

Vermont Transparency Tour

2011



WHY ARE WE HERE?

- **Democracy – Accountability – Openness**
- **The public's right to know comes from the Vermont Constitution**
- **Vermont's open meeting and public records laws are some of our most important because they allow us direct access to the decisions that affect us.**
- **A full understanding of these laws makes everyone a better citizen.**



IN GOVERNMENT, THE ULTIMATE BOSS IS THE PUBLIC...

Vermont Constitution - Chapter 1, Article 6.

That all power being originally inherent in and consequently 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.



IN GOVERNMENT, THE ULTIMATE BOSS IS THE PUBLIC...

Declarations of public policy

1 V.S.A. § 311. Declaration of public policy; short title

. . . public commissions, boards and councils and other public agencies in this state exist to aid in the conduct of the people's business and are accountable to them pursuant to Chapter I, Article VI of the Vermont constitution.

1 V.S.A. § 315. Statement of policy

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. . . .



What is a “meeting”?

- 1 V.S.A. § 310(2)
- "Meeting" means a *gathering* of a *quorum* of the members of a *public body* for the purpose of *discussing* the business of the public body or for the purpose of *taking action*
- **What is a quorum?**
A majority of the Board
- **What is “discussing board business” or “taking action”?**
This means that if a majority of a board find themselves together at a social function they must take care not to discuss the business of the board!
- **School Boards must also follow the VT Open Meeting Law**
16 V.S.A. § 554



What is a “public body”?

- **1 V.S.A. § 310(3)**
- "**Public body**" means *any* board, council or commission of the state or one or more of its political subdivisions, *any* board, council or commission of any agency, authority or instrumentality of the state or one or more of its political subdivisions, or *any* committee of any of the foregoing boards, councils or commissions, except that "public body" does not include councils or similar groups established by the governor for the sole purpose of advising the governor with respect to policy.



To whom or when does the open meeting law *not* apply?

- The judicial branch of the government of Vermont or of any part of the same
- The public service board
- Any public body in connection with a quasi-judicial proceeding
- Site inspections for the purpose of assessing damage or making tax assessments or abatements
- Clerical work or work assignments of staff or other personnel
- Routine day-to-day administrative matters that do not require action by the public body . . . provided that no money is appropriated, expended, or encumbered.



Meetings & NOTICE

Public must be given notice of the meeting.

- **Regular Meetings**

- A public body needs to adopt a resolution specifying its regular meeting schedule in this instance, and provide an agenda on request

- **Special Meetings**

- The time, place and purpose of a special meeting must be publicly announced at least 24 hours before the meeting and requires a minimum of 3 public postings and to each member of the public body. If news media has provided a written request for notification of meetings, they must be notified.

- **Emergency Meetings**

- Emergency meetings are called to respond to “an unforeseen occurrence or condition requiring immediate attention.” May be held without public announcement, without posting of notices and without 24-hour notice to members, provided some public notice thereof is given as soon as possible before any such meeting.



Opportunity to be heard

All Public Bodies

- Public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting as long as order is maintained.
- Public comment shall be subject to reasonable rules established by the chairperson.

School Boards

- A School Board shall afford a reasonable opportunity to any person in the school district to appear and express views in regard to any matter considered by the School Board

16 V.S.A. § 554

- And if requested to do so shall give reasons for its action in writing.



Minutes

Public bodies must take minutes

“The minutes shall cover all topics and motions that arise at the meeting and give a true indication of the business of the meeting.”

- Minutes shall include at least the following:
 - All members of the public body present;
 - All other active participants in the meeting;
 - All motions, proposals and resolutions made, offered and considered, and what disposition is made of same; and
 - The results of any votes, with a record of the individual vote of each member if a roll call is taken.
- Minutes shall be matters of public record, shall be kept by the clerk or secretary of the public body, and shall be available for inspection by any person and for purchase of copies at cost upon request after five days from the date of any meeting.



WHAT RIGHTS DO THE MEDIA HAVE?

- Upon request, the agendas of regular or special meetings must be made available to the news media prior to a meeting.
- News agencies that wish to be notified of special meetings must provide a written request to the public body.
- Members of the news media and the public have the right to attend meetings and to tape or videotape meetings so long as it is not done in a manner that disrupts the meeting.
- The media and the public have the right to know the reason a board is going into executive session.



WHEN CAN A BOARD MEET IN PRIVATE?

- A board may only go into executive session upon a majority vote of the board (2/3 vote of a state board), on a motion made in open meeting, that indicates the reason for going into executive session. The only permissible reasons for going into executive session are set forth in **1 V.S.A. § 313**.
- A board may invite into executive session its attorney, administrative staff and persons who are subjects of the discussion or whose information is needed.
- No decision may be made in executive session. Decisions may be made in deliberative session so long as there is a written decision that is public record.



REASONS FOR ENTERING INTO EXECUTIVE SESSION

- (1) Contracts, labor relations agreements with employees, arbitration, mediation, grievances, civil actions, or prosecutions by the state, where premature general public knowledge would clearly place the state, municipality, other public body, or person involved at a substantial disadvantage;
- (2) The negotiating or securing of real estate purchase options;
- (3) The appointment or employment or evaluation of a public officer or employee;
- (4) A disciplinary or dismissal action against a public officer or employee; but nothing in this subsection shall be construed to impair the right of such officer or employee to a public hearing if formal charges are brought;
- (5) A clear and imminent peril to the public safety;



More Reasons for Entering Executive Session

- (6) Discussion or consideration of records or documents excepted from the access to public records provisions of subsection 317(b) of this title. Discussion or consideration of the excepted record or document shall not itself permit an extension of the executive session to the general subject to which the record or document pertains;
- (7) The academic records or suspension or discipline of students;
- (8) Testimony from a person in a parole proceeding conducted by the parole board if public disclosure of the identity of the person could result in physical or other harm to the person;
- (9) Information relating to a pharmaceutical rebate or to supplemental rebate agreements, which is protected from disclosure by federal law or the terms and conditions required by the Centers for Medicare and Medicaid Services as a condition of rebate authorization under the Medicaid program, considered pursuant to 33 V.S.A. §§ 1998(f)(2) and 2002(c).



MEETINGS

Meetings held without respecting the details of the law may be illegal, and the courts regard what is done in those meetings as voidable.

More importantly, illegal meetings offend our notions of openness and accountability and therefore, our democracy.

In Vermont, the people rule, sometimes directly, sometimes through elected or appointed representatives, but always with the benefit of public scrutiny.



Are There Penalties?

§ 314. Penalty and enforcement

- (a) A person who is a member of a public body and who knowingly and intentionally violates the provisions of this subchapter or who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting for which provision is herein made, shall be guilty of a misdemeanor and shall be fined not more than \$500.00.
- (b) The attorney general or any person aggrieved by a violation of the provisions of this subchapter may apply to the superior court in the county in which the violation has taken place for appropriate injunctive relief or for a declaratory judgment.

Except as to cases the court considers of greater importance, proceedings before the superior court, as authorized by this section and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(Amended 1979, No. 151 (Adj. Sess.), { 4, eff. April 24, 1980; 1987, No. 256 (Adj. Sess.), { 5.)



Questions?

- Does a Selectboard/School Board need to comply with the open meeting law if it meets online?
- Is it a meeting if a Selectboard/School Board adjourns its regular meeting and a quorum sits around talking and town issues come up – i.e. budget?
- Does a SU School Board “negotiating council” constitute a public body?
- Limiting public discussion?



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.”

1V.S.A. § 317(b)

***All Government Records = Public Records
Exempt Public Records = Public Records
Remember! Records Are Not Limited to Paper***



Public records policy

§ 315. STATEMENT OF POLICY

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.



When can the public inspect and copy?

- 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. *1V.S.A. § 316(a)(1)*.
- For public agencies of municipalities and other political subdivisions of the State, the right to inspect and copy applies during customary business hours. *1 V.S.A. 316(a)(2)*.



Don't ask...

In general:

“The 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.



PUBLIC RECORD EXEMPTIONS

Public agencies are required to produce records for inspection or copying *unless* the record is listed as exempt in Title 1, Chapter 5, Subchapter 3 of VT Statutes Annotated *1V.S.A. § 315 - 320*

While a list of public records exemptions is found in *1V.S.A. § 317*, additional specific exemptions are also found elsewhere in State and Federal laws and regulations.



PUBLIC RECORDS EXEMPTIONS

Examples of commonly exempt records:
personal documents relating to an individual, investigations, trade secrets, tax records...

Each agency should maintain a compilation of specific State and Federal laws and regulations that affect inspection and copying of records.



BURDEN OF PROOF

“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 [internal citations omitted]



RIGHT TO KNOW DATABASE

A tool for locating and identifying laws that affect access to VT public records is available on the Secretary of State's VSARA website...

You can search exemptions by agency, exemption type, or through a keyword search

<http://vermont-archives.org/records/access/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. Agencies should seek the advice of legal counsel prior to denying access to any public record.*

*The **Right to Know database** is an ongoing project of VSARA that requires regular updating and review.*



COMPLYING WITH A REQUEST

- All public agencies are obligated to comply.
- Unless otherwise allowed by law, agencies must accept records requests in any manner or format.
- An agency may require requests to be made in writing if staff time will contribute to the cost of complying with the request.
1V.S.A. § 316(c)
- Upon receiving a record request, the custodian of the record must promptly produce the record for inspection. *1V.S.A. § 318(a)*



COMPLYING WITH A REQUEST

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.

1V.S.A. § 318 (a) (1)

If a record does not exist, the record custodian must certify in writing that the record does not exist.

1V.S.A. § 318 (a) (1)



COMPLYING WITH A REQUEST

- If the record custodian believes that the record is exempt from public access, the custodian of the record **must certify in writing** what records are exempt and the basis for the denial which exemption applies.
- Unless there are “unusual circumstances,” a **certification must be made within 3 business days of receiving the request**; the custodian of the record must inform the requester that she or he has a right to appeal to the head of the agency.
- If the denial of access is appealed and the agency head determines that the record custodian must comply with the request, the records must be made available promptly.

1V.S.A. § 318 (a)(2)



COMPLYING WITH A REQUEST

“Unusual circumstances” means:

- 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:
 - (1) the need to search for and collect the requested records from field facilities or other establishments separate from the office processing the request;
 - (2) the need to search for, collect, and appropriately examine a voluminous amount of records;
 - (3) 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. *1V.S.A. § 318(a)(5)*



ACCESS DENIED?

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 5 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)*



MORE ON DENIAL

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)*)



NEW [Act No. 59 of 2011]:

Must Confer; 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 No. 59 of 2011*



NEW [Act No. 59 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 No. 59 of 2011



NEW [Act No. 59 of 2011]:

Agencies must provide accommodation for a disability of 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 No. 59 of 2011



NEW [Act No. 59 of 2011] - MANDATORY ATTORNEY FEES 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 No. 59 of 2011



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.



Do I 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)



Agencies may charge to create documents that don't yet exist

If an agency receives a request for a record that does not already exist, and is willing and able to develop the requested information, it may charge for that undertaking.

It should provide an estimate of the charges in writing in advance, and may require payment before it commences the effort.

1 V.S.A. § 316(c)(2)



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.



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.



Are There Penalties?

§ 320. Penalties

(c) A person who willfully destroys, gives away, sells, discards, or damages a public record without having authority to do so shall be fined at least \$50.00 but not more than \$1,000.00 for each offense.

(Added 1975, No. 231 (Adj. Sess.), { 1; amended 2003, No. 156 (Adj. Sess.), { 15; 2007, No. 96 (Adj. Sess.), { 2; 2011, No. 59, { 6.)



Questions?



**Thank you for coming! Please call or visit
our office with any questions!**

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