



STATE OF VERMONT

MEMORANDUM

To: Rep. Alice Emmons, Chair, House Committee on Corrections and Institutions
Sen. Dick Sears, Chair, Senate Committee on Judiciary
Sen. Peg Flory, Chair, Senate Committee on Institutions

From: Rep. Donna Sweaney, Chair, House Committee on Government Operations, former co-chair of the Public Records Study Committee
Sen. Jeanette White, Chair, Senate Committee on Government Operations, former co-chair of the Public Records Study Committee

Date: February 12, 2015

Subject: Public Records Act exemptions

The Public Records Study Committee (Study Committee or Committee) was created in 2011, and was charged with reviewing all of the statutory exemptions to the Public Records Act (PRA) and recommending whether each exemption should be amended, repealed, or kept in its existing form. The Study Committee's term expired on January 15 of this year.

In fulfilling its charge, the Study Committee reviewed approximately 250 exemptions, and concluded that some raised issues that would be more appropriately addressed by the relevant committees of jurisdiction of the House and Senate.

Below is a description of two exemptions that the Study Committee recommended be reviewed by your committees.

If your committee reviews these exemptions and recommends amending either, H.18 (An act relating to Public Records Act exemptions) may be an appropriate vehicle for an amendment, depending on the timing of your recommendation.

We thank you in advance for your consideration.

(1) 28 V.S.A. § 204(d) (presentence report, pre-parole reports, or supervision history prepared by DOC)

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 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 Committee’s jurisdiction, it recommended that your committees 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) (Department of Corrections 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 Committee requested and received from the Department of Corrections (DOC) a copy of Directives and Policies, available on the DOC’s website, that address 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 Committee was concerned that policies related to the confidentiality of inmate files have been established outside of the formal APA process. Because of the substantive nature of these concerns and the implications of potentially requiring that the confidentiality of inmate files be addressed through formal rulemaking, the Committee recommended that your committees 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.