

Vermont Legislative Council

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MEMORANDUM

To: Steve Klein, Chief Legislative Fiscal Officer, Joint Fiscal Office (JFO)
Sara Teachout, Senior Fiscal Analyst, JFO

From: Helena Gardner, Legislative Counsel

Date: September 23, 2016

Subject: VEGI Program-Related Confidentiality Provisions

Background and Question Presented:

- After receiving authorization from the Joint Fiscal Committee (JFC), JFO has received information that a particular Vermont Employment Growth Incentive Program (VEGI) recipient submitted to the Tax Department, as well as information pertaining to incentive payments the Tax Department has made to the VEGI recipient.
- You asked to what extent JFO may disclose this information:
 - (1) publicly; or
 - (2) to JFC.

Short Answer:

(1) Public disclosure. In general, JFO may publicly disclose information submitted by a VEGI applicant business or approved business that does not constitute proprietary business information and that does not directly or indirectly identify the business. In addition, JFO may publicly disclose generally that a VEGI recipient has received an incentive payment. Specifically, JFO is authorized to disclose:

- The fact that it reviewed a VEGI recipient's submission and that the submission indicates that the recipient met or exceeded job, payroll, and capital investment targets.
 - JFO should not directly or indirectly identify the recipient or disclose the specific job, payroll, and capital investment target amounts or the amount of jobs or payroll added or investment made.
- The fact that the reviewed recipient received a VEGI incentive payment.
 - JFO should not disclose the identity of the recipient, the specific incentive payment amount, the year of receipt, or the fact that the recipient received the maximum amount allowed.

(2) Disclosure to JFC. JFO may share with JFC all VEGI program information that it receives. JFC is obligated to keep the information it receives confidential to the same extent as JFO.

Analysis:**I. Confidentiality under 32 V.S.A. § 5930a(h)**

- Information and materials “submitted by a business” concerning its income taxes and other confidential financial information in connection with the VEGI Program is confidential under 32 V.S.A. § 5930a(h).¹ JFC or a legislative committee may authorize JFO to receive such information, but JFO must keep it and the identity of the business confidential:

(h) Information and materials submitted by a business concerning its income taxes and other confidential financial information shall not be subject to public disclosure under the State's public records law in 1 V.S.A. chapter 5, but shall be available to the Joint Fiscal Office or its agent upon authorization of the Joint Fiscal Committee or a standing committee of the General Assembly, and shall also be available to the auditor of accounts in connection with the performance of duties under section 163 of this title; provided, however, that the Joint Fiscal Office or its agent, and the Auditor of Accounts, shall not disclose, directly or indirectly, to any person any proprietary business information or any information which would identify a business except in accordance with a judicial order or as otherwise specifically provided by law. Nothing in this subsection shall be construed to prohibit the publication of statistical information, rulings, determinations, reports, opinions, policies, or other information so long as the data are disclosed in a form that cannot identify or be associated with a particular business.

- Because JFC, in its legislative oversight capacity, authorizes JFO to receive confidential VEGI business information, and is not a separate “person” with which JFO is prohibited from sharing the information, 32 V.S.A. § 5930a(h) should be interpreted to allow JFO to share the information with JFC. However, JFC is itself bound by the general confidentiality provision of 32 V.S.A. § 5930a(h).
- Neither subsection 5390a(h) nor any other VEGI provision define “confidential financial information” or “proprietary business information.” It appears that these two phrases are used interchangeably. In the absence of any VEGI-specific definition, the definition provided by the Public Records Act (PRA) in its exemption for “trade secrets”—which the PRA defines interchangeably with “confidential business records or information”—supplies helpful guidance. 1 V.S.A. § 317(c)(9) provides in relevant part:

(c) The following public records are exempt from public inspection and copying:

* * *

(9) Trade secrets, meaning confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which [1] a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and [2] which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it...; [emphasis added]

¹ As of January 1, 2017, this subsection of law is repealed and replaced verbatim in a new 32 V.S.A. § 3341(b) and (c). See 2016 Acts and Resolves No. 157, Sec. H.1.

- The PRA test for trade secrets/confidential business records or information provides a workable test for determining what VEGI information must be kept confidential under 32 V.S.A. § 5390a(h).

II. Confidentiality under 32 V.S.A. § 3102

- Some VEGI-related information is not made confidential under 32 V.S.A. § 5390a because it is not “submitted by a business.” Examples include the fact that the Tax Department made an incentive payment to a particular VEGI recipient, and the amount of the incentive payment. Instead, this information falls under the broad confidentiality provision of 32 V.S.A. § 3102 for tax return and return information, which is itself subject to exceptions. One such exception authorizes the Tax Department to disclose information that is already otherwise available to the general public; another authorizes the Tax Department to disclose VEGI-related information to JFO. As an authorized recipient, JFO itself is obligated under § 3102(h) to keep the information it receives confidential in accordance with the section.² Section 3102³ provides in relevant part:

(a) No present or former officer, employee or agent of the Department of Taxes shall disclose any return or return information to any person who is not an officer, employee, or agent of the Department of Taxes except in accordance with the provisions of this section. A person who violates this section shall be fined not more than \$1,000.00 or imprisoned for not more than one year, or both; and if the offender is an officer or employee of this state, he or she shall in addition be dismissed from office and be incapable of holding any public office for a period of five years thereafter.

(b) The following definitions shall apply for purposes of this section:

(1) “Person” shall include any individual, firm, partnership, association, joint stock company, corporation, trust, estate, or other entity.

(2) “Return” means any tax return, declaration of estimated tax, license application, report, or similar document, including attachments, schedules, and transmittals, filed with the Department of Taxes.

(3) “Return information” includes a person’s name, address, date of birth, Social Security or federal identification number or any other identifying number; information as to whether or not a return was filed or required to be filed; the nature, source or amount of a person’s income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liabilities, tax payments, deficiencies or over-assessments; and any other data, from any source, furnished to or prepared or collected by the Department of Taxes with respect to any person.

* * *

(e) The Commissioner may, in his or her discretion and subject to such conditions and requirements as he or she may provide, including any confidentiality requirements of the Internal Revenue Service, disclose a return or return information:

² For the same reasons noted above on p.2, JFO may share VEGI incentive payment information with JFC, which itself is obligated to keep the information confidential.

³ As of January 1, 2017, § 3102(e)(11) is amended to reflect the repeal and reenactment of the VEGI Program. See 2016 Acts and Resolves No. 157, Sec. H.4.

(1) To any person, provided that the information appears in records that are otherwise available to the general public; it shall not be an abuse of discretion to deny disclosure on the grounds that the information is of the type available at a town clerk's office.

* * *

(11) To the Joint Fiscal Office or its agent, provided that the disclosure relates to a successful business applicant under section 5930a of this title and the tax incentive it has claimed and is reasonably necessary for the Joint Fiscal Office or its agent to perform the duties authorized by the Joint Fiscal Committee or a standing committee of the General Assembly under subsection 5930a(h); to the Auditor of Accounts for the performance of duties under section 163 of this title; to the Department of Economic Development for the purposes of subsection 5922(f) of this title; and to the Vermont Economic Progress Council, provided that the disclosure relates to a successful business applicant under sections 5930a and 5930b of this title and the tax incentive it has claimed and is reasonably necessary for the council to perform its duties under sections 5930a and 5930b.

* * *

(h) If any provision of Vermont law authorizes or requires the Commissioner to divulge or make known in any manner any return or return information, the person or persons receiving such return or return information (other than information disclosed under subsection (i) of this section) shall be subject to the provisions of subsection (a) of this section as if such person were the agent of the Commissioner. Nothing in this subsection shall be construed to restrict the disclosure of a return or return information by the person to whom it relates.

- The fact that a particular business earned a VEGI incentive is public information, as that fact is reported by VEPC/Department of Taxes in its annual VEGI report.⁴ However, this information is not year specific, and does not reveal whether the VEGI recipient received the maximum authorized amount. As a result, it would appear that under 32 V.S.A. § 3102(e)(1), JFO is authorized to reveal the fact that a particular VEGI recipient received an incentive payment—though not the year or amount of the payment. However, if JFO intends to report such information at the same time that it intends to report VEGI information controlled by the confidentiality provision of 32 V.S.A. § 5930a(h)—which prohibits directly or indirectly identifying a VEGI business--JFO should avoid revealing the identity of the VEGI recipient.

⁴ See p.15 of <http://legislature.vermont.gov/assets/Legislative-Reports/2016-VEGI-AnnualReport-FINAL.pdf>.

The annual VEGI report is required under 32 V.S.A. § 5930b(e), which provides:

(e) Reporting. By September 1 each year, the Council and the Department of Taxes shall file a joint report on the employment growth incentives authorized by this section with the Chairs of the House Committee on Ways and Means, the House Committee on Commerce and Economic Development, the Senate Committee on Finance, the Senate Committee on Economic Development, Housing and General Affairs, the House and Senate Committees on Appropriations, and the Joint Fiscal Committee of the General Assembly and provide notice of the report to the members of those committees. The joint report shall contain the total amount of incentives authorized during the preceding year and, with respect to each recipient, the date and amount of authorization, the calendar year or years in which the authorization is expected to be exercised, whether the authorization is active, and the date the authorization will expire. The joint report shall also include the following aggregate information: total number of claims and total incentive payments made in the current and prior claim years, the balance of credits not yet allocated, the number of qualifying new jobs created and qualifying payroll of those jobs, and qualifying new capital investments. The Council and Department shall use measures to protect proprietary financial information, such as reporting information in an aggregate form. Data and information in the joint report shall be presented in a searchable format.