

**From:** MacLean, Alex  
**Sent:** Tuesday, January 01, 2013 9:01 AM  
**To:** Allen, Susan  
**CC:** Lofy, Bill; London, Sarah; Porter Louis; Richards, Alyson; Spaulding, Jeb; Miller, Elizabeth  
**Subject:** Re: exe priv re c5 proposal

Me too

Sent from my iPhone

On Dec 31, 2012, at 9:11 PM, "Allen, Susan" <[Susan.Allen@state.vt.us](mailto:Susan.Allen@state.vt.us)> wrote:

Good for me.

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**From:** Lofy, Bill  
**Sent:** Monday, December 31, 2012 5:28 PM  
**To:** London, Sarah; MacLean, Alex; Porter Louis; Allen, Susan; Richards, Alyson  
**Cc:** Spaulding, Jeb; Miller, Elizabeth  
**Subject:** Re: exe priv re c5 proposal

Let's do a senior staff meeting on Wednesday morning – lots to go over. He starts at 9:30 with Reardon and Jeb. How does 8:30 work for everyone?

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**From:** <London>, Sarah <[Sarah.London@state.vt.us](mailto:Sarah.London@state.vt.us)>  
**Date:** Monday, December 31, 2012 5:10 PM  
**To:** Bill Lofy <[bill.lofy@state.vt.us](mailto:bill.lofy@state.vt.us)>, "MacLean, Alex" <[Alex.MacLean@state.vt.us](mailto:Alex.MacLean@state.vt.us)>, Porter Louis <[louis\\_porter@yahoo.com](mailto:louis_porter@yahoo.com)>, "Allen, Susan" <[Susan.Allen@state.vt.us](mailto:Susan.Allen@state.vt.us)>, "Richards, Alyson" <[Alyson.Richards@state.vt.us](mailto:Alyson.Richards@state.vt.us)>  
**Cc:** "Spaulding, Jeb" <[Jeb.Spaulding@state.vt.us](mailto:Jeb.Spaulding@state.vt.us)>, "Miller, Elizabeth" <[Elizabeth.Miller@state.vt.us](mailto:Elizabeth.Miller@state.vt.us)>  
**Subject:** exe priv re c5 proposal

And I know this is way too many emails for today, but what a week. For FRIDAY: Attached is what I think we want to do on amending so-called “(c)(5)”, the public records act exemption related to criminal investigations. All we are doing are replacing most of (c)(5) with the language from the federal FOIA that deals with law enforcement records. Talking points at bottom.

One major decision before Fri, I talked this over with Louis, but want to make sure we are all in the same place: the federal standard applies to criminal AND civil law enforcement records, so things like AGO civil rights enforcement actions, enviro enforcement, antitrust enforcement, etc. Current VT c5 is limited to “records dealing with the detection and investigation of **crime**.” The advocates want to adopt the federal standard, but ONLY for records related to “crimes” and NOT broaden c5 to apply to civil law enforcement.

I have drafted our proposal to be limited to records related to the detection of crime, as that addresses the current problem we have. If we want to broaden c5 to civil law enforcement records like the federal law does, or if I should discuss this further with boss, let me know. (Personally, I think it's a great idea, but perhaps for another day.)

Finally, Alex, let us know if any of us should send this or anything to Sears. (He has of course asked DPS about this and SPAC/IA records of course – this proposal would not alter the existing confidentiality of SPAC records.)

Talking points:

- The crux of adopting the federal standard is this: records related to the investigation of crime will be disclosed unless disclosure will result in a specifically listed harm.
- Those listed harms are: (A) interference with enforcement proceedings, (B) depriving someone of their right to a fair trial, (C) creating an unwarranted invasion of personal privacy, (D) disclosing the identity of a confidential source, (E) disclosing techniques for law enforcement investigations or prosecutions, or disclosing guidelines for investigations or prosecutions if such disclosure could risk circumvention of the law, or (F) endangering someone's life or physical safety.
- By adopting the federal standard, we also benefit from a lot of federal case law that will be helpful to public agencies and Vermont courts in implementing and construing this provision. This is a very well-worn path and it will avoid many of the uncertainties and anti-transparency interpretations of our existing language.
- For instance, the Vermont Supreme Court has concluded that our current (c)(5) exemption applies indefinitely, even after a case is closed. This would not be the law under the federal standard. If law enforcement wanted to withhold records in an old, closed case, they would only be able to do so if they could show how disclosure would result in one of the above-listed harms.
- All transparency advocates we are aware of support adoption of the federal standard for records related to the detection of crimes. [The ACLU does NOT support repeating the "privacy" language above, because they feel like that is already covered elsewhere in the PRA. We can discuss that before Friday.]

Sarah London  
Counsel to the Governor  
802-828-3333  
[sarah.london@state.vt.us](mailto:sarah.london@state.vt.us)