

## **An Overview of Offender and Inmate Records**

### General Overview of Public Records Act

- The PRA, 1 V.S.A. chapter 5, subchapter 3, grants the public a general right to inspect or copy any public record of a public agency subject to a specific procedure and series of exemptions.
- Under the PRA procedure, a public agency has specific timeframes to respond to a request depending on the scope of the request and the location and volume of the records. The default timeframe is 3 business days; the timeframe for “unusual circumstances” is 10 business days.
- [1 V.S.A. § 317\(c\)](#) contains the enumerated PRA exemptions.
- PRA exemptions are either mandatory or discretionary. Mandatory exemptions are often accompanied by the phrase “and shall be kept confidential.”
- Depending on the structure of a given exemption, the agency must withhold specific information or the entirety of a record.
- In some instances, agencies are granted the authority to adopt PRA exemptions as part of rulemaking authority. The Administrative Procedures Act specifically requires agencies to provide notice of a new PRA exemption on the cover page submitted to LCAR.
- There are 42 enumerated exemptions in the PRA, and at least 243 exemptions scattered throughout the V.S.A. These exemptions are compiled in a list by the Office of Legislative Council, and codified in Title 1 as a note to the PRA.

### Act 137 of 2016 and Act 78 of 2017

#### *I. Background*

- Among other provisions, [Act 137](#) required the Commissioner of Corrections to adopt rules providing for the disclosure of offender and inmate records of the Department:
  - when “the public interest served by disclosure of a record outweighs the privacy, security, or other interest in keeping the record confidential”; and
  - in order to provide an offender or inmate access to records relating to himself or herself, subject to various limitations and exceptions that were to be further developed in the rule.

- In response to this rulemaking mandate, the Commissioner initiated the process for adopting the rule and filed a proposed rule with LCAR on January 31, 2017.
- Because the economic impact statement estimated that the rule would result in significant costs to the Department, LCAR sent a letter to the Chairs of the House and Senate Institutions Committees stating that the committees may wish to consider the cost issue and whether to take legislative action to reduce the costs.
- After reviewing and taking testimony on the proposed rule, the House Committee on Institutions found that it was not consistent with legislative intent because it would potentially cause significant costs and disruptions to the Department.

## *II. Sec. 10 of Act 78*

- Sec. 10 was a legislative response to address the costs of the proposed rule. Sec. 10 amends a transition provision in Act 137 in order to:
  - [Subsec. (d)] Directs the Commissioner to:
    - withdraw the proposed rule filed with LCAR; and
    - redraft the proposed rule so that it reflects legislative intent.
  - [Subsec. (e)] Expresses legislative intent that the rule be interpreted *not to require* the Department to give an offender or inmate a copy of records:
    - previously provided to the offender or inmate, if he or she still has a copy; or
    - if the inmate or offender is responsible for the loss or destruction of a previously provided copy. In such cases the Department may charge for a replacement copy.
  - [Subsec. f] Directs the Commissioner, on or before October 1, 2017, to:
    - develop a plan to implement and use modern records management technology and practices in order to minimize the costs of furnishing offender/inmate records; and
    - send the Institutions Committees a copy of this plan as well as a written report that:
      - summarizes the status of the Department's efforts to redraft the rules; and
      - analyzes a possible transition to digital delivery of offender/inmate records.
  - [Subsec. (g)] Directs the Commissioner to:
    - Submit a copy of the redrafted rules to the Institutions Committees on or before January 15, 2018.
    - Prefile the redrafted rules with the Interagency Committee on Administrative Rules on or before July 1, 2018.
- The interim reporting requirement [subsec. (f)] and the requirement to file a copy of the redrafted rule with the Institutions Committees early in the next session [subsec. (f)] gave committee members an opportunity to weigh in and respond to the Department's rule.

Current: Act 192 of 2018 and 28 V.S.A. § 107

- Transitional Provisions:
  - Department shall prefile the adopted rules on or before September 15, 2018 and shall update the Oversight Committee at the first meeting on or after September 15, 2018.
  - The Department may rely on the current provisions in 28 V.S.A. § 107 pending adoption of the rule.
- [Subsec. (a)] directs the Commissioner to adopt a rule defining “offender and inmate records” for purposes of the section.
- [Subsec. (b)] creates a mandatory exemption for “offender and inmate records” and lists exceptions to the exemption. The Department shall release records:
  - if required by State or federal law;
  - pursuant to a court order for good cause shown;
  - pursuant to rules of discovery when an offender or inmate seeks his or her own records;
  - to a State or federal prosecutor as part of a criminal investigation pursuant to a court order issued ex parte
    - if the court finds the records may be relevant to the investigation
    - and may be used for any lawful purpose but shall not otherwise be made public;
  - to DCF for purpose of child protection, unless otherwise prohibited by law;
  - to specific persons, or to any person, in accordance with a rule that the Commissioner shall adopt
    - Provided that the following information is redacted:
      - information that may compromise the safety of any person
      - information that is required by law to be redacted
    - The rule shall provide for disclosure of a category or type of record in either of the following circumstances:
      - when public interest outweighs privacy or security interest in keeping the record confidential; or
      - in order to provide an inmate with access to his or her own records, unless:
        - The category or type of record is confidential or exempt under other law;
        - providing access would unreasonably interfere with the Department’s ability to perform its functions, including unreasonable interference due to staff time or other cost; or
        - providing access may compromise health, safety, security, or rehabilitation of the inmate or others.
- [Subsec. (c)] The rule:
  - Shall specify categories of records to be disclosed and to whom they shall be disclosed, and shall not provide for exceptions;

- Shall specify records disclosed as a matter of course, and those disclosed upon request;
  - May limit access to include only records produced or acquired in the last year;
  - May limit the number of requests that will be fulfilled in a year, provided that at least two will be fulfilled;
  - May specify circumstances where right of access will be limited to a Department supervised inspection;
  - May provide that the Department has no obligation to disclose previously provided records if the inmate still has access to the record;
  - Shall reflect the obligation not to withhold a record in its entirety on the basis that it contains exempt content.
  - Provides that records shall be provided free of charge, or for \$0.01 per page for a replacement copy when the inmate or offender is responsible for loss of the previous copy.
- [Subsec. (d)] The rule shall provide for response and appeal periods; the final exhaustion of administrative appeals shall be no later than 45 days from the Department's receipt of the initial request.
  - [Subsec. (e)] An offender or inmate may request that the Department correct a fact in a record maintained by the Department. The rule adopted under (d) may provide that the request be handled in accordance with the Department's grievance process. Appeal may be taken to the Civil Division of the Superior Court.