



## ACLU-VT Testimony on H. 910

Thank you for the opportunity to speak to you about H. 910.

While the ACLU supports the reforms relating to public records in this bill, we are concerned by some of the changes made to the legislation in the House and feel the bill does not go nearly far enough in meaningfully addressing the real problems in obtaining public records in Vermont. The Access to Public Records Act (PRA) is supposed to ensure reasonable access to public records, but in practice, myriad recurring problems frustrate the PRA's purpose and intent, block public access to critical information, and result in needless costs and litigation. This is why the Center for Public Integrity recently gave Vermont an 'F' in access to public information.<sup>1</sup>

The ACLU has all too much experience with state agencies improperly denying valid requests for public information:

- The ACLU is currently litigating a case against the Burlington Police Department, which refused a public records request for body camera video and paper records related to witnessed alleged police physical aggression towards a child. The BPD cited the need for privacy in investigations, asserting that they cannot redact the faces of the people in the video and therefore releasing the video would violate their privacy. The practical consequence of that position, however, is to prevent the public from access a public record of an incident in which government misconduct is alleged.
- In *Duffort v. Agency of Education*, a journalist requested information and records related to school safety from the Vermont Agency of Education and the State Board of Education. Unfortunately, the agencies refused to provide the records, despite admitting they possessed the data. The data was spread across different documents, and the agencies claimed they were not obligated to compile the records. The ACLU filed a complaint in Rutland Superior Court seeking access to the records under the PRA. The court ruled in our favor and ordered the entities to produce the documents, holding that an agency cannot refuse to query a database to produce records stored within. Almost two years after the request was made, the agency settled, agreeing to pay \$30,000 in attorneys' fees, provide the records, and comply with the law.
- In another recent ACLU case, the state refused VTDigger's request for records related to the EB-5 program and the EB-5 Regional Center, citing the pending litigation exemption in the PRA. The ACLU and VTDigger sued the state, arguing

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<sup>1</sup> Jon Margolis, "Vermont gets D- in State Integrity Investigation," Center for Public Integrity (Nov. 9, 2015), <https://www.publicintegrity.org/2015/11/09/18542/vermont-gets-d-grade-2015-state-integrity-investigation>.

that the documents did not relate to the ongoing fraud cases. The state eventually released some information, much of it heavily redacted. When VTDigger asked for more information, the state said the request would cost \$200,000. After the state released more documents and provided information about why a third of the material was redacted, the ACLU and VTDigger dropped the suit. The matter could have been solved much more quickly, with less cost to the state and taxpayers, had the state provided better explanations for its redactions and had the state not asked for exorbitant fees for the relevant documents.

- The ACLU has attempted to investigate the state's use of ALPRs, including the program's cost and efficacy. We filed a public record request with the Vermont State Police for all requests for active and historical data, but did not pursue the issue further when we were told that our request would cost over \$1,300 and would take several months to produce. As a result, the people of this state and this legislature do not have complete information with major privacy implications and whose costs and benefits are unclear.
- The City of Burlington has refused to allow the ACLU to inspect certain city public records for free, which it is obligated to do under the PRA and relevant court rulings. The city avers that the documents need to be redacted, and that that will require charging the ACLU for staff time for redaction. As a practical matter, the City has denied access to these records.

There are numerous problems and violations regarding current PRA practices:

- There are over 260 exemptions to the PRA spread across Vermont's statutes, with new ones proposed every legislative session. In comparison, the federal Freedom of Information Act has only nine exemptions.
- Vermont state and local agencies regularly misconstrue and misinterpret existing PRA exemptions.<sup>2</sup>
- Vermont agencies commonly exhibit a reflexive "deny first" response to records requests, with no consequences for wrongful denials.
- Agencies charge inconsistent and exorbitant fees for record production, oftentimes rendering access to information cost prohibitive.
- Agencies also engage in inconsistent and improper denial of requesters' ability to inspect records free of charge, effectively placing those records off limits.
- Agencies do not consistently provide justifications for redactions and withholdings, as required.
- Despite statutory time limits, agencies face no consequences for lengthy delays in production.
- There is no recourse for requesters wrongfully denied records, short of costly litigation.

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<sup>2</sup> That includes exemptions for proprietary information or trade secrets; "personal" communications by public officials; police records; pending litigation; privacy exemptions (i.e., healthcare (HIPAA) and educational (FERPA)); as well as "categorical" exemptions through which agencies refuse to identify responsive records.

- The many barriers to public access can shield wrongdoing, leading to greater costs.

H. 910 does make a positive change in PRA practice through its definition of ‘promptly’—in our experience, agencies and local governments regularly do not provide records within 3 days and instead take until the 10-day mark to provide responses. We believe, however, that more can be done to safeguard government transparency. Our suggestions are as follows:

- Bar charging fees for inspection. This would put statute in line with case law. Currently, agencies and towns interpret this law differently, resulting in inconsistent practices.
- Bar collection of fees for staff time for searching. Agencies should be engaged in good recordkeeping practices that do not result in long search times, instead of passing along the costs of unorganized recordkeeping to the public.
- Ensure consequences for PRA violations, including wrongful denials, improper redactions, and unlawful delays. There are currently penalties for members of public bodies who knowingly and intentionally violate the open meeting law, but none exist for agency staff who violate the PRA. Penalties and/or fee waivers for intentional violations would help to ensure compliance with the law. Other New England states have adopted such consequences: in Maine, New Hampshire, Massachusetts, and Rhode Island, willful violations of their public records act or a finding that an employee or agency has acted in bad faith can result in civil penalties or punitive damages from \$250 to \$5,000, depending on the state.
- Clarify the attorney’s fees and litigation costs section to ensure that ‘case’ is defined as the beginning of the attorney’s/attorneys’ involvement in the request through settlement and resolution of the litigation, including the negotiations for fees themselves.
- Ensure that denials from agencies conform or are akin to the style of Vaughn Indexes: an itemized index, correlating each withheld or redacted document or portion with the applicable PRA exemption the agency is claiming for that withholding or redaction, and explaining how disclosure would damage the interests protected by the cited exemption.
- Waive requesting fees for indigence and for when release of the records in question is in the public interest and for a non-commercial purpose.
- Charge fees only for the cost of copying, not for compiling or redacting. This is currently the practice in New Hampshire and should be a model for Vermont – too high of fees can effectively be a denial of records. In the alternative, a sliding scale for larger requests may be effective in reducing fees and barriers.
- Limit or abolish agency directives and policies that limit access to public records; or in the alternative, ensure such rules are subject to the Administrative Procedures Act so as to secure public notice and comment.
- Consolidate all public records exemptions under the PRA and ensure that all future exemptions are placed under the PRA. This should be done with an eye towards one day minimizing the exemptions. If exemptions are not dealt with, we could one day have 300 or more exemptions scattered across different Vermont statutes.

- Make all exemptions subject to a five-year sunset. The validity and necessity of exemptions should be reviewed to ensure that they still serve a compelling government interest.

Representatives of government agencies and municipalities have raised concerns regarding the PRA and their abilities to meet even the current requirements, which they have said are too burdensome and costly. They have posed hypothetical situations of members of the public requesting, for example, 10,000 pages of documents to justify restrictions on public access to documents. We would argue that these concerns are overstated and can be addressed in any number of ways, including imposition of a sliding scale of fees based on the size of a request. Moreover, such extreme and unreasonable records requests are few and far between, whereas improper denials of valid requests are entirely too common.

The ACLU of Vermont recently settled a public records case with the Agency of Education for \$30,000 to obtain a limited number of records that could have been provided years earlier at no cost. The next week, we filed yet another public records suit for yet another improper denial. We and other requesters will be forced to continue doing that until this “deny first” mentality is addressed.

Inaction on public records reform hurts the public and costs the state time and money. We urge the committee to act now and to amend H. 910 to reform the PRA and increase ease of access to public information.