

**From:** Kessler, John [John.Kessler@vermont.gov]  
**Sent:** Wednesday, December 05, 2012 7:23 AM  
**To:** London, Sarah  
**Subject:** RE: Agenda for Wednesday  
**Attachments:** ACCD Comments 30Nov12.docx

I wish I were able to make the meeting today. Looks like a meaningful agenda.

Thought you'd like to see the comments I gave the legislative public records study committee last Friday when I testified on the disclosure exemptions related to ACCD.

I do have an unrelated question I will try to find time to call you on today.

JK

*John W. Kessler*

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**From:** London, Sarah  
**Sent:** Monday, December 03, 2012 6:12 PM  
**To:** London, Sarah; Groveman, Jon; Kessler, John; Gretkowski, Rosemary; Collier, Steven; Lively, Jeff; Peterson, Cliff; Anderson, Dirk; Commons, Geoff; Oettinger, Mark; Harritt, Susan; Bachman, Molly; Zamos, Diane; Dunleavy, John; Bill Griffin  
**Subject:** Agenda for Wednesday

All, an agenda for Wednesday is below. Attached is the most recent report I have from the DII PRA database (link below). See you all soon,  
Sarah

General Counsel Meeting – Wednesday December 5, 2012 – 3:30pm  
AGENDA

(1) Introductions

(2) Public Records

- a. Logging requests: <https://secure.vermont.gov/DII/foia/>
- b. State-issued devices versus personal devices
- c. Charging
- d. Public Records Act Study Committee and Legislative proposal(s)

(3) Final Bill Review Process

- a. Approaches across agencies
- b. How to improve (Governor's Office and agencies)

(4) Contracts

- a. Involvement of agency counsel
- b. Secretary of Administration guidance

(5) Hearing Officer Training

- a. Mark Oettinger and Susan Harritt

(6) Other issues?

**Public Records Legislative Study Committee**

Comments of the Agency of Commerce and Community Development

John W. Kessler, General Counsel

November 30, 2012

**Vermont Access to Public Records Law**

The numbered exemptions to the public inspection and copying requirements highlighted by the Study Committee include five provisions in 1 V.S.A. § 317(c) directly related to the Agency of Commerce and Community Development (ACCD). Those provisions and ACCD's comments in support of their need and effectiveness are identified and described as follows:

**1 V.S.A. § 317(c)(9)** trade secrets, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, 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 shall not be included in this subdivision;

**ACCD:** This exemption is frequently used to protect confidential financial and other proprietary business information in ACCD's custody. ACCD comes to possess the same either for the purpose of administering one of ACCD's numerous business support programs or in the regular course of consulting with employers to ascertain ways in which the state can be of assistance. A complementary provision exists in 32 V.S.A. § 5930a(h) aimed at protecting similar confidential financial information from disclosure as well as carving out a narrow exception for disclosure to the State Auditor of Accounts and the Legislative Joint Fiscal Office.

The Vermont Attorney General several years ago provided a written opinion to ACCD supporting the persuasive value of federal case law interpreting the Freedom of Information Act's use of the phrase "confidential financial information" and the nature of the records it protects from disclosure. In brief, the standard justification for not disclosing "confidential financial information" is based on the record or information not otherwise being released to the public in the ordinary course of business practices and, were it to be released, it could cause a substantial adverse effect to the business advantage gained by the record/information being kept confidential. A common and persuasive example for this exemption is the prospective nature of the information provided by an employer and in the custody of ACCD. Whether the information pertains to financial projections or strategic plans regarding future business investments and operations, premature public disclosure could harm the interests of the employer which are almost always significant.

**RECOMMENDATION:   RETAIN.**

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**1 V.S.A. § 317(c)(21)** lists of names compiled or obtained by Vermont Life magazine for the purpose of developing and maintaining a subscription list, which list may be sold or rented in the sole discretion of Vermont Life magazine, provided that such discretion is exercised in furtherance of that magazine's continued financial viability, and is exercised pursuant to specific guidelines adopted by the editor of the magazine;

**ACCD:** Vermont Life survives on revenue from the sale of subscriptions, advertisements, publications, and products in its gift catalog. This exemption protects Vermont Life from predatory competitors seeking to take advantage of the state's access to public records law to obtain at virtually no expense a list of potential customers. By allowing Vermont Life to adopt guidelines to protect against that sort of harm, the magazine can also make strategic decisions on when to sell, share or exchange subscriber/customer names with another enterprise to achieve mutual benefit. Because this exemption on its face addresses only subscribers, adding customer lists would provide Vermont Life valuable additional protection.

**RECOMMENDATION:   MODIFY. Add customer lists.**

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**1 V.S.A. § 317(c)(22)** any documents filed, received, or maintained by the agency of commerce and community development with regard to administration of 32 V.S.A. chapter 151, subchapters 11C and 11D (new jobs tax credit; manufacturer's tax credit), except that all such documents shall become public records under this section subchapter when a tax credit certification has been granted by the secretary of administration, and provided that the disclosure of such documents does not otherwise violate any provision of Title 32;

**ACCD:** Subchapters 11C (New Jobs Tax Credit) and 11D (Manufacturer's Investment Tax Credit) of Chapter 151 of Title 32 were repealed by Section 5 of Act No. 94 (Adj. Sess. 2006). Therefore, this exemption no longer has any applicability.

**RECOMMENDATION:   REPEAL.**

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**1 V.S.A. § 317(c)(30)** all code and machine-readable structures of state-funded and controlled database applications, which are known only to certain state departments engaging in marketing activities and which give the state an opportunity to obtain a marketing advantage over any other state, regional or local governmental or nonprofit quasi-governmental entity, or private sector entity, unless any such state department engaging in marketing activities determines that the license or other voluntary disclosure of such materials is in the state's best interests;

**ACCD:** We drafted this provision in-house and secured legislative support for its enactment to protect the \$1 million we had invested in creating a unique on-line tourism and marketing web site. The website ConnectVermont.com allows for businesses to join the site to market their services, products and events. The intellectual property developed with public dollars (state and federal) enables businesses to update their own information, saving the state from having to maintain a large administrative staff for that purpose. The exemption provides much needed protection from potential public records requests from other states or entities in competition with Vermont for the same tourism or economic development business. Without the protection from

disclosure, Vermont's investment would be given away, along with the competitive advantage we worked so hard to gain.

**RECOMMENDATION: RETAIN.**

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**1 V.S.A. § 317(c)(40)** records of genealogy provided in support of an application for tribal recognition pursuant to chapter 23 of this title;

**ACCD:** Native American tribes reported that publicizing familial connections was harmful to families and individuals when it enabled another tribe, individual, or family to criticize the veracity of that connection – often in the form of an emphatic rejection of one person's declared relation to another person accompanied by a competing asserting of a relationship to the same person. A lot of animosity emerged then and still is tied to the question of who really is genealogically linked to whom. The legislature agreed to add this exemption to protect people from the hateful and abusive exchanges which had been witnessed by our Division for Historic Preservation.

**RECOMMENDATION: RETAIN.**

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**10 V.S.A. § 7. Economic development; assistance and incentives benchmark reports**

[Text Omitted]

(b) Each economic development recipient shall state, on a form approved by the agency granting assistance, or awarding a tax credit or abatement, or approving any other form of economic development assistance, the number of new jobs that will be created or existing jobs that will be retained as a result of such assistance, the wages and employee benefits associated with such jobs, and a description of any other public benefits associated with such economic development assistance. Such statement shall be made prior to any such grant, award, or approval. Such statements and the information contained therein shall not be available for public inspection until 90 days after the granting of assistance, or the awarding of a tax credit or abatement, or the approving any other form of economic development assistance or incentive. After the expiration of such 90 day period such statements and information shall not be considered confidential, and may be inspected and copied pursuant to subchapter 3, chapter 5 of Title 1 (public records law), notwithstanding the provisions of any other law.

**ACCD:** The benchmark reports requirement under § 7 includes a public disclosure provision that unnecessarily confuses the applicability of the exemptions to disclosure established in 1 V.S.A. § 317(c). One might interpret the § 7 goal to be making available for public inspection as soon as 90 days after the granting of public assistance proprietary financial information that would otherwise be protected under 1 V.S.A. § 317(c)(7)(personal information), 1 V.S.A. § 317(c)(9) (trade secrets), and 32 V.S.A. § 5930a(h)(Vermont economic progress council tax incentive awards). Disclosing the number of new jobs together with the wages and employee benefits associated with them could have a substantial adverse effect on the competitive market advantage an employer retains by maintaining confidentiality around the same. Of the three

categories of information made available 90 days after receiving the public assistance, the number of new jobs would likely be the least sensitive of the proprietary information. However, public disclosure of a private employer's wage and benefits information undermines its competitive position in the marketplace by giving private information to competitors to inform a variety of their strategic business plans, including how they recruit, hire and compensate employees.

The preceding interpretation of the disclosure requirement in § 7 would undercut the goal of several state employment assistance programs by giving support with one hand and then taking it away with the other. However, if that is the legislature's intent, deferring public disclosure of the number of new jobs until much longer after the actual receipt of the public assistance would be necessary to diminish the competitive sensitivity of the employment information. A similar deferral period, however, would not provide the same competitive protection regarding wages and benefits. While new employment can usually be observed within one year, the wages and benefits that attracted new employees are not visible in any manner and, therefore, provide competitive value to the employer beyond the date by which the new employment becomes publicly recognized. Nevertheless, if the legislative intent were to disclose the wages and benefits of private employees, a substantially longer period of protection from public disclosure is warranted and consistent with the purpose and objectives of a number of state programs. As explained above, such disclosure would be in conflict with the exemptions provided in 1 V.S.A. § 317(c)(7) and (9) and 32 V.S.A. § 5930a(h).

Due consideration should also be given to the authorization in 32 V.S.A. § 5930a(h) affording both the State Auditor of Accounts and the Legislative Joint Fiscal Office access to the new jobs, wages and benefits data associated with the public assistance provided by the state's main employment incentive program – the Vermont Employment Growth Incentive, established in 32 V.S.A. § 5930b.

**RECOMMENDATION:   MODIFY. Clarify that the exemptions to public disclosure in 1 V.S.A. § 317(c) and 32 V.S.A. § 5930a(h) remain applicable. If the legislative intent is for greater disclosure than the exemptions allow, defer disclosure of number of new jobs created until much longer after the actual receipt of public assistance tied to the new employment, and provide an even longer waiting period for disclosure of private wages and benefits.**

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#### **10 V.S.A. § 531 Employment Training Program**

[Text Omitted]

##### (i) Program Outcomes.

(1) On or before September 1, 2011, the agency of commerce and community development, in coordination with the department of labor, and in consultation with the workforce development

council and the legislative joint fiscal office, shall develop, to the extent appropriate, a common set of benchmarks and performance measures for the training program established in this section and the workforce education and training fund established in section 543 of this title, and shall collect employee-specific data on training outcomes regarding the performance measures; provided, however, that the **secretary shall redact personal identifying information from such data.**

(2) On or before January 15, 2013, the joint fiscal office shall prepare a performance report using the benchmarks and performance measures created pursuant to subdivision (1) of this subsection. The joint fiscal office shall submit its report to the senate committee on economic development, housing and general affairs and the house committee on commerce and economic development.

(3) The secretary shall use information gathered pursuant to this subsection and customer satisfaction reports submitted pursuant to subdivision (c)(4) of this section to evaluate the program and make necessary changes that fall within the secretary's authority or, if beyond the scope of the secretary's authority, to recommend necessary changes to the appropriate committees of the general assembly.

(emphasis added).

**ACCD:** The requirement to collect employee-specific data on trainees, including personal identifying information such as social security numbers, wages, and other compensation data is a serious concern to employers and business organizations. The authorization in § 531(i)(1) for the secretary to redact “personal identifying information” is of significant importance to the employee seeking the training, the employer wanting its employees to obtain the training, and the state’s economic development interests. The state received extensive comments concerned over the risk to employees of having their social security numbers handled by the number of parties involved in the provision of training, submission of reports to the state, and the state’s examination of the subsequent employment impact on the trainees.

The concern over disclosure of personally identifying information is reasonable and well-founded. One need only follow the news accounts of the all-too-frequent inadvertent disclosure or mishandling of confidential information (including social security numbers) by the Vermont Department of Taxes, the Vermont State Employees Credit Union, and the Vermont State Colleges. Of course, a number of private financial institutions and businesses have also been equally unreliable in their secure handling of personal identifying information.

**RECOMMENDATION:   RETAIN.**

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**24 V.S.A. § 2786. Applicability of state laws**

(a) A service provider awarded a performance contract by the secretary under this chapter shall be subject to 1 V.S.A. chapter 5, subchapter 2 (open meetings) and subchapter 3 (public records) of chapter 5 of Title 1, except that in addition to any limitation provided in subchapter 2 or 3:

(1) no person shall disclose any information relating to a proposed transaction or agreement between the service provider and another person, in furtherance of the service provider's public purposes under the law, prior to final execution of such transaction or agreement; and

(2) meetings of the service provider's board to consider such proposed transactions or agreements may be held in executive session under 1 V.S.A. § 313.

(b) Nothing in this section shall be construed to limit the exchange of information between or among regional development corporations or regional planning commissions concerning any activity of the corporations and the commissions, provided that such information shall be subject to the provisions of subsection (a) of this section.

**ACCD:** The protection from disclosure in 24 V.S.A § 2786(a)(1) is worded not from the standpoint of the record entitled to an exemption from disclosure, but instead as an affirmative obligation of the service provider not to disclose any information relating to a proposed transaction. One could read this legislative drafting style to conclude there was an intentional emphasis placed on the sensitivity of information relating to deals or agreements that had not yet been finalized. Although the exemption in 1 V.S.A § 317(c)(15) addresses “records relating specifically to negotiation of contracts including but not limited to collective bargaining agreements with public employees,” it does not appear to reach the broader range of records protected under 24 V.S.A § 2786(a)(1). Information relating to “proposed transactions or agreements” may assume a variety of forms other than contract.

One possibility is for the protection from disclosure in 24 V.S.A § 2786(a)(1) to be added to the exemption in 1 V.S.A § 317(c)(15), thereby broadening its scope beyond contracts. While 24 V.S.A § 2786(a)(1) concerns only the business and purposes of economic development service providers, there may be other areas of state government or within the work of its nongovernment partners that should be considered for inclusion within a broader statement of the exemption in § 317(c)(15).

**RECOMMENDATION:     RETAIN. Consider merging into a broader exemption under 1 V.S.A § 317(c)(15).**

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