

VERMONT LEGAL AID

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House Committee on Human Services February 25, 2015 H.112/ Access to Financial Records

The Vermont Ombudsman Projects agrees that law enforcement and Adult Protective Services (APS) should have better access to financial records when investigating alleged financial exploitation of a vulnerable adult. We do have the some concerns and questions about the proposed bill and offer the following comments.

1. Purpose and scope:

We suggest that this bill be limited to alleged victims of financial exploitation. We understand that sometimes victims who are exploited are also abused. But until law enforcement and APS investigators suspect financial exploitation, they should not seek access financial records over the objections of a guardian or for a person without capacity who has no guardian.

2. Who can give consent:

- **Agents under a POA.** The bill does not address an agent's authority to consent to the release of financial records. A Power of Attorney may give the agent this authority, but the bill does not appear to require someone with custody of the financial records to make those records available if the agent consents to their release.
- **Joint owner.** Similarly the bill does not address a joint owner's authority to consent to the release of the financial records, even though they may be able to give that consent.

3. Guardian's consent (33 VSA§ 6915(a)(2)(A):

- **"Best interest standard."** The bill states that guardians can refuse consent if they believe it is in the "best interests" of the person under guardianship. However, that is not the standard used in the guardianship statute. 14 VSA§ 3069(f) states that the "[T]he wishes, values, beliefs, and preferences of the person under guardianship shall be respected to the greatest possible extent in the exercise of all guardianship powers."
- **Appeal of guardian's refusal to consent.** The bill allows the APS investigator or the law enforcement officer to appeal to the commissioner of DAIL if the guardian refuses to consent. It may make sense for the commissioner review the law enforcement officer or the APS investigator's request to determine if the records are necessary to protect the victim. Her determination could encourage the guardian to review the refusal. However, we do not think

that this bill can compel a guardian to consent to the release of the records. 14 VSA§ 3062(a) and (c) explain that the Probate Division of the Superior Court has exclusive jurisdiction over all guardianship proceedings and that the Probate Division of the Superior Court has supervisory authority over guardians. It explains that the way to seek review of a guardian's proposed or past actions is by filing an emergency motion with the Court. The Probate Court could order guardians to consent to the release and find them in contempt or remove them if they disobey the order.

4. Consent when there is no guardian (33VSA§6915(a)(2)(B)):

H.112 requires persons having control of an individual's financial records to release those records without the individual's consent and without any Probate Court oversight when the individual lacks capacity to give consent. We agree that this might be necessary, but suggest that additional protection be added to this section.

- **Showing that there is no time for the appointment of an emergency temporary guardian.** We suggest that (33VSA§6915(a)(2)(B)(II)) should be amended by adding "or waiting until the Probate Court appoints a temporary emergency guardian." Law enforcement or the APS investigator should assert in their request that their enforcement activity would be adversely affected if they had to seek an emergency temporary guardianship in order to obtain consent for the records.
- **Showing of imminent harm.** We suggest that an additional condition be added to this section at (33VSA§6915(a)(2)(B)(III)). Before law enforcement and APS investigators would have to include in their statements to the custodian of the records that there is a danger of imminent harm to the alleged victim if the records are not released immediately.
- **Restricting the use of the records.** We suggest including an additional provision at (33VSA§6915(a)(2)(B)(iii)). This new provision would clarify that the records should be used only to investigate and stop the imminent exploitation.

5. Time frame and cost of producing records (33VSA§6915(c) and (e)):

The bill requires the production of records within 10 days and it allows the custodians to charge law enforcement and APS the actual cost of producing those records. We question whether these provisions are consistent with current practice.

6. General comments:

- **Legislation in other states.** It is our understanding that other states either have already or are in the process of enacting legislation similar to what is proposed. Vermont should review the legislation in those states.
- **Federal Law.** Any legislation authorizing the release of private financial information should be clear and specific so that financial institutions will not be restrained by other federal privacy protection statutes.

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