

A Requestor's Introduction to VT's Public Records Laws

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THIS IS NOT LEGAL ADVICE OR A SUBSTITUTE FOR LEGAL ADVICE

- ❑ While the presenter of these slides and discussions is a lawyer with experience in VT public records law, he does not advise anyone other than his employer.
 - ❑ Application of law to facts can be highly variable from case to case, judge to judge, and lawyer to lawyer.
 - ❑ You, and only you, can take responsibility for determining whether you need legal representation, and if so, choosing it.
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In government, the ultimate boss is **the public...**

“That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.”

Vermont Constitution, Chapter I, Article 6

The big picture, and the balancing act:

It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the general assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action.

[1 V.S.A. § 315](#). Statement of policy

Accountability by government:

. . . . Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.

[1 V.S.A. § 315](#). Statement of policy

Protection of personal privacy:

. . . . All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. . . .

[1 V.S.A. § 315](#). Statement of policy

What is a Public Record?

"any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." [1 V.S.A. § 317\(b\)](#)

All Government Records = Public Records

Exempt Public Records = Public Records

Records Are Not Limited to Paper

Who is covered by the Public Records Laws?

- "...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."

1 V.S.A. § 317(a)

What is Required?

- VT government (State and local) must comply with State recordkeeping laws
 - VT Legislature establishes the laws
 - [1 V.S.A. §§ 315-320](#) and [3 V.S.A. §117](#) = applicable to all public agencies
 - [3 V.S.A. §218](#) = specific to State agencies
 - Requirements specific to certain records and agencies found throughout VT Statutes, Administrative Rules, and Federal laws and regulations
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ACCESS TO PUBLIC RECORDS

- [1 V.S.A. § 316](#): Any person may inspect or copy any public record of a State agency between 9 AM and 12 PM and 1 PM and 4 PM on any day other than Saturday, Sunday or a legal holiday. For municipalities and other political subdivisions of the State, inspection may occur during customary business hours.
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ALERT: Inspect? or Copy?

- ❑ Section 316(a) gives a requestor the right to either ***inspect or copy***. Be clear with yourself and the agency about which option you want to exercise.
 - ❑ Section 316 subsections (b) through (e) spell out charges for:
 - copies (actual cost)
 - converting records to a new format
 - creating a record that does not yet exist– but only if the agency is willing to do so
 - staff time for some of the above as allowed in statute (but not to find or allow inspection of records)
 - mailing or faxing a copy if- but only if- the agency is willing to do so - it is not obligated to do so
 - An agency may not charge for the processes of determining whether a record exists, finding a record, or making a record available for inspection. See *VSEA v. Agcy. of Natural Resources*, Docket 517-7-10 (Washington Superior Court, Jan. 6, 2011, Judge (soon Justice) Crawford)
- <https://www.vermontjudiciary.org/20112015%20Tcdecisioncvl/2011-1-11-5.pdf>
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Access does not depend on who is asking or why they're asking:

“[T]he identity and motive of the requestor cannot be considered when weighing access to public documents.”

Vermont Supreme Court decision in *Shlansky v. City of Burlington and Burlington Police Department* 2010 VT 90
¶ 11

Some exceptions- Trade secrets, Statewide voter checklist [there could be other exceptions]

PUBLIC RECORD EXEMPTIONS

- ❑ [1 V.S.A. § 318](#): Public agencies are required to produce records for inspection or copying *unless* the record is listed as exempt.
 - ❑ While a list of public records exemptions is found in [1 V.S.A. § 317\(c\)](#), additional specific exemptions are also found elsewhere in State and Federal laws and regulations.
 - ❑ The “pocket part” to the “green book” containing Title 1 of the VT Statutes contains a table, following Section 317, listing all of the exemptions in the VT Statutes- but it does not cover exemptions under common law (resulting from judicial decisions) federal law, or other sources. [1 V.S.A. § 317\(c\)\(1\)-\(4\)](#) sweeps in these other sources of exemptions.
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A few of the many federal confidentiality requirements:

- FERPA: Educational Records
 - HIPAA: Health Records
 - Tax Records
 - DPPA (Driver Privacy Protection Act)
- ... and others ...
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Why are there so many exemptions?

- ❑ As the world and government both become ever more complex, government holds more and more sensitive information about individuals and businesses.
 - ❑ Exemptions represent policy decisions by the Vermont Legislature and Congress of situations in which the harm of disclosure would outweigh the benefit of open-ness.
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Public Records Exemptions

- ❑ Examples of commonly exempt records: personal documents relating to an individual, investigations, trade secrets, tax records...
 - ❑ Each agency should be familiar with specific State and Federal laws and regulations that affect inspection and copying of its records
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What about “grey areas” of exceptions to public access?

“The Public Records Act represents a strong policy favoring access to public documents and records. Exceptions to that general policy of disclosure are listed in 1 V.S.A. § 317(c). We construe these exceptions strictly against the custodians of records and resolve any doubts in favor of disclosure. The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure.”

Vermont Supreme Court decision in *Wesco, Inc. v. Sorrell*, 2004 VT 102 ¶ 10 [internal citations omitted]

Origin and strictness of exemptions vary by exemption and situation

- ❑ Some exemptions can be waived in the discretion of the agency holding the records (example: records relevant to litigation). Decisions whether or not to waive belong to **management (at the upper levels)**. Agencies should be cognizant and cautious that an intentional partial waiver of an exemption, unless carefully defined and limited, risks creation of an implied broader total waiver.
 - ❑ Other exemptions are imposed from elsewhere and cannot be waived (example: the federal Driver Privacy Protection Act (“DPPA”) prohibits the release or use by any State DMV (or any officer, employee, or contractor thereof) of personal information about an individual obtained by the department in connection with a motor vehicle record; DPPA provides penalties for disclosure).
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The Right to Know Database

- ❑ A tool for locating and identifying laws that affect access to VT public records
- ❑ Connected to VSARA's record appraisal database, which is used to assist agencies in the development of record schedules
- ❑ Exemptions are searchable by agency, exemption type and through a keyword search

<http://vermont-archives.org/records/access/database>

Right to Know Database

VERMONT OFFICE OF THE SECRETARY OF STATE

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VERMONT STATE ARCHIVES & RECORDS ADMINISTRATION

Managing Records

Right to Know

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- > Keyword Search
- > Agency Search
- > Exemption Search
- > Agency/Exemption Search
- > Credits/Disclaimer

VSARA
 Secretary of State Office
 1078 U.S. Rte. 2,
 Middlesex

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AGENCY SEARCH RESULTS

Please note that this database is under development and content is subject to change. This database should be used for reference purposes only.

Results for:

| Statute: | Enacted: | Amended: |
|---------------------------------------|--|-------------|
| 1 V.S.A. § 312 | Right to attend meetings of public agencies | 1957 2000 |
| 1 V.S.A. § 313 | Executive sessions | 1957 2005 |
| 1 V.S.A. § 314 | Penalty and enforcement [for Vermont open meeting law] | 1957 1988 |
| 1 V.S.A. § 315 | Statement of policy [for free and open examination of records] | 1976 1976 |
| 1 V.S.A. § 317(c)(1) | [Public record exemption: confidential by law] | 1976 2006 |
| 1 V.S.A. § 317(c)(10) | [Public record exemption: lists of names] | 1976 2006 |
| 1 V.S.A. § 317(c)(12) | [Public record exemption: formulation of policy; privacy] | 1976 2006 |
| 1 V.S.A. § 317(c)(13) | [Public record exemption: appraisals or purchase price of real or personal property for public purposes] | 1976 2006 |
| 1 V.S.A. § 317(c)(14) | [Public record exemption: litigation] | 1976 2006 |
| 1 V.S.A. § 317(c)(15) | [Public record exemption: negotiation of contracts] | 1976 2006 |
| 1 V.S.A. § 317(c)(16) | [Public record exemption: voluntary information] | 1976 2006 |
| 1 V.S.A. § 317(c)(2) | [Public record exemption: limited disclosure] | 1976 2006 |
| 1 V.S.A. § 317(c)(24) | [Public record exemption: judicial or quasi-judicial deliberations] | 1976 2006 |
| 1 V.S.A. § 317(c)(25) | [Public record exemption: safety of persons and public property] | 1976 2006 |
| 1 V.S.A. § 317(c)(3) | [Public record exemption: professional standards of ethics or conduct] | 1976 2006 |
| 1 V.S.A. § 317(c)(30) | [Public record exemption: marketing database applications] | 1976 2006 |
| 1 V.S.A. § 317(c)(32) | [Public record exemption: safety of persons and public property] | 1976 2006 |
| 1 V.S.A. § 317(c)(33) | [Public record exemption: personal financial information] | 1976 2006 |
| 1 V.S.A. § 317(c)(4) | [Public record exemption: statutory or common law] | 1976 2006 |
| | [Public record exemption: criminal or disciplinary investigation] | 1976 2006 |
| | [Public record exemption: tax return and related documents] | 1976 2006 |
| | [Public record exemption: personal documents] | 1976 2006 |
| | [Public record exemption: test administration records] | 1976 2006 |
| | [Public record exemption: trade secrets] | 1976 2006 |
| | Procedure [for producing records for public inspection] | 1976 1976 |
| | Enforcement [of Vermont public records law] | 1976 1976 |
| | Penalties [for withholding public records] | 1976 2004 |
| | Penalties [for withholding public records] | 1976 2004 |
| | Access to public records and documents | 1976 2004 |
| | Victim and crisis worker privilege | 1994 1994 |

Search by agency, exemption type, combination, or keyword

Right to Know Database

- ❑ **DISCLAIMER**: The Right to Know database is for reference purposes only and in no way defines, limits, construes or describes the scope or extent of VT public records laws and exemptions to public access.
 - ❑ The **Right to Know database** is an ongoing project of VSARA that requires regular updating and review.
 - ❑ It is not a substitute for legal advice.
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PROCEDURAL REQUIREMENTS

- Procedure for responding to public record requests: [1 V.S.A. § 318](#)
 - All public agencies are obligated to comply.
 - Unless otherwise allowed by law, agencies must accept records requests in any manner or format. *For example, agencies may not require requests to be made in writing unless staff time, as authorized by law, will contribute to the cost of complying with the request.* [1 V.S.A. § 316\(c\)](#)
 - Upon receiving a record request, the custodian of the record must promptly produce the record for inspection. [1 V.S.A. § 318\(a\)](#).
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Clarity Helps Everybody:

- ❑ A request need not be in writing unless it triggers charge-able costs under [1 V.S.A. § 316\(c\)](#).
 - ❑ However, a clear written request is more likely to be understood by government.
 - ❑ An initial request may start out broad, as the requestor may not know what to ask or how (the government knows its records better than the public).
 - ❑ An agency can help a requester understand what may be available to help focus the request.
 - ❑ If some records responsive to a request clearly **do** exist and clearly are **not** exempt, it is best for everyone if the agency provides those records as promptly as possible, even though it may take more time to identify what other records exist, are responsive, and whether or not they are exempt.
 - ❑ No one is well-served if an agency withholds all records until it figures out which records it has or are and are not exempt
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Procedural Requirements

- If the record is in active use or in storage and not available for use at the time of the request, the custodian of the record must certify in writing that the records are not currently available and establish a day and time, within one week of the request, that the record will be available. [1 V.S.A. § 318\(a\)\(1\)](#)
 - If a record does not exist, the record custodian must certify in writing that the record does not exist. [1 V.S.A. § 318\(a\)\(4\)](#)
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Procedure: “Unusual Circumstances”

- “Unusual circumstances” means that the agency cannot comply with the time limits outlined in Public Records Law. If an agency needs an extension, it must submit a written notification to the individual making the request and specify the reason(s) why and the date when a determination will be made. Extensions may not exceed 10 business days and are only allowed for the following reasons:
 - the need to search for and collect the requested records from field facilities or other establishments separate from the office processing the request;
 - the need to search for, collect, and appropriately examine a voluminous amount of records; or
 - the need for consultation with another agency having a substantial interest in the determination of the request or among 2 or more components of the agency having substantial subject matter interest therein, or with the attorney general. [1 V.S.A. § 318\(a\)\(5\)](#)
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DENIALS OF ACCESS

- ❑ If access is denied by the record custodian and that denial is appealed to the agency head, the agency head must make a written determination within five business days.
- ❑ The written determination shall include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial. [1 V.S.A. § 318\(c\)](#)



Denials of Access- action by head of agency

- If the head of an agency upholds the denial of a request for records in whole or in part, the agency shall notify the person making such request of the provisions for judicial review of that determination under section 319 of Title 1.

[1 V.S.A. § 318\(a\)\(3\)](#)

- If the head of the agency reverses the denial of a request for records, the records shall be promptly made available to the person making the request. [1 V.S.A. § 318\(c\)](#)
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NEW [Act 059 of 2011]:

Must Confer with requestor,

May ask requester to narrow request

- “In responding to a request to inspect or copy a record under this subchapter, **a public agency shall consult with the person making the request** in order to clarify the request or to obtain additional information that will assist the public agency in responding to the request and, when authorized by this subchapter, in facilitating production of the requested record for inspection or copying. In unusual circumstances, as that term is defined in subdivision (a)(5) of this section, **a public agency may request** that a person seeking a voluminous amount of separate and distinct records narrow the scope of a public records request.” *1 V.S.A. § 318(d) as added by Act 059 of 2011*
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NEW [Act 059 of 2011]: Must redact and provide remainder

- It has always been best practice, whenever possible, to redact exempt information and provide the remainder of a document. Now it is mandated by statute:

“A public agency shall not withhold any record in its entirety on the basis that it contains some exempt content if the record is otherwise subject to disclosure; instead, the public agency shall redact the information it considers to be exempt and produce the record accompanied by an explanation of the basis for denial of the redacted information.” *1 V.S.A. § 318(e) as added by Act 059 of 2011*

NEW [Act 059 of 2011]: Agencies must provide accommodation for a disability of a requester

- “If a person making the request has a disability which requires accommodation to gain equal access to the public record sought, the person shall notify the public agency of the type of accommodation requested. The public agency shall give primary consideration to the accommodation choice expressed by the requestor, but may propose an alternative accommodation so long as it achieves equal access. The public agency shall provide accommodation to the person making the request unless the agency can demonstrate that accommodation would result in a fundamental alteration in the nature of its service, programs, activities, or in undue financial and administrative burden.” *1 V.S.A. § 318(f) as added by Act 059 of 2011*
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NEW [Act 059 of 2011] MANDATORY ATTORNEY FEES [in most instances] to a requester who successfully challenges an agency denial

- Under prior law, judges had the option to make the State (or a municipality) pay the attorney and other legal costs of a party who successfully challenged an agency denial- but such impositions of fees against agencies were more the exception than the rule.
 - Under new law, judges are required, except in narrow exceptions, to make an agency pay attorney and other legal costs to a successful challenger. *1 V.S.A. § 318(d) as added by Act 059 of 2011*
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Procedure: Copying Records

- Agencies with the equipment necessary for copying records must use the equipment to produce copies.
- Agencies have not been required to provide or arrange for the removal of a record for copying off-site.



Can I bring my own copy equipment?

- ❑ Section 316:
 - ❑ “(g) A public agency having the equipment necessary to copy its public records shall utilize its equipment to produce copies. If the public agency does not have such equipment, nothing in this section shall be construed to require the public agency to provide or arrange for copying service, to use or permit the use of copying equipment other than its own, to permit operation of its copying equipment by other than its own personnel, to permit removal of the public record by the requesting person for purposes of copying, or to make its own personnel available for making handwritten or typed copies of the public record or document requested.
 - ❑ “(j) A public agency may make reasonable rules to prevent disruption of operations, to preserve the security of public records or documents, and to protect them from damage.”
 - ❑ ***Digital Cameras are undefined under existing law.***
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Does an agency have to gather new information or create documents in order to respond to a records request?

- No. A requestor cannot obligate the government to create a record which is not already in existence or required by law.

Vermont Supreme Court decision in *Welch v. Seery*,
138 Vt. 126, 129 (1980)

FEES FOR COPIES OF PUBLIC RECORDS

- ❑ Agencies' fees for copying of public records must follow standards that are established by law. Absent any particular statutory fee, public agencies must establish fees based on what is allowed by [1 V.S.A. § 316](#).
 - ❑ Agencies may only charge and collect from the public the actual cost of providing the copy, including mailing or transmission. Staff time for complying with a public record request may not be charged or collected unless:
 - Staff time directly involved in complying with the request exceeds 30 minutes;
 - The agency agrees to create a new record; or
 - The agency agrees to provide the record in a non-standard format and the staff time involved exceeds 30 minutes.
 - ❑ Upon request, an agency must provide an estimate of the charge. The agency may request that any requests subject to staff time charges be made in writing and that all charges be paid prior to *delivery*. Receipts must be provided.
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UNIFORM SCHEDULE OF PUBLIC RECORD CHARGES FOR STATE AGENCIES

- ❑ [1 V.S.A. § 316](#): the Secretary of State is mandated to establish the actual cost of providing a public record that may be charged by state agencies. The Secretary of State is also required to establish the amount that may be charged for staff time.
 - ❑ The [Uniform Schedule of Public Record Charges for State Agencies](#) may only consider the following factors set forth in [1 V.S.A. § 316\(d\)](#):
 - ❑ The cost of the paper or the electronic media onto which a record is copied;
 - ❑ A prorated amount for maintenance and replacement of the machine or equipment used; and
 - ❑ Utility charges directly associated with copying a record.
 - ❑ The State standards are the “default” for what a local government may charge unless it has defined and set its own standards based on its actual costs.
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Allowable Charges:

- State, and default for many local records:

<http://vermont-archives.org/research/fees/pdf/fees.pdf>

- Specific local charges:

<http://vermont-elections.org/elections1/FeeSchedule.pdf>

What records must the government keep and for how long?

- ❑ The State Archivist sets standards for how long records should be kept and what should eventually be done with them, and agencies should not depart from these standards. [1 V.S.A. § 317a](#)
 - ❑ For more detail:
<http://vermont-archives.org/records/>
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Exempt records are still public records!

- ❑ It is a common misunderstanding for people to refer to records that are exempt from examination or copying as “nonpublic records” or to think that retention and disposition standards do not apply to exempt records.
 - ❑ Retention and disposition standards still apply to exempt records.
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Potential and actual requests and resulting obligations

- As long as an agency is following retention and disposition standards set by VSARA, it does not need to keep records based on hypothetical “what ifs” of what someone may someday ask.
 - **HOWEVER:** A public records request, lawsuit, or audit freezes any routine destruction of records until the matter is resolved.
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“Practical Obscurity” ... and its demise

- ❑ In the past, the law acknowledged what came to be known as “practical obscurity:”
 - ❑ Individual records, of many sorts and at many separate locations, were all open to the public, but it was logistically insurmountable for anything other than a massive effort to locate them all and weave them all together.
 - ❑ Technology has now changed this- completely.
 - ❑ “Mosaic Effect”- the potential ability to compile and analyze large amounts of data can make patterns and information emerge that would not be visible separately.
 - ❑ The law has not particularly kept up.
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Information is multiplying

- ❑ Over 90 percent of the data in the world has been created in the last two years alone.
 - ❑ In 2003, humans created more recorded information in that one year than they had created in *all* of the years- *combined*- before 2003.
 - ❑ Vast swaths of this new data/ "big data" are unstructured and at high risk of becoming unmanageable if not aggressively managed 😞
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Unplanned opacity problem

- Unmanaged information becomes utterly unwieldy in quantity and utterly opaque in content and organization, even to those who work directly with it.
 - It is even harder to use for outside persons and organizations, or to those who come later.
 - **Records Management is key to preventing and counteracting this.**
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VSARA is a resource

- ❑ Vermont State Archives and Records Administration (VSARA) is part of the office of the independently elected Secretary of State, separate from other units of State government.
 - ❑ VSARA does continual work with State and local governments to help them with records issues.
 - ❑ VSARA will not take sides in a specific dispute over access to records, but may be able to help various parties find a constructive resolution.
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Vermont State Archives & Records Administration

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