

**House Government Operations
Public Records Access Overview**

January 9, 2020

Thank you for providing me with the opportunity to discuss the important issue of public records access in Vermont.

This is an issue that I am incredibly passionate about.

This was a key issue when I first ran for Secretary of State 10 years ago.

My first Op-Ed after taking office in 2011 - Transparency in Government.

Over the past decade, we have made over sixty visits to cities and towns all over the state to talk about the importance of open meetings, public records and Vermont's Right-to-Know laws.

Just a few months ago, my Deputy Secretary, Chris Winters and I finished up the fifth biennial round of what we like to call the Transparency Tour.

Before I go on, just a little about my background – I served:

- **18 years - South Burlington City Council (last 8 years as Chair)**
- **8 years – VT State Senate (Chaired Senate Ed & Senate Gov Ops)**
- **~10 years – VT Secretary of State**

I don't just talk the talk about transparency, I walk the walk.

Those of you who know me know that I have been a long-time proponent of government transparency.

I just released another op-ed Monday on public records access which you should have received via email from my staff - we have sent it to Andrea for posting on your committee page.

Right now, trust in government is at an all-time low.

It seems like I make this statement every year, and it continues to be true as the average Vermonter becomes more and more disenchanted with what is happening in Washington DC, and in Montpelier VT.

Please don't think that I believe secrecy and bad behavior are running rampant, but it doesn't take but a few bad apples to spoil the bunch.

As "government", the public paints us all with the same broad brush.

I've always believed that sunshine is the best disinfectant, and that if we want to restore public faith in our government, the best way to do so is by ensuring that our government is as transparent as possible.

I want you to understand this really is about the PUBLIC'S right-to-know - and the public is anyone!

Just who is the public? Vermonters, media, attorneys representing citizens.

Access to public records gives the public a critical tool to be able to audit, criticize, and hold our government accountable.

By doing our work in the open - as if 600,000 Vermonters are looking over our shoulder -- hopefully, in the end, we earn the public's trust.

I cannot emphasize this enough: the records created in the course of government business actually BELONG TO THE PUBLIC.

As government officials, we are just the custodians in possession of them.

[Tanya Marshall pointed this out in her testimony, but it bears repeating]

Generous access to public records is rooted in the Vermont Constitution,

"Article 6. [Officers servants of the people]

That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them."

And the Vermont statutes:

“It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. ...” (1 V.S.A. §315(a)).

So what is a public record? A public record is “any written or recorded information, regardless of physical form or characteristics, produced or acquired in the course of public agency business.”

Public records are not limited to just paper records, which is important seeing as it’s 2020 and much of the work we do is in a digital environment.

The bottom line is that all government records are public records, though, of course, some are exempt from disclosure for good reason.

This committee, just like committees of the past, may be tempted to try to make further exemptions based on burdensome or seemingly vindictive requests or requestors.

This will be a very difficult endeavor.

Anyone can request a public record, and neither the identity nor motive of the requestor can be considered when weighing access.

This has been affirmed by the VT Supreme Court:

“The identity and motive of the requestor cannot be considered when weighing access to public documents.” (Shlansky v. City of Burlington and Burlington Police Department, 2010)

This is the law, and it is critically important to ensure that bias for or against a requestor does not enter into the equation and that all requestors are treated equally under the law and granted access to the records to which they’re entitled.

It's also important to note the Supreme Court has upheld the notion that while government agencies may charge for *ACTUAL COSTS* to produce a copy of a record, they may not charge for inspection of a record.

These were the findings of the court in their 2019 *Doyle v. Burlington Police Department* decision.

Yet even today, we have state agencies arguing that they may charge a person inspecting a record for a "copy" when they snap a picture of the record with their cell phone.

To be blunt, arguing that state agencies can seek to recoup costs from a requestor for taking a picture of a public record with their own device while inspecting it - is a twisted interpretation of the law and of this decision.

First, a fee may only be charged if a copy is requested, and if a government employee then produces that copy.

Second, they can only charge for the actual cost of the copy - if I'm taking a picture with my own phone, what's the cost to the government? Zero!!!

I understand there is a burden in producing these records for inspection.

It is most often a minimal burden, but there are times it can be significant.

In my view, it is clear the burden appropriately falls on government – NOT ON THE PUBLIC.

I also recognize that there are times when significant redactions need to be made to protect personally identifying information, or personal medical information, or some other exempt information, and that too comes at a cost to the government.

However, the courts have clearly stated that these costs, when producing a record for inspection, cannot be passed on to the requestor.

Otherwise this would put yet another hurdle in the way of access.

I can't say it enough... The public has a right to know!

I will note, as Tanya Marshall pointed out, that if proper record management practices are in place from the get-go, the time, energy and cost to the agency of producing these records is significantly lessened.

That's where we should be looking to increase efficiency and cut costs: through better records management and by harnessing the digital tools we now have that can make public access better than ever.

Navigating who to ask, and how to request public records is a big enough hurdle for most Vermonters.

When you combine this with a 'deny-first, wait for legal action' mentality, and then you pile on costs that the law does not contemplate, we're left with a situation where the only option members of the public have is to seek legal counsel.

Those are the people who so often call us - rarely taking these cases to court.

And they become dissatisfied, disgruntled and disenchanted.

In my opinion, we should be looking to increase access, and should not be walking it back.

I have several ideas for improving the public records act, but this is probably not the time or place to go into detail.

However, in short, I think Vermont should:

- **Create an open government ombudsperson;**
- **Collapse and clarify the 240+ exemptions scattered throughout the law into the same section; and**

- **Clarify once and for all - there is no charge for inspecting public records**

I'll close by going back to the underlying value that I believe should guide these discussions: government transparency, which includes the public's right to access public records, is critical to a functioning democracy.

It keeps public officials and agencies honest and accountable – while allowing us to prove we are worthy of the public trust.

Most importantly, it keeps Vermonters informed and in control.

I want to thank you for your time, and attention on this very important issue.

I'm happy to take any questions you may have.