



Opinions

Office of the Vermont Secretary of State

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September 2011

page 1

Transparency Tour coming to a town near you!

page 3

Public Records Opinions

page 5

Constitution Day
September 17th!



Quote of the Month

Government must be a transparent garment which tightly clings to the people's body.
-- Georg Buchner

In this Issue

Quote of the Month	1
Voice From the Vault	2
Opinions of Opinions.....	3
Civics Behind the Scenes	5
Elections Calendar.....	6
Upcoming Events.....	7

A Message from the Secretary



This month's issue of Opinions is dedicated to the topics of public records and government transparency.

You will see from reading Greg Sanford's column that there is a rich and interesting history to our state's approach to public records. In our Opinions on Opinions column, we have provided 10 examples of public record and open meeting related topics. We hope you find the information helpful as you deal with the day-to-day realities of your work as it relates to public records requests and open meeting questions.

My staff and other stakeholders have been working to plan my "Vermont Transparency Tour." We will be coming to Montpelier, Morrisville, St. Johnsbury, Newport, St. Albans, Burlington, Middlebury, Rutland, Bennington, Brattleboro, Springfield and White River Junction. Those involved in the discussions of the Transparency Tour are: Vermont Press Association, Vermont League of Cities and Towns, Vermont Municipal Clerks and Treasurers, Vermont School Boards Association, Vermont ACLU, and Common Cause Vermont.

These presentations – expected to last about 2.5 hours – will be conducted from mid-October through mid-November – the majority occurring in the evening. We are aware that many municipalities hold their meetings on Monday, Tuesday, Wednesday and Thursday evenings, and there will be conflicts for some of you. Our hope is that, because this topic is of such high level of importance that, if necessary, your board will be able to adjust its meeting schedule to attend one of these educational training sessions; or you will be able to attend one of the others being offered around the state – the tour is designed to have at least two sessions within a one-hour driving range.

The format will include a short presentation of both the amended public records law and the current open meeting law. Following this presentation, a panel of representatives, from the above list, will join in a Q & A session that will give you an opportunity to discuss real life examples of what you experience every day; and how the law is carried out in practice. The open meeting law may change in the upcoming legislative session so we are interested in any improvements you believe should be implemented.

I am looking forward to having this discussion with members of local boards including school, select board/city councils, planning/zoning, other local officials like town clerks and managers, and the public as we work together to ensure Vermonters have improved access and increased transparency in public records and meetings.

It is clear this issue is of great importance to all Vermonters. Thanks for your hard work and dedication to serving Vermont!

James C. Condos
James C. Condos, Secretary of State

Voice from the Vault

by Gregory Sanford, State Archivist

Of Doppelgangers and Public Records

I keep running into myself. This reflects, in part, my longevity as state archivist: as I create more and more records a few are substantive enough to cross the archival threshold where I encounter them while doing research. It also reflects the persistence of certain issues of interest to the Vermont State Archives and Records Administration (VSARA).

The public record laws are a case in point. Changing political, legal, and social contexts coupled with evolving information technologies continually raise questions about the adequacy and application of our laws and practices. VSARA needs to know the record laws so we can manage and help others manage public records against these legal requirements. Over the decades I occasionally played minor roles in these recurring legislative examinations of the public record laws. Consequently, as we researched the history of those laws I kept encountering my younger doppelganger and my evolving understandings of records and information management.

Our history of the public record laws can be found at: <http://vermont-archives.org/govhistory/governance/PublicRecords/>. It is an ongoing project and as time and resources allow we will continue to add to it. We welcome your ideas.

Beyond the unanticipated autobiographical encounters, I find the project fascinating as persisting tensions are revealed, hidden contexts re-emerge, and assumptions are challenged. Gaps in the documentation of the public record laws serve as reminders of the occasional gulf between our vision and our practice.

Even with gaps the research reveals an intricate weave of cultural self-perception, democratic ideals, and political realities. Right from the start in the mid-Seventies, for example, there were tensions about applying public record requirements to municipalities. Vermont's cultural self-perception was anchored in town-based democracy and thousands of Vermonters volunteered to serve in local government. One of the virtues of local government, we claimed, is that it is highly visible and thus accountable to town residents. Would applying the public record law to towns imply a lack of trust in municipal officials?

Some state officials and members of the news media testified that it was hard, if not impossible, to access local records. Supporters of local control of municipal records succeeded in removing municipalities from the public agency definition in the original public records bill (H. 276 of 1976). Two years later Act 202 put municipalities back under the public record act; the trade off was granting municipalities a form of deliberative process protection. (Exemption 17)

The contours of this debate can be traced through the links on the public agency definition and Exemption 17 sections of the new presentation: <http://vermont-archives.org/govhistory/governance/PublicRecords/Exemptions/1VSA317.htm>. I subsequently discovered more 1976 legislative transcripts of the municipal debate that we will put up as time allows.

This is but one of numerous insights gained by perusing the source documents we have online. We decided to use public records to document the public record laws for a variety of reasons, starting with the fact that it provides an example of the value of public records.

The records can help challenge our assumptions. When I first discovered the 1976 privacy bill introduced at the same time as our first public records law, I assumed it was a companion bill designed to protect personal information in public records. Research revealed, however, the bill—which failed passage—was directly tied to a State initiative to consolidate data processing. Privacy advocates worried about this enhanced ability to mix and match personal data beyond the original reasons for collecting it. For more on the privacy bill and my original assumption, see <http://vermont-archives.org/publications/voice/pdf/PrivateLifeOfPublicRecords.pdf> and the right to privacy section in our spotlight on records <http://vermont-archives.org/research/spotlight/records.htm>).

continued on page 4...

Opinions of *Opinions*

by Secretary of State Jim Condos

1. **Board May Meet In Deliberative Session So Long As Final Decision Is Written.** A board may meet and make its decision in deliberative session so long as it is acting as a quasi-judicial body, and the decision of the board is in writing. The decision should include findings (the facts that the board believes are compelling) and the conclusion. It should also name who has participated in making the decision, indicating those who may have dissented. A deliberative session is not an "executive session" from which the public is excluded, but where no decisions can be made; rather, it is a total exemption from the open meeting law. And, unlike the executive session, in deliberative sessions the board DOES take action and DOES make decisions. The decision is then put in writing and signed by the board and becomes a public document. A Development Review Board hearing applicant's requests for permits is an example of a quasi-judicial board.

2. **Couple Cannot Keep Marriage Out Of The Public Record.** In one town a couple wished to get married but asked the clerk not to include their names in the public record as they did not want family members to know of their marriage. State law makes the marriage records public records. (18 V.S.A. § 5012) However, the clerk might agree to keep their names out of the town report. Note that if both members of the couple live in the same town that will be the only town in which they can register their marriage. However, nothing would stop the couple from leaving the state to marry in accordance with the laws of another state.

3. **Library May Keep Custody of Videos produced by a local public access TV station which record Board Meetings.** No law would prevent the local library from collecting videos of board meetings made by a local public access TV stations and then checking them out to interested residents. This type of video is not an official public record because it was not made by, or paid for, a public agency in the course of agency business. If a town employee or public official records the video it is a public record and falls under public record requirements, including accessibility. The videos should be part of the municipality's record management plan and could, for example, be scheduled for disposal, including to the library, under an approved record schedule. (1 V.S.A. §317a)



4. **The Official Public Record For Action Taken At A Selectboard Or School Board Meeting Is The Minutes Kept By The Clerk Or Recording Secretary.** The draft of the official minutes must be made available for inspection and copying within 5 days of the meeting.

5. **Listers or Zoning Administrator May Move Office To A Private Residence.** There is no state law preventing the listers from moving the listers' office to a private residence. However, as custodians of the records they must make the lister cards and records available for public inspection at reasonable times during customary business hours.(1 V.S.A. §316 a) If copies of the property files were also kept at the Town Clerk's office this requirement would be satisfied. In addition, meetings of the board must be open to the public – even if the meetings are held in a private residence. (1 V.S.A. §§ 312, 316)

6. **Intra-Departmental Communications Preliminary To A Policy Decision Or Budget Vote Are Not A Public Record.** In one municipality the planning staff submitted a recommendation to the planning commission about the drafting of a particular provision of the town plan. This memo was preliminary to the commission taking action to adopt amendments in writing to the town plan. The question was whether this recommendation was public record. 1 V.S.A. § 317 (17) provides that intra-departmental communications are exempt from the public records law "to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action or precede the presentation of the budget at [an open] meeting." Under these facts, the recommendation memo is not a public record because it is preliminary to a determination of policy by the commission. However, unless the planning commission can articulate a reason for keeping the memo confidential we recommend making it public. Note also that records that are exempt from the public records law may be discussed in executive session. 1 V.S.A. § 313 (6)

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- 7. Town Clerk Must Record Properly Submitted Deed And Survey (Which Conforms To Statutory Requirements In 27 V.S.A. §341)** Even If An Abutter Objects That It Contains Incorrect Information. The recording function is a ministerial duty that allows the documents to become public documents which provide notice to others. If a correction needs to be made, a new corrected deed or survey must be submitted for recording.
- 8. The Vermont Public Records Law Provides That Minutes Of ALL Meetings Of Public Bodies, Including Committees And Subcommittees, Shall Be Available For Inspection And/Or For Purchase Of Copies Upon Request After Five Days From The Date Of Any Meeting. (1 V.S.A. §312(b)2)** Some boards mistakenly believe that they can wait until five days after the minutes have been approved at the next meeting of the board. This is not the case. Draft minutes must be made available five days after the meeting. The person drafting the minutes can boldly stamp them "DRAFT" on each page, or write DRAFT across the top, but the intent of the statute is that interested persons must be able to review the minutes after five days from the meeting. The clerk of the board or minute preparer must submit a copy to the town clerk or a public official in the town office so that the minutes can be inspected and copied within five days after the meeting. Draft minutes or other public records can also be posted on a municipal website although this is not required.
- 9. Although Death Certificates Are Public Records, The Town Of Residence May Not Have A Public Record If The Person Died In An Out Of State Hospital.** Clerks from Massachusetts generally do not send death certificates to Vermont town clerks when the deceased was a resident of the Vermont town because Massachusetts law requires that municipal clerks must only send copies to in-state clerks. Likewise Vermont law only requires the mailing of certified copies of birth, marriage and death records to Vermont town clerks. (18 V.S.A. §5009)
- 10. The Public Records Law In Vermont Requires That Public Officials, Including All Municipal Boards And Officers, Must Provide Copies Of All Documents That Are Not Exempt From Disclosure Upon The Request Of Any Person. 1 V.S.A. §316)** There may be some public officials who have misunderstood the procedural language in section §318(a) and believe that public officials must only produce records for inspection by any person, but are not required to provide copies upon request. This is not the law. Section 318 must be read together with §316 (a). Section 316 clearly provides that a person may request copies. If a request is made for a very large number of documents, the public official may consult with the requestor to clarify or refine the request, notify the person in writing that it needs an extension of time and may charge for staff time after the first 30 minutes, and may take a reasonable amount of time to copy documents (not more than 10 days). (17 V.S.A. §§316(b)-(e), 318(a)5)

In our monthly Opinions, we provide what we believe the law requires based upon our legal judgment, years of observing Vermont's local government practices, and Vermont Court decisions. This information is intended as a reference guide only and should not replace the advice of legal counsel.

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Source documents also allow views not available by a simple reading of the statute. For example, we extensively used what is called the original act. These show a bill's language as first proposed and all changes subsequently voted as it moves toward legislative passage. This is how we know that municipalities were specifically removed from the original public records act. Often what is deleted from the bills provide perspectives from where you can best see the battlegrounds over which public record's legislation are commonly fought. Go to the section on access to records <http://vermont-archives.org/govhistory/governance/PublicRecords/Access/access.htm> and click on Act 159 of 1996. Now scroll toward the end of the original act and read through all the deleted material. Here you will see attempts to address records issues that still bedevil us.

Our discussions of public records and the right to know provide an interesting mirror of our society and of our faith in government. If I stare hard enough I can also catch a reflection of me.

Civics Behind the Scenes

by Olivia Gay, Civic Education and Voter Outreach Coordinator

Secretary of State's Office offers resources on Vermont Constitution



Since Constitution Day is coming up on September 17th, we are highlighting "***Revolution, Rights and Rules: A Student's Guide to the Vermont Constitution.***" You can order the booklet online and can preview it on our website: <http://www.sec.state.vt.us/kids/publications.html>

The United States Congress adopted a law in 2004 requiring every school that receives federal funds to teach about the Constitution on September 17th, the day the document was adopted in 1787. Secretary of State Jim Condos is urging Vermont schools to look not only at the United States Constitution, but to also take time to study Vermont's own constitution.

"Constitution Day is the perfect time to remind teachers how to incorporate civics education into the curriculum," notes Condos, "teaching students about the democratic process helps them become better citizens in the future. There is no better way to honor the founders of this country – and the founders of Vermont - than by developing the habits of citizenship in our next generation."

"***Revolution, Rights and Rules: A Student's Guide to the Vermont Constitution***" helps middle school students understand the 224 year-old document which is the founding document of Vermont. The 40 page booklet includes questions, writing assignments, and activities that encourage students to use analytical and critical thinking skills to express their own ideas. It concludes with an exercise where the class creates its own constitution. The exercises can easily be adapted for lower and higher grade levels.

For exemplary resources on the U.S. Constitution, we recommend the Center for Civic Education's We the People curriculum: <http://new.civiced.org/wtp-the-program> . Our colleagues at the Vermont Bar Association administer this program in Vermont. For more information, please contact Kevin Ryan, Director of Education & Communication, kryan@vtbar.org or (802)223-2020. The VBA can also provide your students with copies of the U.S. Constitution at no charge. If you would like a set of Constitutions for your classroom, just call Kevin Ryan at the number above.

In addition to the constitution guide for students, the Secretary of State's Office offers "***Vermont History, Facts and Fun,***" "***The Adventures of Bill – The Real Life Account of How a Vermont Bill Becomes a Law,***" and a series of booklets on the state's unique town meeting process.

You can explore all of our programs and order materials online at www.sec.state.vt.us/kids/index.html or by calling (802) 828-1296 or (800) 439-8683. If you have any questions, please contact Olivia Gay, Civics Education and Voter Outreach Coordinator, at (802) 828-1296 or Olivia.Gay@sec.state.vt.us.

Elections Calendar

SEPTEMBER 2011

10 - First day for members of political party to meet in caucus in their respective towns for the purpose of party affiliation. (17 V.S.A. § 2302)

15 - By September 15 of each odd-numbered year the board of civil authority shall review the most recent checklist name-by-name and consider, for each person whose name appears on the checklist, whether that person is still qualified to vote. 17 V.S.A. §2150(c)

16 - (This could change depending on what the date of the caucus is set for.) Last day for the chairman of a state committee of a political party to mail a notice of the date and purpose of the caucuses to each town clerk and to each town chairman of the party. 17 V.S.A. § 2302

20 - Town clerks must send a letter certifying compliance with 17 V.S.A. §2150 to the secretary of state. 17 V.S.A. §2150(d)(7)

30 - Last day for members of a political party to meet in caucus in their respective towns. 17 V.S.A. § 2302

Within 72 hours after the caucus, the chairman and secretary of the town committee shall mail to the secretary of state, the chairmen of the state and county committees, and the town clerk a copy of the notice calling the meeting and a certified list of the names and mailing addresses of the officers and members of the town committee and delegates to the county committee. 17 V.S.A. § 2307

OCTOBER 2011

17 - Last day for U.S. Congressional candidates to file FEC quarterly reports for the October quarter (July 1-Sept. 30). 2 U.S.C. § 434(a)(2)(B) and 17 V.S.A. §2103(13)

DECEMBER 2011

26 - First day to warn the first public hearing if charter adoption, amendment or repeal is to be voted at town meeting (70 days before town meeting). 17 V.S.A. §§ 2641(a), 2645(a)(3) and (6)



Reminder to Town Clerks and Boards of Civil Authority

By September 20th of each odd numbered year (including this year, 2011), the town clerk shall send a letter to the Secretary of State to confirm that the BCA has completed challenge letters and purging the checklist. 17 V.S.A. §2150(d)(7)

Please review your checklist to remove names of persons who have died, or have given written notice of registration in another jurisdiction or requesting removal from the checklist. Then review the checklist to find persons that a BCA member believes has moved out of town in order to send challenge letters with a form response and a postage paid return envelope or a postage paid return postcard to persons who the BCA thinks have moved from your town.

Upcoming Events

September

8th-9th NNECAPA- Northern New England Chapter of the American Planning Association at Main Street Landing Performing Arts Center, 60 Lake Street, Burlington Vt.

Register at www.nnecapa.org

19th-20th VMCTA- Celebrates 75 years! The Vermont Municipal Clerks' and Treasurers' Association Annual Meeting to be held at Lake Morey Resort in Fairlee, VT. Look for more information at www.vmcta.org

October

6th VLCT Town Fair- Vermont League of Cities and Towns Annual Town Fair will be held at Killington Grand Hotel in Killington, VT. You may view the complete Town Fair registration packet and register online at www.vlct.org/eventscalendar/.

20th-21st VSBA- The Vermont School Boards Association will hold its 2011 Fall Conference in conjunction with the Vermont Superintendents Association at Lake Morey Resort in Fairlee, VT. Registration will be available soon at www.vtvsba.org/.

November

16th-18th NEACTC- New England Association of City and Town Clerks will hold its 44th Annual Conference at the Hilton Mystic, in Mystic Connecticut. Look for more information at www.newenglandclerks.org/

We are still asking folks to let us know if you are willing (and able) to receive this newsletter electronically. If so, please contact us in one of the following ways:

email: secretary@sec.state.vt.us

fax: 802-828-2496

post: 128 State Street, Montpelier, VT 05633-1101

We ask that you include the information from your current Opinions mailing label. Thank you very much!



Spread the News!

Do you know of any upcoming events that should be included in *Opinions*? The next issue will come out in early October. Please email or call Nancy Lynch at 828-2148 or nancy.lynych@sec.state.vt.us to submit an event.

Thanks!

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Thank you for helping us keep Opinions running efficiently!

