

To: Sarah London, Governor's Counsel
From: Helena Gardner, Legislative Counsel
Re: Act 23 Questionnaire: Miscellaneous exemptions that do not clearly fall in the jurisdiction of a particular agency, or that relate to gubernatorial appointments

1) Consolidated “personal records” exemption—and repealing 1 V.S.A. § 317(c)(12)

As you know, 1 V.S.A. § 317(c)(7) is an exemption for “personal records relating to an individual....” As interpreted by the Vermont Supreme Court, this exemption shields from disclosure records implicating individual privacy that would “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.’”¹ The “right to privacy” must be balanced against the public interest in favor of disclosure, including the need for “specific information ... to review the action of a governmental officer.”²

Other exemptions in the list at 1 V.S.A. § 317(c) address personal privacy interests: 1 V.S.A. § 317(c)(12) exempts “records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy, if disclosed.”³ The phrase “clearly unwarranted invasion of personal privacy” parallels the language of Exemption 6 of the Federal Freedom of Information Act, which exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁴ Under FOIA caselaw, Exemption 6 has been interpreted to require a balancing of the public interest in disclosure against the individual’s right to privacy. If a public interest in disclosure outweighs the privacy interest, the record should be disclosed; if the privacy interest outweighs the public interest, the record may be withheld under Exemption 6.⁵

Although the Vermont Supreme Court appeared to recognize in one case that 1 V.S.A. § 317(c)(12) requires a balancing test,⁶ to my knowledge the Court has never opined on whether the balancing tests under 1 V.S.A. § 317(c)(7) and 1 V.S.A. § 317(c)(12) are identical.

The Public Records Study Committee (“Committee”) is taking up 1 V.S.A. § 317(c)(7) at its December 13 meeting. However, because the Office of Legislative Council has been charged under Act 23 with drafting a PRA exemption consolidation bill, I have already been considering ways to possibly restructure 1 V.S.A. § 317(c)(7). In short, I am considering recommending that 1 V.S.A. § 317(c)(12) be repealed, and that 1 V.S.A. § 317(c)(7) be amended and split into six

¹ *Kade v. Smith*, 180 Vt. 554, 557 (2006) (quoting *Trombley v. Bellows Falls Union High School District*, 160 Vt. 101 (1993)).

² *Id.*

³ In addition, 1 V.S.A. § 317(c)(19) addresses library patron records; 1 V.S.A. § 317(c)(40) exempts records of genealogy provided in support of an application for tribal recognition; and 1 V.S.A. § 317(c)(41) addresses documents reviewed by the Victim’s Compensation Board. I am also considering recommending that these subdivisions be repealed and folded into an amended 317(c)(7).

⁴ 5 U.S.C. § 552(b)(6).

⁵ See Department of Justice Guide to the Freedom of Information Act, Exemption 6, available at http://www.justice.gov/oip/foia_guide09/exemption6.pdf

⁶ *Kade*, 180 Vt. at 558 n. 5.

subdivisions, (A)–(F). These subdivisions would encompass the subject matter of (c)(12) as well as additional subject matter.

New § 317(c)(7)(A) would establish a categorical exemption for personally identifiable health information; new § 317(c)(7)(B) would establish a categorical exemption for medical and treatment records that the General Assembly previously determined are entirely exempt; new § 317(c)(7)(C) would cover an individual's personal financial records; new § 317(c)(7)(D) would cover records implicating personal privacy that the General Assembly has previously determined should be categorically exempt; new § 317(c)(7)(E) would be a catchall along the lines of the existing (c)(7) language, but amended to use the FOIA (and existing (c)(12)) standard; and (c)(7)(F) would be an exception requiring agencies to release a "personal record" to the individual to whom the record pertains.

I am considering recommending the following language:

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(7)

(A) *[text omitted – individually identifying health information]*

(B) *[text omitted – medical records categorically exempt]*

(C) *[text omitted – records relating to personal finances]*

(D) records the release of which constitutes an unwarranted invasion of personal privacy:

(i) to the extent provided in 10 V.S.A. § 123(c) (Geographic Information System; individual identifiers); 13 V.S.A. § 5358a(a) (Victims Compensation Board; records reviewed for approving an application for compensation); 18 V.S.A. § 1094 (petition and order for mandated venereal disease testing); 18 V.S.A. § 5112 (records related to the issuance of a new birth certificate in connection with a change of sex); 18 V.S.A. § 9719 (advance directives); 20 V.S.A. § 1941 (DNA samples and records); 21 V.S.A. § 516(b) (employee drug test results); 22 V.S.A. § 172 (library patron records); 23 V.S.A. § 1607 (data collected with automated license plate recognition systems); 30 V.S.A. §§ 7055 and 7059 (enhanced 911 database customer information; linked name and street addresses and requests to municipalities to delink the same); 33 V.S.A. § 111 (applicants for or recipients of assistance from DCF); 33 V.S.A. § 6321 (individuals using attendant care services);

(ii) records of genealogy provided in an application or in support of an application for tribal recognition pursuant to chapter 23 of this title;

(iii) records relating to the identity of library patrons;

(E) ~~personal documents~~ any other record 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 if disclosure of the record would constitute a clearly unwarranted invasion of personal privacy;

(F) ~~provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee a~~

record described in this subdivision (7) shall be disclosed to the individual to whom it pertains, or to his or her designated representative, unless it is otherwise exempt from public inspection and copying;

Questions:

- Do you object to the draft language above, and if so why?
- If you object only to the language, but not to the concept of splitting up 317(c)(7), could you suggest improvements to the language?
- Do you object to the concept of repealing (c)(12) and folding it into an amended (c)(7)?
- Who is the appropriate person at the Emergency 911 Board to send the language highlighted in green? (*I have sent above language to David Tucker, Statewide 911 Director. I am happy to provide his initial feedback.*)

Answer: I do not object to clarifying (c)(7). I do not support adding new categorical prohibitions on the release of information to the Access to Public Records Act, as this amendment appears to do. If it is felt that public agencies need a Privacy Act (with a private right of action) like that governing the federal government, I would prefer it be separate from the Access to Public Records Act, as is the case under federal law. My understanding is that another provision not included above would protect against disclosure of personal finances, as well as medical or psychological information, apart from the statutory provisions listed.

(2) Distinguishing between public records that MUST be kept confidential, and those that MAY be withheld if the subject of a public records request.

Currently, the Public Records Act (PRA), unlike the federal Privacy Act,⁷ does not have a specific provision listing public records that MUST be kept confidential (as opposed to records that may but are not required to be withheld from public inspection and copying).

The Committee is considering recommending that current 1 V.S.A. § 317(c) be split into two separate lists for each category as follows:

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(d) The following public records are exempt from public inspection and copying and may be withheld at the discretion of the public agency:

* * *

In addition, next year the Study Committee may consider whether the PRA should be amended to specify a penalty for agencies that intentionally (or negligently?) release public records that “shall not be released.” Some exemptions scattered throughout the Vermont Statutes Annotated include penalties,⁸ but the PRA itself does not.

⁷ 5 U.S.C. § 552a.

⁸ See, e.g., 20 V.S.A. § 2056a(f) (dissemination of criminal history records).

Questions:

- Do you object to the concept of splitting existing 1 V.S.A. § 317(c) into two subsections: an amended 317(c) that specifies that certain public records shall not be released, and a new 317(d) which states that certain public records are exempt and may be withheld at the discretion of the agency?
- If you don't object to the general concept, but object to the draft language above, could you suggest alternative language?
- Should 1 V.S.A. § 317(c)(24) (deliberations of agencies acting in a judicial or quasi-judicial capacity) be placed under the new proposed § 317(d)?

Answer: *As stated above, I do not think the Access to Public Records Act is the place to add new categorical prohibitions on the release of information. If it is felt that current laws, including common law, do not adequately address the release of private information by public agencies, I would recommend amending other provisions, including chapter 62 of title 9 (protection of personal information) or creating a separate Privacy Act.*

3) Consolidated exemption for personally identifying information

Several exemptions address personally identifying information. The apparent purpose behind these exemptions is to protect information the disclosure of which would create a risk of identity theft or pose safety risks, or which is prohibited under federal law.

As a result, the Committee is considering recommending a consolidated exemption as follows:⁹

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(#) personally identifying information the disclosure of which creates an unreasonable risk of identity theft or of harm to a specific individual or is prohibited under federal law, including credit card information in the possession of a court or the Judicial Bureau as specified at 4 V.S.A. § 741; social security numbers to the extent provided in 9 V.S.A. § 2440(d); victim or survivor identifying information to the extent provided in 13 V.S.A. §§ 5322 and 5358a(c); the address or phone number of a crime victim who requests notification of release or escape to the extent provided in 13 V.S.A. § 5305; voter identifying information to the extent provided in 17 V.S.A. § 2154(b); and motor vehicle records to the extent provided in 23 V.S.A. § 104;

Questions:

- Do you object to the draft language above, and if so why?
- If you object only to the language, but not the concept of the consolidated identifying information exemption, could you suggest improvements to the language?

⁹ This draft language will also be sent to Deputy Secretary of State Brian Leven, John Dunleavy of the Agency of Transportation, and Susanne Young of the Attorney General's Office for comment.

***Answer:** As stated above, I do not think the Access to Public Records Act is the place to create new categorical prohibitions on the release of information. To the extent there is concern that agency personnel are not aware of what is protected information under state law, an “including but not limited to” cross reference to chapter 62 of title 9 may be helpful.*

4) Consolidating 1 V.S.A. § 317(c)(25), (c)(32), and (c)(33)

Three exemptions listed under 1 V.S.A. § 317(c) relate to safeguarding public property and protecting safety: 1 V.S.A. § 317(c)(25) (passwords and security codes); 1 V.S.A. § 317(c)(32) (State building plans and layouts) and 1 V.S.A. § 317(c)(33) (account numbers for bank, credit, or debit cards held by a public agency). In addition, the subjects of 1 V.S.A. § 317(c)(25) and (c)(32) partially overlap.

The Committee is considering recommending a consolidated exemption by repealing (c)(32) and (c)(33), and amending (c)(25) as follows:

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(25) the following records related to safeguarding public property or personal safety:

(A) passwords, access codes, user identifications, security procedures, and similar information the disclosure of which would threaten the safety of persons or the security of public property;

(B) the account numbers for bank, debit, charge, and credit cards held by an agency or its employees on behalf of the agency;

(C) with respect to publicly-owned, -managed, or -leased structures, and only to the extent that release of information contained in the record would threaten the safety of persons or the security of public property: final building plans and as-built plans, including drafts of security systems within a facility, that depict the internal layout and structural elements of facilities, infrastructures, systems, or other structures owned, operated, or leased by an agency before, on, or after the effective date of this provision; emergency evacuation, escape, or other emergency response plans that have not been published for public use; and vulnerability assessments and operation and security plans. For purposes of this subdivision, “system” shall include electrical, heating, ventilation, air conditioning, telecommunication, elevator, and security systems. Information made exempt by this subdivision may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is bidding on or performing work on or related to facilities, infrastructures, systems, or other structures owned, operated, or leased by the State. The entities or persons receiving such information shall maintain the exempt status of the information. Nothing in this subdivision shall preclude or limit the right of the General Assembly or its committees to examine such information in carrying out its responsibilities or to subpoena such information;

Questions

- Do you object to the draft language above, and if so why?
- If you object only to the language but not to the concept of the consolidated exemption, could you suggest improvements to the language?
- As a heads up, the language highlighted in yellow might be appropriate “default” language to add to the PRA: the Committee may take up the issue of default language next year. The Federal Privacy Act takes a similar approach – see in particular 5 U.S.C. 552a(b)(3), (b)(5), (b)(7), and (b)(9).

Answer: Same general objection to adding new categorical prohibitions on the release of information in the Access to Public Records Act stated above. Combining these exemptions makes sense as a conceptual matter.

5) Consolidated exemption for records of proceedings of nominating bodies and information from and about candidates

Three exemptions relate to records of proceedings of nominating bodies and information from and about the candidates they consider. The Committee is considering recommending the consolidated exemption below:¹⁰

(c) The following public records are exempt from public inspection and copying and shall not be released:

* * *

(#) records of nominating bodies and information from and about the candidates they consider, to the extent provided in 4 V.S.A. §§ 602 and 603 (Judicial Nominating Board proceedings; candidate information) and 18 V.S.A. § 9391 (Green Mountain Care Board Nominating Committee proceedings; candidate information);

Questions:

- Do you object to the draft language above, and if so why?
- If you object only to the language, but not to the concept of this consolidated exemption, could you suggest improvements to the language?

Answer: Same general objection stated above.

6) Amend 1 V.S.A. § 317(c)(15) (records relating to contract negotiations)?

As noted in item 2 above, the Committee is considering recommending that 1 V.S.A. § 317(c) be split into two subsections, an amended 317(c) that specifies that certain public records shall not be released, and a new 317(d) which states that certain public records are exempt and may be withheld at the discretion of the agency.

The Committee is interested in your perspective on 1 V.S.A. § 317(c)(15) (“records relating specifically to contract negotiations”).

¹⁰ This language is also being sent to Patricia Gable of the Court Administrator’s Office.

Questions:

- Along the lines of 19 V.S.A. §§ 2604 and 2606 and 24 V.S.A. § 2768(a)(1), should 1 V.S.A. § 317(c)(15) be amended to state that the period of confidentiality is time-limited, i.e. until award of the contract?
- Should the records described in 1 V.S.A. § 317(c)(15) fall under 317(c) (they shall not be released) or the new proposed 317(d) (may be withheld at the discretion of the agency)?

Answer: Same general objection stated above. Vermont judges have upheld withholding certain contract negotiation material even when no contract is ever signed. The rationale used is the interest in “protecting the State's ability to obtain the best contracts for its citizens.” My understanding is that the federal government is governed by common law in this area, which may also be a useful model in Vermont.