

H. 863 – Public Records Act; exemptions; identity of complainants

Question

Does the Public Records Law authorize state agencies to deny public access to records that could be used to identify a person who alleges that a public official or contractor has engaged in misconduct?

Specifically, does the “personal documents” exemption – 1 V.S.A. § 317(b)(7) – limit public access to records that would disclose the identity of a whistleblower?

Answer

It is doubtful that the “personal documents” exemption authorizes state agencies to deny access to records that would disclose the identity of a whistleblower.

Legal Considerations

1. The personal documents exemption authorizes state agencies to deny public access to records “relating to an individual.” 1 V.S.A. § 317(b)(7). The statutory examples of protected information are:
 - “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”

These examples of protected information do not describe whistleblower identity information.

2. The legislative policy behind the Public Records Law is “to provide for free and open examination of records consistent with ... the Vermont Constitution.” 1 V.S.A. § 315. The legislative mandate is that the law “shall be liberally construed with the view towards carrying out the above declaration of public policy.” *Id.*
3. The Vermont Supreme Court has noted that the law “is to be construed liberally.” *Trombley v. Bellows Falls Union H.S.*, 160 Vt. 101, 106 (1993). The Court interprets this statutory mandate as follows:

[T]he public interest clearly favors the right of access to public documents and public records, and under this policy the exceptions listed in § 317(b)

should be construed strictly against the custodians of the records and any doubts should be resolved in favor of disclosure.

Id. at 106 – 107 (internal quotation marks omitted).

4. The Vermont Supreme Court has characterized the personal documents exemption as “vague.” *Trombley*, 160 Vt. at 109. The Court said that it must be limited and defined to implement the intent of the Legislature. *Id.* The Court held that the exemption applies only to documents that reveal “intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.” *Id.*
5. It is unlikely that Vermont courts would decide that a person’s identity as a whistleblower is among the “intimate details of a person’s life.” The courts would more likely reserve the “intimate” label for details like “personal finances, medical or psychological facts” – examples cited by the Legislature when it enacted the personal documents exemption.
6. It is not at all certain that a person’s identity as a whistleblower will cause that person to suffer “embarrassment, harassment, disgrace, or loss of employment or friends.” State employees and others are protected by whistleblower statutes and contract terms. *See* 3 V.S.A. §§ 971 – 974 (whistleblower protection/state employees); 21 V.S.A. § 507 (whistleblower protection/ health care employees); Non-Management Bargaining Unit Contract, Article 65 (whistleblower protection).