



Testimony of ACLU-VT on H. 73, “Public Records Act”

Generally, it remains the American Civil Liberties Union of Vermont’s position that the single most important thing that would improve public records access would be to change “may” to “shall” for the recovery of prevailing plaintiffs’ fees and costs in public records cases that end up in court. This is because the public records law depends on citizens for enforcement. Litigation is expensive. Citizens need to have their costs and fees covered if they are to be expected to enforce the law. We are concerned that if at any time resources are not available to adequately fund the government transparency office, or if the person appointed to that position is not impartial or competent to make sound legal judgments, that we will be no farther along in improving public records access than we are now. The single, simple change of “may” to “shall” -- in the current language of 1 V.S.A. § 319(d) -- would avoid that.

Specifically, it is the ACLU’s view that H. 73 has some positives, some negatives, some unknowns, and some possible downsides to the positives depending on how the bill language is reviewed and the bill’s proposals implemented.

Here are the positives:

- State officials will receive training in meeting the requirements of the public records act. Unfamiliarity with the law on the part of public officials has, actually, been a problem in many public records cases. For example, many officials don’t know that if they deny a request for a record, they must say what records they have that appear relevant to the request.
- We applaud the inclusion in the Statement of Policy (1 VSA § 315) that a public agency bears the “burden of proof for nondisclosure of a public record...” While this is already in current law -- the custodian of the record must list the exemption supposedly preventing disclosure -- this provision isn’t always followed. Saying it should be followed is a good -- although some might think unnecessary -- thing.
- The designation of a state office with the authority to review disputes about public records requests and to issue “binding” orders may be a positive step, but it could have a downside as well. The possible downside is explained below in the next section.
- If the reviewer determines that the record should be provided, the requestor “is presumed” to be entitled to attorney’s fees and costs if s/he must still go to court to get access, and wins. The possible downside is explained below in the next section.

- The 30-minute threshold after which someone can be charged for staff copying of records will be increased to two hours.
- Adding to the state archivist's duties in (Sec. 8) 3 VSA § 117(g) that s/he "operate an informational website and toll-free telephone number during the regular business hours of the office that shall provide municipal public agencies and members of the public information regarding the requirements of the public records act" is a positive step.

Here are the possible downsides of some of the positives:

- Administrative review of a public records request that's been denied could actually slow down or even taint the public records request process. In some states, reviews are done swiftly. In others, they take months. In some states, the reviews are objective. In other states, they can be political. A check against the former concern is a time limit by which a review must be completed and an opinion issued. (That appears to be part of H. 73, but the language on time limits is a bit confusing; see below.) A check against the latter requires appointment of an impartial reviewer. How that can be achieved is problematic.
- A "presumption" that someone is entitled to attorney's fees and costs is not the same as a requirement that a judge award attorney's fees if you win. "Presuming" you're entitled to fees is better than a judge "may" award you fees but not as good as "shall" award you fees. A "shall" requirement can include a standard for defining "substantially prevailed." We have provided language to Legislative Council for this. It is simply five additional lines making two points. We note, also, that the presumption on fees and costs does not exist for anyone not filing a complaint with the government transparency office but instead going directly to court.
- The government transparency office's executive director has two days to schedule a hearing after having received a public records access complaint. There is no limit on how far into the future the hearing can be scheduled. This ambiguity invites possible abuse, with the result that hearings are scheduled weeks or months after the date of the filing of the complaint. Such delays could make the eventual obtaining of the requested document irrelevant, if the need for the information was timely. We're wondering, though, if perhaps the lack of a time limit was an oversight, based on the language of §145 (a) that "The director shall issue an order in response to a complaint under 3 subdivision 142(b)(1) of this title within seven working days of receipt of the complaint..."? If so, the time limits for scheduling a hearing and issuing an order should somehow be made clearer.

Here are the negatives:

- While the 30-minute threshold after which someone can be charged for staff time in the copying of records is being raised to two hours, charges will be assessed not just if you want copies, but also if you simply want to inspect records. Currently, there is no charge

for inspection. The public records law is very clear about this; it's not a "loophole." The plain language of the public records statute is what Judge Geoffrey Crawford relied on in his recent decision that the Vermont State Employees Association not be charged any fees to inspect records. The language in H. 73 would change that.

- While charging for staff time may sound reasonable, the management of state records is not always as good as it should be. Inefficient record-keeping systems lead to excessive retrieval times. Public records requestors may be charged for staff time that shouldn't have to be spent.
- Under H. 73, agencies will have five days instead of the current two to respond to public records requests. It's unclear why this is being changed. There is already in current law a provision that an agency can take up to 10 days for a response if the two days aren't enough. It's hard to believe an agency needs a week -- or two -- to respond to a request for a school budget or a state document regarding, say, Challenges for Change targets. We wonder if there might be a presumption that a public records request will be complied with (or denied) within two days UNLESS the agency provides a credible reason for why it needs up to five days -- or in extreme cases, up to 10 days -- to comply.
- H. 73, if passed into law, would not take effect until July 1, 2012. To us, this underscores the need to change "may" to "shall," effective upon passage, in the awarding of fees and costs to prevailing plaintiffs. Vermonters shouldn't have to wait another 12 months or more to be reimbursed for enforcing the state's public records laws.

Here are the unknowns:

- It's unclear what weight the courts would give to the "presumption" that prevailing plaintiffs be granted attorney's fees and costs if they win in litigation they were forced to bring because of a public agency's refusal to abide by an order of the government transparency office that a record be released. While stronger than "may," "presume" still requires some subjective determination by the court. The standard for making that determination isn't clear.
- The Public Records Act Review Committee is composed of 11 members. Five represent government agencies, four represent the press and consumers, and two represent the legislative branch. We would submit that the impartiality of this committee may depend largely on the impartiality of the two legislators and of the state archivist. We wonder if perhaps a member of the judiciary (maybe a retired judge) and someone else with a legal background and considered impartial could be added to the committee, or substituted for two of the current government agency representatives. We believe such a change is more likely to ensure a fair balancing of the interests of government and the public.
- We note also that the committee will cease to exist as of Jan. 15, 2015 (Section 14, "Repeal"). Will this be sufficient time for the committee to complete its work?

- It appears that the government transparency office executive director may, but is not required, to “issue advisory opinions as to whether a particular type of record is public and available for inspection and copying.” This creates the possibility that the executive director issues an order that a document should be public yet doesn’t issue an advisory opinion stating so. The lack of the discretionary advisory opinion removes the presumption that the complainant receives fees and costs if s/he must go to court to obtain access.
- The training programs for public agency employees -- are local and county public officials (such as school board members, select board members, sheriffs, and the like covered as well as state employees? The language in § 146. (“Training”) seems to suggest not. We believe it is important that all public employees and officials, at any level of government, receive some form of training or information on requirements of the public records act. Perhaps it is assumed that the new Web site and phone contact service to be maintained by the state archivist will satisfy this need. If so, we question that assumption. Local public officials and employees will need to know such a service exists before they utilize it. And sufficient resources must be provided the archivist to ensure s/he can provide the services anticipated.

Finally, the ACLU would urge the committee to deal now with a change to one exemption, rather than wait until the Public Records Act Review Committee might convene next year. That exemption is the police records exemption. Most public records cases that have recently been filed revolve around disputes over the interpretation of this exemption. Many of these disputes would not exist if the federal FOIA standard were used instead of the exemption we now have. The federal standard is used by many states (as well as the federal government), and we feel Vermont should follow suit. Links to: [current state exemption language](#), [federal FOIA language](#). Other documents related to public records can be found at www.acluvt.org/transparency.