CLARIFYING THE MEANING OF "EXEMPT" IN THE PRA—OPTIONS

Below is a list of options regarding clarifying the use of the term "exempt" in the Public Records Act. Options 1 and 2 could be combined, as could options 2 and 3.

Option 1: Add a definition of "exempt from public inspection and copying" in the Public Records Act itself, and a definition in Title 1 that incorporates the PRA definition to apply throughout the Vermont Statutes Annotated.

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

(e) As used in this section, "exempt from public inspection and copying" means the record custodian may but is not required to withhold the record. If another provision of law designates a public record as "exempt" from public inspection or other public disclosure, use of the term "exempt" likewise does not of itself require the custodian to withhold the record. However, other provisions or sources of law may limit the authority of the custodian to disclose the record, and nothing in this subsection shall be construed to authorize disclosure of the record if the custodian's authority is so limited.

Sec. 2. 1 V.S.A. § 149 is added to read:

§ 149. EXEMPT PUBLIC RECORDS

If a statute designates a public record as defined in 1 V.S.A. § 317 as "exempt" from public inspection or other public disclosure, use of the term "exempt" shall have the meaning and effect provided in 1 V.S.A. § 317(e).

Option 2: Add a standard to guide the exercise of discretion of custodians of records in their decisions to claim an exemption.

For example, under a provision[1] of Pennsylvania's Right to Know law, an Agency "may" make an "otherwise exempt" record accessible for inspection and copying, but only if (1) "disclosure is not prohibited" by a "Federal or State law or regulation" or a "Judicial order or decree," (2) the "record is not protected by a privilege," AND (3) "[t]he agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access."

---

[1] 65 P.S. § 67.506(c).

→ <u>However,</u> Vermont should not just adopt a single standard without modification because specific exemptions have their own particular standards for release. *See, e.g.*:

i. 1 V.S.A. § 317(c)(5) (contains an internal balancing test for personal privacy under (5)(A)(iii) and a specific standard for release under (5)(D);
ii. 1 V.S.A. § 317(c)(7) (would be beneficial to address whether any generally applicable standard overrides the balancing test that already exists under caselaw);
iii. 1 V.S.A. § 317(c)(12) (clearly unwarranted invasion of personal privacy is the test under this exemption);
iv. 1 V.S.A. § 317(c)(32) (as written, this exemption relating to the security of public property might be construed to require that the information be kept confidential).

<u>Option 3</u>: Create separate lists in the Public Records Act for the 40 existing exceptions, and change the existing prefatory language.

- One list could start, "A custodian of public records may deny access to [list 1]
- Another list could start, "A custodian of public records shall deny access to [list 2]
- A third list could deal with special cases, like § 317(c)(5), (7), (12), and (32).

→ This option would require the committee to go evaluate each of the exemptions in the Public Records Act.

****** Potential corollary to all of the options ******

If connection with the options shown above, AAG Michael Duane has suggested that language be added to the attorney's fee provision of the Public Records Act to clarify that a custodian's exercise of discretion not to release an exempt record shall not result in the assessment of attorney's fees.