ACLU
AMERICAN CIVIL LIBERTIES UNION of VERMONT

# Testimony by Allen Gilbert, executive director, ACLU-VT, on DOC public records exemptions

All records created by government are public by definition. The reason, as explained in the "statement of policy" of the public records act (1 VSA 315), is

> *"to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer."*

It's the exemptions to the public records act that protect personal privacy. The exemptions are exceptions, not the rule. The rule is that a record is presumed to be public. And "inconvenience or embarrassment" to the government are not reasons for withholding a record from the public. Government accountability requires transparency. That's the default.

Some background on why this issue has come to you.

There was a fight in 2006 over the assertion of deliberative process privilege [exemption 1 VSA 317 (c) (4)] by the gubernatorial administration at the time. In 2010, there was a fight over access to records at the University of Vermont.

The press started asking why the public records law seemed to have so many exemptions. The law seemed to favor shielding records from public inspection rather than guaranteeing access to them. Someone asked how many exemptions there actually were in the state's laws. No one knew. Some thought 150, others thought more.

In 2011, a public records reform bill was passed. It included creation of a study committee with a four-year charge of cataloging all the exemptions and recommending whether some could be eliminated or combined.

Within the year a list of the exemptions had been compiled for the study committee by Legislative Council. The number of exemptions was tagged first at 224, then 240, and eventually ranged even higher.

Then, in 2012, during the study committee's work, it was learned that exemptions to the public records act existed not just in statutes, but also in rules. No one knew how many such rules exemptions there were; there was no list. Then, in 2014, it was learned that exemptions to the public records act also existed in directives and policies. No one knew how many such directives and policy exemptions there were; there was no list.

The Department of Corrections was identified as the state agency with perhaps the most directives. And a quick look determined that – as you heard last week – DOC had utilized the language in the "inmate files" exemption in 28 VSA 601 (10) to create a raft of directives that listed a great number of records within an inmate's file that would be closed to public view. It was essentially a mini-DOC public records act within the larger state public records act, without the review and oversight that occurs when an exemption is created in statute or – to a lesser extent – in rules.

As you heard last week, lack of review raises questions of public oversight. It is rare for a state agency to be able to limit or take away someone's liberties without some degree of review.

Other questions can also be raised, and we hope the committee will consider them.

One question is that it appears to us that a good number of the "exemptions" in the DOC's directives duplicate those in the state's public records act or federal law. The privacy of medical records is an example. DOC does not need to state in its directives that inmate medical records are exempt from disclosure. They already are.

A second question is whether DOC might be using the inmate files exemption to shield from public view information that should be available to the public. For example, the press wants to do a story on searches at the state's correctional facilities. A reporter wants to know how searches are being carried out, how often, which groups of people are being searched. In other words, How are staff in the facilities doing their jobs? The reporter files a public record records request for information on searches – but is told he can't have any information because records of searches are in inmates' files and therefore no information can be released.

Now this seems a little bit odd, because it's likely some of the searches carried out are not of inmates, but of visitors.

But it's also odd that the reporter is told that absolutely no information on searches can be given out. The reason why it's odd is that records can be de-identified so there is no longer any personal information being disclosed. The public records law actually requires such redaction. It's 1 VSA 318 (e):

> *(e) A public agency shall not withhold any record in its entirety on the basis that it contains some exempt content if the record is otherwise subject to disclosure; instead, the public agency shall redact the information it considers to be exempt and produce*

> *the record accompanied by an explanation of the basis for denial of the redacted information.*

The reason why redaction is required is that a single bit of personal information amid other non-personal information can't cause all the information in the record to be withheld – especially when the purpose of the request for information is to judge the decisions of government, to hold government officers accountable.

Let me wrap up. One of the requests made of the Public Records Study Committee in 2011 was to consider

> *Whether an exemption to inspection or copying under the public records act is as narrowly tailored as possible.*

I would suggest that the inmate files exemption is not narrowly tailored, and that the directives developed around it are similarly not narrowly tailored. The public may not be entitled to know about inmates' personal lives, but it is entitled to know how our prisons are run and how officers carry out their duties. That's at the core of Article 6 of our state Constitution.

Thank you for the opportunity to testify.