

Public Records Study Committee 2013 Interim Report

Pursuant to No. 59 of the Acts of 2011

January 2013

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**Public Records Study Committee
Interim Report**

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**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whether the public records act and exemptions under the act from inspection and copying of a public record should be repealed, amended, or remain unchanged.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

Sec. 11 of Act No. 59 of 2011 established a legislative study committee to meet over three years 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 second of three reports to the General Assembly in fulfillment of the Study Committee's charge under Sec. 11 of Act No. 59.

In 2012, the Study Committee reviewed the status of its prior recommendations, considered a number of process-related questions, revisited an exemption related to the state's medical marijuana program, and reviewed exemptions related to financial regulation, human services, education, commerce, energy and public utilities, and corrections.

II. Renewal of 2012 Recommendations of the Study Committee

In its 2012 Interim Report, the Study Committee recommended that the General Assembly amend multiple PRA exemptions and that several other PRA exemptions be reviewed by specified committees of the Vermont General Assembly with jurisdiction over the relevant issue. The General Assembly implemented some of the Study Committee's 2012 recommendations, but the General Assembly did not address many of the Study Committee's 2012 recommendations. In this report, the Study Committee reaffirms those recommendations of the 2012 Interim Report that the General Assembly did not address and requests that the General Assembly address these

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

recommendations as soon as possible. A table summarizing the recommendations of the 2012 report and the action that remains to be taken is attached in Appendix A of this report.

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

The Study Committee discussed how exemptions to the PRA often are enacted without review by the House or Senate Committees on Government Operations. As a result, the Government Operations Committees do not have the opportunity to independently assess whether an exemption is necessary, whether the information protected by proposed exemption is addressed by another existing exemption, or whether the proposed exemption is as narrowly tailored and clearly drafted as possible. To improve the opportunities for review by the Government Operations Committees, the Study Committee discussed various alternatives and their pros and cons. The Study Committee concluded that in order to address the practical realities of the legislative process while also ensuring some level of review, several processes could or should be implemented.

These processes include amending the House and Senate rules to specify that the jurisdiction of the Committees on Government Operations includes public records and open meeting issues. In addition, the Committees on Government Operations could, with the consent of their leadership, announce to other committee chairs that the Government Operations Committee will review any bill with a public records exemption through an informal process without taking possession of a bill. Also, Legislative Council could adopt a policy that an attorney drafting a Public Records Act exemption must confer with the Legislative Council Public Records Officer. If these processes are implemented, the Study Committee determined that there would be much greater opportunity for the Government Operations Committees or their staff at some point to review the proposed exemption. Appendix B of this report includes a more detailed description of each proposal.

IV. Checklists for Review of New Exemptions

As discussed in Section VII below, at its October 19 meeting, the Study Committee heard testimony concerning the confidentiality of information related to medical marijuana dispensaries, which is the subject of a statute as well as a rule adopted by the Department of Public Safety. During that discussion, legislative counsel described the General Assembly's power to grant rulemaking authority to an agency and, more specifically, its power to authorize an agency to create PRA exemptions through rulemaking. Legislative counsel advised that under certain circumstances, it may be appropriate to delegate authority to an agency to create a PRA exemption by rule, but that the General Assembly should provide specific standards to guide the agency and to limit its discretion.

This discussion provoked a broader conversation among committee members about the process for crafting well-tailored PRA exemptions and clear rulemaking authority. Committee members requested that legislative counsel prepare a checklist to guide legislative committees in their review of new (or substantially 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. Committee members reviewed and approved the checklists set forth in Appendix C.

V. Proposed APA Amendment

At its October 19 meeting, the Study Committee heard testimony from several witnesses regarding a proposed Department of Public Safety rule addressing the licensing of dispensaries of medical marijuana. The rule at issue included an exemption from public disclosure of applications for licensed dispensaries. The Study Committee raised questions as to whether it was common for public records exemptions to be adopted by rule or for a public agency to have statutory authority to adopt exemptions by rule. Legislative Council staff responded that some state agencies have been granted statutory authority to adopt exemptions by rule and that

exemptions may be adopted by rule even when a state agency lacks explicit statutory authority to do so. The Study Committee inquired as to how to track or review exemptions adopted by rule.

Senator Ayer proposed that the Administrative Procedure Act (APA) be amended to require public records exemptions to be identified on the cover sheet submitted to the Legislative Committee on Administrative Rules (LCAR) by an agency proposing a rule. The Study Committee agreed that such an amendment would help identify those exemptions proposed for adoption by rule. Moreover, the proposed amendment to the APA would allow for some limited review of the authority and need for the proposed exemption. Consequently, the draft legislation in Sec. 1 of Appendix D of this report includes a proposed amendment to the APA requiring identification of a PRA exemption on the cover sheet submitted to LCAR.

VI. Proposed Repeal of Secretary of State Survey and Report

At its September 28 meeting, the Study Committee heard testimony from Brian Leven, Deputy Secretary of State, concerning the results of the first annual survey of municipalities required under Sec. 14 of Act No. 59. Sec. 14 required the Secretary of State to survey municipalities regarding whether they are receiving an increased number of requests to inspect public records, whether requests for inspection of public records are being used to circumvent copying of a record by a municipality, and whether requests to inspect records pose any administrative burdens on municipalities.

After hearing Mr. Leven's testimony concerning the survey results, the Study Committee determined that the survey results were not informative. For example, the results indicated that municipalities may not accurately track the number of public records requests that they receive, and that they have varying interpretations of what constitutes a public records request. Committee members voted unanimously to recommend repeal of the survey requirement. This recommendation is set forth in Sec. 2 of Appendix D.

VII. Confidentiality of Information Related to Medical Marijuana Dispensaries

Act No. 65 of 2011 (Act 65) amended 18 V.S.A. ch. 8, subch. 2 (the Medical Marijuana Law) to establish a framework for registering up to four nonprofit marijuana dispensaries in Vermont. Act 65 included a statutory provision requiring the Department of Public Safety (DPS) to adopt implementing rules regarding dispensaries² and provisions that address the confidentiality of dispensary-related information.³ After following the rulemaking steps of the Vermont Administrative Procedure Act, DPS adopted Rule 28-000-003, “Therapeutic Use of Cannabis” (the Rule), which took effect on June 8, 2012. The Rule addresses the confidentiality of dispensary-related information in greater depth than the Medical Marijuana Law’s confidentiality provisions.

On September 12, 2012, DPS announced that it had “conditionally approved” two medical marijuana dispensaries, one to be located in Burlington and the other in Waterbury. The executive director of the Burlington dispensary, Shayne Lynn, voluntarily released his name and the location of the dispensary. However, no information was released concerning the Waterbury dispensary other than its corporate name and its general location in Waterbury; DPS denied a September 14 public records request for further information regarding the Waterbury dispensary application.

At its September 28 meeting, the Study Committee raised questions about DPS’s withholding of dispensary application information, and at its October 19 meeting, the Study Committee heard from Francis “Paco” Aumand, Director of the Division of Criminal Justice Services; Tom Kearney of the Waterbury Record and Stowe Reporter; Allen Gilbert, Executive Director of the ACLU-Vermont; Virginia Renfrew of the People with AIDS Coalition; and Shayne Lynn. After hearing from the witnesses and reviewing the relevant language of the Medical Marijuana Law,

² 18 V.S.A. § 4474f(a).

³ 18 V.S.A. §§ 4474d, 4474i.

committee members concluded that the confidential status of dispensary application materials and the scope of DPS's rulemaking authority is unclear. As a result, the Study Committee unanimously recommends that the committees of jurisdiction review the Medical Marijuana Law to determine whether and how provisions concerning the confidentiality of dispensary applications should be clarified.

VIII. Trade Secret Exemption: Process Issues Identified

At its November 30 meeting, the Study Committee heard testimony from Geoff Commons, the Director of Public Advocacy for the Department of Public Service regarding 30 V.S.A. § 206, which relates to information furnished to the Department of Public Service. During his testimony, Mr. Commons stated that an issue that arises with information provided to the Department of Public Service is that utilities and other regulated entities characterize submitted information as a trade secret. If the Department of Public Service subsequently receives a Public Records Act request for information designated a trade secret, the burden of asserting and defending the trade secret exemption under 1 V.S.A. § 317(c)(9) falls on the Department. Consequently, the Department of Public Service incurs costs and must exhaust staff resources in the defense of what a regulated entity asserts to be a trade secret. Mr. Commons suggested that the process of how trade secret exemptions are asserted and defended should be reviewed by the Study Committee or the General Assembly as a whole.

The Study Committee agreed with Mr. Commons' recommendation, but his recommendation also raised an issue that the Study Committee previously discussed: namely, in addition to the trade secret exemption in 1 V.S.A. § 317(c)(9), multiple additional trade secret exemptions exist across statutes. Many of the trade secret exemptions, arguably, could be implied to be a cross reference to 1 V.S.A. § 317(c)(9). However, some trade secret exemptions employ language that differs from 1 V.S.A. § 317(c)(9), which could be construed potentially to mean that a different standard could apply or that a different standard is necessary due to the subject matter at issue.

As a result, the Study Committee concluded that amending the standard and the process for asserting a trade secret exemption under 1 V.S.A. § 317(c)(9) may not sufficiently address all trade secret exemptions throughout statute.

Consequently, the Study Committee requests that the House and Senate Committees on Judiciary, the House Committee on Commerce, the Senate Committee on Finance, and the Senate Committee on Economic Development, Housing and General Affairs review the standard and process by which trade secrets are asserted in Vermont. The Study Committee recommends that these committees of jurisdiction examine whether a uniform standard could be adopted for trade secrets asserted in the state. Similarly, the Study Committee recommends that a uniform process for asserting a trade secret should be adopted and that under this process, the burden and costs of asserting and defending the relevant trade secret should be assumed, at least in part, by the entity who initially asserted that the relevant information is a trade secret.

IX. Exemptions Reviewed in 2012

In 2012, the Study Committee reviewed PRA exemptions related to financial regulation, human services, education, commerce, energy and public utilities, and corrections. 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 amending or repealing various exemptions is set forth in Appendix F. Draft proposed legislation that would implement the Study Committee's recommendations with regard to each exemption proposed to be amended or repealed or that would implement prior year's recommendations that were not enacted is set forth in Secs. 3–17 of Appendix D.

APPENDIX A

Status of Recommendations in 2012 Interim Report of the Public Records Study Committee

	Statutory Citation	Study Committee Recommendation	Status of Recommendation
1.	1 V.S.A. § 317(c)(6) and 32 V.S.A. § 3102	The General Assembly should clarify whether property tax adjustment information was confidential or not.	Addressed and enacted. The miscellaneous tax bill, 2012 Vt. 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 official could disclose the information to certain designated persons.
2.	N/A	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 disclosure of the information.	Enacted. Hold harmless language was enacted by the General Assembly in 2012 Vt. Acts and Resolves No. 70.

	Statutory Citation	Study Committee Recommendation	Status of Recommendation
3.	1 V.S.A. § 317(c)(38)	Repeal the exemption in 1 V.S.A. § 317(c)(38) related to records containing prescriber-identifiable information because, after the U.S. Supreme Court decision in <i>Sorrell v. IMS Health Care</i> , 131 S.Ct. 2653 (2011), the exemption is no longer necessary	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 1 of H. 611 would have repealed 1 V.S.A. § 317(c)(38).
4.	8 V.S.A. § 4089a	Delete exemption under 8 V.S.A. § 4089a related to records of reviews by an independent panel of mental health care providers. The panel has been repealed and the exemption is no longer accurate.	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 2 of H. 611 would have repealed the exemption in 8 V.S.A. § 4089a.
5.	8 V.S.A. § 4089f	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.	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 3 of H. 611 would have clarified the exemption in 8 V.S.A. § 4089f.
6.	18 V.S.A. §§ 1091–1099	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	PRSC staff is not aware of any action by the committees.

	Statutory Citation	Study Committee Recommendation	Status of Recommendation
		records exemption.	
7.	18 V.S.A. § 1099	Amend the exemption under 18 V.S.A. § 1099 for venereal disease testing reports so that it is not a stand-alone exemption, but a reference to the exemption in 18 V.S.A. § 1001 for communicable disease reports.	PRSC staff is not aware of any action by the committees.
8.	18 V.S.A. ch. 204	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 mentally retarded persons to consider whether the chapter is necessary or whether such proceedings are tracked in an aggregate manner.	PRSC staff is not aware of any action by the committees.
9.	18 V.S.A. § 9409a	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.	Addressed and enacted. 2012 Vt. Acts and Resolves No. 171, § 41(b) repealed 18 V.S.A. § 9409a.

	Statutory Citation	Study Committee Recommendation	Status of Recommendation
10.	18 V.S.A. § 9418f	Delete exemption under 18 V.S.A. § 9418f for rental health plan network information submitted to DFR.	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 6 of H. 611 would have repealed the exemption in 18 V.S.A. § 9418f.
11.	18 V.S.A. § 7103	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.	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 7 of H. 611 would have clarified the exemption in 18 V.S.A. § 7103.
12.	1 V.S.A. § 317(c)(37) and 18 V.S.A. § 1917(a)	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.	Addressed and enacted. 2012 Vt. Acts and Resolves No. 171, § 24f provides that: 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.

	Statutory Citation	Study Committee Recommendation	Status of Recommendation
13.	1 V.S.A. § 317(c)(7)	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.	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 1 of H. 611 would have restructured 1 V.S.A. § 317(c)(7).
14.	1 V.S.A. § 317(c)(23)	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.	Bill introduced but not enacted. H. 611, an act relating to public records act exemptions, was introduced by Reps. Sweaney, Hubert, and Martin to implement the recommendation of the PRSC. Section 1 of H. 611 would have amended 1 V.S.A. § 317(c)(23)
15.	N/A	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.	PRSC staff is not aware of any action by the committees.
16.	1 V.S.A. § 317(c)(5) and (c)(18)	The House and Senate Judiciary Committees 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	In preparation for potential committee review of these exemptions in 2013, Senator Dick Sears, the chair of the Senate Committee on the Judiciary, sent a letter to interested parties on December 6, 2012, soliciting proposals, including proposed legislation, regarding the

	Statutory Citation	Study Committee Recommendation	Status of Recommendation
		Department of Public Safety investigations in order to determine if the two exemptions should be amended or revised.	criminal and public safety investigation exemptions to the Public Records Act.

APPENDIX B

Draft Policy: Government Operations Committee Review of Public Records Act Exemptions

The Study Committee discussed how exemptions to the PRA often are enacted without review by the House or Senate Committees on Government Operations. As a result, the Government Operations Committees do not have the opportunity to independently assess whether the exemption is necessary, whether the information addressed is covered by another existing exemption, or whether the proposed exemption is as narrowly tailored and clearly drafted as possible. To improve the opportunities for review by the Government Operations Committees, the Study Committee discussed various alternatives and the pros and cons of each.

The Study Committee concluded that in order to address the practical realities of the legislative process while also ensuring some level of review, several different processes could or should be implemented. If these processes are implemented, the Study Committee determined that there would be much greater opportunity for the Government Operations Committees or their staff at some point to review the proposed exemption. This section of the report summarizes the proposed alternatives.

1. Amend House and Senate Rules to Clarify Committee Jurisdiction

The House and Senate Rules do not clearly state that public records issues fall within the jurisdiction of the Committees on Government Operations. Traditionally, a bill related to the PRA has been referred to the Committees on Government Operations because it relates to government administration. However, a bill with a public records exemption is only referred to the Government Operations Committees if the Speaker of the House or the President of the Senate determines that the predominant subject matter of the bill is government administration or if a member moves to have the bill referred or committed to the Government Operations

Committees. Consequently, the Government Operations Committees may never be referred a public records exemption embedded in a bill unrelated to the jurisdiction of the committee. Further, members of the committees may never know of the exemption and, therefore, cannot move to refer the bill to committee.

To clarify the jurisdiction of the Government Operations Committees, the Study Committee recommends amending House Rule 25 and Senate Rule 24 to clearly state that the jurisdiction of the House and Senate Government Operations Committees includes public records issues. This rule change, however, would not be similar to House Rule 35 or Senate Rule 31, under which any bill that carries an appropriation is referred to the Committee on Appropriations after passage by the original committee of jurisdiction. The proposed change would simply clarify the committees' jurisdiction. Consequently, it would still be possible that a bill with a public records exemption would not be officially referred to the Government Operations Committees. However, the steps set forth below may help ensure committee review.

2. *Informal Committee Review*

During the 2011 session of the Vermont General Assembly, the House Committee on Government Operations made it known to committee chairs and other legislators that a bill that included a study committee would be reviewed by the Government Operations Committee. When a bill with a study committee was proposed in committee, chairs of the committees of jurisdiction informed the Government Operations Committee, or, if the bill reached the House floor, a member would move to pass over the bill so that the Government Operations Committee could review the study committee. There was no rule amendment or any formal motion to refer or commit a bill to the Committee on Government Operations. Instead review was conducted informally with the consent of other committee chairs or during a delay in action on the bill.

The Chairs of the House and Senate Government Operations Committees could pursue a similar approach to review of public records exemptions. The Chairs could, with the consent of leadership of the House and Senate, announce to committee chairs that the Government Operations Committee will review any bill with a public records exemption. The review would be informal and occur when another committee chair requested it or when a public records exemption is noted in a bill on the floor. Because it is difficult for members to know of every provision in every bill, it is possible that an exemption could avoid review by a committee if a committee member never comes to learn of the proposed exemption. However, the next step could help address this issue.

3. *Legislative Council Policy Regarding Public Records Exemptions*

When a Legislative Council attorney is drafting a bill and the subject matter of the bill addresses an issue or topic within another attorney's jurisdiction, the original attorney is supposed to contact and confer with the attorney with subject matter jurisdiction. This process has not worked well with regard to Public Records Act exemptions, most likely because exemptions are embedded in larger bills, the subject matter of which the drafting attorney does not contemplate as within the jurisdiction of another attorney. However, Legislative Council could adopt a policy that an attorney drafting a Public Records Act exemption must confer with the Legislative Council Public Records Officer, Helena Gardner. This policy would allow the Public Records Officer to provide input on the language and policy of the proposed exemption. It would also allow the Public Records Officer to notify the Committees on Government Operations of the exemption so that the committees could conduct review either informally or by motion to commit the bill to the committee.

APPENDIX C

Checklists for Review of New Exemptions

To: Standing Committees of the Vermont House of Representatives and Senate
From: Public Records Legislative Study Committee
Date: January 2013
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 second annual report, the Public Records Study Committee (“Committee”) recommended that the standing committees of the House and Senate use the checklists below 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.

A. REVIEW OF EXEMPTIONS

- ___ **1. Is the exemption 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 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 as to exempt 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?
 ___ *If applicable:* Is it clear who the exemption is intended to benefit? Should that person have the right to waive confidentiality?
- ___ **3. Should the exemption be categorical, or be subject to content-based balancing and redaction?**
 Should records on a subject matter be categorically exempt (*i.e.*, exempt regardless of the content of a particular record), or should a record be exempt only if the harm caused by public disclosure outweighs the public interest in disclosure (and be subject to redaction)?
- ___ **4. 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).

- ___ **5. Should there be exceptions to the exemption?**
 ___ 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?
 ___ 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 each other?
 ___ *If applicable:* Is there a rational basis for limiting the exception to specified persons but not to other similarly situated persons?
- ___ **6. 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 into the exemption.
- ___ **7. Does the exemption use standard language?**
 ___ Legislation creating exemptions to the PRA should use the following language:
 “[Description of records] shall be confidential and shall be exempt from public inspection and copying under the Public Records Act.”
- ___ **8. Should the record also be protected from subpoena and discovery in litigation?**
 A record’s status as confidential and exempt from public inspection and copying does not necessarily shield it from subpoena and/or discovery in litigation. If the General Assembly intends the record to be privileged from subpoena or discovery in litigation, the exemption should specifically address limitations on discovery of the document; however, depending on the circumstances, a litigant may have a constitutional right to discovery of records.
- ___ **9. Should disclosure of a confidential record by a public agency be specifically prohibited and subject to a penalty?**
 Designation of a record as confidential and exempt from public inspection and copying implies that an agency must not release the document. However, there may be no general penalty for disclosure of a confidential record, although there may be penalties under federal or common law. If the general assembly intends to prohibit disclosure of a record by a public agency and to provide a means of enforcing the prohibition through a private suit or an enforcement action, specific language should be added to express this intent.

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, so that legislative intent is clear?**

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. 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.

___ **5. Should the agency be directed to adopt a rule creating a categorical exemption to the PRA or a content-based exemption that may require redaction?**

Should the grant of rulemaking authority direct the agency to adopt rules designating records as categorically exempt (*i.e.*, exempt regardless of the content of a particular record)? Should the agency be directed to adopt a rule designating a record as exempt only if the harm caused by public disclosure outweighs the public interest in disclosure?

___ **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**Legislative Recommendations of Committee as a Draft Bill**

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; 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.

* * *

Sec. 2. REPEAL OF SECRETARY OF STATE ANNUAL SURVEY

2011 Acts and Resolves No. 59, Sec. 14 (survey of municipalities) is repealed.

Sec. 3. 1 V.S.A. § 317(c) is amended to read:

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

* * *

(7) personal documents relating to an individual, including ~~information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency, information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation; 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;~~

(A) unique identifying information of a person, including a person's Social Security number, employee identification number, biometric identifiers, passwords or other access codes, medical records, home or personal telephone number, and personal e-mail addresses;

(B) the race, age, or gender of an individual employee of a public agency; provided that aggregate data related to the race, age, or gender of all employees of a public agency may be disclosed if presented in a form which does not reveal the identity of an individual employee;

(C) information related to personal finances;

(D) medical or psychological facts concerning a person;

(E) information in any files maintained to hire, evaluate, promote, or discipline an employee of a public agency; provided that all information in personnel files of an individual employee of a public agency shall be made available to that individual employee or his or her designated representative;

(F) Information concerning a person who is an applicant for or recipient of assistance or benefits relating to programs administered by the Agency of Human Services.

* * *

(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;

* * *

(30) ~~all code and machine readable structures of state funded and 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 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 best interests;

* * *

(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 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; [Repealed.]~~

* * *

(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. 4. 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). [Deleted.]~~

(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. 5. 8 V.S.A. § 4089f is amended to read:

§ 4089f. INDEPENDENT EXTERNAL REVIEW OF HEALTH CARE

SERVICE DECISIONS

(a) For the purposes of 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 term 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. 6. 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 income tax returns filed by the persons making such certificate and shall report any instances of discrepancy to the ~~corporation~~ 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~~ Incentive grant applications and other records received by the Corporation under this section are confidential under 1 V.S.A. § 317(c)(7) and are exempt from public inspection and copying under the Public Records Act. Nothing herein shall be construed to prevent the publication of However, statistical data may be publicly released as long as the ~~identification~~ identities and the

applications, certificates, and reports of particular individuals, certificates, and reports is prevented are not released.

Sec. 7. 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 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 a~~ confidential public health record under section 1001 of this title.

Sec. 8. 18 V.S.A. § 9418f is amended to read:

§ 9418f. RENTAL NETWORK CONTRACTS

(a) Definitions. As used in this section:

(1) “Health care services” means services for the diagnosis, prevention, treatment, or cure of a health condition, illness, injury, or disease.

(2)(A) “Provider” means a physician, a physician organization, or a physician hospital organization that is acting exclusively as an administrator on behalf of a provider to facilitate the provider’s participation in health care contracts.

(B) “Provider” does not include a physician organization or physician hospital organization that leases or rents the physician organization’s or physician hospital organization’s network to a covered entity.

(3) “Provider network contract” means a contract between a contracting entity and a provider specifying the rights and responsibilities of the contracting entity and provider for the delivery of and payment for health care services to covered individuals.

(b) Scope. This section shall not apply to:

(1) Provider network contracts for services provided to Medicaid, Medicare, or the ~~state children’s health insurance program~~ State Children’s Health Insurance Program (SCHIP) beneficiaries.

(2) Circumstances in which access to the provider network contract is granted to an entity operating under the same brand licensee program as the contracting entity.

(c)(1) Registration. Any person not otherwise licensed or registered by the ~~commissioner~~ Commissioner that intends to conduct business as a contracting entity shall register with the ~~commissioner~~ Commissioner prior to commencing business. Each person not licensed or registered by the ~~commissioner~~ Commissioner as a contracting entity upon the effective date of this section shall have 30 days within which to register with the ~~commissioner~~ Commissioner.

(2) Registration shall consist of the submission of the following information:

(A) the official name of the contracting entity;

(B) the mailing address and main telephone number for the contracting entity’s main headquarters; and

(C) the name and telephone number of the contracting entity’s representative who shall serve as the primary contact with the ~~commissioner~~ Commissioner.

(3) The information required by this subsection shall be submitted in written or electronic format, as prescribed by the ~~commissioner~~ Commissioner. Information submitted to the Commissioner under this section or rules adopted by the Commissioner to implement this section shall not be confidential unless otherwise exempt from inspection and copying under the Public Records Act.

* * *

(d)(1) Contracting entity rights and responsibilities. A contracting entity may not grant access to a provider's health care services and contractual discounts pursuant to a provider network contract unless:

* * *

(5)(A) All information made available to providers in accordance with the requirements of this section shall be confidential and shall not be disclosed to any person or entity not involved in the provider's practice or the administration thereof without the prior written consent of the contracting entity.

(B) Nothing in this section shall be construed to prohibit a contracting entity from requiring the provider to execute a reasonable confidentiality agreement to ensure that confidential or proprietary information disclosed by the contracting entity is not used for any purpose other than the provider's direct practice management or billing activities.

(C) Nothing in this subsection shall be construed to prevent the inspection and copying, as provided under the Public Records Act, of information acquired by the Commissioner under this section or rules implementing this section.

(e) Rental by third parties prohibited. A covered entity, having itself been granted access to a provider's health care services and contractual discounts pursuant to a provider network contract, may not further lease, rent, or otherwise grant access to the contract to any other person.

~~(f)(1) Unauthorized access to provider network contracts. It is a violation of this subchapter subject to enforcement under section 9418g of this title to access or utilize a provider's contractual discount pursuant to a provider network contract without a contractual relationship with the provider, contracting entity, or covered entity, as specified in this section. [Repealed.]~~

(2) Contracting entities and third parties are obligated to comply with subdivision (d)(2)(B) of this section concerning the services referenced on a remittance advice or explanation

of payment. A provider may refuse the discount taken on the remittance advice or explanation of payment if the discount is taken without a contractual basis or in violation of these sections.

However, an error in the remittance advice or explanation of payment may be corrected within 30 days following notice by the provider.

(3) A contracting entity may not lease, rent, or otherwise grant a covered entity access to a provider network contract unless the covered entity accessing the health care contract is:

(A) a payer, a third party administrator, or another entity that administers or processes claims on behalf of the payer;

(B) a preferred provider organization or preferred provider network, including a physician organization or physician hospital organization; or

(C) an entity engaged in the electronic claims transport between the contracting entity and the payer that does not provide access to the provider's services and a discount to any other covered entity.

Sec. 9. 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 directly or indirectly identifying 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 individual identified, the individual's ~~health care~~ agent under ~~subsection 5264~~ section 9701 of this title, ~~or~~ or, if the individual is an unemancipated minor, his or her parent or legal guardian, shall consent in writing; 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.

* * *

Sec. 10. 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.~~

Sec. 11. 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 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.~~

* * *

Sec. 12. 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 or when required by law.~~

~~(b) A person shall not:~~

~~(1) Publish, use, disclose or divulge any of those records for purposes not directly connected with the administration of programs of the 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.~~

Sec. 13. 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. 14. 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. 15. 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 confidential and shall be exempt from public inspection and copying under the Public Records Act. 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. 16. 33 V.S.A. § 7112 is amended to read:

§ 7112. CONFIDENTIAL INFORMATION

(a) Information received by the ~~licensing agency~~ 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~~ 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.

Sec. 17. REPEAL

1 V.S.A. § 317(c)(22) (documents held by ACCD related to new jobs and manufacturer's tax credits) is repealed.

Sec. 18. EFFECTIVE DATES

- (a) This section and Sec. 2 of this act shall take effect on passage.
- (b) All other sections shall take effect on July 1, 2013, except that 1 V.S.A. § 317(c)(7) (personal records exemption) shall take effect on July 1, 2015.

APPENDIX E

Exemptions Reviewed by the Public Records Study Committee in 2012

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
1.	1 V.S.A. § 317(c)(8)	Test questions, scoring keys, and other examination instruments or data used to administer a license, employment, or academic examination	Recommend retaining exemption in existing form.
2.	1 V.S.A. § 317(c)(9)	Trade secret which is known only to certain individuals within a commercial concern and which gives its owner an opportunity to obtain business advantage over competitors	Recommend retaining exemption in existing form.
3.	1 V.S.A. § 317(c)(11)	Student records, unless disclosure authorized under FERPA	Committee will continue reviewing in 2013 to determine whether exemption is needed in light of federal law requirements.
4.	1 V.S.A. § 317(c)(21)	Lists of names compiled by Vermont Life magazine for developing and maintaining a subscription list, which list may be sold/rented in the sole discretion of the magazine	Recommend that the committees on commerce, economic development, and government operations review in order 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.
5.	1 V.S.A. § 317(c)(22)	Any documents filed, received, or maintained by ACCD with regard to administration of the new jobs tax credit or the manufacturer's tax credit	Recommend repeal, as underlying tax credit subchapters were repealed in 2006.
6.	1 V.S.A. § 317(c)(26)	Information and records provided to DFR by an individual or company related to resolution of a dispute between an individual and a DFR-regulated person or company	Committee will continue reviewing in 2013.
7.	1 V.S.A. § 317(c)(27)	Records provided to the DPS by an individual so that the Department can assist that individual in resolving a	Committee will continue reviewing in 2013.

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
		dispute with a utility regulated by the Department	
8.	1 V.S.A. § 317(c)(28)	Records of independent external reviews of health care and mental health service decisions under 8 V.S.A. §§ 4089f and 4089a	Renew 2012 recommendation that 1 V.S.A. § 317(c)(28) and 8 V.S.A. §§ 4089a and 4089f be amended to reflect that the independent panel of mental health care providers has been eliminated. See App. B of the 2012 report.
9.	1 V.S.A. § 317(c)(30)	State-funded and controlled database used for marketing activities and which give the state an opportunity to obtain a marketing advantage over others	Recommend that substance of exemption be retained in existing form, but amending the wording to be more understandable to the average reader.
10.	1 V.S.A. § 317(c)(36)	Anti-fraud plans and summaries submitted by insurers to DFR for the purposes of complying with 8 V.S.A. § 4750	Recommend retaining exemption in existing form.
11.	1 V.S.A. § 317(c)(40)	Records of genealogy provided in support of an application for tribal recognition	Recommend amending exemption to clarify that genealogical information within applications is covered.
12.	8 V.S.A. § 15(b)	Financial institutions' advisory interpretations	Committee will continue reviewing in 2013.
13.	8 V.S.A. § 22	Confidentiality and information sharing	Committee will continue reviewing in 2013.
14.	8 V.S.A. § 23	DFR investigation records	Committee will continue reviewing in 2013.
15.	8 V.S.A. § 2530(j)	Information obtained during an examination or investigation by DFR related to persons engaged in, or applying for a license to engage in, money services (Act 78 of 2012)	Committee will continue reviewing in 2013.
16.	8 V.S.A. § 2561	Information or material provided to the Nationwide Mortgage Licensing System and Registry in connection with licenses to engage in the business of money services	Recommend retaining exemption in existing form.

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
17.	8 V.S.A. § 2768	Information or material provided to the Nationwide Mortgage Licensing System and Registry in connection with licenses to engage in the business of debt adjustment	Recommend retaining exemption in existing form.
18.	8 V.S.A. § 2923	Information or material provided to the Nationwide Mortgage Licensing System and Registry in connection with licenses to act as a third party loan servicer	Recommend retaining exemption in existing form.
19.	8 V.S.A. § 3561	All market conduct annual statements and other information filed by insurance companies with DFR	Committee will continue reviewing in 2013.
20.	8 V.S.A. § 3571	Insurance companies' financial examination synopses	Recommend retaining exemption in existing form.
21.	8 V.S.A. § 3574(d)	Examination reports of insurance companies	Committee will continue reviewing in 2013.
22.	8 V.S.A. § 3577(l)	Actuarial reports, actuarial opinion summaries, work papers, and other information submitted to DFR	Committee will continue reviewing in 2013.
23.	8 V.S.A. § 3687	Examination reports of insurance company subsidiaries	Committee will continue reviewing in 2013.
24.	8 V.S.A. § 3839	Trade secret information included in a life settlement provider's annual statement to DFR	Committee will continue reviewing in 2013.
25.	8 V.S.A. § 3840	Investigation and examination reports related to financial condition or market conduct of life settlement provider	Direct Legislative Council to add to table of exemptions, and review in 2013.
26.	8 V.S.A. § 4089a(a) and (i)	Mental health care services review	Renew 2012 recommendation that 1 V.S.A. § 317(c)(28) and 8 V.S.A. §§ 4089a and 4089f be amended to reflect that the independent panel of mental health care providers has been eliminated. See App. B of the 2012 report.

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
27.	8 V.S.A. § 4089f(d)(6)	External review of health care services decision	Renew 2012 recommendation that 1 V.S.A. § 317(c)(28) and 8 V.S.A. §§ 4089a and 4089f be amended to reflect that the independent panel of mental health care providers has been eliminated. See App. B of the 2012 report.
28.	8 V.S.A. § 4164(b)	Vermont Life and Health Insurance Guaranty Association negotiations	Recommend retaining exemption in existing form.
29.	8 V.S.A. § 4488(5)	Notice of termination of insurance agent	Committee will continue reviewing in 2013.
30.	8 V.S.A. § 4813m(f)	Insurance company notice of termination	Committee will continue reviewing in 2013.
31.	8 V.S.A. § 6002(c)(3)	Captive insurance company license applications	Committee will continue reviewing in 2013.
32.	8 V.S.A. § 6008(c)	Examination reports of captive insurance companies	Committee will continue reviewing in 2013.
33.	8 V.S.A. § 6052(c)(2)	Risk retention group applications	Committee will continue reviewing in 2013.
34.	8 V.S.A. § 6074	Examination reports of risk retention groups	Committee will continue reviewing in 2013.
35.	8 V.S.A. § 7041(e)	Insurer hearings	Committee will continue reviewing in 2013.
36.	8 V.S.A. § 7043	Confidentiality of insurance delinquency hearings	Committee will continue reviewing in 2013.
37.	8 V.S.A. § 8010	Continuing care retirement community records	Direct Legislative Council to delete from the table of exemptions; this provision merely refers to the fact that other law may require an exemption.
38.	8 V.S.A. § 8308	Risk-based capital reports	Recommend retaining exemption in existing form.
39.	9 V.S.A. § 4113(b)	Petroleum storage reports	Recommend retaining exemption in existing form.
40.	9 V.S.A. § 4235	Securities records	Direct Legislative Council to delete from the table of exemptions; this provision was repealed in 2005.

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
41.	9 V.S.A. § 5607	Securities records	Recommend retaining exemption in existing form.
42.	10 V.S.A. § 7(b)	Economic development; benchmark reports	The exemption is ambiguous and ACCD indicated that one reasonable interpretation may have unintended consequences. Recommend that the committees of jurisdiction review the exemption.
43.	10 V.S.A. § 531	Employee-specific personal identifying information that may be used in the evaluation of the employment training program and the Workforce Education and Training Fund	Recommend retaining exemption in existing form.
44.	15 V.S.A. § 307(a)	Domestic relations; acknowledgement of parentage	Recommend that the committees on human services, on health and welfare, and on judiciary review to consider repeal of the exemption.
45.	15 V.S.A. § 788	Domestic relations; office of child support; parent information	Recommend retaining exemption in existing form.
46.	15 V.S.A. § 1140	Domestic violence; fatality review commission; proceedings	Recommend retaining exemption in existing form.
47.	15 V.S.A. § 1152	Address confidentiality program	Direct Legislative Council to delete from the table of exemptions; the actual subject matter of the exemption is addressed in § 1155.
48.	15 V.S.A. § 1155	Disclosure of information in address confidentiality program	Recommend retaining exemption in existing form.
49.	15A V.S.A. § 2-105(d)	Adoption reports; background information	Recommend retaining exemption in existing form.
50.	15A V.S.A. § 6-102	Adoption; adoption records	Recommend retaining exemption in existing form.
51.	15A V.S.A. § 6-104	Release of nonidentifying information regarding adoption	Recommend retaining exemption in existing form.
52.	15A V.S.A. § 6-106	Adoption; request of former parent for nondisclosure	Recommend retaining exemption in existing form.

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
53.	16 V.S.A. § 251	Criminal background checks	Direct Legislative Council to delete from the table of exemptions; the actual subject matter of the exemption is addressed in § 253.
54.	16 V.S.A. § 253	Access to criminal records of school employees; applicants	Recommend retaining exemption in existing form.
55.	16 V.S.A. § 1708	Confidentiality of educator licensing matters	Direct Legislative Council to add to the table of exemptions and recommend retaining exemption in existing form.
56.	16 V.S.A. § 2843(d)	Application for need-based incentive grants	Recommend amending language to modernize it and cross-reference existing exemption for personal information.
57.	18 V.S.A. § 4474d	Therapeutic use of cannabis; records of registered persons and caregivers	Recommend that committees of jurisdiction review and clarify confidentiality of dispensary application materials and/or the scope of DPS's rulemaking authority with regard to confidentiality.
58.	24 V.S.A. § 2786(a)(1)	Regional development corporations; contract agreements prior to execution	Recommend retaining exemption in existing form.
59.	28 V.S.A. § 204(d)	Presentence reports	Recommend that committees of jurisdiction review exemption to clarify who may claim and waive the "privilege" and to determine whether "privilege" is the correct terminology.
60.	28 V.S.A. § 205(b)	Information regarding offender's compliance with probation; offender treatment information	Recommend retaining exemption in existing form.
61.	28 V.S.A. § 403(4)	Register of individuals requesting notice of parole hearings	Recommend retaining exemption in existing form.
62.	28 V.S.A. § 601(10)	Inmate files	Recommend that committees of jurisdiction review exemption 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 standards for the exercise of rulemaking

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
			authority.
63.	28 V.S.A. § 903	Inmate communications for access to treatment	Recommend retaining exemption in existing form.
64.	29 V.S.A. § 505(b)(2)	Vermont natural gas and oil resources board; well logs	Recommend retaining exemption in present form.
65.	29 V.S.A. § 542	Oil and gas drilling; geological drilling logs and reports	Recommend retaining exemption in present form.
66.	29 V.S.A. § 553	Oil and gas confidential information prohibited	Recommend retaining exemption in present form.
67.	30 V.S.A. § 206	Information required to be furnished to DPS by companies subject to its supervision	Recommend deleting the last sentence of the section; trade secret designations can be made as appropriate under 1 V.S.A. § 317(c)(9).
68.	33 V.S.A. § 105(b)	Commissioner for Children and Families; rulemaking authority	Recommend amending subdivision (b)(2) to eliminate the third sentence. Direct Legislative Council to remove this provision from the table of exemptions. The subject matter is covered under other exemptions.
69.	33 V.S.A. § 111	Records regarding Department for Children and Families recipients	Recommend amending the exemption to eliminate the phrase “political or commercial purposes.”
70.	33 V.S.A. § 113(b)	Information regarding the desertion or nonsupport of children	Direct Legislative Council to remove from table of exemptions, because the subject matter is already covered by the exemption at 33 V.S.A. § 4105(c).
71.	33 V.S.A. § 115(g)	Office of Child Support; financial institutions match lists	Recommend retaining exemption in present form.
72.	33 V.S.A. § 304(b)	Commissioner for Children and Families; rulemaking authority	Recommend amending subdivision (b)(2) to eliminate the third sentence. Direct Legislative Council to remove this provision from the table of exemptions. The subject matter is covered under other exemptions.
73.	33 V.S.A. § 306(c)	Disclosure of findings regarding day care facilities	Recommend retaining exemption in present form.
74.	33 V.S.A. § 309(d)	Day care facilities; information released to facility owner or	Recommend retaining exemption in present form.

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
		operator	
75.	33 V.S.A. § 908	Division of Rate Setting; nursing home employee salaries	Recommend amending to reference required disclosure of state employee wages under 1 V.S.A. § 317(b).
76.	33 V.S.A. § 2002(c)	Commissioner of Vermont Health Access; pharmaceutical company trade secrets	Recommend retaining exemption in its present form because of federal law, but the committee notes its philosophical objection to the exemption. The committee also notes that the exemption may be subject to technical changes as part of the Title 33 rewrite.
77.	33 V.S.A. § 2010(e)	Pharmaceutical pricing data	Recommend a technical amendment to clarify that the exemption is a public record subject to an exemption. Otherwise recommend retaining exemption in its present form because of federal law, but the committee notes its philosophical objection to the exemption.
78.	33 V.S.A. § 4105	Office of Child Support; parental rights information	Recommend that the committees of jurisdiction review to address the language and scope of the prohibition on use of information furnished to the Office of Child Support.
79.	33 V.S.A. § 4305	Department of Development and Mental Health Services; children records	Recommend retaining exemption in present form.
80.	33 V.S.A. § 4702(b)	Coordinated system for children at risk of school failure	Direct Legislative Council to delete from the table of exemptions; this provision merely references the existence of confidentiality policies elsewhere in law.
81.	33 V.S.A. § 4913(e)	Name of person reporting abuse	Recommend that the committees of jurisdiction review this exemption to consider how to address bad faith reports of abuse.
82.	33 V.S.A. § 4916(c)	Records of abuse and neglect	Recommend retaining exemption in present form (but see recommendation at item 84).
83.	33 V.S.A. § 4919	Child abuse registry	Recommend retaining exemption in present form (but see recommendation at item 84).

	Statutory Citation	Summary of Statute	Committee Comments and/or Recommendation
84.	33 V.S.A. § 4921	Records of child abuse investigations, assessments, reviews, and responses	Direct Legislative Council to add to the table of exemptions. In addition, recommend that the committees of jurisdiction review in order to clarify and streamline the language of the exemption and possibly to create one section of Title 33 chapter 49 related to confidentiality of registry information and records of reports, investigations, assessments, reviews, and responses.
85.	33 V.S.A. § 5282	Report from Department for Children and Families as to whether a defendant under the age of 18 should be treated as a youthful offender	Recommend retaining exemption in present form.
86.	33 V.S.A. § 6321	Attendant care services	Recommend that the committees of jurisdiction review the exemption to determine its appropriate scope.
87.	33 V.S.A. § 6705	Department of Vermont Health Access; subrogation medical care records	Recommend retaining exemption in present form.
88.	33 V.S.A. § 6903	Identity of person reporting suspected abuse of elderly or disabled	Recommend that the committees of jurisdiction review this exemption to consider how to address bad faith reports of abuse.
89.	33 V.S.A. § 6906(e)	Unsubstantiated reports of abuse, neglect, and exploitation of a vulnerable adult	Recommend retaining exemption in present form.
90.	33 V.S.A. § 6911	Records of abuse of elderly	Recommend retaining exemption in present form.
91.	33 V.S.A. § 7112	Nursing homes; identity of complainants	Recommend amending the exemption to eliminate the reference to guidelines.
92.	33 V.S.A. § 7301(2)(H)	Nursing home residents; bill of rights	Direct Legislative Council to delete from the table of exemptions; this is not a stand-alone exemption.
93.	33 V.S.A. § 7503	Office of State Long Term Care Ombudsman; confidentiality	Recommend retaining exemption in present form.

APPENDIX F

Summary of Committee Recommended Action on Revised Exemptions

I. Financial Regulation-Related Exemptions

The Study Committee reviewed 30 statutory provisions that exempt certain Department of Financial Regulation-related records from inspection and copying under the Public Records Act. The Study Committee heard testimony from DFR representatives and the Office of Legislative Council regarding these exemptions. For many of the exemptions, the Study Committee did not receive sufficient information to make a decision on whether to recommend retaining the exemptions in existing form, repealing them, or modifying them. As a result, as noted in Appendix E, the Study Committee will continue reviewing many DFR-related exemptions in 2013.

In addition, Legislative Council staff brought to the Study Committee's attention the fact that 8 V.S.A. § 3840, related to investigation and examination reports of financial condition or market conduct of life settlement providers, was previously not included in the table of PRA exemptions included as a revision note to 1 V.S.A. § 317 in the Vermont Statutes Annotated. The Study Committee therefore directs the Office of Legislative Council to add 8 V.S.A. § 3840 to the table of exemptions.

Finally, the Committee directs the Office of Legislative Council to delete during the statutory revision process two DFR-related exemptions currently listed in the table of exemptions. Section 8010 of Title 8, related to continuing care retirement community records, merely references the fact that other law may require that records be exempt, but it does not constitute or create a stand-alone exemption. A former provision of law creating an exemption related to securities records, 9 V.S.A. § 4235, was repealed in 2005 and also should be deleted from the table of exemptions.

II. Human Services-Related Exemptions

The Study Committee reviewed 33 statutory provisions that exempt certain Agency of Human Services (AHS) records from inspection and copying under the Public Records Act. The Study Committee heard testimony from AHS representatives and the Office of Legislative Council regarding these exemptions. The Study Committee recommends that six of the reviewed AHS exemptions be amended or deleted. The Study Committee also recommends that four of the AHS exemptions be reviewed for necessity or amendment by the relevant committees of jurisdiction.

In addition, the Study Committee recommends that six of the statutory provisions listed as AHS exemptions be deleted from the list of exemptions because the relevant, listed statutes are not statutory authority on which a public agency lawfully could deny inspection and copying under the Public Records Act. Consequently, the listed provisions should not be assessed or counted as exemptions. However, the Study Committee recommends that one previously unlisted statutory section within AHS's jurisdiction be added to the list of public records exemptions. The recommendations of the Study Committee are summarized below, and draft legislation implementing the recommendations is attached in Appendix D of this report.

1. 15 V.S.A. § 307(a). Review of Voluntary Acknowledgement of Parentage Forms

Under 15 V.S.A. § 307, in any case in which the parents of a child are not married, the parents may acknowledge parentage by signing a Voluntary Acknowledgement of Parentage Form. Under 15 V.S.A. § 307(a), the Voluntary Acknowledgement of Parentage Form shall be confidential and, as such, is not subject to inspection or copying under the PRA. However, the Study Committee heard testimony regarding whether there is a need for confidentiality of the acknowledgement forms and how other states have been repealing confidentiality for the forms. The Study Committee realizes that confidentiality of forms may provide an incentive for some parents to acknowledge parentage when they otherwise would not if the form was public.

Because the policy decision related to the necessity of the Voluntary Acknowledgement of Parentage Form extends beyond the Study Committee’s jurisdiction, the Study Committee requests that the House and Senate Committees on the Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare review 15 V.S.A. § 307(a) to determine if Voluntary Acknowledgement of Parentage Forms should remain confidential.

2. 15 V.S.A. § 1152. Establishment of Address Confidentiality Program

Section 1152 of Title 15 establishes the Address Confidentiality Program. Under this section, a person may apply to the Secretary of State to have an address designated as part of the Address Confidentiality Program. Under 15 V.S.A. § 1155, a program participant’s address is not subject to public inspection and copying. Because 15 V.S.A. § 1155—and not 15 V.S.A. § 1152—is the section that would be asserted as a public records exemption, the Study Committee directs the Office of Legislative Council to remove 15 V.S.A. § 1152 from the list of the public records exemptions.

3. 33 V.S.A § 105(c). Commissioner of Children and Families Rulemaking Authority

Under 33 V.S.A. § 105, the Commissioner of Children and Families is granted rulemaking authority related to the effective administration of the Department of Children and Families (DCF). This rulemaking authority includes authority to adopt regulations regarding the custody of Department records, including provisions restricting the use or disclosure of information contained in the records. Because 33 V.S.A. § 105 is a grant of rulemaking authority and not, in itself, an exemption, the Study Committee directs the Office of Legislative Council to remove the section from the list of public records exemptions.

However, the Study Committee also recommends that 33 V.S.A. § 105 be amended. Subsection 105(b) of Title 33 of the Vermont Statutes Annotated directs DCF to “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.” The Study Committee reviewed this grant of authority and agreed that DCF should have the authority to fix standards and issue regulations necessary to administer law. However, the Study Committee determined that the grant of rulemaking authority to restrict the use or disclosure of information in records of the department was too broad and subject to interpretation. Consequently, the Study Committee recommends that the rulemaking authority to limit access to information should be deleted. Generally, the deletion of this authority should not subject sensitive information to public disclosure, especially in light of the Study Committee’s recommendation to amend 1 V.S.A. § 317(c)(7) to designate as confidential information concerning a person who is a recipient of AHS assistance or benefits.

In addition, 33 V.S.A. § 105(a) provides that “[a]s used in this subdivision, the word “records” includes records, papers, files and communications.” This definition of “records” is duplicative and potentially in conflict with the definition of “public records” under the Public Records Act. To avoid ambiguity, the Study Committee recommends that the definition of records included in 33 V.S.A. § 105 be deleted.

4. 33 V.S.A. § 111. Records of Those Receiving DCF Assistance

Section 111 of Title 33 of the Vermont Statutes Annotated prohibits the disclosure of the names of information pertaining to applicants for or recipients of assistance or benefits from the DCF. The information in DCF records related to applications for or receipt of benefits and assistance can be characterized as personal information, such as family income or salary. The Study Committee discussed in 2012 clarifying the existing personal information exemption under 1 V.S.A. § 317(c)(7) with the intent of consolidating the numerous personal information public records exemptions throughout statute under one exemption.

To further the goal of consolidating the personal information exemptions, the Study Committee recommends that 33 V.S.A. § 111 be repealed and that 1 V.S.A. § 317(c)(7) be

amended to recognize the confidentiality of information related to persons who apply for or receive DCF assistance. As a result, the information previously deemed confidential under 33 V.S.A. § 111 would remain confidential as personal information. The exemption under 33 V.S.A. § 111 could then be deleted from the list of public records exemptions.

If 33 V.S.A. § 111 is not repealed, the Study Committee recommends that it be amended. Specifically, 33 V.S.A. § 111(b)(2) provides that “[a] person shall not: . . . use any records for the department of any kind or description for political or commercial purposes.” The Study Committee believes that this restriction is overbroad and potentially impinges on First Amendment rights under the U.S. Constitution. If 33 V.S.A. § 111 is not repealed in its entirety, 33 V.S.A. § 111(b)(2) should be repealed to avoid any potential constitutional issues.

5. *33 V.S.A. § 113(b). Information Gathered by DCF from Government Agencies Related to Child Support*

Under 33 V.S.A. § 113, DCF may collect information from other state governmental agencies to assist in the location of parents who have deserted children. Subsection 113(b) of Title 33 of the Vermont Statutes Annotated provides that information gathered under the section shall be subject to limitations in 33 V.S.A. § 4105. Under 33 V.S.A. § 4105, information provided to DCF shall not be subject to inspection or copying, except for disclosure to certain designated persons. Considering that 33 V.S.A. § 4105 is the statutory section upon which a public agency would withhold a record and that 33 V.S.A. § 113 simply cross-references the exemption, the Study Committee directs the Office of Legislative Council to remove 33 V.S.A. § 113 from the list of public records exemptions.

6. *33 V.S.A. § 304(b). DCF Rulemaking Authority*

Similar to the recommendation regarding 33 V.S.A. § 105, the Study Committee recommends that 33 V.S.A. § 304 be removed from the list of public records exemptions and that it be amended to address potential conflict with the Public Records Act. Specifically, 33 V.S.A. § 304

grants the Commissioner of Children and Families rulemaking authority related to the effective administration of the Department of Children and Families (DCF). This rulemaking authority includes authority to adopt regulations regarding the custody of Department records, including provisions restricting the use or disclosure of information contained in the records. Because 33 V.S.A. § 304 is a grant of rulemaking authority and not, in itself, an exemption, the Study Committee directs the Office of Legislative Council to remove the section from the list of public records exemptions.

However, the Study Committee also recommends that 33 V.S.A. § 304 be amended. Subdivision 304(b)(2) of Title 33 of the Vermont Statutes Annotated directs DCF to “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.” The Study Committee reviewed this grant of authority and agreed that DCF should have the authority to fix standards and issue regulations necessary to administer law. However, the Study Committee determined that the grant of rulemaking authority to restrict the use or disclosure of information in records of the department was too broad and subject to interpretation. Consequently, the Study Committee recommends that the rulemaking authority to limit access to information should be deleted. Generally, the deletion of this authority should not subject sensitive information to public disclosure, especially in light of the Study Committee’s recommendation to amend 1 V.S.A. § 317(c)(7) to designate as confidential information concerning a person who is a recipient of AHS assistance or benefits.

In addition, 33 V.S.A. § 304(b)(2) of Title 33 of the Vermont Statutes Annotated provides that “[a]s used in this subdivision, the word “records” includes records, papers, files and communications.” This definition of “records” is duplicative and potentially in conflict with the

definition of “public records” under the Public Records Act. To avoid ambiguity, the Study Committee recommends that the definition of records included in 33 V.S.A. § 304 be deleted.

7. *33 V.S.A. § 908. Salary of Nursing Home Employees*

Under 33 V.S.A. § 908, nursing homes are required to file certain data with the Division of Rate Setting in the Agency of Human Services (AHS). The information provided to AHS “shall be available to the public, except that the specific salary and wage rates of employees, other than the salary of the administrator, shall not be disclosed.” However, the State of Vermont operates one nursing home—the Vermont Veterans’ Home—and under 1 V.S.A. § 317(b), “individual salaries and benefits of and salary schedules relating to elected or appointed officials and employees of public agencies shall not be exempt from public inspection and copying.” Thus, 33 V.S.A. § 908 and 1 V.S.A. § 317(b) appear to conflict with regard to salary information of employees of the Vermont Veterans’ Home. To eliminate this conflict, the Study Committee recommends that 33 V.S.A. § 908 be amended to clarify that the requirements of 1 V.S.A. § 317(b) remain applicable.

8. *33 V.S.A. § 2002(c). Pharmaceutical Company Trade Secrets Submitted to DVHA*

Under 33 V.S.A. § 2002, the Commissioner of Vermont Health Access is authorized to negotiate with pharmaceutical companies regarding rebates or price discounts for Medicaid and other state public assistance benefit plans. Under 33 V.S.A. § 2002(c), the Department of Vermont Health Access (DVHA) is prohibited from publicly disclosing information revealing company-identifiable trade secrets obtained by the Department during the course of negotiations with the pharmaceutical companies. Moreover, such obtained information is specifically exempted from public disclosure under the Public Records Act.

The Study Committee objected to the exemption in 33 V.S.A. § 2002 in theory, believing that the exemption was potentially overbroad because all “company identifiable trade secrets” are granted confidentiality. As such, the State assumes the onus of protecting any information that a

company identifies as a trade secret. Moreover, the Study Committee believed that the information relating to pharmaceutical pricing should be public. However, the Study Committee heard testimony from AHS that the disclosure of the pharmaceutical information was prohibited by federal law. Because of the preemptive effect of the federal law, the Study Committee, despite its theoretical objection to the exemption in 33 V.S.A. § 2002(c), recommends that the exemption be retained.

9. *33 V.S.A. § 2010(e). Pharmaceutical Pricing Data Submitted to DVHA*

Under 33 V.S.A. § 2010, a manufacturer of prescription drugs dispensed in the state under a health program administered by the state shall report certain pharmaceutical pricing data to the Commissioner of Vermont Health Access. Under 33 V.S.A. § 2002(e), information submitted to DVHA is confidential and “not a public record as defined in 1 V.S.A. § 317(b).” The Study Committee disagreed with the need for confidentiality for the information submitted to DVHA and would prefer that the information be public. However, the Study Committee heard testimony that federal law required the pricing data submitted to DVHA to be confidential. Consequently, despite its objections to the exemption in theory, the Study Committee recommends that the exemption be retained.

The Study Committee does recommend that 33 V.S.A. § 2010 be amended. As noted, 33 V.S.A. § 2010 provides that information submitted to DVHA is not a public record under the Public Records Act. However, under the Public Records Act definition of “public records” in 1 V.S.A. § 317(b), a public record is any “written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.” The pharmaceutical pricing information submitted to DVHA under 3 V.S.A. § 2010 is clearly provided or acquired by the department in the course of its business. The Study Committee recommends that 33 V.S.A. § 2010 be amended to delete the caveat that the pharmaceutical

information is not a public record. Nevertheless, the information will remain confidential and not subject to inspection or copying under the Public Records Act.

10. 33 V.S.A. § 4105. Office of Child Support; Parental Rights Information

Under 33 V.S.A. § 4105, except for certain limitations, information furnished to the Office of Child Support shall be made available only to the person requesting the office's services or to the person's attorney, the person to whom the information relates, and the family division of the superior court. "Any other use of the information shall be prohibited." The Study Committee recognizes the potential policy need for some confidentiality for information submitted to the Office of Child Support, but the blanket prohibition on all other uses of the information appears overbroad. Because the policy of whether and how much of child support information should be confidential extends into subject matter beyond the scope of the Study Committee's jurisdiction, the Study Committee requests that the House and Senate Committees on the Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare review 33 V.S.A. § 4105 to determine whether the scope of the confidentiality provision is overbroad or requires other amendment.

11. 33 V.S.A. § 4702(b). Coordinated System for Children at Risk of School Failure

Under 33 V.S.A. § 4702, the Secretary of Human Services and the Commissioner of Education shall develop a coordinated system to identify children at risk of school failure. A family participating in the program is required, under 33 V.S.A. § 4702, "to be informed of the confidentiality policies and abuse and neglect reporting requirement." Although information produced or acquired by AHS or another agency in any interactions with a family might be confidential, 33 V.S.A. § 4702 is not a statutory basis to withhold information from inspection or copying. Consequently, the Study Committee directs the Office of Legislative Council to remove 33 V.S.A. § 4702 from the list of public records exemptions.

12. 33 V.S.A. § 4913(e). Name of Person Reporting Abuse of Child

Under 33 V.S.A. § 4913, the name and identifying information of a person reporting the abuse of a child or any person mentioned in the report shall be confidential, unless the person consents to disclosure, a judicial proceeding results from the report, a court finds that the report was not made in good faith, or a review has been requested under 33 V.S.A. § 4916a. The Study Committee acknowledged the need for the confidentiality of such information. However, the Study Committee also noted that 33 V.S.A. § 4913 may not sufficiently address bad faith reports of abuse, including the process and remedy that a person subject to a bad faith report may follow. The Study Committee recommends that the House and Senate Committees on the Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare review 33 V.S.A. § 4913 to determine whether it should be amended to include a clear process by which a person subject to a bad faith claim of abuse may seek to clear his or her name or may seek a remedy against the person who filed the bad faith report.

13. 33 V.S.A. §4921. DCF Records of Abuse and Neglect

Under 33 V.S.A. § 4921, DCF shall maintain records of investigation of abuse and neglect of children. Any investigation file may only be disclosed to certain specified persons, provided that a person subject to an investigation may not receive any of the files. Consequently, 33 V.S.A. § 4921 may be asserted as a basis for denying inspection or copying of a public record. However, 33 V.S.A. § 4921 is not listed as one of the currently identified public records exemptions. The Study Committee directs the Office of Legislative Council to add 33 V.S.A. § 4921 to the list of public records exemptions.

In addition, the Study Committee recommends that the House and Senate Committees on Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare review the existing exemptions in statute related to the abuse or neglect of a child. Several statutory provisions specifically or arguably can be asserted to withhold from inspection

or copying public records related to abuse or neglect of a child. However, the statutes could be clarified to provide a uniform, general cloak of confidentiality for such records.

14. 33 V.S.A. § 6321. Attendant Care Services

Under 33 V.S.A. § 6321, information received by the Department of Disabilities, Aging, and Independent Living (DAIL) with respect to an individual using attendant care services is confidential. The Study Committee acknowledges that some information related to individuals using attendant care should be confidential. Moreover, as noted in communications from AHS staff, federal law may require some of the information related to persons receiving attendant care to be confidential. However, as currently drafted, 33 V.S.A. § 6321 appears overbroad and may unnecessarily extend confidentiality to documents not requiring this protection. Consequently, the Study Committee recommends the House Committee on Human Services and the Senate Committee on Health and Welfare review 33 V.S.A. § 6321 to determine if it is overbroad or in need of revision.

15. 33 V.S.A. § 6903. Identity of Person Reporting Suspected Abuse of Elderly or Disabled

Under 33 V.S.A. § 6903, the name of a person reporting abuse of an elderly or disabled person shall be confidential unless the person consents to disclosure, a judicial proceeding results from the report, or a court finds that the report was not made in good faith. The Study Committee acknowledged the need for the confidentiality of such information. However, the Study Committee also noted that 33 V.S.A. § 6903 may not sufficiently address bad faith reports of abuse, including the process and remedy that a person subject to a bad faith report may follow. The Study Committee recommends that the House and Senate Committees on the Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare review 33 V.S.A. § 4913 to determine whether it should be amended to include a clear process by which a person subject to a bad faith claim of abuse may seek to substantiate the report, may seek to clear his or her name, or may seek a remedy against the person who filed the bad faith report.

16. 33 V.S.A. § 7112. Nursing Homes; Identity of Complainants

Under 33 V.S.A. § 7112, information received by DAIL regarding nursing homes shall be public, except that information that pertains to unsubstantiated reports or the identity of residents and complainants shall be confidential. In addition, prior to release of public information, the Commissioner of Disabilities, Aging, and Independent Living is required to consult with the nursing home industry to develop guidelines for the release of information to the public that ensures the confidentiality of and privacy of complainants who are receiving or have received care in nursing facilities. The Study Committee notes that use of the term “guidelines” related to confidentiality was unique in Vermont statutes. As a result, the Study Committee contacted AHS regarding the guidelines and what they addressed. A representative of AHS indicated that the agency, generally, was unaware of any guidelines related to release of information to the public. In addition, AHS noted that the federal Nursing Home Reform Act likely controlled the disclosure of information related to patients. Consequently, because AHS is unaware of the specified guidelines and because federal law controls, the Study Committee recommends that 33 V.S.A. § 7112(b)(1) be amended to delete the reference to guidelines for disclosure of information.

17. 33 V.S.A. § 7301(2)(H). Nursing Home Bill of Rights

Section 7301 of Title 33 of the Vermont Statutes Annotated sets forth a Nursing Home Residents’ Bill of Rights. Included in this bill of rights is a provision that the staff of a facility shall ensure that each individual admitted to the facility is assured confidential treatment of the resident’s personal and medical records. The Study Committee recognizes that a resident of a nursing home facility is entitled to confidential treatment of many, if not most, of his or her personal and medical records. However, 33 V.S.A. § 7301, does not confer confidentiality. Instead, 33 V.S.A. § 7301 is a policy statement. Any denial of a request to inspect or copy a nursing home facility patient’s information would be based on other state or federal law, not

33 V.S.A. § 7301. Consequently, the Study Committee directs the Office of Legislative Council to remove 33 V.S.A. § 7301 from the list of public records exemptions.

III. Education-Related Exemptions

1. 16 V.S.A. § 251. Criminal Background Checks

The table of PRA exemptions that is an annotation to 1 V.S.A. § 317 lists both 16 V.S.A. § 251 and 16 V.S.A. § 253 as separate exemptions. However, 16 V.S.A. § 251 generally states a policy to protect privacy in connection with criminal background checks, whereas 16 V.S.A. § 253 establishes the actual exemption for criminal record-related information. As a result, the Study Committee directs the Office of Legislative Council to remove 16 V.S.A. § 251 from the table of exemptions, as it does not create a stand-alone exemption.

2. 16 V.S.A. § 1708. Educator Licensing Matters

The table of PRA exemptions included in the 2012 supplement to the Vermont Statutes Annotated does not include 16 V.S.A. § 1708, which addresses the confidentiality of educator licensing matters. The Study Committee directs the Office of Legislative Council to add the exemption to the table of exemptions and recommends that the exemption be retained in its existing form.

3. 16 V.S.A. § 2843(d). Application for Need-Based Incentive Grants

Under 16 V.S.A. § 2843(d), certificates and reports made to the Vermont Student Assistance Corporation (VSAC) by applicants for incentive grants are confidential; however, the release of statistical data that do not identify particular individuals, certificates, or reports is authorized.

Much of the language of this exemption predates the enactment of the Public Records Act and does not recognize that the subject matter of the exemption qualifies as personal information under 1 V.S.A. § 317(c)(7). As a result, the Study Committee recommends that the exemption be modernized and clarified as set forth in Appendix D. Tom Little, Vice President and General Counsel of VSAC, concurs with this recommendation.

IV. Agency of Commerce and Community Development-Related Exemptions

1. 1 V.S.A. § 317(c)(21). List of Names Compiled by Vermont Life Magazine

Under 1 V.S.A. § 317(c)(21), lists of names compiled or obtained by Vermont Life magazine for the purpose of developing and maintaining a subscription list are confidential but may be sold or rented in the sole discretion of Vermont Life magazine provided such discretion is exercised to promote the magazine's financial viability and in accordance with guidelines adopted by the magazine's editor. At the Study Committee's November 30 meeting, ACCD's General Counsel recommended that this exemption be expanded to include customer lists, since on its face it only addresses subscribers, and recommended that the committee hear from representatives of Vermont Life. The Study Committee did not make a decision on this recommendation but did note and raise questions about the magazine's broad discretion to sell or rent subscription lists. The Study Committee did not have time in 2012 to hear from Vermont Life representatives, and it determined that the questions and recommendations raised extended into subject matter beyond the scope of the Study Committee's jurisdiction. Therefore, the Study Committee requests that the House Committee on Commerce and Economic Development, the Senate Committee on Economic Development, Housing and General Affairs, and the House and Senate Committees on Government Operations review 1 V.S.A. § 317(c)(21) to determine whether the exemption should be expanded to include customer lists and amended to further specify the magazine's discretion to rent or sell customer information.

2. 1 V.S.A. § 317(c)(22). Records Related to New Jobs Tax Credit/Manufacturer's Tax Credit

The exemption at 1 V.S.A. § 317(c)(22) refers to the confidentiality of records related to a new jobs tax credit and a manufacturer's tax credit. The underlying tax credits were repealed in 2006. As a result, ACCD's General Counsel and the Study Committee recommend repeal of 1 V.S.A. § 317(c)(22).

3. *1 V.S.A. § 317(c)(30). State-Funded and Controlled Databases Used for Marketing*

Under 1 V.S.A. § 317(c)(30), all code and machine-readable structures of state-funded and controlled database applications which give the state a marketing advantage are confidential. The committee agrees with the policy goal underlying the exemption but believes that, as written, the language of the exemption is so technical as to obscure its meaning. As a result, Legislative Council staff consulted with ACCD representatives to rewrite the exemption to be more understandable to an average reader, without changing the substance of the exemption. The Committee recommends the amended language set forth in Appendix D of this report.

4. *1 V.S.A. § 317(c)(40). Records of Genealogy in an Application for Tribal Recognition*

Under 1 V.S.A. § 317(c)(40), records of genealogy provided in support of an application for tribal recognition are confidential. However, much of the genealogy information provided during the recognition process is provided in the application and not in records or data in support of the application. To ensure that genealogy records remain confidential, the Study Committee recommends that 1 V.S.A. § 317(c)(40) be amended to clarify that genealogy information included in the application and in support of the application shall be confidential.

5. *10 V.S.A. § 7(b). Economic Development; Benchmark Reports*

Under 10 V.S.A. § 7(b), statements by recipients of economic development assistance in “benchmark reports” related to jobs that will be created or retained, wages of employees associated with such jobs, and other public benefits associated with economic development assistance are confidential for 90 days after the granting of assistance. This provision goes on to state that after expiration of the 90-day period, such statements and information shall not be considered confidential and shall be subject to public inspection and copying “notwithstanding the provisions of any other law.”

At the Study Committee’s November 30 meeting, ACCD’s General Counsel, John Kessler, noted that some of the information in benchmark reports is competitively sensitive—particularly

wage and benefit information—and recommended that 10 V.S.A. § 7(b) be revised to clarify that the information contained in benchmark reports remain subject to the exemptions to public inspection and copying for personal records (1 V.S.A. § 317(c)(7)), trade secrets (1 V.S.A. § 317(c)(9)), and economic progress council incentive rewards (32 V.S.A. § 5930a(h)). As a fallback position, Mr. Kessler recommended a substantially longer period of confidentiality than 90 days.

The Study Committee agreed that as currently worded, the exemption is ambiguous and, as a result, may have unintended consequences with regard to requiring public disclosure of competitively sensitive information. However, because the issues raised extended into subject matter beyond the scope of the Study Committee’s jurisdiction, the Study Committee requests that the House Committee on Commerce and the Senate Committee on Economic Development review the exemption.

V. Energy and Public Utility-Related Exemptions

Under 30 V.S.A. § 206, business-related information supplied by companies subject to the supervision of the Department of Public Service (DPS) at the request of DPS is open to public inspection, except that information “exacted for use by the department in a particular instance shall not be made public, except in the discretion of the department.” On its face, the conflicting mandates of this section with regard to the public’s right to information collected by DPS are difficult to reconcile. Geoff Commons, the Director of Public Advocacy for DPS, recommended that the last two sentences of 30 V.S.A. § 206 be deleted. The Study Committee agreed, noting that competitively sensitive company information collected by DPS under the authority of this section may be exempt from public inspection and copying under the trade secret exemption of 1 V.S.A. § 317(c)(9). The recommended amendments to 30 V.S.A. § 206 are set forth in Appendix D.

VI. Corrections-Related Exemptions

1. 28 V.S.A. § 204(d). Presentence Reports.

Under 28 V.S.A. § 204(d), presentence reports, pre-parole reports, and supervision history prepared by an employee of the Department of Corrections are “privileged” and may not be disclosed outside the Department except to the judge or the parole board or to other specified persons at the discretion of the court or board. The Study Committee raised questions about use of the term “privileged” in 28 V.S.A. § 204(d), including whether it is intended to mean something different than “confidential” and, if so, which persons hold the privilege and are entitled to waive it. Because the subject matter and policy issues raised by these questions exceed the scope of the Study Committee’s jurisdiction, the committee recommends that the House Committee on Corrections and Institutions and the Senate Committee on Judiciary review the exemption to determine whether “privilege” is the correct terminology and, if so, whether the holder of the privilege should be clarified.

2. 28 V.S.A. § 601(10). Inmate Files.

Under 28 V.S.A. § 601(10), the contents of inmate files are confidential and shall not be accessible to inmates except as “otherwise may be indicated by the rules and regulations of the department,” or as otherwise provided by court order.

The Study Committee requested and received from the Department of Corrections (DOC) a copy of Directives and Policies, available on the DOC’s website, that addresses the contents of inmate files as well as which persons are entitled to receive which types of information contained in these files. These Directives and Policies were not adopted as rules pursuant to the Administrative Procedure Act (APA). The Study Committee is concerned that policy related to the confidentiality of inmate files has been established outside of the formal APA process. Because of the substantive nature of these concerns and the implications for the Department of Corrections of potentially requiring that the confidentiality of inmate files be addressed through

formal rulemaking, the Study Committee recommends that the House Committee on Corrections and Institutions and the Senate Committee on Judiciary review 28 V.S.A. § 601(10) in conjunction with the Policies and Directives adopted by DOC to consider the appropriate breadth of a PRA exemption for inmate files, whether to require rulemaking by DOC in connection with the confidentiality of inmate files, and standards for the exercise of any rulemaking authority.