



COMMENTS TO DRAFT 1.4 REGARDING VERMONT'S OPEN MEETING LAW & PUBLIC RECORDS ACT

Proposed Purpose #1 – Clarify and amend what activities constitute a “meeting” under the Open Meeting Law.

Comment - The proposed purpose here is consistent with concerns from members of various public bodies within the City who would like more clarity on what constitutes a “meeting” under the Open Meeting Law. The primary questions in South Burlington regard: a) social media use such as Front Porch Forum and Facebook; and, b) attending community events when there is a quorum of the public body members present.

Aside from (2)(C)(iv), the proposed amendments at 1 V.S.A. § 310(2)(C)(i-iii) and (2)(D) may offer some helpful clarity to one of the City’s typical questions above. However, in (2)(C)(iv), what is a “virtual gathering on an electronic platform”? And what does it mean for it to be “open and accessible to all members of the general public without obstacles”? Is merely requiring access to an internet connection a sufficient obstacle? What about providing personal information before you can access the site or signing a third-party comments policy? Does a “virtual gathering” include Front Porch Forum or Facebook? While (2)(C)(iv) appears to ask a lot more questions than it answers, the added clarity in (2)(C)(i-iii) may be a helpful and welcome addition.

If one of the purposes of these proposed amendments is to provide additional clarity, the proposed amendments to the new (2)(A) also appear to ask more questions than answers. How does this apply to a Facebook page posting by a public body member and then subsequent comments that may be days, months or years apart? What about other communications from the public body to third-parties that are later relayed by the third-party? What about an e-mail from a public body member to a support staff person with a question and that staff person replies to the entire public body with a clarification? This communication would likely clearly be a public record but would it also be an open meeting law violation by a quorum of the public body?

Proposed Purpose #2 – Amend provisions related to fees that a public agency may charge in connection with responding to a Public Records Act request.

Comment – The proposed purpose here is consistent with concerns from City staff related to public records requests who would like some clarity as well as assistance handling requests in situations when they are caught between the privacy rights of the public and/or employees and

providing free public access as well as situations when there are multiple requests from large out-of-state for-profit database companies looking to profit from the often free or very inexpensive City staff time providing pricing and vendor information.

Over the past couple of years, the City of South Burlington has very rarely charged for staff time related to providing access to records, even when staff time well exceeds the half hour as currently allowed by statute. This is in part a policy decision but also is due to the decision by Judge Crawford related to the “inspection” of public records. An experienced lawyer or journalist today understands by using the word “inspect” there is a presumption that there will be no charge. The reality, as briefed and weighed in the Crawford decision, is that many records are in e-mail accounts, server drives, and other municipal electronic databases. The City does not have the budget, hardware, or software to provide a requestor a relatively closed universe of electronic files to inspect based on the specific request without giving the requestor full access to e-mail accounts, server drives and other databases that likely contain attorney/client communications, personal information such as social security numbers of citizens or health care information of employees, and other information that is likely exempt under the Act. As a result, particularly with a broad request, staff time and often expensive outside legal counsel, will be tasked with weeding through voluminous documents in order to respond so that the City does not incur additional liability through waiving any common law privileges, running afoul of HIPAA laws or confidentiality agreements with employees/unions or vendors, to name a few.

Therefore, the proposed amendments have the same purpose, but go in the opposite direction from the assistance City staff would request from the legislature related to charges in the Public Records Act. Explicitly closing the “inspection” loophole and maintaining the no-charge for the first 30 minutes would be very helpful as it relates to complying with requests for records that will require significant staff time and taxpayer resources to weed through. If possible, a compromise may be to distinguish between those types of records that require extensive staff review to provide and those records that are customarily stored and maintained by a municipality, such as land or tax records, assessor cards, etc.

Proposed Purpose #3 – clarify and update provisions related to time periods for responding to a Public Records Act request and specify an obligation of records officers of State agencies and departments to be accountable for the processing of requests for public records.

Comment – Needing additional clarity related to the time periods to respond to public records requests has not been recently requested.

Proposed Purpose #4 – establish a position for an Open Government Ombudsman and authorize the Ombudsman to investigate and adjudicate acts of public bodies and public agencies alleged to violate the Open Meeting Law and the Public Records Act and to carry out other activities related to these laws.

Comment – As an alternative to the current proposed amendments, some state support staff, as in the elections division of the Secretary of State’s office, that could assist City staff, public body volunteers, and the public with questions related to the open meeting law and the

public records act would be welcome. Additionally, some screening of complaints of violations of the acts could be helpful if shown it could reduce overall costs associated with litigating these complaints in the current course.

Thank you very much for your time and consideration.

Sincerely,

/s/ Andrew Bolduc
South Burlington City Attorney