

Public Records Act and S.9

S.9 – Auditor’s Authority to Acquire Records

The Auditor shall: “Have discretion to examine the records, accounts, books, papers, reports, and returns in all formats of any contractor that provides services to the State, provided that the examination of records, accounts, books, papers, reports, and returns shall be limited to those that are relevant to the contract with the State.”

Vermont Public Records Act – “Agencies” and “Records”

Definitions and Context

Under 1 V.S.A. § 317(a)(2), a “public agency” means “any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State.”

The Supreme Court of Vermont recently examined the definition of “public agency” within the context of non-governmental entities who have some relationship with the State.

- *McVeigh v. Vermont Sch. Boards Ass'n*, 266 A.3d 763 (Vt. 2021).
 - In determining whether the VSBA acts as the functional equivalent of a public agency, SCOV stated the following: “The definition of “public agency” in 1 V.S.A. § 317(a)(2) contains no reference to functional equivalents; rather, it sets forth a limited list of traditional, well-established forms in which government chooses to organize itself. To the extent that the Legislature intended for the PRA to apply to a nongovernmental entity, that entity must qualify as one of these forms.”
 - SCOV declined to establish a test for what may qualify as an “instrumentality” under the Public Records Act, and stated that “the determination of whether a particular entity is an ‘instrumentality’ must be made on a case-by-case basis, looking at the facts surrounding the government’s relationship with that entity.”
- *Human Rights Def. Ctr. V. Correct Care Solutions*, 263 A.3d 1260 (Vt. 2021).
 - “[T]he language of the PRA is unambiguous: where the state contracts with a private entity to discharge the entirety of a fundamental and uniquely governmental obligation owed to its citizens, that entity acts as an ‘instrumentality’ of the state.”

Under 1 V.S.A. § 317(b), a “public record” means “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.”

- *U.S. Right to Know v. Univ. of Vermont*, 255 A.3d 719 (2021).

- “It is clear that by choosing the words ‘in the course of public agency business,’ the Legislature sought to shed light on government business, not the personal endeavors of state employees.”
- When evaluating what constitutes a “public record,” SCOV has provided some bases for understanding the division between personal records and records reflecting the business of a public agency: “In that analysis, we look to the Legislature’s description of public records for such considerations as whether the record contains information bearing on a government function, provides government officials with bases for making decisions, serves to ensure continuity with past government operations, or documents responsibilities of government actors. Other necessary factors to examine are the circumstances surrounding the record’s creation, for example, by whom, for whom, and for what purpose the record was created; the role the record played in the functioning of the agency; and the record’s location.”
- *Toensing v. Att’y Gen. of Vt.*, 178 A.3d 1000 (Vt. 2017).
 - The Public Records Act extends to digital copies of public records that are kept on private accounts, provided that the records otherwise meet the definition of a “public record.”

Public Records Act Exemptions and Auditor Confidentiality Provisions

- 1 V.S.A. § 317(c) (Enumerated PRA Exemptions)
 - (6) A tax return and related documents, correspondence, and certain types of substantiating forms that include the same type of information as in the tax return itself filed with or maintained by the Vermont Department of Taxes or submitted by a person to any public agency in connection with agency business.
 - This exemption applies to the “return” and related documents. The exemption is applied to the record in its entirety. However, SCOV has previously held that this does not cover the name and address of the taxpayer. *Finburg v. Murnane*, 159 Vt. 431 (1992).
 - (7) Personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency; information in any files relating to personal finances; medical or psychological facts concerning any individual or corporation; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his or her designated representative.
 - This exemption covers “personal documents only if they reveal ‘intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.’”

Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101 (1993).

- (9) Trade secrets, meaning confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information that is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it, except that the disclosures required by 18 V.S.A. § 4632 are not exempt under this subdivision.
 - The exemption covers sensitive financial information that gives “its possessor a commercial advantage over others[.]” *Long v. City of Burlington*, 208 Vt. 418 (2018).
 - In addition to the plain language of the exemption, there are policy considerations that drive the interpretation of the scope of (c)(9): “it is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release.” *Springfield Terminal Railway*, 174 Vt. 341 (2002)
- (15) Records relating specifically to negotiation of contracts, including collective bargaining agreements with public employees.
- 32 V.S.A. § 163(4)(B)
 - Draft audit reports, working papers, correspondence, and other materials relied on by the Auditor of Accounts to produce the draft audit report shall be confidential and exempt from public inspection and copying under the Public Records Act until the audit is completed but shall be provided to the audited entity upon request unless the record is exempt from public inspection and copying under another provision of law.
 - Draft audit reports, working papers, correspondence, and other materials received by an audited entity prior to completion of the audit shall remain confidential until completion of the audit, and shall not be further disclosed by the audited entity until completion of the audit.