

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

VERMONT

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

OPEN RECORDS AND MEETINGS LAWS IN

VERMONT

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**SIXTH EDITION
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Previously Titled
Tapping Officials' Secrets

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Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

Vermont has long recognized as a matter of common law that its citizens have a right to inspect public records and to attend the meetings and proceedings of any government body. *Matte v. City of Winoozki*, 129 Vt. 61, 271 A.2d 830 (1970). This fundamental right of every Vermont citizen encompasses not only the “right to know” but also the right to be present, to be heard, and to participate. *State v. Vermont Emergency Board*, 136 Vt. 506, 394 A.2d 1360 (1978).

Vermont’s “right to know” laws are codified in two short pieces of legislation, the open meetings law, 1 V.S.A. §§ 310-314, and the open records law, 1 V.S.A. §§ 315-320. Both laws are somewhat broadly stated and are not explained by any published legislative history. Several opinions by the Vermont Supreme Court have held that both statutes are to be liberally construed in order to implement the twin policy goals of open access and public disclosure. *See, e.g., Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 624 A.2d 857 (1993).

Open Records**I. STATUTE -- BASIC APPLICATION***OPEN RECORDS LAW*

“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 To that end, the provisions of this subchapter shall be liberally construed.” 1 V.S.A. § 315.

A. Who can request records?

“Any person may inspect or copy any public record or document.” 1 V.S.A. § 316(a). There is no limitation on or definition of the term “person.” Neither the motivation of the requester nor her or his use of the information or documents creates any restrictions. *Finberg v. Murnane*, 159 Vt. 431, 437, 623 A.2d 979 (1992). However, if records are sought by a party for use in a pending or ongoing litigation, they will likely be exempt from disclosure as “relevant to litigation” under 1 V.S.A. § 317(c)(14). *See Wesco Inc. v. Sorrell*, 2004 VT 102, 177 Vt. 287, 865 A.2d 350 (2004); Part II.A.2(14), *infra*.

B. Whose records are and are not subject to the act?

The Vermont open records law applies to all branches, departments, agencies and subdivisions of the state; since there is no “home rule” authority in Vermont, it also applies to all county, municipal and town governments and all of their boards and commissions. 1 V.S.A. § 317(a). School districts are also included, as are regional planning commissions and regional waste disposal, sewer and water authorities.

1. Executive branch.

The Vermont Supreme Court has recognized that some records of the Governor are protected by a qualified executive privilege. *Killington, Ltd. v. Lash*, 153 Vt. 628, 639, 672 A.2d 1368 (1990); *see also Herald Ass’n Inc. v. Dean*, 174 Vt. 350, 355-56, 816 A.2d 469, 474-75 (2002); *New England Coalition for Energy Efficiency & Environment v. Office of Governor*, 164 Vt. 337, 339-40, 670 A.2d 815 (1995). A claim of executive privilege shifts the burden to the requester to provide reasons why the need for the information outweighs the interest in confidentiality. If the court determines that the requester has shown need, the court will conduct an *in camera* inspection of the documents to determine if the interest in confidentiality outweighs the need for disclosure. Although the court upheld the assertion of executive privilege in both *Killington* and *New England Coalition*, it was careful to note that the privilege is not absolute, and that not all direct communications with the Governor are privileged. *See Killington*, 153 Vt. at 637; *New England Coalition*, 164 Vt. at 340, 343-44.

In *Dean*, 174 Vt at 351, 816 A.2d at 471, several newspapers sought access to Governor Howard Dean’s daily calendar to determine how much time the Governor spent on “nongubernatorial activities, particularly time spent on matters related to his bid for the United States presidency.” The Supreme Court found that the calendar qualified as a public record, and held that certain information contained within it was “not sufficiently related to gubernatorial policymaking or deliberations to qualify for confidential treatment under the executive privilege” and therefore must be disclosed. *Id.* at 357, 816 A.2d at 476.

The Supreme Court has squarely rejected any effort to expand executive privilege beyond sensitive policy-making communications with or to the Governor. *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 107 n.5, 624 A.2d 857, 861 n.5 (1993) (noting that the executive privilege is “limited to communications with the Governor of Vermont”).

2. Legislative bodies.

There is no case law negating the statute's apparently broad application to all "branch[es] or authority of the State." An early opinion of the Attorney General expressly holds that the companion public meetings law applies to legislative committees. *See* 1966-68 Op. Atty. Gen. 101.

"The doors of the House in which the General Assemble" Vt. Const. Ch. II, § 8.

3. Courts.

Although the statute says it applies to any "branch" of the state government, Vermont Supreme Court opinions suggest that court and judicial records are not subject to the act [the open meetings law expressly exempts the judiciary, *see* 1 V.S.A. § 312(e)] but rather to separate statutes and rules which define the duties of court clerks, *e.g.*, 4 V.S.A. §§ 652, 693, 740, as well as the common law right of all courts to control their own procedures and records. *See State v. Schaefer*, 157 Vt. 339, 599 A.2d 337 (1991); *In re K.F.*, 151 Vt. 211, 559 A.2d 663 (1989); *Herald Ass'n Inc. v. Judicial Conduct Bd.*, 149 Vt. 233, 544 A.2d 596 (1988); *Greenwood v. Wolchik*, 149 Vt. 441, 544 A.2d 1156 (1988); *State v. Tallman*, 148 Vt. 465, 537 A.2d 422 (1987). In addition, the open records law specifically exempts from coverage the "records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity." 1 V.S.A. § 317(b) (24).

4. Nongovernmental bodies.

The Attorney General stated early on that the state college board is subject to the open meetings law. 1962-64 Op. Atty. Gen. 427. However, the legislature amended the open records law in 1996 to exempt "information developed, discovered, collected or received by or on behalf of faculty, staff, employees or students of the University of Vermont or the Vermont state colleges in the conduct of study, research or creative efforts on medical, scientific, technical, scholarly or artistic matters . . . until such data, records or information are published, disclosed in an issued patent or publicly released by the institution or its authorized agents." 1 V.S.A. § 317(b)(23), *see* ¶ II(A)(2)(23), *infra*. By enacting this amendment, the legislature partially overruled *Animal Legal Defense Fund Inc. v. University of Vermont*, 159 Vt. 133, 616 A.2d 224 (1992), and *Sprague v. University of Vermont*, 661 F. Supp. 1132 (D. Vt. 1987), in which both the Vermont Supreme Court and the United States District Court for the District of Vermont had held that the University of Vermont was subject to the open records law in connection with animal-testing research.

a. Bodies receiving public funds or benefits.

The Public Records Act appears to assume that "educational institutions funded wholly or in part by state revenue" fall under the definition of public agencies. *See* 1 V.S.A. § 317(c)(11). In *Caledonian-Record Publ'g. Co. v. Vermont State Colleges*, 2003 VT 78, ¶ 3, 175 Vt. 438, 439, 833 A.2d 1273, 1275 (2003), Defendants Vermont State College and Lyndon State College stipulated that they are instrumentalities of the State, and thus subject to the open meetings and public records laws.

b. Bodies whose members include governmental officials.

Not specified.

5. Multi-state or regional bodies.

Not specified.

6. Advisory boards and commissions, quasi-governmental entities.

Although the open records law makes no such distinction, the open meetings statute expressly exempts "councils or similar groups established by the governor for the sole purpose of advising the governor

with respect to policy." 1 V.S.A. § 310(3). Any records thus generated would then presumably be exempt from disclosure under "executive privilege." *See* Part I(B)(1), *supra*.

C. What records are and are not subject to the act?

1. What kind of records are covered?

"[A]ll papers, documents, machine readable materials, or any other written or recorded matters regardless of their physical form or characteristics, that are produced or acquired in the course of agency business" are subject to the act except for enumerated exemptions. 1 V.S.A. § 317(b). This includes all forms of records, whether on paper or in electronic form. 1 V.S.A. § 316(h).

2. What physical form of records are covered?

A public record includes "all papers, documents, machine readable materials, or any other written or recorded matters *regardless of their physical form or characteristics*, that are produced or acquired in the course of agency business." 1 V.S.A. § 317(b) (emphasis added).

3. Are certain records available for inspection but not copying?

All records are available for copying if the agency has the equipment necessary to make the copies. 1 V.S.A. § 316(g). However, an agency need not provide for copying just to satisfy the act if it does not itself have the equipment necessary to do so, and persons are not allowed to remove the records from the agency for copying elsewhere. *Id.*

D. Fee provisions or practices.

Under a 1996 amendment to the statute, the Vermont legislature for the first time granted public agencies and subdivisions the authority to recover costs and fees for providing information under the public records law. Agencies may charge and collect the "actual cost of providing the copy," including "the costs associated with mailing or transmitting the record by facsimile or other electronic means." 1 V.S.A. § 316(b).

The 1996 amendment directs the Secretary of State to establish the actual cost of providing a copy of a public record, in order to set the fees that may be charged by state agencies. 1 V.S.A. § 316(d). Once the actual cost is determined, the Secretary of State is required to adopt rules establishing "a uniform schedule of public record charges for state agencies." *Id.* Political subdivisions of the State are also directed to "establish actual cost charges for copies of public records," and to post them in prominent locations in the town offices. 1 V.S.A. § 316(e).

Under certain circumstances, agencies and political subdivisions "may also charge and collect the cost of staff time associated with complying with a request for a copy of a public record." 1 V.S.A. § 316(c). These costs may be recovered if: "(1) the time directly involved in complying with the request exceeds 30 minutes; (2) the agency agrees to create a public record; or (3) the agency agrees to provide the public record in a nonstandard format and the time directly involved in complying with the request exceeds 30 minutes." *Id.* Where a request for public records is subject to staff time charges, the agency may require that the request be made in writing and that the charges be prepaid. *Id.*

2. Particular fee specifications or provisions.

E. Who enforces the act?

The State appears to rely on the press and private citizens for enforcement of the Public Records Act under 1 V.S.A. § 319(a). To date, there have been no enforcement actions brought by the Vermont Attorney General's Office, and there is no state ombudsman.

F. Are there sanctions for noncompliance?

None provided for by statute, although the court may award reasonable attorney fees and litigation costs to a substantially prevailing complainant under § 319(d). *See* Part V.D.9, *infra*. In addition, § 320 provides that an agency employee who arbitrarily or capriciously with-

holds public records may be subject to disciplinary action, and that, in the event of noncompliance with a court disclosure order, the employee or official responsible for the noncompliance may be held in contempt. *See also* Part V.D.11, *infra*.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

The exemptions to disclosure listed in 1 V.S.A. § 317(b) are for the most part specific rather than generalized.

b. Mandatory or discretionary?

Exemptions are to be narrowly construed, and any doubts should be resolved in favor of disclosure. *Finberg v. Murnane*, 159 Vt. 431, 436, 623 A.2d 979 (1992); *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 624 A.2d 857 (1993). The governmental body has the burden of establishing that an exemption applies, and this burden cannot be sustained with conclusory claims or pleadings. *Finberg*, 159 Vt. at 438. Rather, the defendant must present a specific factual record that supports the exemption claim. *Id.* There is no exemption that recognizes withholding simply “in the public interest”; disclosure is mandatory unless a record falls within a specific exemption.

c. Patterned after federal Freedom of Information Act?

Vermont exemptions are patterned in part after the federal exemptions, but do not follow them exactly.

2. Discussion of each exemption.

The Vermont statutory exemptions are as follows, each of which is a discrete subsection of 1 V.S.A. § 317(c):

(1) any records “which by law are designated confidential or by a similar term,” such as records of the Judicial Conduct Board, which are designated “non-public” before formal charges are brought. 12 V.S.A. App. Part VIII, A.0.9. *See Herald Ass’n v. Judicial Conduct Bd.*, 149 Vt. 233, 544 A.2d 596 (1988).

(2) records which “by law may only be disclosed to specifically designated persons.”

(3) records the disclosure of which would “violate duly adopted standards of ethics or conduct for any profession regulated by statute.” Presumably this refers to rules or statutes governing attorneys, accountants, physicians, etc., and would incorporate confidentiality privileges that have been formally recognized. *See, e.g.*, 12 V.S.A. § 612(a) providing for confidentiality of records of any physician, dentist, nurse or mental health professional.

(4) records the disclosure of which would “violate any statutory or common law privilege.” The Vermont Supreme Court has recognized common law privileges protecting investigatory files and executive communications. *Douglas v. Windham Superior Court*, 157 Vt. 34, 597 A.2d 774 (1991); *Killington Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368 (1990).

(5) “records dealing with the detection and investigation of crime,” including any records compiled during any “disciplinary investigation” by any “professional licensing agency.” However, excluded from the exemption are records relating to the “management and direction” of law enforcement agencies, and all records “reflecting the initial arrest of a person and the charge.” Vermont newspapers have obtained rulings that this subsection makes all citations and arrest warrants public, and that police logs or “blotters” are presumptively public with the police being required to segregate out entries “dealing with the detection and investigation of crime.” *Caledonian-Record Publ’g Co. v. Walton*, 154 Vt. 15, 573 A.2d 296 (1990); *Times-Argus Ass’n v. City of Montpelier Police Dept.*, Docket No. S-117-92 WnC (April 17, 1992);

Rutland Herald v. Rutland Police Dept., Docket No. S346-87 WnC (April 7, 1988).

(6) tax returns and all related documents and correspondence which contain “the same type of information.” Taxpayer lists, however, are not covered by this exemption. *Finberg v. Murnane*, 159 Vt. 431, 623 A.2d 979 (1992).

(7) “personal documents” relating to an individual, including any information relating to “personal finances, medical or psychological facts.” The Vermont Supreme Court has defined “personal documents” as those that “reveal intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.” *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 110, 624 A.2d 857 (1993). Documents do not qualify as “personal documents” merely because they are in a personnel file. *Id.* at 108. Whether such records contain “personal” information “is a fact-specific determination.” *Norman v. Vermont Office of Ct. Adm’r*, 2004 VT 13, 9, 176 Vt. 593, 595, 844 A.2d 769, 772 (2004) (noting in dicta that “employment performance evaluations or disciplinary records, even if favorable, may be ‘highly offensive’ and therefore properly withheld”). Information in an employee’s personnel file is, of course, always available to the employee or his designated representative. 1 V.S.A. § 317(c)(7).

(8) test questions and other examination data used for licensing, employment or academic purposes.

(9) trade secrets and any other commercial information which is not generally known and gives the provider a business advantage. The Vermont Supreme Court has held that “internal, corporate financial information” can be exempt from disclosure if it qualifies as a “compilation of information” under the exemption. *Springfield Terminal Ry. v. Agency of Transp.*, 174 Vt. 341, 347, 816 A.2d 448, 453-54 (2002) (observing that “§ 317(c)(9) reflects a legislative desire to protect from public access some nontechnical, competitively useful business information”). The information sought to be withheld “must not be patented, must be known only to those individuals within a commercial concern, and must give the user or owner an opportunity to obtain a business advantage over competitors who do not know or use that information.” *Id.* (finding that detailed, corporate financial information submitted by railway company to state agency in conjunction with bid to provide rail freight services was protected from disclosure under the Act).

(10) lists of names where disclosure would violate any “right to privacy” or “produce public or private gain.” But the exemption does not apply to lists which are publicly available by law, or to lists of professional licensees.

(11) “student records” at any institution funded wholly or in part by the state, except that the records may be requested pursuant to the federal Family Educational Rights and Privacy Act of 1974. The Vermont Supreme Court has broadly construed the exemption for “student records,” holding that it is not limited to documents concerning “student academic performance, financial aid, or other strictly scholastic subjects,” but also protects from disclosure student disciplinary records and the minutes of disciplinary hearings and “other records generated by such proceedings.” *Caledonian-Record Publ’g Co. v. Vermont State Colleges*, 2003 VT 78, ¶¶ 9-10, 175 Vt. 438, 442-43, 833 A.2d 1273, 1276-77 (2003). However, the public may have access to “the ‘final results’ of any disciplinary proceeding against a student alleged to have committed a ‘crime of violence’ or ‘nonforcible sex offense’ where the college determines that the student violated the college’s rules by committing the offense,” as such records are disclosable under FERPA. *Id.* at ¶ 12, 175 Vt. at 444, 833 A.2d at 1278.

(12) “records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal property.”

(13) information about the prices, appraisal or location of real or personal property prior to announcement of any project or contract involving the same.

(14) records related to any litigation involving a public agency, except those that are ruled discoverable by any court, and “in any event upon final termination” of the litigation. The purpose of this exemption is “to place a temporary restriction on the release of otherwise publicly accessible documents during the pendency of litigation in which the requested documents have relevance.” *Wesco Inc. v. Sorrell*, 2004 VT 102, ¶¶ 15, 22, 177 Vt. 287, 865 A.2d 350, 356, 358 (2004) (noting that the Public Records Act “should not be used to enlarge the scope of discovery or permit parties litigating with the government to do an end run around discovery rules”). Thus, it protects documents which are “related or pertinent” to, or “at issue in,” pending or ongoing litigation, and not those which are “merely discoverable in” such a litigation. *Id.* at ¶¶ 17, 20, 865 A.2d at 356-57

(15) records relating to negotiation of any contract including collective bargaining agreements with public employees.

(16) any voluntary information provided by anyone prior to July 1, 1975.

(17) all inter-and intra-departmental communications of any political subdivision, including all towns, cities and school districts which (a) “cover other than primarily factual materials,” and (b) are either “preliminary to any determination of policy or action” or “precede the presentation of the budget” at a public meeting.

(18) records of the “office of internal investigation of the department of public safety,” *i.e.* principally the Vermont state police and the department of corrections.

[Exemptions 1-18 were originally included in the public records act, in pretty much their current form; exemptions 19 *et seq.* have been added by subsequent legislatures in response to specific situations, and are even more narrowly targeted.]

(19) records relating to the identity of library patrons, specifically in regard to the circulation of library materials.

(20) information that would reveal the location of archeological sites and underwater historic properties, except as provided in 22 V.S.A. § 762 [this provision was recently added, primarily to keep secret the location of several historic shipwrecks located underwater on the bed of Lake Champlain].

(21) “lists of names compiled or obtained by Vermont Life magazine for the purpose of developing and maintaining a subscription list” [this exemption was added after a privately published magazine that competes with the state-owned Vermont Life sued to obtain the latter’s list of subscribers].

(22) “any documents filed, received, or maintained by the agency of development and community affairs with regard to administration of 32 V.S.A. chapter 151, subchapters 11C and 11D (new jobs tax credit; manufacturer’s tax credit), except that all such documents shall become public records. . . when a tax credit certification has been granted by the secretary of administration, and provided that the disclosure of such documents does not otherwise violate any provision of Title 32.”

(23) “any data, records or information developed, discovered, collected or received by or on behalf of faculty, staff, employees or students of the University of Vermont or the Vermont state colleges in the conduct of study, research or creative efforts on medical, scientific, technical, scholarly or artistic matters, whether such activities are sponsored alone by the institution or in conjunction with a governmental body or private entity, until such data, records or information are published, disclosed in an issued patent or publicly released by the institution or its authorized agents. This subdivision applies to, but is not limited to, research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements, methodologies, protocols, and the identities of or any personally identifiable information about participants in research.”

(24) “records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity” [so-called “deliberative sessions” of any board or agency acting in a quasi-judicial capacity are also exempted from the public meetings law, *see* 1 V.S.A. § 312(e)].

(25) “passwords, access codes, user identifications, security procedures and similar information the disclosure of which would threaten the safety of person or the security of public property.”

(26) “information and records provided to the department of banking, insurance, securities, and health care administration by an individual for the purposes of having the department assist that individual in resolving a dispute with any person or company regulated by the department, and any information or records provided by a company or any other person in connection with the individual’s dispute.”

(27) “information and records provided to the department of public service by an individual for the purposes of having the department assist that individual in resolving a dispute with a utility regulated by the department, or by the utility or any other person in connection with the individual’s dispute.”

(28) “records of, and internal materials prepared for, independent external reviews of health care service decisions pursuant to 8 V.S.A. § 4089f.”

(29) “records in the custody of the secretary of state of a participant in the address confidentiality program [for victims of domestic violence, sexual assault or stalking] described in chapter 21, subchapter 3 of Title 15, except as provided in that subchapter.”

(30) “all code and machine-readable structures of state-funded and controlled database applications, which are known only to certain state departments engaging in marketing activities and which give the state an opportunity to obtain a marketing advantage over any other state, regional or local governmental or nonprofit quasi-governmental entity, or private sector entity, unless any such state department engaging in marketing activities determines that the license or other voluntary disclosure of such materials is in the state’s best interests.”

(31) “records of a registered voter’s month and day of birth, motor vehicle operator’s license number, the last four digits of the applicant’s Social Security number, and street address if different from the applicant’s mailing address contained in an application to the statewide voter checklist or the statewide voter checklist established under section 2154 of Title 17.”

(32) final building plans and as-built plans of publicly-owned, -managed, or -leased structures, including “drafts of security systems within a facility, that depict the internal layout and structural elements of buildings, facilities, infrastructures, systems, or other structures owned, operated, or leased by an agency before, on, or after the effective date of this provision; emergency evacuation, escape, or other emergency response plans that have not been published for public use; and vulnerability assessments, operation and security manuals, plans, and security codes, but only to the extent that release of information contained in the foregoing records “would present a substantial likelihood of jeopardizing the safety of persons or the security of public property.” When exercising this exemption, the custodian of the information shall articulate the grounds for denying access to information requested.

(33) “account numbers for bank, debit, charge, and credit cards held by an agency or its employees on behalf of the agency.”

(34) “affidavits of income and assets as provided in 15 V.S.A. § 662 and Rule 4 of the Vermont Rules for Family Procedure.”

(35) Expired.

(36) anti-fraud plans and summaries submitted by insurers to the department of banking, insurance, securities, and health care administration for the purposes of complying with 8 V.S.A. § 4750;

(37) records provided to the department of health pursuant to the patient safety surveillance and improvement system established by chapter 43a of Title 18;

(38) records held by the agency of human services, which include prescription information containing prescriber-identifiable data, that could be used to identify a prescriber, except that the records shall be made available upon request for medical research, consistent with and for purposes expressed in 18 V.S.A. §§ 4621, 4631, 4632, 4633, and 9410 and chapter 84 of Title 18, or as provided for in chapter 84A of Title 18 and for other law enforcement activities;

(39) records held by the agency of human services or the department of banking, insurance, securities, and health care administration, which include prescription information containing patient-identifiable data, that could be used to identify a patient;

(40) Records of genealogy provided in support of an application for tribal recognition pursuant to chapter 23 of this title.

B. Other statutory exclusions.

Two additional statutory exemptions address unique concerns raised by hazardous wastes and endangered species.

Hazardous Waste. Disclosure of information and documents concerning facilities and sites for the treatment, storage and disposal of hazardous wastes is governed in “substantially the same manner” as under RCRA, 42 U.S.C. chap. 82, and the federal FOIA, 5 U.S.C. § 552 *et seq.* See 1 V.S.A. § 316(e).

Endangered Species. “All information regarding the location of endangered species sites shall be kept confidential in perpetuity except that the secretary shall disclose this information to the owner of land upon which the species has been located, or to a potential buyer who has a bona fide contract to buy the land and applies to the secretary for disclosure of endangered species information, and to qualified individuals or organizations, public agencies and nonprofit organizations for scientific research or for preservation and planning purposes when the secretary determines that the preservation of the species is not further endangered by the disclosure.” 10 V.S.A. § 5410.

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

There are no exemptions, exclusions or privileges against disclosure that the Vermont courts have developed or extrapolated from the text of the open records law itself. However, the statute specifically exempts records which, if made public, would cause a violation of any statutory or common law privilege. 1 V.S.A. § 317(c)(4). The Vermont Supreme Court has thus held that § 317(b)(4) “brings common law privileges with their established burdens into the [open records] law.” *Killington, Ltd. v. Lash*, 153 Vt. 628, 639, 672 A.2d 1368 (1990). In *Killington*, for example, the Court recognized that a claim of executive privilege may be asserted against a request for information made under the open records law. *Id.*; see also *Herald Ass’n Inc. v. Dean*, 174 Vt. 350, 355-56, 816 A.2d 469, 474-75 (2002) (evaluating claim of executive privilege); *New England Coalition for Energy Efficiency & Environment v. Office of Governor*, 164 Vt. 337, 670 A.2d 815 (1995) (upholding assertion of the privilege). In addition, at least one superior court judge has held that the Vermont Supreme Court would recognize a “deliberative process privilege” that would allow other public agencies “to withhold from public access information of an advisory or deliberative nature that relates to the governmental decision or policy-making process.” *Professional Nurses Serv. Inc. v. Smith*, No. 732-12-04 Wncv, at 2-3 (Wash. Super. Ct. July 14, 2005). Given the broad language of § 317(c)(4), Vermont courts would presumably allow other common law privileges to be raised as an exemption or defense to open records requests.

In *Judicial Watch Inc. v. State*, 2005 VT 108, 179 Vt. 214, 892 A.2d 191, (2005), the Vermont Supreme Court upheld an agreement between the Secretary of State and a retiring Governor, made pursuant

to the State Archives Act, to restrict public access to the Governor’s official correspondence for a period of up to ten years. The Court held that “notwithstanding the general right of access to public records” under the open records law, the ten-year restriction was “separately authorized and controlled” by the “more specific and exacting legislative requirements” of the Archives Act as to how a retiring governor’s official correspondence shall be placed in the state archives. *Id.* ¶¶ 8, 12.

D. Are segregable portions of records containing exempt material available?

The act is silent as to segregating public from non-public portions of a given document or record, although the concept seems to be inherent in § 319(a)’s direction to the court to examine the records and “determine whether such records or any part thereof” should be withheld or released. See *Douglas v. Windham Superior Court*, 157 Vt. 34, 597 A.2d 774 (1991); *Killington Ltd. v. Lash*, 153 Vt. 628, 672 A.2d 1368 (1990); *Rutland Herald v. Rutland Police Dept.*, Docket No. S346-87 WnC (April 7, 1988). An agency may be required to redact non-public information from documents in order to prepare them for production, and the Public Records Act “does not allow an agency to withhold public records simply because complying with the request is difficult or time consuming.” *Herald Ass’n Inc. v. Dean*, 174 Vt. 350, 359, 816 A.2d 469, 477 (2002).

E. Homeland Security Measures.

No specific discussion in statute or case law, but such materials may fall under the exemption for information which, if disclosed, would compromise the safety or people or public property. See 1 V.S.A. § 317(c)(25).

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

If an agency maintains public records in an electronic format, the requester may choose to receive the copies in either electronic format or paper format. 1 V.S.A. § 316(i). An agency may, but is not required to, convert paper public records to electronic format. *Id.* The Vermont Supreme Court has noted that nothing in the Act “prevents a public agency from contractually binding itself to provide electronic versions of documents in a specified format in return for” a certain fee. *Blum v. Friedman*, 172 Vt. 622, ___, 782 A.2d 1204, 1207 (2001).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

There is no statutory authority for the requester to obtain a customized search of computer databases to fit particular needs. However, note that computer databases themselves are covered by the definition of “public records” until June 3, 2006. See 1 V.S.A. § 317(b) (Supp. 2005).

C. Does the existence of information in electronic format affect its openness?

The fact that records are maintained in electronic format in no way affects whether the records must be produced under the statute. “Public records” are defined as all papers, documents, machine readable materials or any other written or recorded matters produced or acquired in the course of agency business, “regardless of their physical form or characteristics.” 1 V.S.A. § 317(b) (emphasis added).

D. How is e-mail treated?

The public records statute does not specifically address e-mail; however, it is likely that e-mail would fall under the statute’s definition of a “public record.”

1. Does e-mail constitute a record?

Not specified.

2. Public matter on government e-mail or government hardware

Not specified.

3. Private matter on government e-mail or government hardware

Not specified.

4. Public matter on private e-mail

Not specified.

5. Private matter on private e-mail

Not specified.

E. How are text messages and instant messages treated?

Not specified.

1. Do text messages and/or instant messages constitute a record?

Not specified.

2. Public matter message on government hardware.

Not specified.

3. Private matter message on government hardware.

Not specified.

4. Public matter message on private hardware.

Not specified.

5. Private matter message on private hardware.

Not specified.

F. How are social media postings and messages treated?

Not specified.

G. How are online discussion board posts treated?

Not specified.

H. Computer software

Not specified.

1. Is software public?

Not specified.

2. Is software and/or file metadata public?

Not specified.

I. How are fees for electronic records assessed?

Not specified.

J. Money-making schemes.

Not specified.

1. Revenues.

Not specified.

2. Geographic Information Systems.

Not specified.

K. On-line dissemination.

Not specified.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

There are no court decisions or attorney general opinions dealing with specific categories or types of records, other than as mentioned in connection with the express statutory exemptions. See 1 V.S.A. §§ 317(c)(1) through (35), Part II(A)(2), *supra*.

A. Autopsy reports.

Presumed closed, if given similar treatment as hospital or medical records.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

§ 131, personally identifying information is private unless a complaint is filed by the

1. Rules for active investigations.

Not specified.

2. Rules for closed investigations.

Not specified.

C. Bank records.

Presumed closed.

D. Budgets.

Not specified.

E. Business records, financial data, trade secrets.

Trade secrets, financial data, tax returns and other confidential commercial information are generally closed.

F. Contracts, proposals and bids.

Open except to the extent they contain information in IV.C above.

G. Collective bargaining records.

Closed.

H. Coroners reports.

Presumed closed, if given similar treatment as hospital or medical records.

I. Economic development records.

Not specified.

J. Election records.

Not specified.

1. Voter registration records.

Voter registration materials are closed.

2. Voting results.

Not specified.

K. Gun permits.

Not specified.

L. Hospital reports.

Closed.

M. Personnel records.

Closed, except to employee, if involve "personal documents." See 1 V.S.A. § 317(c)(7).

1. Salary.

See 1 V.S.A. § 317(b).

N. Police records.

Whether many of these issues are open or closed under the open records law and the state constitution is an issue pending before the Vermont Supreme Court in *Rutland Herald v. City of Rutland*, No. 2010-344 and *Rutland Herald v. Vermont State Police*, No. 2010-434. An opinion is expected soon (as of August 2011).

2. Police blotter.

See 1 V.S.A. § 317(5) above.

3. 911 tapes.

30 V.S.A. § 7055, 7059.

4. Investigatory records.**5. Arrest records.**

See 1 V.S.A. § 317(5) above.

Q. Real estate appraisals, negotiations.

Not specified.

1. Appraisals.

Not specified.

2. Negotiations.

Not specified.

3. Transactions.

Not specified.

4. Deeds, liens, foreclosures, title history.

Not specified.

5. Zoning records.

Not specified.

R. School and university records.

See 1 V.S.A. § 317(c)(11) above.

1. Athletic records.

Not specified.

2. Trustee records.

Not specified.

3. Student records.

Not specified.

4. Other.

Not specified.

S. Vital statistics.**1. Birth certificates.**

§ 5007; § 5083.

2. Marriage & divorce.

§ 5007; § 5132.

3. Death certificates.

§ 5007.

4. Infectious disease and health epidemics.

§ 1001, 1099.

V. PROCEDURE FOR OBTAINING RECORDS**A. How to start.****1. Who receives a request?**

The open records law in Vermont is procedurally very simple. The person seeking a record or document has only to make a “request” for it to “the custodian of a public record,” who “shall promptly produce the record for inspection.” 1 V.S.A. § 318 (a). Every office and agency must comply with its own requests; there are no centralized handling procedures.

2. Does the law cover oral requests?

There is no requirement that the request be in writing, unless the request is subject to staff time charges. 1 V.S.A. § 316(c). As a practical

matter, of course, a written request (perhaps as a follow-up where an initial oral request has not been satisfied) will assist later proceedings to compel disclosure. The statute seems to presume that the requester will have started his or her search with the correct agency or records custodian; there is no statutory requirement or procedure for informing the requester that she or he simply has the wrong office or agency. In Vermont the practice in most instances is that public employees do not read the statute so literally, and will ordinarily be helpful to some extent about the reason(s) why a request is not being honored.

There also is no statutory requirement that administrative appeals be in writing, but effectively there is no other way to utilize the process. However, the initial custodian’s response — either that a record is exempt, or that it “does not exist under the name given to him . . . or by any other name known to the custodian,” see 1 V.S.A. § 318(a) (2), (4) — must be in writing if it is anything other than production of the requested documents. An outright denial, at any stage, must also set forth the name(s) and title(s) of each person involved in the denial. 1 V.S.A. § 318(b).

3. Contents of a written request.

There is no statutory requirement that the request be stated with any degree of particularity, although obviously the more precise the description the more likely the requester is to receive an intelligent response. The act does require that the custodian be something more than just a passive conduit, as it requires her or him to certify that the requested records, if non-existent, also do not exist under “any other name known to the custodian.” Thus, for example, if the records are generally described but the wrong label used, that is not grounds for a disclosure refusal. 1 V.S.A. § 318(a)(4).

B. How long to wait.**1. Statutory, regulatory or court-set time limits for agency response.**

Waiting periods under the statute are not lengthy. The custodian ordinarily has two business days to search and respond if the request cannot be filled on the spot. 1 V.S.A. § 318(a)(2). However, any time limit [either the initial two-day response period, or the five-day appeal response period, see ¶ C, *infra*] may be extended up to ten working days by written certification that one (or more) of three “unusual circumstances” exist: (1) need to search or collect records from field offices; (2) need to search or collect voluminous records; or (3) need to consult with another agency. See 12 V.S.A. § 318(a)(5).

2. Informal telephone inquiry as to status.

Not specified.

3. Is delay recognized as a denial for appeal purposes?

Failure to meet the statutory response deadline(s) is deemed a denial for subsequent appeal purposes. 1 V.S.A. § 318(b).

4. Any other recourse to encourage a response.

Not specified.

C. Administrative appeal.

Although the act does not explicitly require an administrative appeal to the agency head before commencing a court challenge, the Vermont Supreme Court has held that the structure of the act imposes such a requirement. *Bloch v. Angney*, 149 Vt. 29, 538 A.2d 174 (1987).

1. Time limit.

There is no stated time limit for appealing an “adverse determination” by a custodian to the agency head. On appeal to the head of the agency, the superior official has five business days to issue a decision. 1 V.S.A. § 318(1)(3). See also ¶ (B)(1), *supra*, re extensions of time.

2. To whom is an appeal directed?

Administrative appeals are to the agency head, see 1 V.S.A. § 318(a) (3).

3. Fee issues.

Not specified.

4. Contents of appeal letter.

There are no statutory requirements for the appeal to the agency head; it is not even required that it be in writing, although in practice it should be to be of any real use. The appeal need not explain why the denial is erroneous, but it probably would be helpful. At the very least the appeal should attach or refer to the written denial of the custodian and state that it is being appealed.

5. Waiting for a response.

Not specified.

6. Subsequent remedies.

Not specified.

D. Court action.

1. Who may sue?

“Any person aggrieved by the denial of a request for public records” can file a court action at the trial level to obtain a *de novo* review of the administrative decision; the court’s review can include *in camera* inspection, and the court is specifically authorized to segregate disclosable from non-disclosable records. 1 V.S.A. § 319(a). The agency bears the burden of persuading the court that the refusal to disclose is correct.

2. Priority.

The court is directed to expedite open records cases and give them priority “except as to cases the court considers of greater importance.” 1 V.S.A. § 319(b).

3. Pro se.

Permitted.

4. Issues the court will address:

The court considers all issues framed by the denial, and makes its own determination as to the scope or applicability of the exemption(s) relied on. Declaratory judgment is a possibility, although not specifically mentioned, to set up future guidelines.

5. Pleading format.

There is no prescribed format for pleadings — a simple complaint will do — in the appeal to superior court from the agency head. The filing fee at the trial level is not dispensed with, but service costs are minimal as Vermont has now adopted the federal “service by mail” procedures. Costs can be recovered if the requester prevails.

6. Time limit for filing suit.

There is no stated time limit on the appeal to superior court from the agency head.

7. What court.

The aggrieved requester can file suit in any county where he or she resides, or works, or where the records are located, or in the superior court for the county that includes Montpelier, the state capital.

8. Judicial remedies available.

The primary remedy available is that the court will simply order the release of all, or part, of the requested records. 1 V.S.A. § 319(a). If the agency has not honored the request because of the magnitude or difficulty of the request, but is not objecting on substantive grounds, the court can grant additional time to comply if the agency demonstrates “due diligence” and “exceptional circumstances.” *Id.*

9. Litigation expenses.

Now, litigation expenses are mandatory if the attorney representing the public entity does not concede that the documents are public records within the time to answer under the Vermont Rules of Civil Procedure. Attorney’s fees may be assessed even when the concession is made. Finally, if the person seeking the records violates Rule 11 of the Vermont Rules of Civil Procedure, attorney’s fees may be assessed against him or her. 2011 Vermont Acts & Resolves 59.

Under the former law, Attorney fees and “other litigation costs” reasonably incurred may, in the court’s discretion, be assessed against the agency if the requester “substantially prevails.” 1 V.S.A. § 319(d). In order to receive attorney fees under the Public Records Act, the requesting party has the burden of showing that it is both eligible for and entitled to the fees. *See Burlington Free Press v. Univ. of Vermont*, 172 Vt. 303, 305-06, 779 A.2d 60, 63 (2001). The Vermont Supreme Court has held that to “establish eligibility, the requesting party must prove that legal action could reasonably be regarded as necessary to obtain the requested documents, and that in fact the litigation had a substantial causative effect on the release of the documents.” *Id.* Among the factors consideration of which may be helpful in determining entitlement to fees (but is not required) are “(1) the public benefit derived by the lawsuit; (2) the commercial benefit the requesting party will receive from release of the requested documents; (3) the nature of the requesting party’s interest in the documents; and (4) whether the public agency had a reasonable basis for withholding the documents.” *Id.* At 306, 779 A.2d at 63. However, the trial court’s discretion is the “single most important element” in evaluating a request for fees, and will carry great weight on appeal. *See id.* at 310, 779 A.2d at 66-67 (holding that lower court did not abuse its discretion in denying attorney fees to newspaper that substantially prevailed in action under Public Records Act). The lower court’s decision “will stand on appeal unless the requesting party shows that the court either failed to exercise its discretion altogether or exercised it for reasons that are clearly untenable or unreasonable.” *Herald Ass’n Inc. v. Dean*, 174 Vt. 350, 359-60, 816 A.2d 469, 477-78 (2002).

10. Fines.

None specified.

11. Other penalties.

If the court orders production of the records, finds that they were improperly withheld, orders payment of legal fees and costs, and “additionally” finds that the denial “raises questions” of arbitrary or capricious action by the agency, then the “department of personnel applicable to that employee” must promptly hold proceedings to see if any disciplinary action is warranted. 1 V.S.A. § 320(a). If the court’s disclosure order is not obeyed the court may punish for contempt the “responsible employee or official.” § 320(b).

12. Settlement, pros and cons.

Not specified.

E. Appealing initial court decisions.

Any appeal of the trial court’s decision, which is to the Vermont Supreme Court, must be accomplished within 30 days of the decision using ordinary appellate procedures and rules. 1 V.S.A. § 319(b) provides that, as with proceedings before the superior court, appeals shall be “expedited in every way,” including being assigned “for argument at the earliest practicable date.”

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state’s highest court.

F. Addressing government suits against disclosure.

No case law on point.

Open Meetings

I. STATUTE -- BASIC APPLICATION.

A. Who may attend?

The public meetings law, 1 V.S.A. §§ 310-314, is silent as to its specific beneficiaries. Because the act is premised on Art. 6 of the Vermont Constitution, however, it applies to all “the people” of the state, including corporations. *See Valley Realty & Development Inc. v. Town of Hartford*, 165 Vt. 463, 685 A.2d 292 (1996); *Central Vermont Public Service Corp. v. Town of Springfield*, 135 Vt. 436, 379 A.2d 677 (1977). The act itself echoes that broad principle: “All meetings of a public body are declared to be open to the public at all times, except as provided in Section 313 [executive sessions].” 1 V.S.A. § 312(a).

B. What governments are subject to the law?

The act is applicable to all levels, “political subdivisions” and branches of Vermont government, unless specifically exempted, and particularly local and town government because there is no “home rule” authority in Vermont.

C. What bodies are covered by the law?

1. Executive branch agencies.

The act covers “public bodies,” defined as “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 of its political subdivisions, or any committee of any of the foregoing boards, council 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.” 1 V.S.A. § 310(3).

In one early judicial interpretation of the statute, the Vermont Supreme Court held that the State Emergency Board chaired by the governor was not an official agency and that the governor could informally convene it by telephone conference call. *State v. Vermont Emergency Bd.*, 136 Vt. 506, 394 A.2d 1360 (1978). The legislature quickly acted in the next session specifically to include the State Emergency Board in the statute. The general legislative intent is thus to cover all workings of state government and any meetings of any “public body” where official action is considered or taken. 1 V.S.A. § 312(a).

2. Legislative bodies.

The legislature is governed by the act in drafting its own rules, as it is allowed to do under Chapter II of the Vermont Constitution. 1 V.S.A. § 313(c).

3. Courts.

The “judicial branch” and the Public Service Board are completely exempt from the open meetings law. *See* 1 V.S.A. § 312(e).

4. Nongovernmental bodies receiving public funds or benefits.

As stated above, the intent of the act is to have it simply apply to every “public body” at which any official action is taken or contemplated. With the exception of the rulings that the University of Vermont is covered by the act, none of these more arcane issues (§#182;#182; 4-9) has ever been addressed or resolved in Vermont.

5. Nongovernmental groups whose members include governmental officials.

Although it receives less than 25 percent of its total budget from the State, the University of Vermont is still a public body because, *inter alia*, it is chartered by the State, the Governor is an *ex officio* trustee, and the legislature appoints additional trustees. *See Sprague v. University of Vermont*, 661 F. Supp. 1132 (D. Vt. 1987); *Animal Legal Defense*

Fund Inc. v University of Vermont, 159 Vt. 133, 616 A.2d 224 (1992). (However, the animal-testing documents ordered disclosed in those cases are now exempt by superseding legislative action, *see* 1 V.S.A. § 317(c)(23).)

6. Multi-state or regional bodies.

Not specified.

7. Advisory boards and commissions, quasi-governmental entities.

Not specified.

8. Other bodies to which governmental or public functions are delegated.

The “deliberations” of any boards or agencies or commissions acting in a judicial or quasi-judicial capacity are not subject to the open meetings law. 1 V.S.A. § 312(e). Moreover, if a written decision will be issued in a quasi-judicial proceeding, that too need not be adopted at a public meeting. *Id.* § 312(f). In practice, however, many local boards, such as planning commissions and zoning boards of adjustment, often debate and vote on subdivision or zoning permit applications in public, and also allow public comment even though it is not statutorily mandated in quasi-judicial proceedings. *Id.* § 312(h).

If the parole board chooses to meet at a correctional facility, then attendance at and access to such a meeting may be subject to “security rules” established by the superintendent of the facility. 1 V.S.A. § 312(i).

9. Appointed as well as elected bodies.

Not specified.

D. What constitutes a meeting subject to the law.

The speed with which the legislature acted to overturn the Supreme Court’s ruling that a telephone conference between members of the State Emergency Board was not a meeting, suggests a legislative intent to include within the definition of “meeting” any gathering, no matter how constituted or effected, of any board, commission or other “public body” at which any official action is taken or considered. Presumably the board or body will have followed whatever other statutes or regulations that control if and when it has a quorum to act. “No resolution, rule, regulation, appointment or formal action shall be considered binding” except as taken at a public meeting, unless an exception for executive session is established, or unless the action is later ratified at a lawful open meeting. 1 V.S.A. § 312(a); *see also Berlickij v. Town of Caselton*, 327 F. Supp. 2d 371, 383 (D. Vt. 2004) (finding town violated open meeting law by taking “formal action” while in executive session); *Valley Realty & Development Inc. v. Town of Hartford*, 165 Vt. 463, 685 A.2d 242 (1996). There is no substantive limitation on or definition of the types of business that may be conducted by the board or body in public, except, again, for the provisions for executive session that expressly define those subject matters that may (but are not required to) be discussed in private meetings.

The “deliberations” of any boards or agencies or commissions acting in a judicial or quasi-judicial capacity are not subject to the open meetings law. 1 V.S.A. § 312(e).

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

The act obviously applies to all regular meetings of any public body.

b. Notice.

The timing and placement of notices for regular meetings are controlled by other statutes, not the act. 1 V.S.A. § 312(c)(1). The agenda for any regular or special meeting shall be made available prior to the meeting, upon *specific* request of the news media or any concerned per-

son. 1 V.S.A. § 312(d). The remedy for inadequate warning is that any action taken may not be binding, because the gathering is by definition no longer an “open meeting.” § 312(a). See *Rowe v. Brown*, 157 Vt. 333, 599 A.2d 333 (1991). However, the action may later become binding if the public body subsequently ratifies it at a duly warned open meeting. *Valley Realty & Development Inc. v. Town of Hartford*, 165 Vt. 463, 685 A.2d 292 (1996).

(1). Time limit for giving notice.

If a meeting or proceeding is to be adjourned or continued, then it is sufficient notice if the “time and place” of the next meeting is publicly announced before adjournment.

(2). To whom notice is given.

Notice is given to anyone who has specifically requested it.

(3). Where posted.

Not specified.

(4). Public agenda items required.

Although the Vermont open meetings law does not expressly require that a written agenda be prepared in advance of all regular or special meetings, if one is, then it must be made available prior to the meeting upon “specific request” by the “news media” or any concerned person. 1 V.S.A. § 312(d).

(5). Other information required in notice.

None specified.

(6). Penalties and remedies for failure to give adequate notice.

None specified.

c. Minutes.

Minutes must be prepared that cover “all topics and motions that arise,” and they must “give a true indication of the business of the meeting.” 1 V.S.A. § 312(b)(1). The minutes must minimally include the members present and all “active participants,” all proposals or motions made or considered and their disposition, and the results of any vote(s) or roll call(s) taken. *Id.* The minutes are public records and must be made available upon request from the body’s clerk or secretary five days after the meeting. § 312(b)(2).

2. Special or emergency meetings.

Special meetings must be publicly announced at least 24 hours prior to the meeting, and notice for an emergency meeting must be given “as soon as possible” prior to the meeting. 1 V.S.A. § 312(c)(2),(3). No particular form or place of notice is prescribed in either event, but all other requirements for public meetings would seem to apply.

a. Definition.

Not specified.

b. Notice requirements.

If the media has filed a written request for notification of any special meetings with a public body, then during that calendar year (or the next year if the written request is filed in December) that media entity shall be given notice of any such meeting. 1 V.S.A. § 312(c)(5). The statute is silent as to special notice of “emergency” meetings; it is likely this notice provision would be extended to that situation.

c. Minutes.

The minutes requirements for regular meetings would seem to apply.

3. Closed meetings or executive sessions.

a. Definition.

The authority of any public body to go into executive session is limited only to those instances in which the body is to consider specific topics or types of action enumerated in 1 V.S.A. § 313(a):

(1) contracts, labor relations agreements and grievances, civil actions, and prosecutions by the state, provided that the public body finds, before going into executive session, that premature public knowledge would clearly place the public body at a substantial disadvantage. See *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 105, 624 A.2d 857 (1993); see also *Times Argus Ass’n v. Town of Moretown*, No. 55-10-04 WnCiv (Wash. Super. Ct. March 4, 2005) (finding that under § 313(a)(1), term “grievance” has a “legal connotation, implying a formal and particularized dispute of some labor action,” and does not extend to a “generalized gripe by anyone who may have some disagreement with municipal . . . policy, action or inaction”). Whether the “substantial disadvantage” standard is met must be determined on a “case by case analysis,” and the public body bears the burden of making the demonstration. See *Blum v. Friedman*, 172 Vt. 622, ___, 782 A.2d 1204, 1206-07 (2001); see also *Berlickij v. Town of Casleton*, 327 F. Supp. 2d 371, 383 (D. Vt. 2004) (finding town violated open meeting law by closing meeting in which collective bargaining agreement was discussed without any showing that public knowledge of the issue would have placed town at any sort of disadvantage);

(2) negotiating or securing real estate options;

(3) appointment or employment or evaluation of a public officer or employee;

(4) disciplinary action against a public officer or employee, except that the employee is entitled to a public hearing if charges are brought;

(5) a clear and imminent peril to public safety;

(6) consideration of any document or record that is confidential under 1 V.S.A. § 317(b), but such consideration may not extend beyond the document itself to the general subject matter. The Vermont Supreme Court has held, however, that a public body’s discussion of a confidential document to which an exemption under the public records act may ultimately apply does not automatically render the document subject to disclosure, and the failure to go into executive session does not violate the open records law. See *232511 Invs., Ltd. v. Town of Stowe Dev. Review Bd.*, 2005 VT 59, ¶¶ 4-5, 878 A.2d 282, 284 (2005);

(7) academic records, suspension or discipline of any student;

(8) testimony in a parole proceeding if public disclosure of the identity of the person testifying could result in physical or other harm to that person; and

(9) information relating to a pharmaceutical rebate or to supplemental rebate agreements, which is protected from disclosure by federal law or as required by the Medicare or Medicaid programs, considered pursuant to 33 V.S.A. §§ 1998(f)(2) and 2002(c) (prescription drug cost containment statutes).

Executive sessions may include only the members themselves, legal counsel and any person who is subject to the discussion or whose information is needed. 1 V.S.A. § 313(b).

b. Notice requirements.

The only statutorily required notice in advance of an executive session is by specific motion at the public meeting itself, which must “indicate the nature of the business of the executive session.” *Id.* § 313(a). The vote to go into executive session must be public and duly recorded in the minutes. *Id.*

c. Minutes.

Minutes of the executive session need not be taken, but if they are they are also not public. However, the executive session is basically only an opportunity for consideration and discussion; no “formal or binding action” may be taken in the executive session itself, except for the “securing of real estate options.” *Id.*, § 313(a).

d. Requirement to meet in public before closing meeting.

The procedure for invoking an executive session is as follows: an affirmative vote of the members of the body (2/3 of those present for any state board or agency; a majority of those present for any local body) must be taken in an open meeting and the vote recorded in the minutes. The motion to enter executive session must indicate the “nature of the business” to be discussed, and nothing else may be considered. 1 V.S.A. § 313(a).

e. Requirement to state statutory authority for closing meetings before closure.

Not specified.

f. Tape recording requirements.

Not specified.

F. Recording/broadcast of meetings.

The recording or broadcasting of open meetings is not specifically addressed by the law or any court decision, except for meetings intended as a “forum for public comment on a proposed rule,” which must be recorded by audio tape. 1 V.S.A. § 312(a).

G. Are there sanctions for noncompliance?

The knowing and intentional violation of the open meetings law or participation in the wrongful exclusion of any person from any public meeting is a misdemeanor and carries a fine of not more than \$500. 1 V.S.A. § 314(a). In addition, the court may grant injunctive or declaratory relief to an aggrieved plaintiff. *Id.* § 314(b). In *Berlickij v. Town of Caselton*, 327 F. Supp. 2d 371, 383 (D. Vt. 2004), despite finding violations of the open meetings law, the court declined to order injunctive relief because the plaintiff was no longer employed by the town and would suffer no unique damages from further violation, there was no evidence of continuing violation, and the court presumed that the town would comply with the law even in the absence of a court order.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

The above discussion basically exhausts the entire subject of open meetings law in Vermont. There are no exceptions or limitations except for executive sessions, ratification at a later open meeting, or where the act does not apply at all — e.g., the judicial branch.

A. Exemptions in the open meetings statute.

1. Character of exemptions.

The Vermont open meetings law does not apply to “the judicial branch of the government of Vermont or of any part of the same or to the public service board.” 1 V.S.A. § 312(e). Similarly, the law does not “extend to the deliberations of any public body in connection with a quasi-judicial proceeding.” Finally, the law shall not “be construed to require the making public of any proceedings, records, or acts which are specifically made confidential by the laws of the United States of America or of this state.” *Id.*

The Act further provides that it shall not be “construed to prohibit the parole board from meeting at correctional facilities with attendance at the meeting subject to rules regarding access and security established by the superintendent of the facility.” 1 V.S.A. § 213 (i).

2. Description of each exemption.

There are no exemptions other than those described above, and perhaps the topics that are authorized to be addressed in executive session, as discussed in Part I.E.3, *supra*.

B. Any other statutory requirements for closed or open meetings.

None.

C. Court mandated opening, closing.

None, except that, in an appropriate case, a court may issue an injunction or grant declaratory relief stating that a meeting shall be open. *See* 1 V.S.A. § 314(b).

III. MEETING CATEGORIES -- OPEN OR CLOSED.

Again, there is nothing more in the Vermont open meetings statute than what is discussed above. If there is no specific authorization for an executive session, or there is no express statutory exemption from the law, any meeting of any “public body” must be open no matter what the particular topic.

A. Adjudications by administrative bodies.

Open meetings law does not apply to deliberations of public body in connection with quasi-judicial proceedings.

1. Deliberations closed, but not fact-finding.

Yes.

2. Only certain adjudications closed, i.e. under certain statutes.

No.

B. Budget sessions.

Open.

C. Business and industry relations.

Open.

D. Federal programs.

Generally open except for discussion of information protected from disclosure by federal law.

E. Financial data of public bodies.

Open.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

Presumed closed if considering documents deemed confidential under public records law.

G. Gifts, trusts and honorary degrees.

Open.

H. Grand jury testimony by public employees.

Closed to the extent grand jury proceeding is closed.

I. Licensing examinations.

Presumed open, unless treated as evaluation of public employee.

J. Litigation; pending litigation or other attorney-client privileges.

Closed if public body finds that premature public knowledge would clearly place public body at a substantial disadvantage.

K. Negotiations and collective bargaining of public employees.

1. Any sessions regarding collective bargaining.

Closed only where public body finds that premature public knowledge would clearly place the public body at a substantial disadvantage.

2. Only those between the public employees and the public body.

Closed only where public body finds that premature public knowledge would clearly place the public body at a substantial disadvantage.

L. Parole board meetings, or meetings involving parole board decisions.

Closed only if meeting involves testimony by person who could suffer physical or other harm as a result of public disclosure of identity.

M. Patients; discussions on individual patients.

Closed if involves consideration of document or record which is deemed confidential under Public Records Act.

N. Personnel matters.**1. Interviews for public employment.**

Closed.

2. Disciplinary matters, performance or ethics of public employees.

Closed.

3. Dismissal; considering dismissal of public employees.

Closed.

O. Real estate negotiations.

Closed if meeting concerns real estate purchase options for public body.

P. Security, national and/or state, of buildings, personnel or other.

Closed if presents clear and imminent peril to public safety.

Q. Students; discussions on individual students.

Closed if discussion concerns academic records, suspension or discipline of student.

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A person who is a member of a public body who knowingly and intentionally violates the open meeting law may be convicted of a misdemeanor and fined up to \$500. 1 V.S.A. § 314(a). Any person aggrieved by a violation of the statute may seek injunctive or declaratory relief in superior court to enforce the law, and the court should expedite such cases. *Id.* § 314(b). See *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 624 A.2d 857 (1993); *Rowe v. Brown*, 157 Vt. 333, 599 A.2d 333 (1991). The Vermont Supreme Court has read the term “aggrieved” to require “that plaintiffs must make some showing of injury

to obtain relief.” *Trombley*, 160 Vt. at 106; 624 A.2d at 861. Such a showing should not be difficult, however, because the Court has also held that the public meetings law is “entitled to a liberal construction in support of the goal of open access to public meetings for members of the public,” and that “[e]xemptions . . . must be strictly construed.” *Id.* at 104, 624 A.2d at 860; see also *Blum v. Friedman*, 172 Vt. 622, ___, 782 A.2d 1204, 1206-07 (2001) (discussing standing requirements). Because the open meetings law provides remedies for “the curtailment of free speech [caused] by holding improper executive sessions” and for “violations of the rights to observe and participate in the discussion and decision making of local government,” a plaintiff cannot maintain a suit for damages for the same injuries under Articles 13 (freedom of speech) or 10 (due process) of the Vermont Constitution. *Berlickij v. Town of Caselton*, 348 F. Supp. 2d 335, 341-42 (D. Vt. 2003).

In practice, interested persons — e.g., news reporters — try to make their concerns known to the public body as loudly and as early as possible, in the hopes that logic, or more likely political acumen, will influence the body’s decision not to go into a questionably legitimate executive session. The reality is that almost all such situations are likely to have already occurred, especially where local boards typically meet in the evening hours, before there is even an opportunity to pursue judicial relief. There is no history of any Vermont public official ever having been charged after-the-fact with a violation of the open meetings law. Enforcement is thus largely dependent on the presumption of honesty and integrity on the part of public officials that still persists in Vermont.

A. When to challenge.**B. How to start.****1. Where to ask for ruling.****a. Administrative forum.****C. Court review of administrative decision.****4. What issues will the court address?****D. Appealing initial court decisions.****V. ASSERTING A RIGHT TO COMMENT.**

There is a public right to a “reasonable opportunity” to comment and “express opinion” on any matter under consideration at an open meeting, “as long as order is maintained” and “subject to reasonable rules established by the chairperson.” 1 V.S.A. § 312(h). However, the right to comment does not apply to any quasi-judicial proceeding. *Id.*

Statute

Constitution

Vt. Const. Ch. I, Art. 6. [Officers servants of the people]

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.

Open Records and Meetings

1 Vt. Stat. § 310 et seq.

TITLE ONE. General Provisions

CHAPTER 5. Common Law; General Rights

SUBCHAPTER 2. Public Information

§ 310. Definitions

As used in this subchapter:

(1) “Deliberations” means weighing, examining and discussing the reasons for and against an act or decision, but expressly excludes the taking of evidence and the arguments of parties.

(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.

(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.

(4) “Publicly announced” means that notice is given to an editor, publisher or news director of a newspaper or radio station serving the area of the state in which the public body has jurisdiction, and to any editor, publisher or news director who has requested under section 312(c)(5) of this title to be notified of special meetings.

(5) “Quasi-judicial proceeding” means a proceeding which is:

(A) a contested case under the Vermont Administrative Procedure Act; or

(B) a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority.

§ 311. Declaration of public policy; short title

(a) In enacting this subchapter, the legislature finds and declares that 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.

(b) This subchapter may be known and cited as the Vermont open meeting law.

§ 312. Right to attend meetings of public agencies

(a) All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title. No resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting, except as provided under section 313(a)(2) of this title. A meeting may be conducted by audio conference or other electronic means, as long as the provisions of this subchapter are met. A public body shall record by audio tape, all hearings held to provide a forum for public comment on a proposed rule, pursuant to section 840 of Title 3. The public shall have access to copies of such tapes as described in section 316 of this title.

(b)(1) Minutes shall be taken of all meetings of public bodies. 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 minimal information:

(A) All members of the public body present;

(B) All other active participants in the meeting;

(C) All motions, proposals and resolutions made, offered and considered, and what disposition is made of same; and

(D) The results of any votes, with a record of the individual vote of each member if a roll call is taken.

(2) Minutes of all public meetings 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.

(c)(1) The time and place of all regular meetings subject to this section shall be clearly designated by statute, charter, regulation, ordinance, bylaw, resolution or other determining authority of the public body and this information shall be available to any person upon request.

(2) The time, place and purpose of a special meeting subject to this section shall be publicly announced at least 24 hours before the meeting. Municipal public bodies shall post notices of special meetings in or near the municipal clerk’s office and in at least two other public places in the municipality, at least 24 hours before the meeting. In addition, notice shall be given, either orally or in writing, to each member of the public body at least 24 hours before the meeting, except that a member may waive notice of a special meeting.

(3) Emergency meetings 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. Emergency meetings may be held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention by the public body.

(4) Any adjourned meeting shall be considered a new meeting, unless the time and place for the adjourned meeting is announced before the meeting adjourns.

(5) An editor, publisher or news director of any newspaper, radio station or television station serving the area of the state in which the public body has jurisdiction may request in writing that a public body notify the editor, publisher or news director of special meetings of the public body. The request shall apply only to the calendar year in which it is made, unless made in December, in which case it shall apply also to the following year.

(d) The agenda for a regular or special meeting shall be made available to the news media or concerned persons prior to the meeting upon specific request.

(e) Nothing in this section or in section 313 of this title shall be construed as extending to the judicial branch of the government of Vermont or of any part of the same or to the public service board; nor shall it extend to the deliberations of any public body in connection with a quasi-judicial proceeding; nor shall anything in this section be construed to require the making public of any proceedings, records, or acts which are specifically made confidential by the laws of the United States of America or of this state.

(f) A written decision issued by a public body in connection with a quasi-judicial proceeding need not be adopted at an open meeting if the decision will be a public record.

(g) The provisions of this subchapter shall not apply to 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, may be conducted outside a duly warned meeting, provided that no money is appropriated, expended, or encumbered.

(h) At an open meeting the 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. This subsection shall not apply to quasi-judicial proceedings.

(i) Nothing in this section shall be construed to prohibit the parole board from meeting at correctional facilities with attendance at the meeting subject to rules regarding access and security established by the superintendent of the facility.

§ 313. Executive sessions

(a) No public body described in section 312 of this title may hold an executive session from which the public is excluded, except by the affirmative vote of two-thirds of its members present in the case of any public body of state government or of a majority of its members present in the case of any public body of a municipality or other political subdivision. A motion to go into executive session shall indicate the nature of the business of the executive session, and no other matter may be considered in the executive session. Such vote shall be taken in the course of an open meeting and the result of the vote recorded in the minutes. No formal or binding action shall be taken in executive session except actions relating to the securing of real estate options under subdivision (2) of this subsection. Minutes of an executive session need not be taken, but if they are, shall not be made public subject to subsection 312(b) of this title. A public body may not hold an executive session except to consider one or more of the following:

- (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;
- (6) Discussion or consideration of records or documents excepted from the access to public records provisions of section 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).

(b) Attendance in executive session shall be limited to members of the public body, and, in the discretion of the public body, its staff, clerical assistants and legal counsel, and persons who are subjects of the discussion or whose information is needed.

(c) The senate and house of representatives, in exercising the power to make their own rules conferred by Chapter II of the Vermont Constitution, shall be governed by the provisions of this section in regulating the admission of the public as provided in Chapter II, section 8 of the Constitution.

§ 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.

§ 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 with the view towards carrying out the above declaration of public policy to implement this policy, and the burden of proof shall be on the public agency to sustain its action.

§ 316. Access to public records and documents

(a) Any person may inspect or copy any public record or document of a public agency, as follows:

- (1) For any agency, board, department, commission, committee, branch, instrumentality, or authority of the state, a person may inspect a public record on any day other than a Saturday, Sunday, or a legal holiday, between the hours of nine o'clock and 12 o'clock in the forenoon and between one o'clock and four o'clock in the afternoon;
- (2) For any agency, board, committee, department, instrumentality, commission, or authority of a political subdivision of the state, a person may inspect a public record during customary business hours.

(b) If copying equipment maintained for use by a public agency is used by the agency to copy the public record or document requested, the agency may charge and collect from the person requesting the copy the actual cost of providing the copy. The agency may also charge and collect from the person making the request, the costs associated with mailing or transmitting the record by facsimile or other electronic means. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

(c) Unless otherwise provided by law, in the following instances an agency may also charge and collect the cost of staff time associated with complying with a request for a copy of a public record: (1) the time directly involved in complying with the request exceeds 30 minutes; (2) the agency agrees to create a public record; or (3) the agency agrees to provide the public record in a non-standard format and the time directly involved in complying with the request exceeds 30 minutes. The agency may require that requests subject to staff time charges under this subsection be made in writing and that all charges be paid, in whole or in part, prior to delivery of the copies. Upon request, the agency shall provide an estimate of the charge.

(d) The secretary of state, after consultation with the secretary of administration, shall establish the actual cost of providing a copy of a public record that may be charged by state agencies. The secretary shall also establish the amount that may be charged for staff time, when such a charge is authorized under this section. To determine "actual cost" the secretary shall consider the following only: the cost of the paper or the electronic media onto which a public record is copied, a prorated amount for maintenance and replacement of the machine or equipment used to copy the record and any utility charges directly associated with copying a record. The secretary of state shall adopt, by rule, a uniform schedule of public record charges for state agencies.

(e) After public hearing, the legislative body of a political subdivision shall establish actual cost charges for copies of public records. The legislative body shall also establish the amount that may be charged for staff time, when such a charge is authorized under this section. To determine actual cost charges, the legislative body shall use the same factors used by the secretary of state. If a legislative body fails to establish a uniform schedule of charges, the charges for that political subdivision shall be the uniform schedule of charges established by the secretary of state until the local legislative body establishes such a schedule. A schedule of public records charges shall be posted in prominent locations in the town offices.

(f) State agencies shall provide receipts for all moneys received under this section. Notwithstanding any provision of law to the contrary, a state agency may retain moneys collected under this section to the extent such charges represent the actual cost incurred to provide copies under this subchapter. Amounts collected by a state agency under this section for the cost of staff time associated with providing copies shall be deposited in the general fund, unless another disposition or use of revenues received by that agency is specifically authorized by law. Charges collected under this section shall be deposited in the agency's operating account or the general fund, as appropriate, on a monthly basis or whenever the amount totals \$100.00, whichever occurs first.

(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.

(h) Standard formats for copies of public records shall be as follows: for copies in paper form, a photocopy of a paper public record or a hard copy print-out of a public record maintained in electronic form; for copies in electronic form, the format in which the record is maintained. Any format other than the formats described in this subsection is a nonstandard format.

(i) If an agency maintains public records in an electronic format, nonexempt public records shall be available for copying in either the standard electronic format or the standard paper format, as designated by the party requesting the records. An agency may, but is not required to, provide copies of public records in a nonstandard format, to create a public record or to convert paper public records to electronic format.

(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.

(k) Information concerning facilities and sites for the treatment, storage, and disposal of hazardous waste shall be made available to the public under this subchapter in substantially the same manner and to the same degree as such information is made available under the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. chapter 82, subchapter 3, and the Federal Freedom of Information Act, 5 U.S.C. section 552 et seq. In the event of a conflict between the provisions of this subchapter and the cited federal laws, federal law shall govern.

§ 317. Definitions; public agency; public records and documents

(a) As used in this subchapter,:

- (1) "Business day" means a day that a public agency is open to provide services.
- (2) "Public agency" or "agency" means 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.

(b) As used in this subchapter, "public record" or "public document" means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business. Individual salaries and benefits of and salary schedules relating to elected or appointed officials and employees of public agencies shall not be exempt from public inspection and copying.

(c) The following public records are exempt from public inspection and copying:

- (1) records which by law are designated confidential or by a similar term;
- (2) records which by law may only be disclosed to specifically designated persons;
- (3) records which, if made public pursuant to this subchapter, would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the state;
- (4) records which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege other than the common law deliberative process privilege as it applies to the general assembly and the executive branch agencies of the state of Vermont;
- (5) records dealing with the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal or disciplinary investigation by any police or professional licensing agency; provided, however, that records relating to management and direction of a law enforcement agency; records reflecting the initial arrest of a person, including any ticket, citation, or complaint issued for a traffic violation, as that term is defined in 23 V.S.A. § 2302; and records reflecting the charge of a person shall be public;
- (6) a tax return and related documents, correspondence and certain types

of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont department of taxes or submitted by a person to any public agency in connection with agency business;

(7) personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency, information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his or her designated representative;

(8) test questions, scoring keys, and other examination instruments or data used to administer a license, employment, or academic examination;

(9) trade secrets, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it, except that the disclosures required by section 4632 of Title 18 shall not be included in this subdivision;

(10) lists of names compiled or obtained by a public agency when disclosure would violate a person's right to privacy or produce public or private gain; provided, however, that this section does not apply to lists which are by law made available to the public, or to lists of professional or occupational licensees;

(11) student records, including records of a home study student, at educational institutions or agencies funded wholly or in part by state revenue; provided, however, that such records shall be made available upon request under the provisions of the Federal Family Educational Rights and Privacy Act of 1974 (P.L. 93-380) and as amended;

(12) records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy, if disclosed;

(13) information pertaining to the location of real or personal property for public agency purposes prior to public announcement of the project and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts thereof;

(14) records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation;

(15) records relating specifically to negotiation of contracts including but not limited to collective bargaining agreements with public employees;

(16) any voluntary information provided by an individual, corporation, organization, partnership, association, trustee, estate, or any other entity in the state of Vermont, which has been gathered prior to the enactment of this subchapter, shall not be considered a public document;

(17) records of interdepartmental and intradepartmental communications in any county, city, town, village, town school district, incorporated school district, union school district, consolidated water district, fire district, or any other political subdivision of the state 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 a meeting held in accordance with § 312 of this title;

(18) records of the office of internal investigation of the department of public safety, except as provided in section 1923 of Title 20;

(19) records relating to the identity of library patrons or the identity of library patrons in regard to library patron registration records and patron transaction records in accordance with chapter 4 of Title 22;

(20) information which would reveal the location of archeological sites and underwater historic properties, except as provided in section 762 of Title 22;

(21) lists of names compiled or obtained by Vermont Life magazine for the purpose of developing and maintaining a subscription list, which list may be sold or rented in the sole discretion of Vermont Life magazine, provided that such discretion is exercised in furtherance of that magazine's continued financial viability, and is exercised pursuant to specific

guidelines adopted by the editor of the magazine;

(22) any documents filed, received, or maintained by the agency of commerce and community development with regard to administration of 32 V.S.A. chapter 151, subchapters 11C and 11D (new jobs tax credit; manufacturer's tax credit), except that all such documents shall become public records under this section subchapter when a tax credit certification has been granted by the secretary of administration, and provided that the disclosure of such documents does not otherwise violate any provision of Title 32;

(23) any data, records or information developed, discovered, collected, or received by or on behalf of faculty, staff, employees or students of the University of Vermont or the Vermont state colleges in the conduct of study, research or creative efforts on medical, scientific, technical, scholarly, or artistic matters, whether such activities are sponsored alone by the institution or in conjunction with a governmental body or private entity, until such data, records or information are published, disclosed in an issued patent or publicly released by the institution or its authorized agents. This subdivision applies to, but is not limited to, research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements, methodologies, protocols, and the identities of or any personally identifiable information about participants in research;

(24) records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity;

(25) passwords, access codes, user identifications, security procedures and similar information the disclosure of which would threaten the safety of persons or the security of public property;

(26) information and records provided to the department of banking, insurance, securities, and health care administration by an individual for the purposes of having the department assist that individual in resolving a dispute with any person or company regulated by the department, and any information or records provided by a company or any other person in connection with the individual's dispute;

(27) information and records provided to the department of public service by an individual for the purposes of having the department assist that individual in resolving a dispute with a utility regulated by the department, or by the utility or any other person in connection with the individual's dispute;

(28) records of, and internal materials prepared for, independent external reviews of health care service decisions pursuant to 8 V.S.A. § 4089f and of mental health care service decisions pursuant to 8 V.S.A. § 4089a;

(29) the records in the custody of the secretary of state of a participant in the address confidentiality program described in chapter 21, subchapter 3 of Title 15, except as provided in that subchapter;

(30) all code and machine-readable structures of state-funded and controlled database applications, which are known only to certain state departments engaging in marketing activities and which give the state an opportunity to obtain a marketing advantage over any other state, regional or local governmental or nonprofit quasi-governmental entity, or private sector entity, unless any such state department engaging in marketing activities determines that the license or other voluntary disclosure of such materials is in the state's best interests;

(31) records of a registered voter's month and day of birth, motor vehicle operator's license number, the last four digits of the applicant's Social Security number, and street address if different from the applicant's mailing address contained in an application to the statewide voter checklist or the statewide voter checklist established under section 2154 of Title 17;

(32) with respect to publicly-owned, -managed, or -leased structures, and only to the extent that release of information contained in the record would present a substantial likelihood of jeopardizing the safety of persons or the security of public property, final building plans and as-built plans, including drafts of security systems within a facility, that depict the internal layout and structural elements of buildings, facilities, infrastructures, systems, or other structures owned, operated, or leased by an agency before, on, or after the effective date of this provision; emergency evacuation, escape, or other emergency response plans that have not been published for public use; and vulnerability assessments, operation and security manuals, plans, and security codes. For purposes of this subdivision, "system" shall include electrical, heating, ventilation, air conditioning, telecommunication, elevator, and security systems. Information

made exempt by this subdivision may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is bidding on or performing work on or related to buildings, facilities, infrastructures, systems, or other structures owned, operated, or leased by the state. The entities or persons receiving such information shall maintain the exempt status of the information. Such information may also be disclosed by order of a court of competent jurisdiction, which may impose protective conditions on the release of such information as it deems appropriate. Nothing in this subdivision shall preclude or limit the right of the general assembly or its committees to examine such information in carrying out its responsibilities or to subpoena such information. In exercising the exemption set forth in this subdivision and denying access to information requested, the custodian of the information shall articulate the grounds for the denial;

(33) the account numbers for bank, debit, charge, and credit cards held by an agency or its employees on behalf of the agency;

(34) affidavits of income and assets as provided in section 662 of Title 15 and Rule 4 of the Vermont Rules for Family Proceedings;

(35) [Expired].

(36) anti-fraud plans and summaries submitted by insurers to the department of banking, insurance, securities, and health care administration for the purposes of complying with 8 V.S.A. § 4750;

(37) records provided to the department of health pursuant to the patient safety surveillance and improvement system established by chapter 43a of Title 18;

(38) records held by the agency of human services, which include prescription information containing prescriber-identifiable data, that could be used to identify a prescriber, except that the records shall be made available upon request for medical research, consistent with and for purposes expressed in sections 4621, 4631, 4632, 4633, and 9410 of Title 18 and chapter 84 of Title 18, or as provided for in chapter 84A of Title 18 and for other law enforcement activities;

(39) records held by the agency of human services or the department of banking, insurance, securities and health care administration, which include prescription information containing patient-identifiable data, that could be used to identify a patient.

(40) Records of genealogy provided in support of an application for tribal recognition pursuant to chapter 23 of this title.

§ 317a. Disposition of public records

A custodian of public records shall not destroy, give away, sell, discard, or damage any record or records in his or her charge, unless specifically authorized by law or under a record schedule approved by the state archivist pursuant to subdivision 117(a)(5) of Title 3.

§ 318. Procedure

(a) Upon request the custodian of a public record shall promptly produce the record for inspection, except that:

(1) if the record is in active use or in storage and therefore not available for use at the time the person asks to examine it, the custodian shall so certify this fact in writing to the applicant and set a date and hour within one calendar week of the request when the record will be available for examination;

(2) if the custodian considers the record to be exempt from inspection under the provisions of this subchapter, the custodian shall so certify in writing. Such certification shall identify the records withheld and the basis for the denial. A record shall be produced for inspection or a certification shall be made that a record is exempt within three business days of receipt of the request, unless otherwise provided in subdivision (5) of this subsection. The certification shall include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial. The custodian shall also notify the person of his or her right to appeal to the head of the agency any adverse determination;

(3) if appealed to the head of the agency, the head of the agency shall make a determination with respect to any appeal within five business days, after the receipt of such appeal. If an appeal of the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determi-

nation under section 319 of this title;

(4) if a record does not exist, the custodian shall certify in writing that the record does not exist under the name given to the custodian by the applicant or by any other name known to the custodian;

(5) in unusual circumstances as herein specified the time limits prescribed in this subsection may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten business days from receipt of the request. As used in this subdivision, "unusual circumstances" means to the extent reasonably necessary to the proper processing of the particular request:

(A) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(B) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(C) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein, or with the attorney general.

(b) Any person making a request to any agency for records under subsection (a) of this section shall be deemed to have exhausted the person's administrative remedies with respect to each request if the agency fails to comply within the applicable time limit provisions of this section. Upon any determination by an agency to comply with a request for records, the records shall be made available promptly to the person making such request. Any notification of denial of any request for records under this section shall set forth the names and titles or positions of each person responsible for the denial of such request.

(c)(1) Any denial of access by the custodian of a public record may be appealed to the head of the agency. The head of the agency shall make a written determination on an appeal within five business days after the receipt of the appeal. A written determination shall include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial.

(2) 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. A failure by the agency to comply with any of the time limit provisions of this section shall be deemed a final denial of the request for records by the agency.

(d) 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.

(e) 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.

(f) 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.

(g) The secretary of state shall provide municipal public agencies and members of the public information and advice regarding the requirements of the public records act and may utilize informational websites, toll-free telephone numbers, or other methods to provide such information and advice.

§ 319. Enforcement

(a) Any person aggrieved by the denial of a request for public records under this subchapter may apply to the civil division of the superior court in the county in which the complainant resides, or has his or her personal place of business, or in which the public records are situated, or in the civil division of the superior court of Washington County, to enjoin the public agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in section 317 of this title, and the burden of proof is on the public agency to sustain its action.

(b) Except as to cases the court considers of greater importance, proceedings before the civil division of 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.

(c) If the public agency can show the court that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

(d)(1) Except as provided in subdivision (2) of this subsection, the court shall assess against the public agency reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(2) The court may, in its discretion, assess against a public agency reasonable attorney fees and other litigation costs reasonably incurred in a case under this section in which the complainant has substantially prevailed provided that the public agency, within the time allowed for service of an answer under Rule 12(a)(1) of the Vermont Rules of Civil Procedure:

(A) concedes that a contested record or contested records are public; and

(B) provides the record or records to the complainant.

(3) The court may assess against the complainant reasonable attorney fees and other litigation costs reasonably incurred in any case under this section when the court finds that the complainant has violated Rule 11 of the Vermont Rules of Civil Procedure.

§ 320. Penalties

(a) Whenever the court orders the production of any public agency records, improperly withheld from the complainant and assesses against the agency reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether the agency personnel acted arbitrarily or capriciously with respect to the withholding, the department of human resources if applicable to that employee, shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The department, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his or her representative. The administrative authority shall take the corrective action that the department recommends.

(b) In the event of noncompliance with the order of the court, the superior court may punish for contempt the responsible employee or official, and in the case of a uniformed service, the responsible member.

(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.

