

Opinions

Office of the Vermont Secretary of State



Vol.7, #8

September 2005



A Message from the Secretary

Most of us would feel offended if in order to vote we were required to show our completed ballots to two Justices of the Peace or some other person – even if those people were sworn to secrecy.

The belief that we have a right to privacy in our vote is a strong Vermont value, and many of our election procedures have been put in place to ensure that privacy. It is easy to understand, then, why voters with physical disabilities that leave them unable to see a ballot or unable to hold a pencil to mark a ballot, or who are unable to read are so pleased about the new Federal requirements that every polling place have some technology that would permit voters with disabilities to vote independently and privately.

The Help America Vote Act (HAVA) gives states until January 1, 2006 to provide at least one voting system at each polling place that is disabled-accessible and may be used by visually-impaired voters in private and without help. This past month we were pleased to announce that the state will be using vote-by-phone technology in 2006 to ensure equal access to voting for disabled voters.

We decided to purchase a vote-by-phone system rather than a computer-voting system because it was the most voter- and poll-worker-friendly system we've seen. This system will also save Vermont millions of dollars compared with the other technology currently available that requires the purchase of expensive equipment that is costly to program.

This is how it will work on Election Day: the disabled voter simply signs in at his or her designated polling place and asks to vote by phone. Poll workers use a designated telephone (provided by our office) to call the system, enter the appropriate access IDs and give the phone to the voter. The system reads the ballot to the voter, who indicates his or her choices by pressing the corresponding numbers on the telephone key pad. The system then generates a paper ballot, scans it and reads it back to the voter so that he or she may verify that the ballot is correct before casting it. The ballots cast in this way will be centrally counted at the Secretary of State's Office, which will help ensure the privacy of the vote.

Deborah L. Markowitz, Secretary of State

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Karl Rove v. Erin Brockovich: Musings on Accountability and Why We Create Records

Last month I shared some of my pleasure reading. I also do extensive professional reading in order to keep up with trends and possible models. Sometimes it all seems like too much. I subscribe to professional journals and newsletters; am on several listservs (MUNINET being but one); and receive various studies, reports and fact sheets from organizations such as the National Association of Government Archives and Records Administrators and my recently discovered favorite: NAID, The National Association for Information Destruction. There is no way to keep up with all this information.

One publication I always take time for is *Archivaria*, the journal of the Association of Canadian Archivists. It unfailingly has well written articles of interest. A recent issue (Number 55, Spring 2003, okay they are running a tad behind) is no exception.

The issue had two articles on whether stronger right to know laws lead governments to either not create, or to destroy, records. Anecdotal tales suggested that this is the case, but a preliminary analysis of selected Canadian agency and department records did not find any changes in record creation that could be linked to new freedom of information laws.

What the study suggested was that record creation is strongly embedded in government culture. One reason is that we create records of necessity; we need them to meet legal, regulatory or administrative requirements. We need records to move processes forward and as instruments of control in an increasingly complex organizational and service delivery environment. We also create records to overcome periodic organizational disruptions, such as changing administrations or staff turnover.

Accountability plays a role, though not always linked to higher constitutional mandates. Accountability may simply be the need to protect yourself by documenting that you did what was right, even if politically inexpedient. Finally there is the very human desire to leave a lasting record, to anchor a place in history.

The good news that stronger right to know laws do not curtail record creation is tempered by other findings. Record creation may remain unchanged, but barriers to access may be raised. A government function might be transferred to the private sector, which is not governed by freedom of information requirements. Excessive costs for copies, unwarranted extensions of response time, or over-broad interpretations of exemptions may be used to discourage access.

I have, alas, seen examples of all these responses in Vermont. I also see a changing context for how “accountability” is practiced. I recently wrote a paper for a panel on gubernatorial records convened at the annual meeting of the Society of American Archivists. The paper addressed aspects of our experience with Governor Dean’s records during the presidential primaries.



I noted that accountability is increasingly practiced by surrogates, not citizens. Gov. Dean's primary opponents, not concerned citizens, came to the Archives. Their interest was in selectively using the records to de-rail his candidacy. This was not a unique experience and I cautioned my colleagues not to be distracted by occasional tales of heroic citizens persisting in archival research to achieve a public good. In today's political climate we are more likely to be visited by Karl Rove than Erin Brockovich. This generates negative perceptions about records among public officials, a changing cultural context that may influence recordkeeping more than stronger freedom of information laws.

It is important that we, as public archivists, understand this changing context of "accountability" and focus on ways to re-enforce records as a valuable institutional resource.

The New England Archivists will be holding their Fall meeting at the University of Vermont on October 14-15. There are several sessions that may be of interest to municipal clerks, including one on how to use outreach to improve perceptions of records. There will also be an open discussion forum on government records chaired by the city clerk of Nashua, N.H.

For more information go to: <http://www.newenglandarchivists.org>

Update from the Elections Division

New Applications to the Checklist (Voter Registration Forms)

We are having new Applications to the Checklist printed that contain a place for HAVA-required information including VT DMV Driver's License or Personal I.D. #'s. We will be having the printer send at least one packet (100 applications) to each town and more to larger towns toward the end of September. **Please discard and do not distribute the old forms after you receive the new forms.** If you need additional packets, please contact David Crossman at 828-0771 or email dcrossman@sec.state.vt.us.





Opinions of Opinions

- 1. Selectboard and school board records should be maintained separately in the town clerk's Office.** The town school district is a separate municipal corporation from the town or city. The records for each municipal corporation should be maintained separately to avoid confusion.
- 2. Clerk is not required to search and copy.** The public records law only requires the custodian of the records to make the records available for "public inspection" and copying (if you have copy equipment) during your regular office hours. The custodian may, as a courtesy, collect, copy and send the requested records, but this is a courtesy only - it is not required by law.
- 3. Public has a right to be heard at open meeting.** Public boards must allow the public reasonable opportunity to express its opinion on matters considered by the public body during the meeting, subject to reasonable rules established by the chair. 1 V.S.A. §312(h) Vermont law makes it clear that a board cannot eliminate all public comment; however, it does not clearly articulate the limits of the board's control over public comment. Not surprisingly, boards and citizens may differ in interpreting how much comment and what type of rules provide "reasonable opportunity" to participate. What makes it even more challenging is that the appropriateness of the rules governing participation may change depending upon the matters under consideration by the board. At a minimum, we suggest that the board chair should articulate the procedures for public comment and the board's rationale for the procedures at the beginning of each open meeting.
- 4. Non-residents may participate in public meetings.** The rule that only voters can speak unless the assembly votes to allow the person to participate applies only to the Annual and Special meetings of the town. The open meeting law provides that members of the public (not just voters) have the right to speak on public issues at meetings of public bodies. 1 V.S.A. § 312
- 5. Assistant treasurer must be reappointed at new term.** Vermont law requires the treasurer to reappoint his or her assistant treasurer each time he or she is re-elected or re-appointed. 24 V.S.A. §1573 The reappointment must then be filed with the town clerk. A new oath of office should be taken and filed at the same time. If an assistant treasurer leaves office or is terminated, a revocation of the appointment should be filed with the town clerk.
- 6. School district clerk must appoint an assistant clerk.** After his or her election as a town school district clerk, a union school district clerk, a unified district clerk or an incorporated district (I.D.) Clerk, the elected clerk should appoint one or more assistant clerks. The assistant clerk is authorized to perform all of the duties of the clerk in his or her absence and the clerk is responsible for his or her assistant's official acts. The assistant clerk must be sworn in before taking office. 16 V.S.A. §551 and 24 V.S.A. §1170,1171.
- 7. Towns are not required to use bid process.** There is no state statute that requires towns or town cemeteries to use a public bid process. However, many towns have adopted public bid policies, and

some towns include bidding requirements in their charters. Whenever a public official may be an interested bidder, a public bid process should be used to ensure that the public has confidence in the selection process. Note that the law requires public bidding in many school district contracts.



8. **Board members who bid on town contracts must not participate in discussion or vote on contract.** Whenever a board member wishes to bid on a town contract the board member should remove him or herself from the board for the purpose of the discussion and vote. To avoid even the appearance of undue influence the board member should not be present during the discussion and vote.
9. **Board members should stay away when board decision could affect their pocketbook.** Whenever a board member has a financial interest in a decision of the board he or she serves on, the board member should not only not participate in the decision but he or she should not be present during the discussion of the matter. This is because it is important for the public to feel confident that the decision was made in the best interest of the community, and that the interested board member did not exercise undue influence on other board members. Note that there is no law that regulates this type of conflict of interest outside a quasi-judicial proceeding. However, the law permits communities to adopt ethics policies that would reach these types of conflict of interest either by vote of the board or by a voter petition. 24 V.S.A. § 2291
10. **Selectboard member/ justice of the peace is only entitled to one vote on the Board of Civil Authority.** Even though the BCA is made up of justices of the peace and selectboard members and the town clerk, a person who is elected to serve in more than one of those offices can only fill one seat on the board. This means that when there is a dual election, the number of board members on the full board is reduced by one for purposes of calculating a quorum. For example, if a town normally has a BCA made up of five selectboard members, 15 justices and a town clerk, the board would be 21 members and a quorum for other than election purposes would be 11. If, however, in the same town, two select board members were also elected Justices of the Peace, the board would be 19 members and a quorum for other than election purposes would be 10. A person cannot cast two votes by virtue of being elected to two different offices. **NOTE: For tax appeals, at least three members must be present and then a majority vote of the board members present.**
11. **Vacancy in independent justice position is filled by governor without recommendation.** Vermont law does not tell us who can make recommendations to fill a justice of the peace vacancy created by the death or resignation of an independent justice. When 17 VSA §2402 was amended to allow citizens to petition for the office of justice of the peace as independents, section 2623 was not amended to address the treatment of vacancies. Section 2623 provides that the town committee of the political party of the justice who created the vacancy may make recommendations to the governor, and then the governor may appoint a qualified person, whether or not the appointee is recommended by the party committee. The law does not suggest a procedure for recommendation for filling the vacancy of an independent justice, although the vacancy will be filled by appointment by the governor.

12. BCA has flexibility when scheduling tax appeal hearings. 32 V.S.A. §4404 requires tax appeal hearings to start within the 14 days after the last date allowed for a notice of appeal, but it does not require that the hearing be completed on that date. This means that the BCA can use the initial hearing to set a schedule of hearings to be held at later dates. The BCA must then “continue” the hearing to each subsequent date. Note that whenever a hearing is postponed at the request of an applicant rather than convened and then continued to a date certain as described above, the board should obtain a waiver from the appellant. It is within the discretion of the BCA to allow postponement to a later date at the request of the appellant or insist on going forward on the scheduled date.

13. BCA must hold hearing even in absence of appellant. If a person bringing a tax appeal to the BCA chooses not to attend the hearing, the BCA must still hold the hearing, consider the appellant’s written submission, inspect the property and render a decision. However, if the appellant refuses to allow an inspection of the property (both interior and exterior of any structure), then the appeal will be considered withdrawn. 32 V.S.A. §4404(c) If this were to occur the applicant must be clearly told the consequence of his denial of inspection and a follow up letter indicating that the appeal was deemed withdrawn should be sent to him or her.

14. Tax appeal is not appropriate venue to challenge exemption decision. The initial decision about whether a property qualifies for tax exemption is made by the listers. The statutes do not set out an appeal process, and do not expressly authorize the BCA to hear appeals of this issue. 32 V.S.A. chapter 125 Although it is logical that an appeal of a determination of exemption could go to the BCA, the law does not give the BCA authority to decide tax exempt status. Rather, the statutes authorize the BCA to address issues of value and equalization. Whenever the law does not articulate an administrative appeal, the rules of civil authority provide for an appeal to Superior Court. And, indeed, there are many cases decided by the Superior Court (and Supreme Court) involving whether a particular exemption is appropriate.

15. Voters cannot force a vote on whether a town should apply for or accept a grant. Voters cannot petition the selectboard for vote to force the board to apply for or sign grant documents. That is because decisions about whether to apply for or accept grants are generally left up to the discretion of the board. A board that wishes to get public input on such a decision can conduct an informal poll or can ask for a “straw vote” or consensus of opinions at a public meeting held for that purpose. Note that in some cases the terms of a grant may require a public vote, in which case such vote can be held as part of a special or annual meeting of the municipality.



16. No single board member has any authority to act alone. 1 V.S.A. §172 states that whenever authority is given to a board with two or more individuals, the board can only act when a majority authorizes the action. Board members have no authority independent of the board as a whole. This means that individual board members, even the chair, may not act on his or her own. An official who acts on his or her own may run the risk of personal liability because the official is acting outside of his or her authority as a board member.

17. Board correspondence must be authorized by the board. Chairs of municipal boards do not have authority to act on their own making representations for the board. This means an individual board member may not write a letter using town or official stationery, representing that the letter is on behalf of the board without a motion passed at a duly warned meeting authorizing the board member to send the letter on behalf of the board. 1 V.S.A. § 172



18. Motion fails without majority of board vote. Unless otherwise provided by law (for example, school boards follow a different law), when authority is given to three or more persons, the concurrence of a majority of the total number is required to pass a motion, and not just a majority of a quorum. 1 V.S.A. § 172 For example, a five-member board can act only if the motion proposing the action receives at least three affirmative votes. Anything less, and the motion fails.

19. All checklists must be purged this September. In September of each odd-numbered year (including this year, 2005), the town clerk must send a letter to the secretary of state to confirm that the BCA has completed challenge letters and purged the checklist. A memorandum explaining the process and including sample forms was sent to each town clerk by the elections division this summer. Please review the memorandum with your BCA and then review your checklist to remove names or to send challenge letters to individuals who have moved out of your town.

20. It is time for political parties to reorganize! Political parties must reorganize in the fall of each odd numbered year (including this year, 2005). 17 V.S.A. (Chapter 45) §2301 et seq. Organizing the reorganization is the responsibility of the state committees. The parties were sent a memo explaining the process and including forms in June. If party members have questions, direct them to the state party. The telephone numbers are available on our website.

21. Non-profit organization serving town can keep finances private. No law requires a private business or non-profit to open its financial books for public inspection. It would be reasonable, however, for the selectboard to ask a nonprofit that serves the town to justify its request for an increase in payment from the town. As part of that justification the board may ask to see the financial books of the organization.

22. Non-profit organizations can hold raffles and lotteries. Vermont law generally prohibits gambling but allows non-profit organizations, including municipalities, to organize and execute games of chance for the purpose of raising funds for civic undertakings. 32 V.S.A. § 2143 and 10201(5) Check the law for specific prohibitions (ex. awarding alcohol, using gambling machines, holding too many casino nights in one year, etc . . .). Note that political parties may also organize and execute games of chance to support their activities.

23. Only adults may organize or execute a game of chance. A nonprofit organization that is organizing a lottery or casino night must be careful not to allow any person who is under 18 to help out in the gambling activities. A person who is under age may work performing services at the event so long as they are not related to the execution of the game of chance. 32 V.S.A. § 2143 and 10201(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.

Does Your Town Need a Tune-Up? Part 2

(Excerpted from *Tune Up for Towns*, a publication of the Office of the Secretary of State. To obtain the full publication, visit www.sec.state.vt.us or call Kathryn at 802-828-2148)

You go to the dentist twice a year for a checkup, usually not because you have a known problem but because you want to know if there is one you haven't noticed. Some annual checkup is also probably done on your furnace, your car, and your dog. So why not the town? Give your town a legal tune-up by review the checklist below.

Last month we provided a checklist of items to consider to ensure that you are following the legal requirements of Vermont's open meeting laws. This month's checklist will cover considerations for selectboard. As with last month's list, some of the items are not the law; they are simply recommendations based on others' bad experience. The list below is just the start. Next month we will look at the town clerk . . .

A Legal Tune up for Selectboards:

- Does the board annually designate an official newspaper for the publication of warnings and other official business, as required by 17 V.S.A. § 2641(b)?
- Does the board chair (or person under his or her charge) keep a "single record of all orders drawn by the board showing the number, date, to whom payable, for what purpose and the amount of each such order?" See 24 V.S.A. § 1622.
- Have all newly elected selectboard members (also constables, listers, grand jurors, fence viewers, and justices of the peace) taken the oath of office before taking office? Are the oaths kept by the town clerk?
- Has the selectboard required and set the amount of a bond for the school directors, constable, road commissioner, collector of [delinquent] taxes, treasurer, and town clerk? Have the records of these bonds been filed with the clerk? Read 24 V.S.A. § 832 for more details.
- At its organizational meeting, did the selectboard elect a new chair? Did they appoint three fence viewers, at least one poundkeeper, an inspector of lumber, shingles and wood, a weigher of coal, and a tree warden? See 24 V.S.A. § 871.
- Have all vacancies in elective and appointive office been promptly filled? Has a notice that a vacancy in an elective office was created been posted within ten days of the creation of the vacancy? See 24 V.S.A. § 963. Has the board given any thought to town officer recruitment as an active policy? If a citizen walks into the town office and expresses an interest in public office, is there any handout or official to direct the citizen's interest—even an application form the citizen can complete and have kept on file? Has the town ever held a general public session to explain the roles of the various officers, in order to engender greater interest in office holding?
- Has the board adopted or considered adopting personnel rules (optional; not mandatory, but worth exploring)? See 24 V.S.A. § 1121. Does the town maintain a bulletin board for employees which includes all of the required notices and posters (i.e. sexual harassment policy, notice of non-discrimination, worker's compensation notice, etc . . .)?

- Has the board adopted procedural rules, such as Robert's Rules for Small Boards, for the conduct of its meetings? Does the town own a copy of Robert's Rules that the selectboard can use when they need it, in the midst of a meeting?
- Is the town adequately covered by insurance? How long has it been since your insurance agent has checked to see if your policies are up to date? How long has it been since you put the insurance out to bid to see if another company can offer you lower rates or better coverage for the same price?
- Does the workload of the chair and other members justify consideration of the hiring of an administrative assistant or town manager?
- How often does the selectboard meet with other town officers and employees? Is there a neutral forum where elective and appointive officials can meet and share ideas about the direction the town is taking?
- Has an inventory of all real and personal property owned by the town been compiled (optional, not mandatory)? Is there a policy about how to treat this property?
- Has the board written a policy on the use of public property that covers town land, buildings and equipment?



Mark Your Calendar with the Vermont League of Cities and Towns' Upcoming Events!

For more information, go to www.vlct.org, email info@vlct.org or call 800/649-7915.

VLCT Town Fair

September 14, 2005

Event Sponsor: VLCT and VLCT Group Services

Location: Killington Grand Hotel, Killington, Vermont

Time: 8:00 AM

Cost: \$50.00

Contact: [Jessica Hill](#), VLCT Conference Coordinator

Phone: 802-229-9111

Fax: 802-229-2211

Web Site: www.vlct.org

Maintaining Gravel Roads

September 20, 2005

Event Sponsor: Vermont Local Roads Program

Location: Wilmington Fire Station

Time: 8:00 AM

Contact: [M. Dakin](#)

Phone: 800-462-6555

This workshop is intended for Vermont municipal road officials, particularly those involved in road work and public works. The emphasis will be on non-technical, practical applications. All municipal officials are invited to attend.



Vermont History, Facts & Fun

cover of
book here

On Monday, August 29, the Secretary of State's Office hosted a kick off party at the Vermont Historical Society to celebrate the newest publication from our office – *Vermont History, Facts & Fun*. This activity booklet is designed to help 3rd -5th graders learn about Vermont's amazing history, culture and geography. Students, teachers and history buffs came together at this event to honor those students who helped put the book together and take a look at the finished product!

Copies of *Vermont History, Facts & Fun* are available for elementary school children as part of their curriculum on Vermont history which is typically taught in the 4th grade. A copy of the booklet has been sent to all Vermont elementary schools and the orders are starting to pour in! If you would like a copy in the Town Clerk's office, please feel free to contact me at jjohnson@sec.state.vt.us or call (802) 828-1296.

bill
car-

Within the month, our newest publication will also be available. *How a Bill Becomes a Law* is an engaging comic-like booklet designed for middle school children. This booklet walks readers through the bill-making process and demonstrates how they can become involved. Watch for updates on this publication!

Vermont Public Service Awards

Dates for the Autumn 2005 VPSA ceremonies are:

Event Date	Location
October 6	Middlebury
October 11	Johnson
October 13	Montpelier
October 20	Springfield
October 27	Lyndon
November 2	Rutland
November 9	Fairlee
November 15	Burlington

Spring 2006 VPSA ceremonies include:

April 6	St. Albans
April 12	Barton
TBA	West Dover

VPSA

The Secretary of State's Vermont Public Service Awards program honors local officials who have provided their communities with 20-plus years of service.



We are busy gearing up for the VPSA awards ceremonies which will occur in towns throughout Vermont during the autumn and spring of 2005-06. If you are still interested in participating, please contact Kathryn Mathieson at 802-828-2148 or email her at kmathieson@sec.state.vt.us for more information and to obtain nomination forms.

If you have completed your forms, please make sure to let Kathryn know which ceremony your town will be attending.

Thank you for participating!

September-December 2005 Calendar

- September 5** Labor Day. 1:371
- September 14** VLCT Annual Meeting and Town Fair
- September 15** Last day for Town Clerk to remit to State Treasurer an accounting of dog and wolf-hybrid licenses sold and remit the license fee surcharge for an animal and rabies control program. 20:3581(f)
- September 15** Last day for the Board of Civil Authority to review most recent checklist to determine whether those listed are still qualified to vote. 17:2150(c)
- September 20** Last day for the Board of Civil Authority to certify to Secretary of State purging of the checklist has been completed. 17:2150(d)(7)
- October 10** Columbus Day. 1:371
- October 25** State Withholding Tax Return is due (*actual date by which return must be postmarked is shown on the printed form*) if reporting less than \$2500 per quarter. More than \$2500 requires monthly report; more than \$9000 requires semi-weekly report. 32:5842
- October 31** Last day to file Form 941 (*Quarterly Withholding Return*) with the IRS.
- November 11** Veterans' Day. 1:371
- November 24** Thanksgiving Day. 1:371
- December 1** Last day to pay property taxes in towns that voted to collect interest on overdue taxes. 32:5136(a)
- December 14** Last day for Listers to notify persons of omissions from inventory. 32:4086
- December 25** Christmas Day. 1:371
- December 27** (*70 days before Town Meeting*) First day to warn the first public hearing if a charter adoption, amendment or repeal is to be voted on at Town Meeting. 17:2641(a), 2645(a)
- December 30** Last day for Listers to correct real or personal estate omission or obvious error in grand list, with approval of Selectboard. 32:4261
- December 31** Town fiscal year ends, unless voted otherwise. 24:1683(c)

Quote of the Month

You only live once. But if you work it right,
once is enough.”

Fred Allen

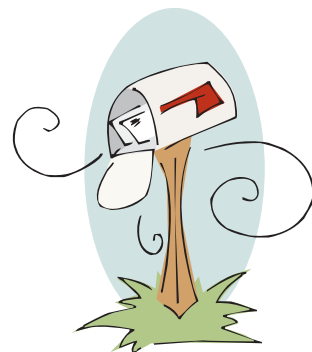


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Send us a note via fax: 802-828-2496,

email: kmathieson@sec.state.vt.us,

or post: 26 Terrace St. Drawer 09, Montpelier, VT 05609-1101.

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