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STATE OF VERMONT
HOUSE OF REPRESENTATIVES
House Committee on Corrections
and Institutions

To: Legislative Committee on Administrative Rules
Sen. Mark MacDonald, Chair

From: House Committee on Corrections and Institutions
Rep. Alice Emmons, Chair

Date: May 5, 2017

Subject: Rule 16-P64, Department of Corrections – Inmate/Offender Records

The House Committee on Corrections and Institutions (Committee) writes to update you on the actions of the Committee and of the General Assembly as a whole regarding the proposed rule related to inmate/offender records filed with LCAR on January 31, 2017.

As you may recall, after receiving a request from the Committee to postpone action on the rule until after the close of the 2017 legislative session, LCAR voted at its February 23, 2017 meeting to postpone action on the rule until May 25, 2017. The Committee had requested the postponement in order to have additional time to consider whether the significant cost and other impacts cited in the proposed rule's economic impact statement were likely to occur, and whether to develop legislation to address the rule's costs and impacts.

After reviewing and taking testimony on the proposed rule, the Committee found that it was not consistent with legislative intent because it would potentially cause significant costs and disruptions to the Department of Corrections.

The Committee developed legislation which passed both chambers as of yesterday (May 4) and is awaiting signature by the Governor. This legislation, Sec. 10 of S. 61, is shown on the pages that follow. In relevant part, Sec. 10 directs the Commissioner of Corrections to:

- withdraw the proposed rule that was filed with LCAR on January 31, 2017;
- redraft the proposed rule so that it reflects legislative intent, which is further articulated in the legislation;
- submit a copy of the redrafted rule to the Institutions Committees on or before January 15, 2018; and
- prefile the redrafted rules with the Interagency Committee on Administrative Rules on or before July 1, 2018.

The requirement to file a copy of the redrafted rule with the Institutions Committees early in the next session will give committee members an opportunity to weigh in and respond in case the Department needs further direction.

We thank you for bringing the rule's economic impact statement to the Committee's attention and for giving us an opportunity to respond legislatively.

Sec. 10. 2016 Acts and Resolves No. 137, Sec. 7 is amended to read:

Sec. 7. EFFECTIVE DATE; TRANSITION PROVISION

(a) This act shall take effect on passage.

(b) Except as provided in subsection (c) of this section, the Commissioner of Corrections may only release or permit inspection of offender or inmate records in reliance upon an exception to the confidentiality of offender and inmate records if the exception is created by law, including an exception created by rule adopted in accordance with the Administrative Procedure Act under the mandate in Sec. 5, 28 V.S.A. § 107(b)(5).

(c) The Department of Corrections may rely upon exceptions to the confidentiality of offender and inmate files under directives adopted by the Department prior to the effective date of this act until the Commissioner adopts rules pursuant to the rulemaking mandates of Sec. 5, 28 V.S.A. § 107(a) and (b)(5). On or before September 1, 2016, the Commissioner shall prefile rules with the Interagency Committee on Administrative Rules in accordance with these mandates. The Commissioner shall update the Joint Legislative Justice Oversight Committee on the status of its efforts to adopt the rules at the Oversight Committee's first meeting on or after September 1, 2016.

(d)(1) On August 30, 2016, to implement the rulemaking requirements of 28 V.S.A. § 107, the Commissioner prefiled a proposed rule entitled "inmate/offender records and access to information" with the Interagency Committee on Administrative Rules. The Commissioner filed the proposed rule, as corrected, with the Secretary of State on October 13, 2016 and the final proposed rule, as revised, with the Legislative Committee on Administrative Rules (LCAR) on January 31, 2017. After reviewing and receiving testimony on the final proposed rule, as revised, the House Committee on Corrections and Institutions found that it was not consistent with legislative intent because the rule would potentially cause significant costs and disruptions to the Department.

(2) The Commissioner shall:

(A) withdraw the proposed final rule filed with LCAR on January 31, 2017; and

(B) redraft the proposed rule so that it reflects legislative intent as described in subsection (e) of this section.

(3) The Department of Corrections may continue to rely upon exceptions to the confidentiality of offender and inmate files under directives adopted by the Department prior to May 26, 2016 until the Commissioner adopts final rules as required under 28 V.S.A. § 107.

(e) The General Assembly intends that, in either of the following situations, 28 V.S.A. § 107 shall be interpreted not to require the Department to provide an inmate or offender a copy of records:

(1) Previously provided by the Department to the inmate or offender, if the inmate or offender has custody of or the right to access the copy.

(2) If the inmate or offender is responsible for the loss or destruction of a previously provided copy. In the case of such loss or destruction, the inmate or offender may—subject to the limitations of 28 V.S.A. § 107—be entitled to a replacement copy, but the Department may charge him or her for the replacement copy in accordance with law.

(f) On or before October 1, 2017, the Commissioner shall:

(1) develop a plan to implement and use modern records management technology and practices in order to minimize the costs of reviewing, redacting, and furnishing such records in accordance with law; and

(2) send to the members of the House Committee on Corrections and Institutions and of the Senate Committee on Institutions a copy of the plan required under subdivision (1) of this subsection, and a written report that:

(A) summarizes the status of the Department's efforts to redraft the rules as required under subsection (d) of this section; and

(B) outlines the implementation steps, expected benefits and costs to the State of Vermont, and time line associated with transitioning to digital delivery of inmate and offender records.

(g) On or before January 15, 2018, the Commissioner shall submit a copy of the redrafted rules to the House Committee on Corrections and Institutions and to the Senate Committee on Institutions. On or before July 1, 2018, the Commissioner shall prefile the redrafted rules, as may be revised, with the Interagency Committee on Administrative Rules.

Effective date: On passage.