

To: Helena Gardner, Legislative Counsel
From: Kenneth Schatz, General Counsel, Agency of Human Services
Re: Act 23 Questionnaire: AHS-related exemptions
Date: December 9, 2013

I am glad to respond to the questionnaire to assist the Committee in addressing the challenging task of consolidating exemptions in the Public Records Act (PRA). In preparing the responses to the questions below, I did the best I could in the time allotted to consult with the relevant departments in the Agency of Human Services. For the most part, I received comments and assistance from the AAGs assigned to departments. However, the Secretary and Commissioners have not had time to review and approve these responses. As you indicate in the questionnaire and as we discussed, it will be necessary to review any proposed amendment to the PRA as a whole before making final comments.

I trust the information below will be helpful to you and the Committee. Feel free to contact me at 871-3348 or ken.schatz@state.vt.us if you have any questions.

Brief Overview: Part I (pp. 1–8) addresses Public Records Act (PRA) exemptions related to public health, medical and treatment records, health care administration, and advance directives. Part II (pp. 9–14) addresses PRA exemptions related to various human services topics.

As noted in the cover memo, the Act 23 project to list all PRA exemptions in the Public Records Act itself (at 1 V.S.A. § 317(c)) will not entail repealing all of the PRA exemptions scattered throughout the Vermont Statutes Annotated. Instead, wherever a draft “consolidated” exemption is proposed to be added to 1 V.S.A. § 317(c), in most cases exemptions that fall within its scope would not be repealed, but instead be amended to cross-reference back to the appropriate subdivision within 1 V.S.A. § 317(c).

I. PRA EXEMPTIONS RELATED TO PUBLIC HEALTH, MEDICAL AND TREATMENT RECORDS, HEALTH CARE ADMINISTRATION, AND ADVANCE DIRECTIVES

1) Consolidated exemption for public health records

The Public Records Study Committee (“Committee”) is considering recommending a consolidated “public health” exemption under 1 V.S.A. § 317(c) that cross-references several public health-related exemptions, and the repeal of 1 V.S.A. § 317(c)(37) as a standalone exemption. Because the specific language of public health-related exemptions is varied, the draft language below is intended to be flexible to accommodate those variations.

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(37) records ~~provided to the department of health pursuant to the patient safety surveillance and improvement system established by 18 V.S.A. chapter 43a collected for public health programs or activities, to the extent provided in 18 V.S.A. §§ 154~~

6) 33 V.S.A. § 111: Names or information pertaining to applicants for or recipients of assistance from the Department for Children and Families

After consulting with Sue Harritt, the Public Records Study Committee recommended in its Jan. 2013 report that this section be repealed if 1 V.S.A. § 317(c)(7) were amended to address the information currently covered in 33 V.S.A. § 111. Alternatively, if 33 V.S.A. § 111 were to be retained, the Committee recommended that 33 V.S.A. § 111 be amended to avoid First Amendment issues raised by the language of § 111(b)(2). Sue Harritt also concurred with this recommendation.

Below is a proposed amendment to 33 V.S.A. § 111²:

§ 111. RECORDS, RESTRICTIONS, PENALTIES

(a) The names of or information pertaining to applicants for or recipients of assistance or benefits, including information obtained under section 112 of this title, shall not be disclosed to anyone, except for the purposes directly connected with the administration of the ~~department~~ Department or when required by law, and shall be exempt from public inspection and copying under 1 V.S.A. § 317(c)(7)(D).

(b) A person shall not:

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

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

Question:

- Does your Agency object to this draft amendment to 33 V.S.A. § 111, and if so, why?

Answer: We recommend that 33 V.S.A. §111 be retained even if it is also included within §317(c)(7). The statute is commonly used to deny access to the police or other entities when beneficiary information is requested. The words “shall not be disclosed to anyone” are important in that respect. In fact, the statute, or more specifically the “required by law” aspect of the statute, has been interpreted by our office to mean more than a subpoena. In response to a subpoena, our practice has been to oppose the subpoena in court and, if the judge orders compliance, to comply with the court’s order, since it is at this point that the subpoena has the force of law. That being said, we have no objection to the proposed language of the amended 33 V.S.A. §111.

7) Amend 33 V.S.A. § 306(c) (information about child abuse or neglect at a child care facility that results in fatality or near fatality) to consolidate into 1 V.S.A. § 317(c)(5)?

In 2013, Act 70³ substantially amended 1 V.S.A. § 317(c)(5), the PRA exemption for records dealing with the detection and investigation of crime. The subject matter of 33 V.S.A. § 306(c)

² Please see p. 5 above for a proposed reference to 33 V.S.A. § 111 in an amended 1 V.S.A. § 317(c)(7).