House Government Operations Committee: Public Records Act Discussion

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Background Information: January 20, 2021

INTRODUCTION

This written testimony is being provided to the House Committee on Government Operations to supplement today's verbal testimony by the Secretary of State's Office in the event a more detailed history of the Public Records Act is desired by the Committee or individual legislators. The following background information is largely a summary of the Vermont State Archives and Records Administration's *Continuing Issues Series* on the Public Records Act that is published on the Secretary of State's website. The series is based on archival records in the state archives and legislative research that was first conducted and published by State Archivist Emeritus Gregory Sanford approximately a decade ago. A similar summary, also in the form of written testimony, was provided to this Committee on January 9, 2020.

BACKGROUND

The Federal Administrative Procedure Act of 1946 provided the foundation for most states' first transparency laws. In 1957, S.35 (An act to make available to the public the rules) was introduced by Senator Smith as the State of Vermont's first "Right to Know" bill. In his explanation for the rationale for the bill, the senator stated during a February 14, 1947 hearing that the bill was not intended as a criticism but that he prefers "to have laws written in the books rather than have laws written by men as they go along." Smith's bill proposed the following:

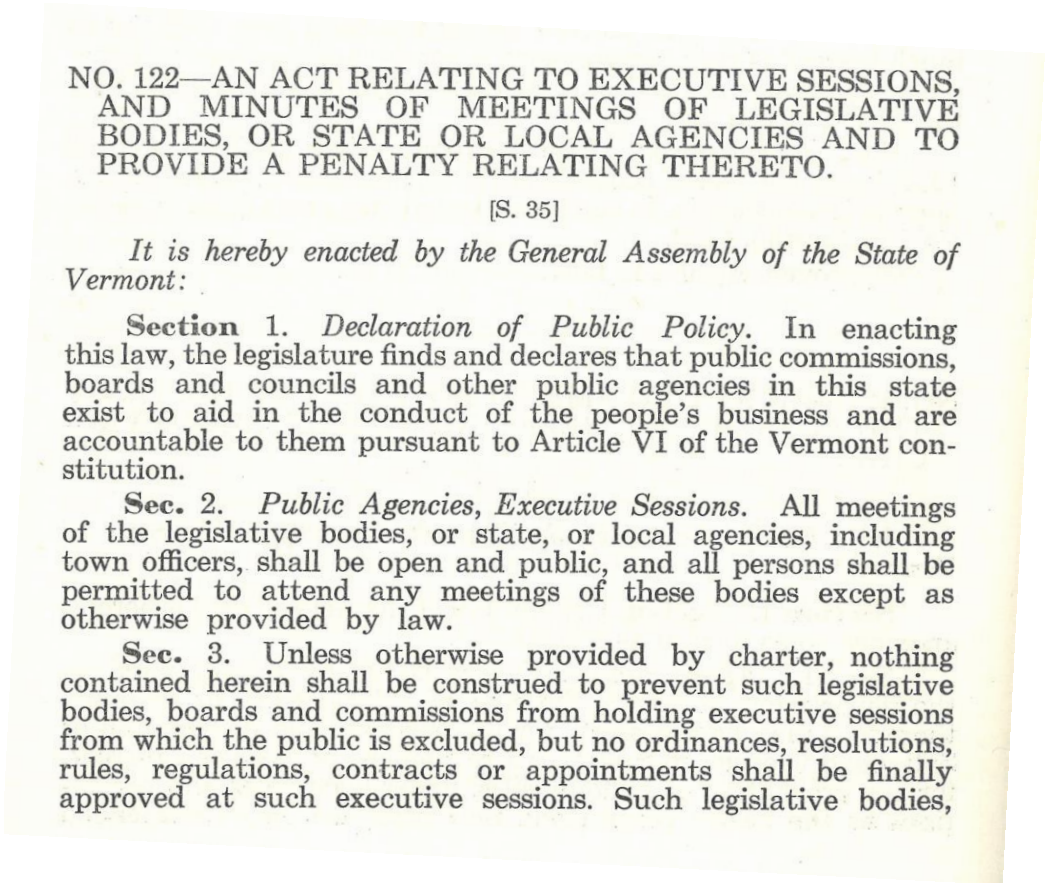
- Rules, regulations and minutes of any administrative agency of local and state government be made available to the public during regular business hours.
- Citizens have the right to make memoranda abstracts from the records.
- Records which are declared by law to be private or confidential are excluded.

The Senate General Committee was favorable towards the bill with Senator Fayette remarking during the hearing that S.35 "gives meaning not only to Article 6 of the Constitution, but to Section 13 of Chapter 2, which provides that the doors of the General Assembly shall be open

'for the admission of all persons who behave decently, except only when the welfare of the state may require them to be shut.[1]"

Public testimony on the bill, which was covered extensively by the Rutland Herald and Burlington Free Press, ensued almost weekly between February and April 1957 with several amendments. Ultimately, S.35 and a similar bill, H.141 (An act providing that sessions of public bodies and agencies be public) were consolidated and became Act 122 of 1957 (An act relating to executive sessions and minutes of meetings of legislative bodies or state or local agencies and to provide for a penalty related thereto).

The text of Act 122 of 1957 (S.35) as enacted is shown below:



NO. 122—AN ACT RELATING TO EXECUTIVE SESSIONS, AND MINUTES OF MEETINGS OF LEGISLATIVE BODIES, OR STATE OR LOCAL AGENCIES AND TO PROVIDE A PENALTY RELATING THERETO.

[S. 35]

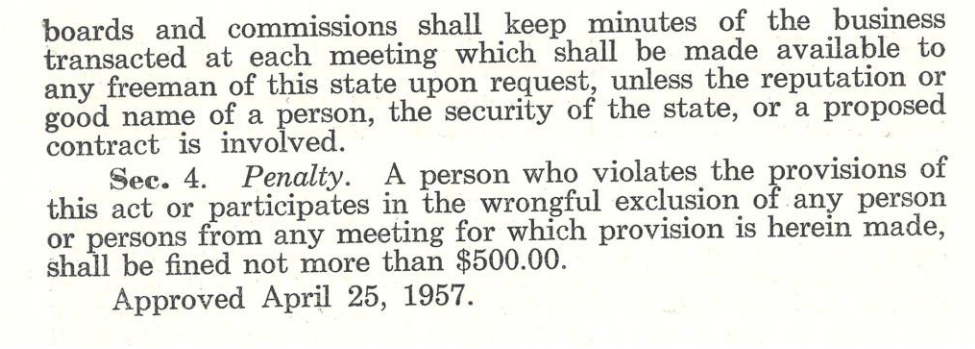
It is hereby enacted by the General Assembly of the State of Vermont:

Section 1. *Declaration of Public Policy.* In enacting this law, the legislature finds and declares that public commissions, boards and councils and other public agencies in this state exist to aid in the conduct of the people's business and are accountable to them pursuant to Article VI of the Vermont constitution.

Sec. 2. *Public Agencies, Executive Sessions.* All meetings of the legislative bodies, or state, or local agencies, including town officers, shall be open and public, and all persons shall be permitted to attend any meetings of these bodies except as otherwise provided by law.

Sec. 3. Unless otherwise provided by charter, nothing contained herein shall be construed to prevent such legislative bodies, boards and commissions from holding executive sessions from which the public is excluded, but no ordinances, resolutions, rules, regulations, contracts or appointments shall be finally approved at such executive sessions. Such legislative bodies,

[1] Rutland Daily Herald, February 15, 1957, page 3



boards and commissions shall keep minutes of the business transacted at each meeting which shall be made available to any freeman of this state upon request, unless the reputation or good name of a person, the security of the state, or a proposed contract is involved.

Sec. 4. *Penalty.* A person who violates the provisions of this act or participates in the wrongful exclusion of any person or persons from any meeting for which provision is herein made, shall be fined not more than $500.00.

Approved April 25, 1957.

The current Vermont Public Records Act or PRA (1 V.S.A. §§ 315-320) has its origin in Act 231 of 1976 (H.276), the State of Vermont first comprehensive public records law. The most significant changes to the PRA were enacted as part of Act 159 of 1996 although the original bill, H.780, began as much more robust public records bill than what was eventually passed.

H.780 as introduced, nonetheless, sheds light on the interests and mindset of the House Government Operations Committee following hearings in both the summer and fall of 1995. The bill initially included requirements for public agencies to: sunset exemptions after 50 years unless the State Archivist determined a longer period of time was needed to satisfy the purpose of the specific exemption; make available all nonexempt records and information for copying in a standard electronic or paper format; bear the cost of redacting exempt information in order to permit the inspection or copying of a record unless the request was for more than 100 pages; and separate exempt information from nonexempt information in all future upgrades to "electronic application systems." Under H.780, members of the public could also seek an advisory opinion from the Secretary of State if aggrieved by an agency head's denial of a request to inspect or copy a public record.

Act 59 of 2011 (H.73) resulted in a substantive change to penalties. Prior to 2011, if a court overturned an agency's decision to deny access, the court had the option of ordering the agency to pay attorney fees and other litigation costs. Act 59 mandated that courts award attorney fees if a complainant substantially prevailed against an agency. Like H.780 of 1996, H.73 also began as a more robust bill than what was eventually passed. H.73, for example, originally called for the

training of all agency employees responsible for responding to public records requests as well as the creation of a Government Transparency Office.

Since its initial passage, the PRA has focused on six core elements, although one element – management – was originally kept separate, in Title 22, despite routinely being amended within some of the same legislative acts pertaining to public records. It was not until the passage of Act 96 of 2008 that management was added to the PRA and it was through Act 100 of 2018 that cross-references between the PRA and the state's records management laws were more clearly drawn. Today, the six core elements of the PRA are:

1. Policy (1 V.S.A. § 315)
2. Access (1 V.S.A. § 316)
3. Exemptions (1 V.S.A. § 317)
4. Management (1 V.S.A. § 317a)
5. Procedure (1 V.S.A. §§ 318-318a)
6. Enforcement (1 V.S.A. §§ 319-320)

Policy (1 V.S.A. § 315)

The statement of policy found in 1 V.S.A. § 315 describes the rationale for affording access to public records. The language of this section originally was adopted through Act 231 of 1976 (An act to add 1 V.S.A. Chapter 5, Subchapter 3 relating to access to public documents and records), the State of Vermont first comprehensive public records law.

> *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. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the General Assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action.*

1 V.S.A. § 315 remained unchanged until the passage of Act 59 of 2011 (An act relating to establishing a government transparency office to enforce the public records act), which added "and the burden of proof shall be on the public agency to sustain its action." The current 1 V.S.A. § 315(c), which formalized the name of the Public Records Act, was added by Act 29 of 2015 (An act relating to Public Records Act exemptions): "This subchapter may be known and cited as the Public Records Act or the PRA."

In 2018, the passage of Act 166 (An act relating to the Open Meeting Law and the Public Records Act) added the current 1 V.S.A. § 315(b), which was drawn from existing language in 3 V.S.A. § 218 (Agency and Department Records Management Program):

> *The General Assembly finds that public records are essential to the administration of State and local government. Public records contain information that allows government programs to function, provides officials with a basis for making decisions, and ensures continuity with past operations. Public records document the legal responsibilities of government, help protect the rights of citizens, and provide citizens a means of monitoring government programs and measuring the performance of public officials. Public records provide documentation for the functioning of government and for the retrospective analysis of the development of Vermont government and the impact of programs on citizens.*

The State of Vermont's policy statement that the provisions of the Public Records Act "shall be liberally construed with the view towards carrying out the provisions" allowing access to public records is frequently cited by Vermont courts in rulings on public record cases.

Access (1 V.S.A. § 317)

While the statement of purpose found in 1 V.S.A § 315 declares the public's right to access public records, the provisions in 1 V.S.A. § 316 define the nature of that access.

> *Any person may inspect or copy any public record of a public agency, as follows…*

The language in 1 V.S.A. § 316 generally describes the parameters under which individuals may inspect or request copy records. Act 231 of 1976 set forth the provisions that established the times when individuals could access records; allowed agencies to charge individuals for the cost of physically copying records; and set limits on what copying services agencies would be required to provide.

The most significant changes to this section were enacted as part of Act 159 of 1996, adding language detailing how actual copying costs are to be calculated and giving the Secretary of State the authority to adopt by rule a uniform schedule for public record charges.

> *The secretary of state, after consultation with the secretary of administration, shall establish the actual cost of providing a copy of a public record that may be charged by state agencies. The secretary shall also establish the amount that may be charged for staff time, when such a charge is authorized under this section. To determine "actual cost" the secretary shall consider the following only: the cost of the paper or the electronic media onto which a public record is copied, a prorated amount for maintenance and replacement of the machine or equipment used to copy the record and any utility charges directly associated with copying a record. The secretary of state shall adopt, by rule, a uniform schedule of public record charges for state agencies.*

The results of a 1993 survey of "actual costs" charges being assessed by municipalities and a similar survey in 1995 of state agencies, which showed significant inconsistencies and a wide range of interpretations of "actual cost," was the impetus for a uniform schedule. The Secretary of State was also charged with doing a survey following the passing of the first "actual cost" rule and reporting its findings by January 1998.

Act 159, which began as H.440 in March 1995 with a focus on public access and privacy, particularly in light of the increased use of electronic mail and systems by public agencies, transitioned over the summer and fall of 1995 to a new bill draft, which was introduced in February 1996 as H.780. Given the emphasis on electronic records during hearings held by the House Government Operations Committee, the final act further clarified which formats individuals could expect to receive copies of records based on the original format of the records.

Exemptions (1 V.S.A. § 317)

Under the Public Records Act, all public records are open to public inspection or copying unless specifically exempted by law. A core set of these exempt records are outlined in 1 V.S.A. § 317, but some exemptions still exist outside of 1 V.S.A. § 317. This statute is also where "public agency" and "public record" are defined.

The public agency definition was part of Act 231 of 1976, the original public records act (H. 276). Commenting on the original bill, Attorney General Jerome Diamond found the list of public agencies "under-inclusive" in relation to the agencies already covered under the open meeting law. Further committee discussion in the Senate on H. 276 touched on whether municipalities should be included. Ultimately, the senate amended the definition to exclude municipalities and other political subdivisions. Municipalities and other political subdivisions were brought back under the definition of public agency by Act 202 of 1978 (H.350).

> *As used in this subchapter, "public agency" or "agency" means any agency, board, department, commission, committee, branch or authority of the state or any agency, board, committee, department, branch, commission or authority of any political subdivision of the state.*

In Act 231 of 1976 (H. 276), the definition of a public record or document tried to enumerate various record types (staff reports, individual salaries, etc.) before adding a more inclusive "or any other written or recorded matters produced or acquired in the course of agency business." Subsequent amendments expanded the definition in attempts to cover emerging formats, such as "machine readable records." Section 2 of Act 159 of 1996 (H. 780) added the more inclusive phrase "regardless of physical form or characteristics."

Even after Act 159, the public record definition was amended to embrace new formats. Act 158 of 2004 for example added "computer databases" to the list. Section 3 of Act 110 of 2008 (S. 229) recognized the inclusiveness of the "regardless of physical form or characteristics" language and removed references to specific formats.

Despite having almost 45 amendments since the law was first enacted, several of the exemptions listed under 1 V.S.A. § 317(c) remain unchanged from Act 231 of 1976. The legislative history (with historical notes) of each exemption is available through the Vermont State Archives and Records Administration.

Relatively new to the Public Records Act in 1 V.S.A. § 317 is a repeal and reenactment provision for exemptions enacted or substantively amended in legislation introduced by the General Assembly in 2019 or later. This provision was added by Act 166 of 2018 and can be found in 1 V.S.A. § 317(e). Also added by Act 166 of 2018 is 1 V.S.A. § 317(f), which requires "a record produced or acquired during the period of applicability of an exemption" to "remain exempt following the repeal or narrowing in scope of the exemption."

This new repeal and reenactment provision, including the requirement for public agencies to continue exempting records under statutory exemptions that have been subsequently been repealed or substantively narrowed, has yet be tested and it also remains unclear how public agencies will readily comply with 1 V.S.A. § 317(f). The Statewide Records and Information Management Program and record schedules issued by the Vermont State Archives and Records Administration pursuant 1 V.S.A. § 317a are designed to facilitate compliance by public agencies with the most current and up-to-date Federal and state recordkeeping laws, rules and regulations, including exemptions to public inspection or copying, and not historical legislation.

Management (1 V.S.A. § 317a)

Under the Public Records Act and 1 V.S.A. § 317a, public agencies are charged with systematically managing their public records "to provide ready access to vital information, to promote the efficient and economical operation of government, and to preserve their legal, administrative, and informational value."

1 V.S.A. § 317a was added to the Public Records Act by Act 96 of 2008 as a re-codification of sections of Title 22, Chapter 11, which was repealed by Act 96. 1 V.S.A. § 317a has its origins in Act 229 of 1937, which created the Public Records Commission to oversee the administration of public records by both state and local government. The Public Records Commission, which was succeeded by the Public Records Advisory Board and finally the

Vermont State Archives and Records Administration (also by Act 96 of 2008), was created as an outgrowth of Joint Resolution 306 of 1935 and legislative concerns about the condition and management of local records in the State of Vermont.

1 V.S.A. § 317a was last amended by Act 100 of 2018 to include a cross-reference to the services provided to local and state public agencies under the Statewide Records and Information Management Program administered by the Vermont State Archives and Records Administration.

Procedure (1 V.S.A. §§ 318-318a)

The provisions in 1 V.S.A. § 318 lay out the process for public agencies to follow when responding to requests to access public records. They impose time limits on an agency for responding to record requests; outline what an agency must do when it denies a request; and establish an appeal process for individuals who are denied access. Most of these provisions were adopted under the first public records law, Act 231 of 1976.

Subsequent amendments to the process have aimed at improving records access and making public agencies more accountable when they deny requests. For example, Act 132 of 2006 required that an agency explain the basis for a denial in writing. In relation to the appeal process, Act 110 of 2008 similarly required agency heads to put their decisions in writing and required them to cite the statutory basis for a denial. Act 59 of 2011 required agencies to more closely cooperate with individuals requesting information in order to fulfill their requests and it also required agencies to redact exempt information from a record rather than deny access to the entire record.

Pursuant to 1 V.S.A. § 318a, which was added into law by Act 166 of 2018 and went into effect on July 1, 2018, the Secretary of Administration is required to maintain and update the Public Records Request System established pursuant to Act 132 of 2006 and Act 59 of 2011 with the information furnished under 1 V.S.A. § 318a(b) and post system information on the website of the Agency of Administration.

1 V.S.A. § 318a(b) requires all public agencies of the Executive Branch of the State that receive a written request to inspect or copy a record to log the request in the Public Records Request System with the following information:

- Date request was received;
- Agency that received the request;
- Person who made the request, including contact name;
- Status of the request, including if request was fulfilled in whole, fulfilled in part, or denied;
- If fulfilled in part or denied, the exemption or grounds asserted as the basis for partial fulfillment or denial;
- Date request was closed; and
- Elapsed time between receipt of the request and the date request was closed.

Enforcement (1 V.S.A. §§ 319-320)

The original public records act also provided for judicial review of the denial of access to public records. Found in 1 V.S.A. § 319, individuals denied access by an agency may petition the Civil Division of the Superior Court to review the agency's actions. The language in the section was first amended by Act 59 of 2011. Prior to 2011, if a court overturned an agency's decision to deny access, the court had the option of ordering the agency to pay attorney fees and other litigation costs. Act 59 removed this option and instead, under 1 V.S.A. § 320, mandates that courts award attorney fees if a complainant substantially prevailed against an agency.