Donald M. Kreis, Esq.
67 Gilson Road
Hartland, Vermont 05048
dmk54@columbia.edu
802.778.0885

February 5, 2015

Representative Donna Sweaney
Chair, Committee on Government Operations
Vermont House of Representatives
The State House
115 State Street
Montpelier, Vermont 05633-1501

Re: H.18, "An act relating to Public Records Act exemptions"

Dear Representative Sweaney:

Thank you for inviting me to share my views with your Committee about H.18. I apologize that my schedule precludes my testifying in person at your hearing today; I am grateful for the opportunity to provide this written statement.

I support the bill enthusiastically and commend the Committee for its ongoing effort to refine the disclosure exemptions in the Public Records Act (PRA) in a manner that advances the statute's primary purpose – governmental sunshine – while recognizing that other important and sometimes competing public policy imperatives deserve consideration in this realm. However, for the reasons I explain below, I am concerned about certain apparently unintended consequences of the legislation as introduced. Accordingly, I offer a proposal for avoiding those consequences and using the bill to eliminate a potentially troubling ambiguity in the statute.

I. My background and interest in public records law

By way of context, I am a senior energy law fellow at Vermont Law School and am engaged in the private practice of law, focusing on providing legal assistance to cooperatives and people forming cooperatives. I am especially interested in the Public Records Act as the result of an extensive background in law and journalism. Prior to graduating from law school in 1993, I worked as a reporter with Associated Press and the alternative newsweekly *Maine Times*, where I regarded it as my solemn duty to barrage state government agencies regularly with requests for records under the Maine Freedom of Access Act. Quite a few years later, I served as

a staff attorney and then general counsel of the New Hampshire Public Utilities Commission, where I oversaw the agency's compliance with the New Hampshire Right-to-Know Law. There I had the experience of watching my agency lose a Superior Court case challenging a decision I made to redact certain documents, only to see my determination vindicated by the New Hampshire Supreme Court. *See Lamy v. New Hampshire Pub. Util. Comm'n*, 152 N.H. 106 (2005). In other words, I am unusual in having had extensive experience on both sides of the reporter's notebook when it comes to access to public records.

II. The problem

The United States Supreme Court has long since clarified that the Freedom of Information Act (FOIA) is a disclosure statute rather than a privacy statute. *Chrysler Corporation v. Brown*, 441 U.S. 281, 291-92 (1979). In other words, the disclosure exemptions in the FOIA are discretionary and a private party cannot invoke the FOIA in an effort to compel an agency to withhold information in the agency's possession. *Id*. at 294.

Although the Vermont Supreme Court has frequently applied FOIA case law by analogy, *see, e.g., Ruger v. Natural Resources Bd*., 191 Vt. 429, 437-39 (2012); *Rutland Herald v. City of Rutland*, 191 Vt. 387 398-401 (2012), the Court will deviate from federal FOIA caselaw when the language of our Public Records Act (PRA) clearly demonstrates that the intent of the Vermont Legislature varied from that of Congress in adopting the FOIA. *See Herald Assn. v. Dean*, 174 Vt. 350, 354-55 (2002). The Vermont Supreme Court has not yet had occasion to apply the *Chrysler v. Brown* precedent in a PRA action and, thus, it is not clear whether so-called "Reverse FOIA" litigation would be permissible under FOIA's Vermont analog.

There is reason to be concerned that our state courts would construe the Public Records Act as permitting "Reverse-PRA" actions. Like the Public Records Act, the FOIA enumerates a list of disclosure exceptions. The FOIA states that it simply "does not apply" to records that fall within one of the exemptions. 5 U.S.C. § 552(b). In contrast**,** the comparable Vermont language introduces the disclosure exemptions by providing simply that "[t]he following public records are *exempt from public inspection and copying*." 3 V.S.A. § 317(c) (emphasis added). This ambiguous language could reasonably mean that agencies are not obliged to disclose when an exemption applies – or it could plausibly be interpreted as requiring records custodians to withhold documents that meet one or more of the exemptions.

Why is this an issue worthy of your attention? There are two distinct reasons.

First, it would undermine the beneficent purposes of the PRA, and the liberal pro-disclosure rule of construction explicitly adopted by the Legislature in section 315 of the statute, to allow parties wishing to block disclosure to intervene in PRA litigation or, worse, to initiate such proceedings. This regrettable dynamic has been

present in at least one PRA case that has reached the Vermont Supreme Court, *Springfield Terminal Railway Co. v. Agency of Transportation*, 174 Vt. 301 (2002). In that case, it appears to have simply been assumed by the trial and appellate courts that third parties referenced in the government documents at issue could intervene and argue in favor of non-disclosure, at least in circumstances where the third parties submitted the information in the first place.

Second, given that PRA litigation is something to avoid if possible, and given that most PRA requestors lack the time or resources to challenge adverse determinations, custodians of public records in Vermont should not be allowed to wield the PRA offensively – claiming, contrary to the public policy of the state, that the PRA somehow compels them to withhold a document that they would otherwise prefer to disclose. The reality is that it is not always wise or useful to withhold documents even in circumstances where one of the disclosure exemptions applies.

An excellent example is the situation in *Galloway v. Town of Hartford*, 192 Vt. 171 (2012). It should not have been necessary for Anne Galloway to go all the way to the Vermont Supreme Court in an effort to vindicate the public's right to know the circumstances of a mistaken arrest with potentially racial overtones. The Town of Hartford's position throughout the case was that the police records exemption (since amended) justified non-disclosure, a colorable argument until the day the Vermont Supreme Court wisely rejected it. But the argument should never have been made; the Hartford Police Department should have exercised its discretion under the PRA to release these records because (a) the release compromised no ongoing police work and (b) disclosure would have addressed urgent public concern about possible racial bias in the Police Department and, arguably, bolstered public confidence about the Department's conduct. It would be a great leap backwards if, the next time such a case arises, law enforcement could credibly claim disclosure is simply prohibited.

III. Problematic Language in the Bill

Unfortunately, H.18 as introduced has the potential to exacerbate the problem I describe above. Two sections of the bill are of concern.

Section 19 clarifies and strengthens the statute governing trade secrets of waste generators, 10 V.S.A. § 6632, by inserting an explicit reference to trade secrets "which are exempt from public inspection and copying under 1 V.S.A. § 317(c)(9)," requiring the Agency of Natural Resources to treat such trade secrets as confidential. The risk is that the courts would treat these two provisions – the amended waste management statute and the "trade secrets" disclosure exemption in the PRA – as *in pari materia*, thus turning the PRA provision into a mandatory non-disclosure provision. *See Board of Trustees of Kellogg-Hubbard Library, Inc. v. Labor Relations Bd.*, 162 Vt. 571, 574 (1994) (noting that "closely related" statutes should be treated as "one system" and "construed with reference to each other")

(citations omitted); *but see Springfield Terminal Railway*, supra at 347 n.2 (declining to read Trade Secrets Act and PRA as *in pari materia* in light of explicit liberal construction rule in PRA).

Even more problematic is Section 20 of the bill, which advances the laudable purpose of strengthening the privacy of personal records held by the government. Section 20 does this by replacing a judicial gloss on the relevant PRA disclosure exemption, limiting the exemption to records revealing "intimate details" of a person's life, with a balancing test involving the potential consequences to the person of disclosure versus the general public's interest in disclosure. The balancing test is a fine idea -- but it is clear the intention of Section 20 is to *require* government agencies to withhold records in which the privacy interest outweighs the public disclosure interest. This can only have the effect of turning section 317(c), which generally covers records that are "exempt from disclosure," into a mandatory non-disclosure statute.

Privacy is an important governmental objective. The best way to advance that objective is through the enactment of privacy statutes. In the *Chrysler v. Brown* case the U.S. Supreme Court concluded that any privacy rights enjoyed by the plaintiff arose out of the federal Trade Secrets Act and not the FOIA. So, too, should the Vermont Legislature erase any ambiguity and instruct agencies, the courts and the public that the PRA is a disclosure statute with discretionary exceptions, not a privacy statute with narrow exceptions favoring sunshine in limited circumstances.

IV. The Remedy

The problem identified above can easily be remedied. The Committee should amend the bill to include a new section replacing the preliminary language in section 317(c) – "[t]he following records are exempt from public inspection and copying" – with the language from the FOIA, slightly revised in light of the way the PRA is codified, *viz*: "This subchapter does not apply to:," followed by the enumerated disclosure exceptions. If the Legislature concludes it is necessary not just to allow agencies to withhold certain personal information but to mandate that this information be kept private – and there is certainly good reason for doing that – the bill should be amended to enshrine this protection in a separate privacy statute.[1]

[1] The same point can be made about section 20 of the bill, which seeks to clarify the language in the "trade secrets" disclosure exemption. However, this exemption should be subject to a major overhaul for reasons that are beyond the scope of this letter. In a nutshell, the trade secrets exemption, as presently worded and as interpreted in the *Springfield Terminal Railway* case (the only reported decision construing this provision), is so broad as to potentially shield from public disclosure essentially all business information in government files.

V. Conclusion

I share with the Committee, and with the Legislature as a whole, a deep commitment the purpose articulated in section 315 of the Public Records Act "to provide for free and open examination of records" in light of the hallowed principle that "officers of government are trustees and servants of the people." I also share with Vermont's lawmakers and judicial officers an understanding that imperatives like privacy, fairness, governmental effectiveness, and the sanctity of the deliberative process can and should operate as constraints on disclosure in certain circumstances.

Balancing these competing imperatives is a delicate task; the appropriate balance is struck by following the example of the federal Freedom of Information Act by making clear that the Public Records Act is a disclosure statute and not a privacy statute. Privacy deserves its own home in the Vermont Statutes Annotated.

I therefore earnestly hope you will consider amending H.18 as I have recommended here. I would be honored to have the opportunity to testify before the Committee on this subject at some suitable time in the near or distant future.

Thank you for considering my views.

Sincerely,

Donald M. Kreis