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Sent: Friday, June 28, 2013 12:24 PM
To: Condos, Jim
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Subject: New PRA standard for criminal investigation files

Jim, FYI.

Effective Monday, July 1st, public record act requests related to the detection and investigation of crime will be governed by a new legal standard. Under prior Vermont law, records dealing with the detection and investigation of crime were categorically and permanently exempt from public disclosure and inspection. Under the new law, records related to the detection and investigation of crime are presumed public unless disclosure would result in one or more potential harms, including: (1) interference with enforcement proceedings, (2) deprivation of a person's right to a fair trial, (3) invasion of personal privacy, (4) disclosure of the identity of a confidential source, (5) disclosure of law enforcement techniques if such disclosure would risk circumvention of the law, and (6) danger to the life or physical safety of any individual. See 1 V.S.A. sec. 317(c)(5), amended by Act 70, available here: <http://www.leg.state.vt.us/docs/2014/Acts/ACT070.pdf>

In enacting the new law, the General Assembly stated that:

“It is the intent of the General Assembly that in construing subdivision (A) of this subdivision (5), the courts of this State will be guided by the construction of similar terms contained in 5 U.S.C. § 552(b)(7) (Freedom of Information Act) by the courts of the United States,” and

“It is the intent of the General Assembly that, consistent with the manner in which courts have interpreted subdivision (A) of this subdivision (5), a public agency shall not reveal information that could be used to facilitate the commission of a crime or the identity of a private individual who is a witness to or victim of a crime, unless withholding the identity or information would conceal government wrongdoing. A record shall not be withheld in its entirety because it contains identities or information that have been redacted pursuant to this subdivision.”

1 V.S.A. sec. 317(c)(5)(C) & (D).

The new standard governing public access to records related to the detection and investigation of crime is nearly identical to the federal Freedom of Information Act (FOIA) standard for law enforcement records, commonly referred to as “Exemption 7.” The U.S. Department of Justice provides guidance regarding the federal Freedom of Information Act, including Exemption 7, here: http://www.justice.gov/oip/foia_guide09.htm.

Before revealing identifying information of victims and witnesses of crime in response to a public records act request, it is recommended that all records custodians carefully consider the potential privacy and safety concerns at stake. In addition, you may wish to consult with the above guidance from the U.S. DOJ.