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TO: Rep. Donna Sweaney-Chair House Committee on Government
          Operations

FROM: Karen L. Richards, Executive Director

RE: 9 V.S.A. §4555(a)

DATE: January 28, 2015

Thank you for the opportunity to discuss the confidentiality provisions of the
Human Rights Commission's enabling statute. In October 2014, I testified
before the Public Records Study Committee about the interplay between
subsections (a) and (c) of 9 V.S.A. §4555. The basic premise of VHRC
confidentiality is two-fold:

Access by the General Public:

The complaint files and investigative files are confidential and the general
public has no right to access the information. 9 V.S.A. §4555(a). The public
does have a right of access to the determination (which we interpret to be
the investigative report) and the names of the parties after the
Commissioners vote to find reasonable grounds to believe that
discrimination occurred. 9 V.S.A. §4555(c). Final settlements are also public
documents. 9 V.S.A. §4555(b). If there is not a reasonable grounds
finding, there is no right of access by the public to anything related to the
case. 9 V.S.A. §4555(c).

Access by Complainants, Respondents and their Representatives:

Subsection (a) of §4555 makes it clear that the investigative file is available
to the complainant, the respondent, and their attorneys. This is to ensure
due process. The only information that may not be available to the parties
or their attorneys is the identity of non-party witnesses if the VHRC believes
that there is good cause for protecting the witnesses' identity. The VHRC
executive director makes this determination in consultation with the

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investigator. This often happens in school cases where both the complainant student and student witnesses are identified by pseudonyms to protect their privacy and sometimes in landlord/tenant matters where witnesses fear retaliation from either the complainant or the respondent.

VHRC Rule and Practice:

The place where the VHRC has encountered some difficulty with access by the parties to its investigative files is with regard to certain types of information that may be obtained as part of an investigation which may not be appropriate to turn over to a complainant or respondent. This includes, but is not limited to, student names and records which are protected by federal law (Family Education Rights in Privacy Act-FERPA), medical information submitted to verify a disability that is otherwise protected from re-disclosure by HIPPA, personnel records of other state employees that may be obtained as part of an employment investigation, inmate files protected from disclosure to an inmate (who may be the complainant), and records related to termination of parental rights or juvenile proceedings. As the statute currently reads, there are no exceptions to providing the investigative file to the parties, other than identity of witnesses, so technically this information must be turned over to the parties upon request.

This places the Commission in the very uncomfortable position of either violating its own statutory requirement to turn over information or re-disclosing information in violation of other confidentiality laws. To deal with this difficult situation, the VHRC currently takes one of several approaches depending on the circumstances. We can redact information, for example student or employee names from documents; we can review files but not copy them unless we need them so they do not become part of the investigative file; and/or we assist the complainant and respondent in entering into a confidentiality agreement whereby nothing can be re-disclosed by the complainant or respondent other than to his/her counsel. Most of the time, one or more of these strategies works but in the event that someone is unwilling to enter into a confidentiality agreement or insists on being provided non-redacted documents, the Commission has no authority to withhold the information. The proposed language would help to address this issue.