § 761, and the Committee recommends that 1 V.S.A. § 317(c)(20) be amended to insert the correct cross-reference. See Sec. 20 of App. G.

2. *10 V.S.A. § 101—mineral records.*

10 V.S.A. § 101(6) requires the Division of Geology and Mineral Resources to maintain old and new information related to the geology, mineral resources, and topography of the State and to make public new information resulting from research and field studies conducted by or for the

Division. It then specifies, “Certain information provided by the mineral industries of the state may be held in confidential status at the industries’ request and used only for purposes and in a manner permitted by the industry.”

The Committee believes that it is unnecessary to state the Division’s obligation to “make public” information that it produces or acquires in the course of its business. If the goal of this language is to make clear that public records are available for public inspection and copying, this general obligation already exists under the Public Records Act, and it can be deleted as superfluous.

In addition, the second sentence of § 101(6) is confusing, overly broad, and appears to be unnecessary. Use of the word “may” (instead of “shall”) in the phrase “may be held in confidential status” appears to give ANR discretion whether to agree to a request by the mineral industry to keep information confidential. This discretion is difficult to reconcile with the second phrase, “may be . . . used only for purposes and in a manner permitted by the industry,” which appears to give free reign to industry to decide how mineral information in public records is used. Under 1 V.S.A. § 317(c)(9), ANR already has the discretionary ability to withhold trade secret information, and 1 V.S.A. § 317(c)(9) provides a standard for what types of business information should be withheld. The Committee believes that the second sentence of § 101(6) provides an inadequate, confusing standard for withholding public records, and should be deleted. The effect of this deletion will be that mineral information may be exempt from public inspection and copying under the general trade secrets exemption, 1 V.S.A. § 317(c)(9).

The Committee’s recommendations are shown in Sec. 29 of App. G.

3. *10 V.S.A. § 1259(b)—wastewater permit program records.*

10 V.S.A. § 1259(b) provides that records obtained under the wastewater permit program shall be available to the public, except that records other than effluent data which would “divulge methods or processes entitled to protection as trade secrets” shall be protected “as confidential” except when relevant to enforcement proceedings.

The text stating that such records are generally available to the public is already the general rule under the Public Records Act, is superfluous, and therefore the Committee recommends that it be deleted. “Trade secrets” are undefined, and the Committee recommends that this provision be clarified to cross-reference the trade secret standard at 1 V.S.A. § 317(c)(9). See Sec. 30 of App. G.

Because 1 V.S.A. § 317(c)(9) exempts trade secrets from public inspection and copying, but does not mandate that trade secrets be withheld by a public agency, the Committee notes that 10 V.S.A. § 1259(b) adds a layer of confidentiality protection that would not be in place if it were simply repealed. The Committee does not have sufficient information to recommend repealing this subsection and eliminating the requirement that ANR not disclose wastewater permit program records which constitute trade secrets.

4. *10 V.S.A. § 6628(a)—toxics use reduction and hazardous waste reduction plans.*

10 V.S.A. § 6628(a) states that a toxics use reduction and hazardous waste reduction plan submitted to the Secretary of ANR “shall not be a public record.” The apparent intent of this language is to require that such plans not be publicly released. However, it is incorrect to say that the plan is not a public record, because under 1 V.S.A. § 317(b), a public record is defined as a record produced or acquired in the course of public agency business. To effect the apparent intent of this subsection, and correct the existing language, the Committee recommends that it be

amended to specify that toxics use reduction and hazardous waste reduction plans are exempt from public inspection and copying under the general trade secrets exemption and shall not be released. See Sec. 31 of App. G.

5. *10 V.S.A. § 6632—hazardous waste generator plans, report.*

10 V.S.A. § 6632 requires the Secretary of ANR to adopt rules “to ensure that trade secrets designated by a generator” in certain records are used “only in connection with the responsibilities of the department pursuant to this subchapter, and that those trade secrets are not otherwise disseminate” This section further provides that the rules “shall provide that a generator may only designate as trade secrets those that satisfy the criteria for trade secrets set forth in 18 V.S.A. § 1728(a).”

The Committee recommends that the language of this section be amended to cross-reference the trade secret standard of 1 V.S.A. § 317(c)(9), as 18 V.S.A. § 1728(a) was repealed in 1994. See Sec. 32 of App. G.

Because 1 V.S.A. § 317(c)(9) exempts trade secrets from public inspection and copying, but does not mandate that trade secrets be withheld by a public agency, the Committee notes that 10 V.S.A. § 6632 adds a layer of confidentiality protection that would not be in place if this section were simply repealed. The Committee does not have sufficient information to recommend repealing this subsection and eliminating the requirement that ANR not disclose program records which constitute trade secrets.

II. Transportation/Motor Vehicle-Related Exemptions

1. *9 V.S.A. § 4100b—prehearing conference discussions.*

Under 9 V.S.A. chapter 108, the Transportation Board has authority to hear disputes brought under the Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act.

Under 9 V.S.A. § 4100b(e), the Board is directed to require the parties to attend a prehearing conference at which the parties must address the possibility of settlement, and “[c]onference discussions shall remain confidential and shall not be disclosed or used as an admission in any subsequent hearing.”

As written, it is unclear that this provision exempts records concerning settlement, as it references only conference “discussions.” In addition, because the conference could address subjects other than settlement, it appears that the provision is overbroad in referring to “conference” discussions, as opposed to “settlement” discussions.

To address these issues, the Committee recommends that the language of 9 V.S.A. § 4100b(e) be amended to reference the confidentiality of “settlement communications” and their exemption from the Public Records Act. See Sec. 10 of App. G.

2. 23 V.S.A. § 104—motor vehicle records

23 V.S.A. § 104 generally provides that a variety of motor vehicle records is open to public inspection and copying, but that the Commissioner of Motor Vehicles may not release photographs of persons to whom licenses, permits, or nondriver identification cards have been issued without the written consent of the person depicted in the photograph.

The general language of this section stating that motor vehicle records are open for public inspection and copying was enacted prior to enactment of the federal Driver’s Privacy Protection Act (Act). The Act prohibits the release of “personal information” about any individual obtained by state DMVs in connection with a motor vehicle record, except for certain permissible uses.¹¹ “Personal information” is defined broadly to mean “information that identifies an individual, including an individual’s photograph, [S]ocial [S]ecurity number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability

¹¹ 18 U.S.C. § 2721.

information, but does not include information on vehicular accidents, driving violations, and driver's status."¹² The Committee believes that 23 V.S.A. § 104 likely should be updated to be consistent with the Act, and recommends that the Committees on Transportation review this section for conformity to the Act. The Committee is sending a letter to the Committees on Transportation with its recommendation.

3. *23 V.S.A. § 707—driver training school records.*

23 V.S.A. § 707 requires driver training school licensees to keep records showing the name and address of each instructor, the instruction license number of such instructor, the particular type of instruction given, and how much time was given to each type of instruction, among other records that the Commissioner of Motor Vehicles may require. Under this section, “[s]uch record[s] shall be open to the inspection of the department at all reasonable times but shall be for the confidential use of the department.”

The Committee believes that the confidentiality language of this section is overly broad. It shields from public scrutiny the activities of a regulated industry, including the identity of motor vehicle instructors, the type of instruction given, and the hours of instruction given. The Committee believes that student drivers have a privacy interest in not having their identities revealed, and that this privacy interest may outweigh the public interest in disclosure under 1 V.S.A. § 317(c)(7), but that driver training school records otherwise should be publicly available. As a result, the Committee recommends that this section be amended to specify that individually identifying information in driver training school records may be kept confidential and be exempt from public inspection and copying under 1 V.S.A. § 317(c)(7). See Sec. 37 of App. G.

¹² 18 U.S.C. § 2725.

III. Agriculture-Related Exemptions

At its October 4, 2013 meeting, the Committee reviewed a number of agriculture-related PRA exemptions:

- (1) 6 V.S.A. § 61 exempts the identities of persons, households, or businesses that provide agricultural information to the Agency of Agriculture, Food and Markets (Agency);
- (2) 6 V.S.A. § 484 requires the Secretary of Agriculture, Food and Markets (Secretary) to keep confidential records regarding the purchase and sale of maple products;
- (3) 6 V.S.A. § 1039 generally prohibits the Secretary from making public records regarding pesticide trade secrets or financial information;
- (4) 6 V.S.A. § 2766 generally requires the Agency and the Attorney General to keep confidential identifying information in rbST inspection and reporting records; and
- (5) 6 V.S.A. § 2936(b) requires the Vermont Milk Commission (Commission) to keep confidential reports from milk handlers.

The Committee asked representatives of the Agency if it made sense to have one provision in Title 6 that addresses the confidentiality of these records. The representatives agreed that such an approach would be useful, as it would enable Agency and Commission representatives, legislators, and members of the public to look in one place to determine confidentiality protection for Agency and Commissioner records. As a result, the Committee recommends that a new section be added in chapter 1 of Title 6 to address the confidentiality of these records,¹³ and that each of the sections listed above be amended accordingly to delete references to confidentiality. See Secs. 3–7 of App. G.

¹³ This section should also make clear that exemptions in the Public Records Act might also apply to allow a public agency to withhold records in the event of a request.

IV. Professions and Occupations-Related Exemptions

The Committee recommends that 26 V.S.A. § 82 be removed from the list of exemptions compiled by the Office of Legislative Council as an annotation to 1 V.S.A. § 317. 26 V.S.A. § 82(a) states that “[n]o firm or any of its employees or other public accountants engaged by the firm, shall disclose any confidential information obtained in the course of a professional engagement except with the consent of the client or former client or as disclosure may be required by law, legal process, or the standards of the profession.” Counsel for the Office of Professional Regulation testified that the definition of “firm,” which means “a sole proprietorship, a corporation, a partnership, association, *or any other entity that practices public accountancy*” (emphasis added) should not be construed to include any public agency that may engage in accounting-type activities. The Committee agrees with this reading and therefore recommends that this provision be removed from the list of exemptions.

V. Department of Financial Regulation-Related Exemptions

Following up on its review of DFR-related exemptions at its September 30, 2012 and December 14, 2012 meetings, the Study Committee continued its review of DFR-related exemptions at its November 1, 2013 meeting, including several exemptions that were added or substantially amended during the 2013 legislative session. The Committee heard testimony from DFR representatives and the Office of Legislative Council and received information about these exemptions through DFR’s response to a questionnaire sent by legislative counsel.

1. *1 V.S.A. § 317(c)(26)—records submitted to DFR in connection with dispute-resolution.*

1 V.S.A. § 317(c)(26) exempts records submitted to DFR “by an individual for the purposes of having the [D]epartment assist that individual in resolving a dispute with any person or company regulated by the Department, and any information or records provided by a company or

any other person in connection with the individual’s dispute.” Because the term “individual” is generally understood to refer to natural persons, and not to corporations and other entities, the Committee believes that this provision should be amended to replace the word “individual” with the word “person.” The policy rationale of the exemption appears to be to encourage informal dispute-resolution by DFR, and the Committee believes that this policy would better be served if corporations and other entities benefited from the exemption to the same extent as natural persons. The Committee’s recommendation is shown in Sec. 14 of App. G.

2. *1 V.S.A. § 317(c)(36)—anti-fraud plans.*

1 V.S.A. § 317(c)(36) exempts “anti-fraud plans and summaries submitted by insurers to the Department of Financial Regulation for the purposes of complying with 8 V.S.A. § 4750.”

Because workers’ compensation insurers are also required to file anti-fraud plans to the Department of Labor under 8 V.S.A. § 4750, the Committee recommends that the reference to the Department of Financial Regulation in 1 V.S.A. § 317(c)(36) be struck, so that its scope may also include anti-fraud plans submitted to the Department of Labor. See Sec. 14 of App. G.

3. *8 V.S.A. § 2530(j)—examination or investigation; money services.*

8 V.S.A. § 2530(j) provides that information “obtained during an examination or investigation under this chapter [chapter 79, regulating providers of money services] shall be confidential and privileged, and shall be treated as provided in section 23 of this title.” Because 8 V.S.A. § 23 already addresses the confidentiality of examination and investigation records for persons licensed under Part 2 of Title 8, which includes chapter 79 of Title 8, 8 V.S.A. § 2530(j) merely cross-references confidentiality protection that already exists. Therefore, it does not create a separate exemption, and the Committee recommends that it be removed from the list of exemptions compiled by Legislative Council as an annotation to 1 V.S.A. § 317.

4. 8 V.S.A. § 3683(a)(2)—*notices of divestitures, acquisitions, and mergers related to domestic insurers.*

8 V.S.A. 3683 was substantially amended in 2013 Acts and Resolves No 29, Sec. 28.

Because it is unclear which records are intended to be designated confidential under this section, the Department of Financial Regulation stated that it would review this section and propose technical corrections for clarity. The Committee is sending a letter to the committees of jurisdiction to inform them of its review of this section and of DFR's planned actions.

5. 8 V.S.A. § 3687—*insurance holding companies.*

8 V.S.A. § 3687 was amended in 2013 Acts and Resolves No. 29, Sec. 33 to cross-reference 8 V.S.A. § 3683(b)(12) and (13) (which were added in Sec. 28 of Act 29). Because it is unclear which records are intended to be designated confidential through these cross-references, DFR stated that it would review this section and propose technical corrections for clarity as needed. The Committee is sending a letter to the committees of jurisdiction to inform them of its review of this section and of DFR's planned actions.

6. 8 V.S.A. § 3839—*trade secret information included in life settlement provider annual statement.*

8 V.S.A. § 3839 requires life settlement providers to file an annual statement with DFR containing information "as the commissioner may prescribe by rule or order," and that upon "proper request by the filer, the commissioner shall maintain the confidentiality of trade secret information." This section does not further specify what might be a "proper" request by the filer, or what constitutes "trade secret information." The Committee believes that the general trade secret standard found in the Public Records Act provides an appropriate standard, and therefore recommends that 8 V.S.A. § 3839 be amended to cross-reference 1 V.S.A. § 317(c)(9). See Sec. 15 of App. G.

7. *8 V.S.A. § 4488(5)—termination of appointment of an insurance agent; fraternal benefits society*

8 V.S.A. § 4488(5) requires every fraternal benefits society doing business in Vermont to file with DFR a statement of the facts relative to the termination of any insurance agent licensed to represent it in Vermont, and provides that “[e]very statement made pursuant to this section shall be deemed a privileged communication.”

The language of this exemption differs substantially from the language of 8 V.S.A. § 4813m(f), which addresses records of the termination of insurance agents generally and associated proceedings. For example, subsection 4813m(f) specifies that, subject to certain exceptions, such records “shall be confidential by law and privileged, shall not be subject to 1 V.S.A. chapter 5, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.” Because the intent behind the language of 8 V.S.A. § 4488(5) is unclear, and it appears that there is no policy reason for the difference between the language of 8 V.S.A. §§ 4488(5) and 4813m(f), the Committee recommends that 8 V.S.A. § 4488(5) be amended to cross-reference the clearer, more comprehensive language of 8 V.S.A. § 4813m(f). See Sec. 16 of App. G.

8. *8 V.S.A. § 7041(e)—domestic insurer supervision proceeding.*

When the Commissioner of DFR has reasonable cause to believe that a domestic insurer has committed or engaged in, or is about to commit or engage in, any act that would subject it to delinquency proceedings, it may hold a hearing to determine if supervision is appropriate. 8 V.S.A. § 7041(e) specifies that such hearings “shall be private and shall not be subject to the provisions of 1 V.S.A. chapter 5, subchapters 2 and 3 (public information and access to public records), unless the insurer requests a public hearing.”

Because 8 V.S.A. § 7041(e) refers to the Open Meeting Law and the Public Records Act, the apparent intent of this provision is to specify that the hearings themselves may be closed to the public and that records of such hearings are exempt from public inspection and copying. As currently written, however, this provision refers only to the “hearings” themselves being private. The Committee recommends that this section be amended to clarify that records of such hearings are exempt from public inspection and copying. See Sec. 17 of App. G.

APPENDIX G

Legislative Recommendations of Committee as a Draft Bill

* * * Administrative Procedure Act – Cover Sheet * * *

Sec. 1. 3 V.S.A. § 838 is amended to read:

§ 838. FILING OF PROPOSED RULES

(a) Proposed rules shall be filed with the ~~secretary of state~~ Secretary of State. The filing shall include the following:

(1) a cover sheet;

(2) an economic impact statement;

(3) an incorporation by reference statement, if the proposed rule includes an incorporation by reference;

(4) an adopting page;

(5) the text of the proposed rule;

(6) an annotated text showing changes from existing rules;

(7) an explanation of the strategy for maximizing public input on the proposed rule as prescribed by the ~~interagency committee on administrative rules~~ Interagency Committee on Administrative Rules; and

(8) a brief summary of the scientific information upon which the proposed rule is based to the extent the proposed rule depends on scientific information for its validity.

(b) The cover sheet shall be on a form prepared by the ~~secretary of state~~ Secretary of State containing at least the following information:

- (1) the name of the agency;
- (2) the title or subject of the rule;
- (3) a concise summary explaining the effect of the rule;

- (4) the specific statutory authority for the rule, and, if none exists, the general statutory authority for the rule;
- (5) an explanation of why the rule is necessary;
- (6) an explanation of the people, enterprises, and government entities affected by the rule;
- (7) a brief summary of the economic impact of the rule;
- (8) the name, address, and telephone number of an individual in the agency able to answer questions and receive comments on the proposal;
- (9) a proposed schedule for completing the requirements of this chapter, including, if there is a hearing scheduled, the date, time, and place of that hearing; and a deadline for receiving comments; ~~and~~
- (10) whether the rule adopts an exemption from inspection and copying of public records or otherwise designates information confidential and, if so, the asserted statutory authority for the exemption or designated confidentiality and a brief summary of the need for the exemption or confidentiality; and
- (11) a signed and dated statement by the adopting authority approving the contents of the filing.

* * *

* * * Short Title * * *

Sec. 2. 1 V.S.A. § 315 is amended to read:

§ 315. STATEMENT OF POLICY; SHORT TITLE

(a) It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review

and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the General Assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action.

(b) This subchapter may be known and cited as the Public Records Act or the PRA.

*** * * Exemptions to the Public Records Act * * ***

*** * * Agriculture-Related Exemptions * * ***

Sec. 3. 6 V.S.A. § 21 is added to read:

§ 21. CONFIDENTIALITY OF CERTAIN RECORDS

(a) The following information acquired under section 61 of this title shall be kept confidential and be exempt from public inspection and copying under the Public Records Act:

(1) the identities of individual persons, households, or businesses from whom information is obtained; and

(2) identifying information, including unique characteristics, activities, or products, associated with individual persons, households, or businesses.

(b) Except as may be necessary for the Agency or another public agency to carry out its duties or for enforcement purposes, trade secrets or business information submitted pursuant to section 484 or 2936, chapter 84, or chapter 151, subchapter 5 of this title, or rules implementing the same, shall be exempt from public inspection and copying under the Public Records Act and shall not be released.

(c) This section shall not be construed to permit or require the release of public records exempt from public inspection and copying under 1 V.S.A. § 317(c) or that are otherwise exempt or confidential by law.

Sec. 4. 6 V.S.A. § 61 is amended to read:

§ 61. INFORMATION COLLECTION AND CONFIDENTIALITY

The ~~secretary~~ Secretary may collect information on subjects within the jurisdiction of the ~~agency~~ Agency, including data obtained from questionnaires, surveys, physical samples, and laboratory analyses conducted by the ~~agency~~ Agency. ~~Such information shall be available upon request to the public, provided that it is presented in a form which does not disclose the identity of individual persons, households, or businesses from whom the information was obtained, or whose characteristics, activities, or products the information is about.~~

Sec. 5. 6 V.S.A. § 484 is amended to read:

§ 484. RECORDS; INSPECTION

(a) The ~~secretary~~ Secretary may, by rule, require all licensed dealers or processors to maintain specific records for the purchase and sale of maple products. Those records shall be kept in a full and accurate manner and shall be made available to the ~~secretary~~ Secretary or his or her inspector upon request. ~~The secretary shall use those records only for purposes of administering this chapter, or for other law enforcement purposes, and shall otherwise keep them confidential.~~

* * *

Sec. 6. REPEAL

6 V.S.A. §§ 1039 (confidentiality of pesticide trade secrets) and 2766 (confidentiality of identifying information in rbST inspection and reporting records) are repealed.

Sec. 7. 6 V.S.A. § 2936 is amended to read:

§ 2936. REPORTS FROM MILK HANDLERS; ~~RELEASE OF INFORMATION BY~~
HANDLERS

(a) In order that the ~~commission~~ Commission has adequate information available to proceed under this chapter, as a condition of a handler's license, the ~~commission~~ Commission may require from a handler:

(1) information on a time schedule established by the ~~secretary~~ Secretary from handlers showing the prices paid to purchase various forms of milk from Vermont producers, the costs of production, processing, transporting, distributing, and marketing milk, together with any other information deemed necessary and relevant by the ~~commission~~ Commission; and

(2) that each milk handler licensed pursuant to section 2721 of this title execute a release with the federal market order administrator authorizing the ~~secretary~~ Secretary and the ~~commission~~ Commission to obtain all production data which in the discretion of the ~~secretary~~ Secretary and ~~commission~~ Commission is deemed relevant and necessary.

(b) ~~The commission shall keep information received under this section confidential except as necessary for the adoption of rules or enforcement actions. [Repealed].~~

* * * Commerce and Historic Preservation-Related Exemptions * * *

Sec. 8. STATEMENT OF PURPOSE

Sec. 9 of this act repeals 1 V.S.A. § 317(c)(22), which exempted from public inspection and copying any documents filed, received, or maintained by the Agency of Commerce and Community Development with regard to administration of 32 V.S.A. chapter 151, subchapters 11C and 11D (new jobs tax credit; manufacturer's tax credit), provided that all such documents were no longer exempt when a tax credit certification had been granted by the Secretary of

Administration unless the disclosure of such records would otherwise violate any provision of Title 32. Subchapters 11C and 11D of 32 V.S.A. chapter 151 were repealed in 2006, and thus the exemption at 1 V.S.A. § 317(c)(22) is no longer needed going forward. However, if the Agency of Commerce and Community Development or any other public agency has custody of records described in the former 1 V.S.A. § 317(c)(22), these records shall remain exempt from public inspection and copying as they were under the former 1 V.S.A. § 317(c)(22).

Sec. 9. 1 V.S.A. § 317(c) is amended to read:

(c) The following public records are exempt from public inspection and copying:

* * *

(10) 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, except~~ lists:

(A) which are by law made available to the public, ~~or to lists~~;

(B) of professional or occupational licensees; or

(C) sold or rented in the sole discretion of Vermont Life magazine, provided that such discretion is exercised in furtherance of that magazine's continued financial viability and pursuant to specific guidelines adopted by the editor of the magazine;

* * *

(20) information which would reveal the location of archeological sites and underwater historic properties, except as provided in 22 V.S.A. § ~~762~~ 761;

~~(21) lists of names compiled or obtained by Vermont Life magazine for the purpose of developing and maintaining a subscription list, which list may be sold or rented in the sole discretion of Vermont Life magazine, provided that such discretion is exercised in furtherance of~~

~~that magazine's continued financial viability, and is exercised pursuant to specific guidelines adopted by the editor of the magazine; [Repealed.]~~

~~(22) any documents filed, received, or maintained by the Agency of Commerce and Community Development with regard to administration of 32 V.S.A. chapter 151, subchapters 11C and 11D (new jobs tax credit; manufacturer's tax credit), except that all such documents shall become public records under this subchapter when a tax credit certification has been granted by the Secretary of Administration, and provided that the disclosure of such documents does not otherwise violate any provision of Title 32; [Repealed.]~~

* * *

~~(30) all code and machine readable structures of state funded and controlled state-controlled database applications structures and application code, including the vermontvacation.com website and Travel Planner application, which are known only to certain state departments engaging in marketing activities and which give the state State an opportunity to obtain a marketing advantage over any other state, regional, or local governmental or nonprofit quasi-governmental entity, or private sector entity, unless any such state department engaging in marketing activities determines that the license or other voluntary disclosure of such materials is in the state's State's best interests;~~

* * *

~~(40) records of genealogy provided in an application or in support of an application for tribal recognition pursuant to chapter 23 of this title;~~

* * *

Sec. 10. 9 V.S.A. § 4100b is amended to read:

§ 4100b. ENFORCEMENT; TRANSPORTATION BOARD

* * *

(e) The Board shall be empowered to determine the location of hearings, appoint persons to serve at the deposition of out-of-state witnesses, administer oaths, and authorize stenographic or recorded transcripts of proceedings before it. Prior to the hearing on any protest, but no later than 45 days after the filing of the protest, the Board shall require the parties to the proceeding to attend a prehearing conference in which the Chair or designee shall have the parties address the possibility of settlement. If the matter is not resolved through the conference, the matter shall be placed on the Board's calendar for hearing. ~~Conference discussions~~ Settlement communications shall remain confidential ~~and, shall be exempt from public inspection and copying under the Public Records Act,~~ shall not be disclosed ~~or,~~ and shall not be used as an admission in any subsequent hearing.

* * * Education-Related Exemptions * * *

Sec. 11. 1 V.S.A. § 317(c) is amended to read:

(c) The following public records are exempt from public inspection and copying:

* * *

(11) student records, including records of a home study student, ~~at educational institutions or agencies funded wholly or in part by State revenue;~~ provided, however, that such records shall be made available upon request under the provisions of the Federal Family Educational Rights and Privacy Act of 1974 (~~P.L. 93-380~~) and as, 20 U.S.C. § 1232g, as may be amended;

* * *

(23) any data, records, or information ~~developed, discovered, collected, or received~~ produced or acquired by or on behalf of faculty, staff, employees, or students of the University of Vermont or the Vermont ~~state colleges~~ State Colleges in the conduct of study, research, or

creative efforts on medical, scientific, technical, scholarly, or artistic matters, whether such activities are sponsored alone by the institution or in conjunction with a governmental body or private entity, until such data, records, or information ~~are~~ is published, disclosed in an issued patent, or publicly released by the institution or its authorized agents. This subdivision applies to, ~~but is not limited to,~~ research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements, methodologies, protocols, and the identities of or any personally identifiable information about participants in research. This subdivision shall not apply to records, other than research protocols, produced or acquired by an institutional animal care and use committee regarding the committee's compliance with state law or federal law regarding or regulating animal care;

* * *

Sec. 12. 16 V.S.A. § 2826 is added to read:

§ 2826. CONFIDENTIALITY OF PERSONALLY IDENTIFYING INFORMATION

Except as otherwise provided by law, or by consent of the individual, information that directly or indirectly identifies applicants, recipients, beneficiaries, or participants in programs administered by the Corporation, including grant, loan, scholarship, outreach, or investment plan programs, shall not be released and shall be exempt from public inspection and copying under 1 V.S.A. § 317(c)(7).

Sec. 13. 16 V.S.A. § 2843 is amended to read:

§ 2843. APPLICATIONS, CERTIFICATES, AND REPORTS

(a) The recipient must apply for an incentive grant at least annually. Grants may be for a maximum of five full-time equivalent school years.

(b) Each applicant for an incentive grant shall furnish a certificate of income with the application. Attached to the certificate shall be a form of consent, executed by the student and any other required persons, granting permission to the Vermont ~~commissioner of taxes~~ Commissioner of Taxes to disclose the income tax information required by subsection (c) of this section.

(c) The Vermont ~~commissioner of taxes~~ Commissioner of Taxes, when requested by the ~~corporation~~ Corporation, shall compare any certificate filed pursuant to this subchapter with the ~~state~~ State income tax returns filed by the persons making such certificate and shall report any instances of discrepancy to the corporation.

(d) ~~Except as otherwise provided in this subchapter or other applicable law or court order, or by agreement of the applicant, certificates and reports made to the corporation under this section shall be confidential, and it shall be unlawful for anyone to divulge the amount of income or any particulars set forth in a certificate or any report made to an applicant or the corporation. Nothing herein shall be construed to prevent the publication of statistical data as long as the identification of particular individuals, certificates, and reports is prevented. [Repealed.]~~

* * * Financial Regulation-Related Exemptions * * *

Sec. 14. 1 V.S.A. § 317(c) is amended to read:

(c) The following public records are exempt from public inspection and copying:

* * *

(26) information and records provided to the Department of Financial Regulation by ~~an individual~~ a person for the purposes of having the ~~department~~ Department assist that individual in resolving a dispute with any person ~~or company~~ regulated by the Department, and any

information or records provided by a ~~company or any other~~ person in connection with the individual's dispute;

* * *

(36) anti-fraud plans and summaries submitted by insurers to the Department of Financial Regulation for the purposes of complying with 8 V.S.A. § 4750;

* * *

Sec. 15. 8 V.S.A. § 3839 is amended to read:

§ 3839. REPORTING REQUIREMENTS AND PRIVACY

(a) Each life settlement provider shall file with the ~~commissioner~~ Commissioner on or before March 1 of each year an annual statement containing such information as the ~~commissioner~~ Commissioner may prescribe by rule or order. Information relating to life settlement transactions shall be limited to only those transactions where the policy owner is a resident of this state. Upon proper request by the filer, the ~~commissioner~~ Commissioner shall maintain the confidentiality of and not release trade secret information exempt from public inspection and copying under 1 V.S.A. § 317(c)(9). The annual statement shall not contain individually-identifiable life settlement transaction information, but such information shall be provided to the ~~commissioner~~ Commissioner pursuant to section 3840 of this title. If available to the provider because of the provider's business relationship or affiliation with one or more life settlement purchasers, the annual statement shall also include such information as the ~~commissioner~~ Commissioner may prescribe by rule or by order concerning life settlement purchase agreements or similar investment contracts entered into by residents of this ~~state~~ State.

* * *

Sec. 16. 8 V.S.A. § 4488(5) is amended to read:

(5) Notice of termination of appointment of insurance agent. Every society doing business in this State shall, upon the termination of the appointment of any insurance agent licensed to represent it in this state, forthwith file with the Commissioner of Financial Regulation, a statement, in such form as he or she may prescribe, of the facts relative to the termination and the cause thereof. Every statement made pursuant to this section ~~shall be deemed a~~ is confidential and privileged communication to the same extent as provided under subsection 4813m(f) of this title.

Sec. 17. 8 V.S.A. § 7041(e) is amended to read:

(e) The notice of hearing held under subsection (a) of this section and any order issued pursuant to subsection (a) shall be served upon the insurer pursuant to the provisions of 3 V.S.A. chapter 25. The notice of hearing shall state the time and place of hearing, and the conduct, condition or ground upon which the Commissioner may base his or her order. Unless mutually agreed between the Commissioner and the insurer, the hearing shall occur not less than ten days nor more than 30 days after notice is served and shall be held at the offices of the Department of Financial Regulation or in some other place convenient to the parties as determined by the Commissioner. ~~Hearings~~ Unless the insurer requests a public hearing, hearings under subsection (a) of this section shall be private and ~~shall not be subject to the provisions of 1 V.S.A. chapter 5, subchapters 2 and 3 (public information and access to public records), unless the insurer requests a public hearing~~ exempt from the requirements of the Open Meeting Law, and records of such hearings shall be kept confidential and be exempt from public inspection and copying under the Public Records Act.

* * * Health Care-Related Exemptions * * *

Sec. 18. 1 V.S.A. § 317(c)(38) is amended to read:

(38) records held by the agency of human services, which include prescription information containing prescriber identifiable data, that could be used to identify a prescriber, except that the records shall be made available upon request for medical research, consistent with and for purposes expressed in 18 V.S.A. §§ ~~4621, 4631, 4632, 4633, and 4622~~ or 9410 and, 18 V.S.A. chapter 84, or as provided for in 18 V.S.A. chapter 84A, and for other law enforcement activities;

Sec. 19. 8 V.S.A. § 4089a is amended to read:

§ 4089a. MENTAL HEALTH CARE SERVICES REVIEW

* * *

(g) ~~Members of the independent panel of mental health care providers shall be compensated as provided in 32 V.S.A. § 1010(b) and (c). [Repealed.]~~

(h) A review agent shall pay a license fee for the year of registration and a renewal fee for each year thereafter of \$200.00. In addition, a review agent shall pay any additional expenses incurred by the ~~commissioner~~ Commissioner to examine and investigate an application or an amendment to an application.

(i) The confidentiality of any health care information acquired by or provided to ~~the~~ an independent panel of mental health professionals or to an independent review organization pursuant to section 4089f of this title shall be maintained in compliance with any applicable state or federal laws. ~~The independent panel shall not constitute a public agency 1 V.S.A. § 317(a), or a public body under section 310 of Title 1. Records of, and internal materials prepared for, specific reviews under this section shall be exempt from public disclosure under 1 V.S.A. § 316.~~

Sec. 20. 8 V.S.A. § 4089f is amended to read:

§ 4089f. INDEPENDENT EXTERNAL REVIEW OF HEALTH CARE

SERVICE DECISIONS

(a) ~~For the purposes of~~ As used in this section:

(1) “Health benefit plan” means a policy, contract, certificate, or agreement entered into, offered, or issued by a health insurer, as defined in 18 V.S.A. § 9402, to provide, deliver, arrange for, pay for, or reimburse any of the costs of health care services, including mental health care services as that phrase is defined in subdivision 4089a(b)(3) of this title.

(2) “Insured” means the beneficiary of a health benefit plan, including the subscriber and all others covered under the plan, and shall also mean a member of a health benefit plan not otherwise subject to the ~~department’s~~ Department’s jurisdiction which has voluntarily agreed to use the external review process provided under this section.

* * *

Sec. 21. 18 V.S.A. § 1099 is amended to read:

§ 1099. REPORTS AND RECORDS CONFIDENTIAL

All information and reports in connection with persons suffering from venereal diseases ~~shall be regarded as absolutely confidential and for the sole use of the board in the performance of its duties hereunder, and such records shall not be accessible to the public nor shall such records be deemed public records; and such board shall not disclose the names or addresses of persons so reported or treated except~~ are confidential public health records under section 1001 of this title and may only be used as provided in that section or disclosed to a prosecuting officer or in court in connection with a prosecution under sections 1105 or 1106 of this title. ~~The foregoing shall~~

~~not constitute a restriction on the board in the performance of its duties in controlling the above communicable diseases.~~

Sec. 22. 18 V.S.A. § 7103 is amended to read:

§ 7103. DISCLOSURE OF INFORMATION

(a) All certificates, applications, records, and reports, other than an order of a court made for the purposes of this part of this title, ~~and~~ which directly or indirectly ~~identifying~~ identifies a patient or former patient or an individual whose hospitalization or care has been sought or provided under this part, together with clinical information relating to such persons, shall be kept confidential and shall not be disclosed by any person except insofar:

(1) as the following persons have consented to disclosure in writing:

(A) the individual identified; in the records;

(B) the individual's health care agent under subsection 5264 an advance directive that has become effective under section 9706 of this title, or a person specifically authorized by the individual to receive health care information under an advance directive that has become effective under section 9706 of this title;

(C) the individual's legal guardian, if any (~~or, or~~ if the individual is an unemancipated minor, his or her parent or legal guardian), shall consent in writing guardian; or

(2) as disclosure may be necessary to carry out any of the provisions of this part; or

(3) as a court may direct upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make disclosure would be contrary to the public interest.

(b) Nothing in this section shall preclude disclosure, ~~upon proper inquiry,~~ of information concerning an individual's medical condition ~~the individual's family, clergy, physician, attorney,~~

~~the individual's health care agent under section 5264 of this title, a person to whom disclosure is authorized by a validly executed durable power of attorney for health care, or to an interested party to a person authorized by law.~~

* * *

* * * Human Services-Related Exemptions * * *

Sec. 23. 33 V.S.A. § 105(c) is amended to read:

(c) In addition to other duties imposed by law, the ~~commissioner~~ Commissioner shall:

- (1) ~~Administer~~ administer the laws assigned to the ~~department~~. Department; and
- (2) ~~Fix~~ fix standards and issue regulations necessary to administer those laws and for the custody and preservation of records of the ~~department~~. ~~Those regulations shall contain provisions restricting the use or disclosure of information contained in the records to purposes directly connected with the administration of the department. As used in this subdivision, the word "records" includes records, papers, files and communications~~ Department.

* * *

Sec. 24. 33 V.S.A. § 111 is amended to read:

§ 111. RECORDS, RESTRICTIONS, PENALTIES

(a) The names of or information pertaining to applicants for or recipients of assistance or benefits, including information obtained under section 112 of this title, shall not be disclosed to anyone, except for the purposes directly connected with the administration of the ~~department~~ Department or when required by law.

(b) A person shall not:

~~(1) Publish~~ publish, use, disclose, or divulge any of those records for purposes not directly connected with the administration of programs of the ~~department~~ Department, or contrary to regulations issued by the ~~commissioner~~; or

~~(2) Use any records of the department of any kind or description for political or commercial purposes, or purposes not authorized by law~~ Commissioner.

Sec. 25. 33 V.S.A. § 304(b) is amended to read:

(b) In addition to other duties imposed by law, the ~~commissioner~~ Commissioner shall:

(1) Administer the laws assigned to the ~~department~~ Department.

(2) Fix standards and issue regulations necessary to administer those laws and for the custody and preservation of records of the ~~department~~ Department. ~~Those regulations shall contain provisions restricting the use or disclosure of information contained in the records to purposes directly connected with the administration of the department. As used in this subdivision, the word "records" includes records, papers, files, and communications.~~

(3) Appoint all necessary assistants, prescribe their duties, and issue regulations necessary to assure that the assistants shall hold merit system status while in the employ of the ~~department~~ Department, unless otherwise specifically provided by law.

Sec. 26. 33 V.S.A. § 908 is amended to read:

§ 908. POWERS AND DUTIES

(a) Each nursing home or other provider shall file with the ~~division~~ Division, on request, such data, statistics, schedules, or information as the ~~division~~ Division may require to enable it to carry out its function. Information received from a nursing home under this section shall be available to the public, except that unless disclosure is required under 1 V.S.A. § 317(b), the

specific salary and wage rates of employees, other than the salary of an administrator, shall not be disclosed.

(b) The ~~division~~ Division shall have the power to examine books and accounts of any nursing home or other provider caring for state-assisted persons, to subpoena witnesses and documents, to administer oaths to witnesses and to examine them on all matters of which the ~~division~~ Division has jurisdiction.

(c) The ~~secretary~~ Secretary shall adopt all rules and regulations necessary for the implementation of this chapter.

Sec. 27. 33 V.S.A. § 2010(e) is amended to read:

(e) Notwithstanding any provision of law to the contrary, information submitted to the ~~department~~ Department under this section ~~is confidential and is not a public record as defined in 1 V.S.A. § 317(b)~~ shall be exempt from public inspection and copying under the Public Records Act and shall not be released. Disclosure may be made by the ~~department~~ Department to an entity providing services to the ~~department~~ Department under this section; however, that disclosure does not change the confidential status of the information. The information may be used by the entity only for the purpose specified by the ~~department~~ Department in its contract with the entity. Data compiled in aggregate form by the ~~department~~ Department for the purposes of reporting required by this section are public records as defined in 1 V.S.A. § 317(b), provided they do not reveal trade information protected by state or federal law.

Sec. 28. 33 V.S.A. § 7112 is amended to read:

§ 7112. CONFIDENTIAL INFORMATION

(a) Information received by the licensing agency 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.

(b) Prior to release of information, the ~~commissioner~~ Commissioner shall consult with representatives from the nursing home industry and the ~~office of state long term care ombudsman~~ 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.~~

~~(2) Indicators~~ indicators, derived from information databases maintained by the licensing agency and the ~~division of rate setting~~ Division of Rate Setting, which shall be disseminated to consumers in a readily understandable format designed to facilitate consumers' ability to compare the quality of care provided by nursing facilities. The ~~commissioner~~ Commissioner shall continually update quality indicators and refine and improve the information disseminated to consumers.

* * * Natural Resources-Related Exemptions * * *

Sec. 29. 10 V.S.A. § 101 is amended to read:

§ 101. DIVISION OF GEOLOGY AND MINERAL RESOURCES; DUTIES

The ~~division of geology and mineral resources~~ Division of Geology and Mineral Resources shall:

* * *

(6) Maintain records of old and new information relating to the geology, mineral resources, and topography of the state and ~~make public new information resulting from research~~

~~and field studies conducted by or for the division. Certain information provided by the mineral industries of the state may be held in confidential status at the industries' request and used only for purposes and in a manner permitted by the industry State.~~

(7) Prepare and publish reports on the geology, mineral resources, and topography of the state State.

Sec. 30. 10 V.S.A. § 1259 is amended to read:

§ 1259. PROHIBITIONS

(a) No person shall discharge any waste, substance, or material into waters of the State, nor shall any person discharge any waste, substance, or material into an injection well or discharge into a publicly owned treatment works any waste which interferes with, passes through without treatment, or is otherwise incompatible with those works or would have a substantial adverse effect on those works or on water quality, without first obtaining a permit for that discharge from the Secretary. This subsection shall not prohibit the proper application of fertilizer to fields and crops, nor reduce or affect the authority or policy declared in Joint House Resolution 7 of the 1971 Session of the General Assembly.

(b) Any records, ~~reports~~ or information obtained under this permit program ~~shall be available to the public for inspection and copying. However, upon a showing satisfactory to the Secretary that any records, reports or information or part thereof, other than effluent data, would, if made public, divulge methods or processes entitled to protection as which constitute trade secrets, the Secretary shall treat and protect those records, reports or information as confidential. Any shall be exempt from public inspection and copying under 1 V.S.A. § 317(c)(9) and shall not be released, except that such~~ records, ~~reports~~ or information ~~accorded confidential treatment~~ will be

disclosed to authorized representatives of the State and the United States when relevant to any proceedings under this chapter.

Sec. 31. 10 V.S.A. § 6628 is amended to read:

§ 6628. PLAN, PLAN SUMMARY, AND PERFORMANCE REPORT REVIEW

(a) Except as provided for in this section, a toxics use reduction and hazardous waste reduction plan developed under this subchapter shall be retained at the facility and is not a public record under 1 V.S.A. § 317. If a person developing a Toxics Use Reduction and Hazardous Waste Reduction Plan under this chapter chooses to send all or a portion of the plan to the Secretary for review, it ~~still shall not be a public record~~ exempt from public inspection and copying under 1 V.S.A. § 317(c)(9) and shall not be released. A plan summary submitted pursuant to section 6629 of this title shall be submitted to the Secretary and shall be a public record.

* * *

Sec. 32. 10 V.S.A. § 6632 is amended to read:

§ 6632. TRADE SECRETS

The ~~secretary~~ Secretary shall adopt rules to ensure that trade secrets designated by a generator in all or a portion of the review and plans, and the report required by this subchapter, ~~are utilized~~ which are exempt from public inspection and copying under 1 V.S.A. § 317(c)(9), shall be used by the ~~secretary or~~ Secretary, the department Department, and any authorized representative of the Department only in connection with the responsibilities of the ~~department~~ Department pursuant to this subchapter, and ~~that those trade secrets are not otherwise disseminated by the secretary, the department, or any authorized representative of the department~~ shall not be

~~released. The rules shall provide that a generator may only designate as trade secrets those that satisfy the criteria for trade secrets set forth in 18 V.S.A. § 1728(a).~~

* * * Public Service Corporation-Related Exemptions * * *

Sec. 33. 30 V.S.A. § 206 is amended to read:

§ 206. INFORMATION TO BE FURNISHED DEPARTMENT

On request by the ~~department of public service~~ Department of Public Service, a company owning or operating a plant, line, or property subject to supervision under this chapter shall furnish the ~~department~~ Department information required by it concerning the condition, operation, management, expense of maintenance and operation, cost of production, rates charged for service or for product, contracts, obligations, and the financial standing of such company. It shall also inform the ~~department~~ Department of the salaries of, the pensions, option, or benefit programs affecting, and the expenses reimbursed to, its officers or directors, or both. ~~Such information shall be open to public inspection at reasonable times and any person shall be entitled to copies thereof. Information exacted for use by the department in a particular instance shall not be made public, except in the discretion of the department.~~

* * * Personal Privacy * * *

Sec. 34. FINDINGS; STATEMENT OF PURPOSE

(a) Findings. The General Assembly finds that:

(1) Under 1 V.S.A. § 317(c)(7), personal records relating to an individual are exempt from public inspection and copying.

(2) The Vermont Supreme Court has interpreted “personal records” under 1 V.S.A. § 317(c)(7) as records the disclosure of which would reveal “intimate details” of an individual’s life. Under Vermont Supreme Court cases, a record containing intimate details is only exempt if

the invasion of privacy occasioned by disclosure of the record outweighs the public interest in its disclosure.

(3) What constitutes “intimate” details for purposes of 1 V.S.A. § 317(c)(7) is subject to multiple interpretations, all of which are overly narrow and, thus, prevent protection of personal information that should be exempt from public disclosure.

(b) Statement of purpose. It is the purpose of Sec. 35 of this act to:

(1) reorganize and restructure the personal records exemption of 1 V.S.A. § 317(c)(7);

(2) supersede the threshold requirement that a record relating to an individual must reveal intimate details of that individual’s life in order to qualify as exempt under 1 V.S.A. § 317(c)(7); and

(3) provide that a personal record shall be exempt from disclosure under 1 V.S.A. § 317(c)(7) if it relates to a particular individual and if the nature, gravity, and potential consequences of the invasion of privacy occasioned by disclosure of the record outweighs the public interest in its disclosure.

Sec. 35. 1 V.S.A. § 317(c)(7) is amended to read:

(7) personal ~~documents~~ records relating to ~~an~~ a particular individual, ~~including if the~~ nature, gravity, and potential consequences of the invasion of privacy occasioned by disclosure of a record outweighs the public interest in favor of its disclosure. Such records may include:

(A) ~~information in any files~~ Information maintained to hire, evaluate, promote, or discipline any employee of a public agency;. However, such information shall be made available to that individual employee or his or her designated representative.

(B) ~~information in any files~~ Information relating to personal finances;.

(C) Individually identifying medical or psychological facts ~~concerning any individual or corporation~~ information; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his or her designated representative;

* * * Trade Secrets * * *

Sec. 36. 1 V.S.A. § 317(c)(9) is amended to read:

(9) trade secrets, meaning confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which ~~is known only to certain individuals within a commercial concern~~ a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it, except that the disclosures required by 18 V.S.A. § 4632 ~~shall not be included in~~ are not exempt under this subdivision;

* * * Transportation and Motor Vehicle-related Exemptions * * *

Sec. 37. 23 V.S.A. § 707 is amended to read:

§ 707. RECORDS REQUIRED; MAINTENANCE OF VEHICLES

Every driver's training school licensee shall keep a record on such forms as the ~~commissioner~~ Commissioner may prescribe showing the name and address of each instructor, the instruction license number of such instructor, the particular type of instruction given and how much time was given to each type of instruction, and such other information as the ~~commissioner~~ Commissioner may require. Such record shall be open to the inspection of the ~~department~~ Department at all reasonable times ~~but shall be for the confidential use of the department~~. Individually identifying information about students may be exempt from public inspection and

copying under 1 V.S.A. § 317(c)(7). Every driver's training school licensee shall maintain all vehicles used in driver training in safe mechanical condition at all times.

Sec. 38. EFFECTIVE DATE

This act shall take effect on July 1, 2014.