TO: Members of the Senate Judiciary Committee
FROM: Allen Gilbert, executive director, ACLU-VT
SUBJECT: S. 138, warrant bill
DATE: Jan. 12, 2012

S. 138 is a bill the ACLU can support – if the subsection (i) provisions are deleted. These provisions deal with the confidentiality and sealing of search warrants. They have the potential to undermine the first part of the bill, which aims for greater transparency. And the provisions actually conflict with the Vermont Rules for Public Access to Court Records and with decisions of the Vermont Supreme Court. These rules and common law govern the way in which the public may inspect court records.

In the 2001 case, *In re Sealed Documents* (172 Vt. 152, 161-16, 2001), the Supreme Court said the public has a presumed right of access to court records, including warrants, and that court records may only be sealed where:

i. that presumption of access has been overcome by the "substantial threat . . . to the interests of effective law enforcement, or individual privacy and safety" posed by normal public access to the record;
ii. the substantial threat has been "demonstrated with specificity as to each document" to be sealed rather than by "general allegations of harm";
iii. that the sealing order extend "no further than necessary to protect the interests in confidentiality" provided by the substantial threat; and
iv. that any sealing order "examine each document individually, and make fact-specific findings with regard to why the presumption of access has been overcome."

The Supreme Court's decision in *Sealed Documents* properly recognizes that in a democracy, the business of the courts is the business of the public. The standard the court established appropriately places the burden on the party seeking to have the record sealed to demonstrate what harm will flow from disclosure – "access absent harm," in other words. We are concerned that the "good cause" standard in S. 138 would make it easier to keep documents secret from the public. Ironically, this would have the effect of undoing the first part of S. 138. You could create a comprehensive warrant tracking system, but large numbers of warrants could end up being sealed. We don't think this broadens government transparency.

We applaud the idea of keeping track of warrants. The public is entitled to know when police agencies are receiving judicial permission to breach Vermonters' privacy by searching their homes and property. The *Free Press* has shown that court clerks aren't tracking warrants despite a statutory mandate to do so. Right now, the clerk of each unit of the superior court "shall . . . [m]ake and keep dockets of the causes pending at each term of the court." Vt. Stat. Ann. tit. 4, § 652(1). Warrant applications are "causes" as defined by § 652. *State v. Tallman*, 148 Vt. 465, 472-473 (1987). This means someone could request a court order to force a clerk to keep track of warrant applications and their outcomes.

The bottom line is that if the committee is busy, this bill really isn't necessary. We think court action could solve the warrant tracking problem. But if you are committed to a bill, we ask that you focus on warrant tracking and drop the sealing portion. As S. 138 is currently constructed, you're essentially asking the public to trade one measure of transparency (tracking the number of warrants) for another (knowing the contents of the warrant applications). We don't think that's right.