

Sources of Privacy Law in Vermont: An Overview

In Griswold v. Connecticut (1965),¹ the United States Supreme Court made its first concerted attempt to locate a source for a right “older than the Bill of Rights,”² a right that was, and is, a fundamental expectation of all American citizens: the right to privacy. While only two Justices dissented, all Justices acknowledged that this right, no matter how dearly held, is mentioned explicitly *nowhere* in the U.S. Constitution. Indeed, a hallmark of the Griswold case is its sequence of concurring opinions, each locating the source of the privacy right in a different place.

In 1965, the prevailing opinion, as articulated by Justice Douglas, was that the Bill of Rights had “penumbras” surrounding its enumerated rights, within which resided un-enumerated rights that were “emanations from those guarantees that help give them life and substance.”³ Privacy was such an un-enumerated right. It could be seen in the “zones of privacy”⁴ created by the First, Third, Fourth, and Fifth Amendments, and it protected “the sanctity of a man’s home and the privacies of life.”⁵ Justice Goldberg concurred with this reading of the Bill of Rights, but wrote separately to emphasize that the Ninth Amendment explicitly provided for the possibility of un-enumerated, yet Constitutionally-protected rights. He asserted that the right to privacy (in marriage)⁶ was just such a right, “basic and fundamental and ... deeprooted [sic] in our society....”⁷ Over time, however, the concurring voices of Justices Harlan and White rose amongst the clatter, and today the privacy concerns addressed in Griswold are encompassed by the body of Fourteenth Amendment law known as “Substantive Due Process.”

While Substantive Due Process law has carved out (painfully and with much controversy) certain realms of protected privacy, arguably, it has done little to articulate a

¹ Griswold v. Connecticut, 381 U.S. 479 (1965).

² Id., at 486.

³ Id., at 484.

⁴ Id.

⁵ Id. (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

⁶ While Justice Goldberg writes most explicitly of a “right to privacy *in marriage*,” Id., at 491 (emphasis added), all of the Justices place this type of privacy within a broader range of privacy expectations presumed and held dear by citizens of a free society.

⁷ Id.

comprehensive definition of those fundamental beliefs in a sanctified space of protected thought, belief, behavior, information, association, property, and identity alluded to by the Justices who called them “our most precious freedoms.”⁸ These freedoms are what constitute the larger belief in “Privacy,” the belief invoked so passionately when citizens feel the boundaries of those freedoms being violated. Fourth Amendment search and seizure law polices (so to speak) some of these boundaries, as do the First Amendment protections of speech, religion, and assembly. However, as legal tools, these Constitutional protections can sometimes feel insufficient to the task.

Today, as technology advances at astounding rates, as the values of a consumer and information culture take firmer root, and as the globe shrinks and concerns over national security increase, these protected boundaries of privacy become ever more confusing and illusive. At times, our legal questions seem as if they might out-pace our ability to analogize. Most people are aware of the privacy controversies that have recently been raised by national security concerns (those embodied in increased airport and border searches, the debate over surveillance technologies, and so on), but what of the arguably more mundane, day-to-day questions raised, for example, by our increased use of the Internet? Has a woman’s privacy been invaded if she finds herself listed on an adult website as a “swinger?”⁹ More so than if she found herself listed as such on a bathroom wall? Is my privacy invaded when Google keeps track of the videos I watch on YouTube? What if they give that information to a third party as part of the discovery process during litigation?¹⁰ And if we want protection from these sorts of privacy invasions, where do we turn? Federal and/or state constitutions? Statutes? Common law torts and contracts?

Here in Vermont, we struggle with our own concerns over privacy and while we often like to boast, “Vermont is different” and take comfort in a belief in increased protection for individual rights, our privacy concerns are equally as vexed as those of our

⁸ *Id.*, at 498 (Goldberg, J., concurring) (quoting *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932)).

⁹ *Doe v. Friendfinder Network*, 540 F.Supp.2d, 288 (D.N.H., 2008).

¹⁰ See Stephanie Bodoni, *Google May Face New Round of Privacy Complaints*, Boston Globe, July 5, 2008, at http://www.boston.com/business/technology/articles/2008/07/05/google_may_face_new_round_of_privacy_complaints/.

neighbors. Are Vermonters really as protected as they believe themselves to be? How many Vermont commuters were stunned to find out that the government *could*, in fact, overcome their reasonable expectation of privacy in the bags they carried on to the Lake Champlain ferry from Grand Isle to Plattsburgh, NY?¹¹ How do we resolve conflicts when our desire for privacy is pitted against equally important values? What, for example, is the proper resolution to a massive medical records database that will improve the quality and efficiency of healthcare throughout Vermont and New Hampshire, but will also make personal medical information increasingly vulnerable to abuse?

When Vermonters seek resolution to these issues, to what sources of law should they turn?

The Vermont Constitution

When Vermonters claim enhanced protections for individual privacy, generally they are referring to provisions of the Vermont Constitution, in particular, Article 11.

Article 11 reads:

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.¹²

¹¹ Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006). (While the small commuter ferry between Grand Isle, VT and Plattsburgh, NY may not seem an obvious equivalent to an international flight, the Second Circuit determined that preventing terrorist attacks on vessels of mass transportation constituted a “special need” justifying warrantless searches of Lake Champlain ferry passengers’ car trunks and baggage.) Vermonters traveling to and from Canada should also be apprised that “In the context of customs inspections, ‘the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior.’ Given the government’s important interest in ‘protect[ing] the Nation by stopping and examining persons entering this country,’ ‘the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is ... struck much more favorably to the Government at the border.’ As such, the government has significant latitude to detain persons in a border-crossing context. ‘Routine searches of the persons and effects of entrants [at the international border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant...’”

State v. Lawrence, 834 A.2d 10 (Vt. 2003) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 & 540 (1985)).

¹² Vt. Const. ch. 1, art. XI.

Indeed, Article 11 provides Vermonters with somewhat greater expectations of privacy in search and seizure contexts than does the Fourth Amendment of the United States Constitution. While a federal law enforcement officer need not obtain a separate warrant to search a closed container in a vehicle,¹³ a Vermont state officer must.¹⁴ Similarly, while many U.S. citizens have no reasonable expectation of privacy in the trash they leave out for the garbage collector,¹⁵ Vermonters do have such an expectation if they've put such trash into an opaque bag.¹⁶

In these cases, the Vermont Supreme Court speaks of its “task ... ‘to honor not merely the words, but the underlying purposes of constitutional guarantees’ and ‘to discover and protect the core values that gave life to Article 11.’”¹⁷ It notes that exceptions to the Article 11 warrant requirement must be “jealously and carefully drawn,”¹⁸ and distinguishes its Article 11 jurisprudence from that of the United States Supreme Court’s Fourth Amendment jurisprudence by naming the warrant requirement as the *resolution* of a balancing between “citizens’ interest in privacy” and “law enforcement’s interest in expeditious searches.”¹⁹ The Vermont Supreme Court sets the “expectation of privacy” as the starting point for analyzing Article 11 claims,²⁰ and states that such expectations will be judged reasonable by “examin[ing] both private subjective expectations and general social norms.”²¹ The Court clarifies, however, that while general social norms are a factor in analyzing whether a person’s expectation of privacy is reasonable, “constitutional rights should not succumb to waning expectations or fluctuations in the degree of government intrusion ‘society’ is willing to condone.”²²

¹³ California v. Acevedo, 500 U.S. 565, 579-80 (1991)(citing United States v. Ross, 456 U. S. 798, 824 (1982)).

¹⁴ State v. Savva, 616 A.2d 774 (Vt. 1991).

¹⁵ California v. Greenwood, 486 U.S. 35 (1988).

¹⁶ State v. Morris, 680 A.2d 90 (Vt. 1996).

¹⁷ State v. Savva, 616 A.2d 774, 779 (quoting State v. Kirchoff, 587 A.2d 988, 992 (Vt. 1991)).

¹⁸ Id. (quoting State v. Jewett, 532 A.2d 958, 960 (Vt. 1986)).

¹⁹ Id., at 780.

²⁰ Id., at 776-8.

²¹ Morris, 680 A.2d at 94.

²² Kirchoff, 587 A.2d at 993.

The presumption that “[t]he Vermont Constitution may afford greater protection to individual rights than do the provisions of the federal charter”²³ permeates Vermont’s Article 11 jurisprudence; however, even the Vermont Supreme Court seems to be at a loss when trying to determine where such an interpretation of its Constitution originates. Many have noted the comparative absence of the word “unreasonable” when comparing the Fourth Amendment’s prohibition on “unreasonable” searches and seizures and Article 11’s guarantee that “the people have a right to hold themselves, their houses, papers and possessions, free from search or seizure.”²⁴ However, the Vermont Supreme Court has dismissed the relevance of this omission: “this Court has held that the word ‘unreasonable’ is as implicit in Article Eleven as it is express in the Fourth Amendment.”²⁵ One need only look at the Court’s tortured efforts in State v. Kirchoff to find textual²⁶ justification for expanded protections²⁷ (and its eventual reliance on a duty to intuit the “core value that gave life to Article 11”²⁸) to understand that, at some level, this body of Vermont Constitutional law is essentially just a judicial assertion of the “Vermont is different” axiom.²⁹

Other articles of the Vermont Constitution implicate, if not directly protect, privacy. Article 1 asserts “[t]hat all persons are born free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending of life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety....”³⁰

²³ Id., at 991.

²⁴ Vt. Const. ch. 1, art. 11.

²⁵ State v. Record, 548 A.2d 422, 423 (Vt. 1988).

²⁶ Or contextual, or comparative, and so on....

²⁷ Kirchoff, 587 A.2d at 991-2.

²⁸ Id., at 992.

²⁹ See Benning v. State, 641 A.2d 757, 761 (Vt. 1994) (“ At the center of plaintiffs’ argument is the assertion that Vermont values personal liberty interests so highly that the analysis under the federal constitution or the constitutions of other states is simply inapplicable here. In support of this contention, plaintiffs rely on political theorists, sociological materials and incidents in Vermont’s history. Without detailing this argument, we find it unpersuasive not because it overvalues Vermont’s devotion to personal liberty and autonomy, but because it undervalues the commitment of other governments to those values. ...

Certainly, if there was a heightened concern for personal liberty, there is no evidence of it in the text of the Constitution”).

³⁰ Vt. Const. ch.1, art. 1.

However, Article 1 does not actually *provide* these rights; rather, it “expresses fundamental, general principles, principles that infuse the rights of individuals and powers of government specified elsewhere in the constitution.”³¹ The Vermont Supreme Court “ha[s] often treated what protections we have found in Article 1 as coextensive with those of the Fourteenth Amendment to the United States Constitution,”³² compelling, along with Article 10’s Laws of the Land Clause,³³ due process.³⁴ Equal protection in the Vermont Constitution is found in Article 7’s Common Benefits Clause. Unlike in Article 1 though, the Court has made clear that Article 7 provides greater protections³⁵ than the Fourteenth Amendment, stating that Article 7 is the “first and primary safeguard of rights and liberties of all Vermonters.”³⁶ As Baker v. State

³¹ Shields v. Gerhart, 658 A.2d 924, 928 (Vt. 1995). “Other more specific provisions provide the protections where the drafters found them necessary. At best, Article 1 is a restatement of the general requirement of due process of law. We have held, however, that Article 4 is the general analog to federal due process protections. In addition to due process protections, a private individual asserting a taking of property by the state has recourse in the mandatory compensation provisions of Article 2. Recognition of an enforceable right to preserve and protect property under Article 1 would, in many situations, render the guarantees found in Articles 2 and 4 redundant or superfluous. Thus, a cause of action under Article 1 is unnecessary to protect property interests. For the foregoing reasons, we conclude that Article 1 is not self-executing. Alone, it does not provide rights to individuals that may be vindicated in a judicial action.” Id., at 929 (internal citations omitted).

³² Benning, 641 A.2d at 760.

³³ In addition to due process, Article 10 covers many of the familiar criminal rights, including the rights to counsel, confrontation of witnesses, speedy trial, and jury trial, as well as the right against self-incrimination. Vt. Const. ch. 1 art. 10.

³⁴ Parker v. Gorczyk, 744 A.2d 410, 416 (1999)(“ the term “laws of the land” in Article 10 is synonymous with the term ‘due process of law’ contained in the Fourteenth Amendment of the United States Constitution and, as such, our own due-process jurisprudence has relied heavily on that of the United States Supreme Court even when our decisions were ultimately based on the Vermont Constitution.”).

³⁵ Baker v. State, 744 A.2d 864, 877-8 (Vt. 1999)(“ The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7. . . . When a statute is challenged under Article 7, we first define that ‘part of the community’ disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state’s protection. Our concern here is with delineating, not with labelling [sic] the excluded class as ‘suspect,’ ‘quasi-suspect,’ or ‘non-suspect’ for purposes of determining different levels of judicial scrutiny.”).

³⁶ Id., at 870 (“As we explain in the discussion that follows, the Common Benefits Clause

illustrates, the equal protection principles of the Common Benefits Clause can be used to protect interests with privacy implications; however, the clause itself is not concerned with ‘privacy,’ per se. Rather, “Article 7 is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons ‘who are a part only of that community.’”³⁷

Articles 3,³⁸ 13,³⁹ and 20⁴⁰ respectively provide Vermont’s constitutional protections for the freedoms of religion, speech and the press, and assembly: the First Amendment rights. Although not habitually spoken of in these terms, free exercise of religion (and, by extension, the ban on “compelled support”), for many, implicates one of the most precious of privacy rights: the right to hold and act upon one’s spiritual beliefs without governmental interference. While the Vermont Supreme Court has mainly relied on First Amendment analyses⁴¹ in addressing free exercise claims, it once implied that

of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters.”)

³⁷ *Id.*, at 878.

³⁸ Article 3 reads: “That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord’s day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.” Vt. Const. ch.1 art. 3.

³⁹ Article 13 reads: “That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.” Vt. Const. ch. 1 art.13.

⁴⁰ Article 20 reads; “That the people have a right to assemble together to consult for their common good – to instruct their Representatives – and to apply to the Legislature for redress of grievances, by address, petition or remonstrance.” Vt. Const. ch. 1 art. 20.

⁴¹ *Brady v. Dean*, 790 A.2d 428, 433 (Vt. 2001)(“ Plaintiffs note that we have traditionally applied a balancing test [to Article 3 free exercise claims] drawn from a long line of United States Supreme Court decisions, which asks whether an interference with a sincerely held religious belief serves a compelling governmental interest and is narrowly tailored to serve that interest.”). See also *State v. DeLaBruere*, 577 A.2d 254, 268-72 (Vt.

the Vermont provision could have a more expansive reading. Focusing on the language “no authority ... shall in any case interfere with ... the free exercise of religious worship,”⁴² the Court noted that “[a]ll that is required is a mere interference.”⁴³ However, eight years later, the Court restricted this possible reading, stating, “Although the more recent

language in Beauregard is broad, the decision contains no real analysis, and the case before the Court fell squarely within the anti-discrimination construction of Article 3 announced in Ferriter. Based on these cases, we would have to conclude that at least with respect to the claims made in this case, we can find no basis for the argument that the Vermont Constitution affords additional protection to defendants....”⁴⁴

While the Court may not be anxious to expand Article 3 free exercise protections, the Beauregard language still exists, waiting for a future case.

It is similarly unclear whether the Vermont Constitution provides any greater or lesser restrictions on state endorsement of religion. The Vermont Supreme Court has explicitly stated that it is not bound to federal Establishment Clause jurisprudence in interpreting Article 3’s Compelled Support Clause, particularly when it faces “a choice between deciding a constitutional case on state grounds [that] yield[s] a final answer ... and a construction of the federal constitution that faces an uncertain future given the state of applicable federal principles....”⁴⁵ Unlike the First Amendment, Article 3 “speaks not to the establishment of religion but to state support of religious worship.”⁴⁶ However, the Court has made clear that “[a]s applied to the myriad of circumstances that might come before us, we do not believe we can simplistically state that one provision is always more restrictive of state action with respect to religion than another.”⁴⁷ In deciding a school-funding case, the Court stated, “Article 3 is not offended by mere compelled support for a place of worship unless the compelled support is for the ‘worship’ itself.”⁴⁸ After a long

1990); State v. Chambers, 477 A.2d 110, 112 (Vt. 1984) *cert denied*, 469 U.S. 875 (1984).

⁴² Vt. Const. ch.1 art. 3.

⁴³ Beauregard v. City of St. Albans, 450 A.2d 1148, 1152 (Vt. 1982).

⁴⁴ State v. DeLaBruere, 577 A.2d 254, 270 (Vt. 1990).

⁴⁵ Chittenden Town Sch. Dist. V. Dept. of Educ., 738 A.2d 539, 546 (Vt. 1999).

⁴⁶ Id., at 541.

⁴⁷ Id., at 549.

⁴⁸ Id., at 550.

exploration of the article's historical and legislative history, though, it "[saw] no reason why, from its first adoption, Article 3 would not be seen to cover all forms of religious worship even as part of religious education" and determined "no artificial line between religious worship and religious education emerged in Vermont."⁴⁹ In short, it is not yet clear whether Article 3 might provide Vermonters with greater or lesser protection than the First Amendment in privacy claims related to religious freedoms.

Just as the freedom of religion speaks to the privacy of one's thoughts, beliefs, and the expressions thereof, so too does the right to free speech (and assembly).⁵⁰ While "expressly reserv[ing] a final determination of the congruence of the state and federal rights"⁵¹, the Vermont Supreme Court has "suggested that the right of free speech guaranteed under Chapter I, Article 13 is coextensive with the First Amendment...."⁵² In State v. Read, the Court stated clearly that the "[d]efendant ... bears the burden of explaining how or why the Vermont Constitution provides greater protection than the federal constitution."⁵³ It went on, though, to suggest that such an argument might be made persuasively through "empirical, doctrinal, prudential, structural or ethical arguments,"⁵⁴ such as in State v. Jewett,⁵⁵ or by reference to "'core values,' a principle that has at times guided our analysis of distinctions between state and federal constitutional rights."⁵⁶ As the Court acknowledges, "Article 13 is largely undeveloped in our cases,"⁵⁷ and to date,⁵⁸ such an argument has not been made successfully.

⁴⁹ Id., at 557-8.

⁵⁰ See Charles Fried, Saying What the Law Is: the Constitution in the Supreme Court, (2004)(making the argument that *all* of the First Amendment protections are fundamentally aimed at protecting the freedom of the mind.)

⁵¹ State v. Read, 680 A.2d 944, 951 (Vt. 1996).

⁵² Id.

⁵³ Id.

⁵⁴ Id., at n. 7.

⁵⁵ State v. Jewett, 500 A.2d 233, 237 (Vt. 1985).

⁵⁶ Read, 680 A.2d at n.7.

⁵⁷ Shields v. Gerhart, 658 A.2d 924, 929 (Vt. 1995).

⁵⁸ State v. Read stands, to date, as the Court's most comprehensive discussion of the relationship between the First Amendment's and Vermont's constitutional free speech protections. 680 A.2d at 951-3. See White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, n.2 (2d Cir. 2007)(" because the state provision provides substantially the same protections as the First Amendment, both freedom of expression claims may be analyzed under the same standard." (citing State v. Read)).

Certainly other provisions of the Vermont Constitution might invite creative readings implicating privacy rights. Indeed, Article 4⁵⁹ was once invoked, unsuccessfully, to establish a privacy right in one's 'character' that might constitutionalize a defamation claim.⁶⁰ In sum, though, Articles 1, 3, 7, 10, 11, 13, and 20 form the constellation of Vermont's Constitutional safeguards for privacy, with only Article 11 having a solid jurisprudential history of providing greater *privacy* protections than the federal Constitution.

Vermont Statutes

While there is no Vermont "Privacy Statute," many of Vermont's laws have privacy provisions. These provisions protect as confidential everything ranging from identifying information of those contributing to the collection of agricultural data,⁶¹ to all potentially identifying information relating to HIV and AIDS within the public health reporting system.⁶² Indeed, there are 206 statutory exemptions to the requirement that all public documents be open for inspection and review under the Public Records Act.⁶³ While the specifics of these protections are too numerous to discuss, there are some commonalities to the information Vermont legislators have deemed "private."

I. Exceptions to the Public Records Act

⁵⁹ Article 4 reads: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws." Vt. Const. ch.1 art 4.

⁶⁰ Levinsky v. Diamond, 559 A.2d 1073, 1086 (Vt. 1989)(overruled on other grounds) ("The cited Vermont constitutional provision has never been held by this Court, however, to give rise to a substantive constitutional right. Instead, it has been treated as the Vermont equivalent of the federal Due Process Clause. As such it protects recourse to the judicial process but does not rise to the level of establishing a fundamental privacy right, and we decline to do so here." (citations omitted)).

⁶¹ Vt. Stat. Ann. tit. 6 § 61 (2005).

⁶² tit. 18, § 1001 (Supp. 2007) (effective April 1, 2008).

⁶³ Michal O'Grady, Legislative Council, Staff Report on Public Records Requirements in Vermont, 2005 Adj. Sess., app. I (2007).

The Public Records Act⁶⁴ itself acknowledges that “[a]ll people 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.”⁶⁵ So, while the law “provide[s] for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution,”⁶⁶ it also has an extensive subsection of exemptions, protecting 39 types of information from public view.⁶⁷ Approximately half of these provisions protect information that one might traditionally think of as falling within a personal right to privacy.⁶⁸

As one might expect, these exceptions include the identification information found in voter registrations, including date of birth, social security number, address, and driver’s license number.⁶⁹ They also address the economic information found in tax returns⁷⁰ and affidavits of income and assets filed in Vermont Family Proceedings,⁷¹ as well as any banking and credit card information held by Vermont state agencies.⁷² Three

⁶⁴ Vt. Stat. Ann. tit. 1 §§ 315-20 (2003)

⁶⁵ § 315.

⁶⁶ Id.

⁶⁷ tit. 1 § 317(c) (Supp. 2007).

⁶⁸ The other half of the exceptions fall into categories that might be described as 1) protecting business or special interests, and 2) facilitating the smooth and effective functioning of governmental or judicial processes. Among the first group are protections of trade secrets, § 317(c)(9) (Supp. 2007); data filed to apply for new jobs and manufacturers’ tax credits, § (c)(22); University of Vermont and Vermont state colleges’ administrative, academic, and scholarly research, data, etc., § (c)(23); as well as Vermont Life magazine’s subscription list, §(c)(21). Information protected in the second category includes location, appraisals, and purchase price of property prior to a public agency’s announcement of a project and award of contracts, § (c)(13); information regarding contract negotiations, “including ... collective bargaining agreements with public employees,” § (c)(15); records of non-factual inter-and intradepartmental communication preliminary to actions and policy decisions of cities, towns, school districts, and other political subdivisions, § (c)(17); records or materials prepared for deliberations of a public agency acting in a judicial or quasi-judicial capacity, § (c)(24); information provided by individuals to departments of banking, insurance, securities, health care administration, and public service who are seeking to resolve disputes with these departments or with a regulated utility, §§ (c)(26) & (27); and so on.

⁶⁹ § 317(c)(31).

⁷⁰ § (c)(6).

⁷¹ § (c)(34).

⁷² § (c)(33).

exceptions specifically protect health information,⁷³ and another, the exception for personnel files of public employees, explicitly mentions physical and mental health information among its listed concerns.⁷⁴ Other provisions protect information that could be described as addressing “general” privacy concerns: matters of thought, behavior, reputation, personal safety, and so on.⁷⁵ These exceptions cover student records;⁷⁶ testing scores for licensing, employment, or academic exams;⁷⁷ the identity of library patrons;⁷⁸ address information of victims of domestic violence, sexual assault, or stalking who are participating in the confidentiality program;⁷⁹ and information relating to the detection and investigation of crime.⁸⁰

Two exceptions highlight the growing importance of information technology in government administration as well as in the daily lives of individuals. Exception (c)(25) protects “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.”⁸¹ Exception (c)(30) is interesting in that it protects “all code and machine-readable structures of state-funded and controlled database applications” that are used in state marketing activities, “*unless* any such state department ... determines that

⁷³ § 317(c)(37) (protecting “records provided to the department of health pursuant to the patient surveillance and improvement system”), and §§(38) & (39) (protecting human service records containing prescription information that might identify provider or patient, respectively).

⁷⁴ § 317(c)(7).

⁷⁵ The exception for personnel files also addresses general privacy concerns; however, the Vermont Supreme Court has determined that § 317(c)(7) does not exempt *everything* within personnel files. Rather, it protects “only those ‘personal’ documents which 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.’” Norman v. Vermont Office of Court Adm’r, 844 A.2d 769, 772 (Vt. 2004) (citing Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 624 A.2 857, 863 (Vt. 1993)).

⁷⁶ § 317(c)(11).

⁷⁷ § (c)(8).

⁷⁸ § (c)(19).

⁷⁹ § (c)(29).

⁸⁰ § 317(c)(5). While this provision also facilitates the smooth functioning and efficacy of government, law enforcement, and judicial processes, it would seem that, from the point of view of privacy, its fundamental purpose is to protect the presumption of innocence and the impact disclosures might have on the lives and reputations of individuals.

⁸¹ § 317(c)(25).

the license or other voluntary disclosure of such materials is in the state's best interests."⁸² At one level, this provision is similar to those that protect business or interest groups; by controlling access to information, the state reaps clear marketing advantages and revenue-raising opportunities. However, the provision also alludes, intentionally or otherwise, to the state's ability to collect and store increasingly vast amounts of personal information through advancing database technology.

Two other exceptions are interesting in that they define the boundaries of their own privacy protections by relying on the language: "the right to privacy." Exception (c)(10) exempts from disclosure "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...."⁸³ The provision goes on to say that "lists which are by law made available to the public" are not included,⁸⁴ which, in a just-shy-of circular manner, presumes these lists will not violate a person's right to privacy. The language of exception (c)(12) is particularly vague; it protects "records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy, if disclosed."⁸⁵ The protection clearly hinges on what will or will not be interpreted as constituting a "clearly unwarranted invasion of personal privacy." Such interpretations, to date, are scant.⁸⁶

⁸² § (c)(30) (emphasis added).

⁸³ § (c)(10).

⁸⁴ *Id.* I find the "or produce public or private gain" a curious clause. Its location suggests some relevance to, or boundary for defining "a person's right to privacy;" however, the clarification is lost on me.

⁸⁵ § 317(c)(12).

⁸⁶ I found, via Westlaw, only two cases citing 1 V.S.A. §317(c)(12); both of them do so in footnotes. One discusses the appropriate use of a balancing test in the Public Records Act. Kade v. Smith, 904 A.2d 1080, n.5 (Vt. 2006) ("The dissent argues that the explicit balancing requirement within the exception for records 'concerning formulation of policy,' 1 V.S.A. § 317(c)(12) (exempting such records from disclosure 'where such would constitute a clearly unwarranted invasion of personal privacy'), suggests a legislative intent to preclude a balancing test where it is not expressly set forth in other exceptions. We are not persuaded, however, that the inclusion of a balancing test within one exception necessarily negates the otherwise express, overarching legislative principle that the "right to privacy ... ought to be protected unless specific information is needed to review the action of a governmental officer.").

The other explains a trial court's rationale for reviewing documents in camera.

Killington v. Lash, 572 A.2d 1368, n.2 (Vt. 1990) ("The trial court apparently based its order for in camera inspection on 1 V.S.A. § 317(b)(12), 'records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy

Finally, provisions (c)(1)-(4) allow for additional exceptions created by lawmakers,⁸⁷ professional codes of ethics of state-regulated professions,⁸⁸ as well as statutory and common law privileges (other than the common law deliberative process privilege).⁸⁹ Indeed, the remaining 167 statutory exemptions to the Public Records Act's open records mandate are born of the two exceptions for materials made confidential "by law."⁹⁰

II. Exceptions Created By Lawmakers

These statutory provisions reflect privacy concerns similar to those found in the exceptions enumerated in the Public Records Act.⁹¹ A number of them address personal and financial information that we now associate with identity theft. 9 V.S.A. § 2440 is the Social Security Number Protection Act, an expansive law affecting state and business practices that went into effect July 1, 2007. In addition to providing strictures on the use and protection of social security numbers, this law also gives individuals the right to request identifying information be redacted from documents on town websites.⁹² Courts will protect credit card numbers in their possession⁹³, and multiple laws help protect the

, if disclosed.' That section is only obliquely referred to by defendants and is not the basis of the present appeal.")

⁸⁷ §§ 317(c)(1) & (2) (protecting records that, respectively, have been designated by law as either confidential or open only to specifically designated people).

⁸⁸ § (c)(3).

⁸⁹ § 317(c)(4) It is interesting to note that the common law deliberative process privilege was removed from the Public Records Act exemptions as a result of a 2005-2006 "Open Records" movement, led by a diverse coalition of individuals, citizens groups, and non-profits. In arguing for "open records" and an end to the common law deliberative process privilege, the movement relied heavily on a 'Vermont is Different' platform. See e.g. Louis Porter, Group Criticizes Lack of Vt. Stormwater Plan, Rutland Herald, November 9, 2005, at

<http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20051109/NEWS/511090365/1004>; and Vermont Natural Resources Council, Frequently Asked Questions About Deliberative Process Privilege, at <http://www.vnrc.org/article/articleview/9579/1/604/>.

⁹⁰ §§317 (c)(1) & (2).

⁹¹ Including those that cater to certain interest groups and lobbies. See e.g. Vt. Stat. Ann. tit. 5 § 3452 (2005)(protecting from disclosure information collected from railroads); tit. 6 § 484 (2005)(protecting records of maple products dealers and processors); and tit. 6 § 1815 (2005)(protecting milk business records of the Northeast dairy compact).

⁹² tit. 9, § 2440(f) (2006).

⁹³ tit. 4 § 740(c) (2005).

financial information provided on individual tax returns.⁹⁴ Just as your tax preparer must keep your financial information confidential,⁹⁵ so too must your CPA.⁹⁶ In general, it seems fair to say that one's financial "health" is a private matter in Vermont. Financial information revealed during proceedings related to overdue child support⁹⁷ is confidential, as is information provided to obtain need-based educational incentive grants,⁹⁸ as well as unemployment⁹⁹ and public assistance¹⁰⁰ benefits. Hitting the financial jackpot is deemed equally private as falling on hard times, and lottery winners might be happy to know that the financial information they file to claim their winnings is also protected.¹⁰¹

To whatever extent one's financial health may be protected, information about one's medical health is even more so. Vermont's Bill of Rights for Hospital Patients states:

"The patient has the right to expect that all communications and records pertaining to his or her care shall be treated as confidential. Only medical personnel, or individuals under the supervision of medical personnel, directly treating the patient, or those persons monitoring the quality of that treatment, or researching the effectiveness of that treatment, shall have access to the patient's medical records. Others may have access to those records only with the patient's written authorization."¹⁰²

Medical records and information rank high among society's anxieties over privacy, perhaps because they reveal vulnerabilities whose exposure we fear could be exploited. In this way, it's not surprising to see how protections of health-related information blend in with another category of provisions I'm describing as "special protections for vulnerable populations." Title 18 contains Vermont's laws explicitly relating to health,

⁹⁴ tit. 32, § 3102 (2007) ("Confidentiality of tax records"); See also § 3411(4) (property valuation and review division); § 4009 (tax lister inventories); § 5939 (exception for claimant agencies using tax information solely for debt-collection purposes).

⁹⁵ § 5901.

⁹⁶ tit. 26, § 82 (Supp. 2007).

⁹⁷ tit. 33, § 115(g) (2001).

⁹⁸ tit. 16 § 2843(d) (2004).

⁹⁹ tit. 21, §§ 1314(d)-(f) (2003).

¹⁰⁰ tit. 33, § 111 (2001).

¹⁰¹ tit. 31 § 674(L)(1I) (Supp. 2007).

¹⁰² tit. 18 § 1852(a)(7) (Supp. 2007).

including the above Bill of Rights, and while they may do so to a greater or lesser degree, just about all of Vermont's health-related laws explicitly address privacy concerns.

For example, both the cancer and mammography registries take pains to protect identifying information of individual patients, health care providers, and facilities¹⁰³ as they collect and share statistical and epidemiological information critical to improving public health.¹⁰⁴ Information in the advance directive¹⁰⁵ and childhood immunization¹⁰⁶ registries must be kept confidential. And while health care labs and providers must report all cases of lead poisoning, particularly in children under the age of 6, the health commissioner must simultaneously "establish procedures to ensure the confidentiality of the[se] children and families."¹⁰⁷ "Prescriptions, orders and records required by [title 18, chapter 84]"¹⁰⁸ are to be kept confidential, as are the records of all patients and caregivers registered through Vermont's medical marijuana program.¹⁰⁹ Vermont is especially vigilant about protecting identifying information of those individuals with HIV or AIDS.¹¹⁰ While all reports concerning instances of communicable diseases are confidential,¹¹¹ a number of special provisions apply to HIV and AIDS, including two that explicitly address issues related to collection, storage, and electronic transfer of such information.¹¹² Unlike many other statutory privacy provisions, there are penalties for

¹⁰³ tit. 18 §§ 154 & 157 (2002).

¹⁰⁴ §§ 152-3 & 155.

¹⁰⁵ tit. 18 § 9719(b) (Supp. 2007).

¹⁰⁶ tit. 18 § 1129(b) (2002).

¹⁰⁷ § 1755(d).

¹⁰⁸ § 4211.

¹⁰⁹ tit. 18 § 4474d (Supp. 2007).

¹¹⁰ Venereal diseases are also singled out from other communicable diseases, and have their own privacy protection in Vt. Stat. Ann. tit. 18, § 1099 (2002) ("All information and reports in connection with persons suffering from venereal diseases shall be regarded as absolutely confidential ... and such records shall not be accessible to the public nor shall such records be deemed public records") This law was enacted in 1953.

¹¹¹ Vt. Stat. Ann. tit. 18, § 1001(a) (Supp. 2007, effective April 1, 2008).

¹¹² §§ 1001(a)(2)(requiring "procedures for backing up encrypted, individually identifying information, including procedures for storage, location, and transfer of data) & (f)(prohibiting the health department from "collecting, processing, or storing any individually identifying information concerning HIV/AIDS on any networked computer or server, or any laptop computer or other portable electronic device.")

violating confidentiality under § 1001, including fines up to \$25,000.¹¹³ Vermont's evidentiary privileges and other court procedures also reflect these concerns. Doctor-patient confidentiality is codified in 12 V.S.A. §1612(a), but special protections exist for HIV-related information. No court may order "disclosure of individually-identifiable HIV-related testing or counseling information" unless there is a "demonstrated ... compelling need ... that cannot be accommodated by other means."¹¹⁴ If a court determines that such information is needed, it must follow strict procedures to maintain confidentiality, including *in camera* proceedings and the use of pseudonyms.¹¹⁵

The elderly and disabled, whose hallmark vulnerabilities are often medical in nature, have specific legislative protections. Title 18 houses the protections for individuals with developmental disabilities. The Bill of Rights for the developmentally disabled¹¹⁶ includes the right to "[p]rivacy, dignity, confidentiality and humane care."¹¹⁷ All evaluations prepared in relation to petitions for guardianship are confidential¹¹⁸ as are guardianship proceedings.¹¹⁹ Information regarding individuals who use attendant care services is protected via the Human Services laws of Title 33,¹²⁰ the title that contains most of the protections for the elderly. Nursing home residents have a Bill of Rights similar to the one for the developmentally disabled that promises confidentiality of personal and medical information.¹²¹ However, in the privacy provisions for the elderly

¹¹³ § 1001(e). An interesting comparison: the confidentiality provision for mental health records punishes violations with fines up to \$2,000 and/or up to one year in prison. § 7103. However, the confidentiality protections for genetic testing focus entirely on employment-related situations, forbidding, for example, disclosure of such information "to an employer, labor organization, employment agency or licensing agency...." § 9333.

¹¹⁴ tit. 12 § 1705(a) (2002).

¹¹⁵ §§ 1705(b)-(e).

¹¹⁶ Although "mental retardation" is included among the definitions of "developmental disability," tit. 18, § 8722(2)(A) (2000), there are special sections of code that only apply to "mental retardation." Of particular note, chapter 204 of Title 18 addresses the sterilization of "mentally retarded" individuals; "[a]ll proceedings under this chapter shall be closed to the public, and the records shall be sealed unless requested to be opened by the respondent." § 8713.

¹¹⁷ tit. 18 § 8728(a)(2) (2000).

¹¹⁸ tit. 18 § 9306(c) (Supp. 2007).

¹¹⁹ § 9309(b).

¹²⁰ tit. 33 § 6321(c) (Supp. 2007).

¹²¹ § 7503(2)(H).

one sees a shifting concern towards safety, as several are designed not to stop the unauthorized transfer of medical information, but to stop elder abuse. For example, certain enumerated individuals have a legal obligation to report actual or suspected abuse of an elderly or disabled adult, but they are provided confidentiality when doing so.¹²² Similarly, those complaining of operations or treatment of patients in nursing homes will have their identities protected.¹²³ Although the registry containing the names of those found to have committed elder abuse is accessible to the public under the Nursing Home Reform Act,¹²⁴ the “information obtained through reports and investigations [of such abuse] including the identity of the reporter shall remain confidential....”¹²⁵

Similar laws use privacy protections as a means to safeguard children, youth offenders, and crime victims. In fact, reporting laws designed to stop child abuse parallel those aimed to stop elder abuse. While any “concerned person” may report a reasonably-suspected instance of child abuse,¹²⁶ and while health care providers, school personnel, law enforcement officers, and so on are legally obligated to do so,¹²⁷ “identifying information about either the person making the report or any person mentioned in the report shall be confidential....”¹²⁸ Children are safeguarded in many other ways as well. The “departments of developmental and mental health services, social and rehabilitation services, and education” must protect the confidentiality of children with emotional disturbance.¹²⁹ The secretary of human services and commissioner of education also have developed policies to protect the confidentiality of participants in the health, education, and family support programs under chapter 47’s Children at Risk of School

¹²² § 6903. Subsection (c) lists three situations in which confidentiality would not apply: “(1) the person making the report consents to disclosure; (2) a judicial proceeding results ...; or (3) a court, after a hearing, finds probable cause to believe the report was not made in good faith and orders ... disclos[ure]”

¹²³ tit. 33, § 7112 (2001).

¹²⁴ tit. 33 § 6911(b)-(c) (Supp. 2007).

¹²⁵ § 6911(a).

¹²⁶ § 4913(b).

¹²⁷ § 4913(a).

¹²⁸ § 4913(d). The same exceptions apply as well: the person making the report can specifically consent to disclosure, and if a judicial proceeding results and a court determines the report was not made in good faith, confidentiality will not apply. *Id.*

¹²⁹ tit. 33 § 4305(a) & (b)(2) (2001).

Failure.¹³⁰ Confidentiality is also guaranteed to individuals and families involved in the birth information network,¹³¹ a program “designed to identify newborns who have specified health conditions which may respond to early intervention and treatment by the health care system.”¹³²

Indeed, many of Vermont’s privacy laws apply to family relationships, particularly as they affect the welfare of children.¹³³ Voluntary Acknowledgement of Parentage forms are confidential, though they can be made available to hospitals, medical offices, schools, courts, and the office of child support in certain circumstances.¹³⁴ For good cause, courts are able to keep confidential information relating to child support or parental rights, and all such information will be confidential in cases where “a temporary or final order for relief from abuse has been entered....”¹³⁵ In proceedings under the Family Support Act of 1996, the court can order all identifying information of a child or party be kept confidential, if it determines that their “health, safety, or liberty ... would be unreasonably put at risk by ... disclosure....”¹³⁶ Adoption records and information are protected by measures that try to balance competing interests in the privacy of the involved families and individuals, and the revelation of information that will help maximize the health and wellbeing of the adopted child. For instance, prospective adoptive parents are to receive a social and health history of the child, natural parents, and extended family; however, that history should exclude any information that might be identifying.¹³⁷ Adoption records are confidential, retained permanently and sealed for 99

¹³⁰ § 4702(b).

¹³¹ tit. 18 § 5088 (Supp. 2007).

¹³² § 5087(a).

¹³³ The provision regarding reports on fetal deaths is particularly interesting insofar as it implicates and intersects with the privacy controversies surrounding abortion. 18 V.S.A. § 5222 requires hospitals, physicians, and funeral directors to report on all cases of fetal death “of 20 or more weeks of gestation or, if gestational age is unknown, of 400 or more grams...; [and] all therapeutic or induced abortions....” tit. 18 §§ 5224(a)(1) & (2) (2000). The statute makes clear, however, that “[f]etal death reports are for statistical purposes only and are not public records. They shall be destroyed after five years.” § 5224(d).

¹³⁴ tit. 15 § 307 (2002).

¹³⁵ §§ 788(a) & (c).

¹³⁶ tit. 15B § 312 (2002).

¹³⁷ tit. 15A § 2-105 (2002).

years after the adoptee's birth.¹³⁸ Adult adoptees may, in general, access identifying information about a former parent;¹³⁹ however, the former parent may fill out a request for non-disclosure that will keep that information confidential as well.¹⁴⁰ Similarly, certain enumerated parties – including the adoptive parent, the emancipated adoptee, the direct descendant of a deceased adoptee, the court that heard the adoption petition, and so on – may request information from these records, but that information must be non-identifying.¹⁴¹

The courts also use privacy protections to grant 'second chances' to youth offenders. Indeed, by creating a separate system for handling juvenile offenses, the courts, among other things, seek to "remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and ... provide a program of treatment, training, and rehabilitation...."¹⁴² Hearings in juvenile court are closed to the general public,¹⁴³ and juvenile court records are confidential,¹⁴⁴ subject to certain exceptions aimed at "rehabilitating juveniles and protecting students and staff within ... schools."¹⁴⁵ After a statutorily prescribed time and fulfillment of conditions, all files and records are to be sealed.¹⁴⁶ Moreover, in Windsor county's 'youth court,'¹⁴⁷ proceedings are treated similarly to court diversion matters, "subject to the same rules governing ... confidentiality ... and all participants ... maintain[ing] that confidentiality."¹⁴⁸ All records of these youth proceedings are the property of court diversion,¹⁴⁹ with the mandatory audio recordings of such proceedings "subject to the same confidentiality criteria...."¹⁵⁰

¹³⁸ § 6-102.

¹³⁹ § 6-105.

¹⁴⁰ § 6-106.

¹⁴¹ § 6-104.

¹⁴² tit. 33 § 5501(a)(2) (2001).

¹⁴³ tit. 33 § 5523(c) (Supp. 2007).

¹⁴⁴ tit. 33 § 5536 (2001).

¹⁴⁵ § 5536(a).

¹⁴⁶ tit. 33 § 5538 (Supp. 2007).

¹⁴⁷ Windsor county's youth court is a special pilot program established by chapter 216 of Title 12 of Vermont Statutes.

¹⁴⁸ tit. 12 § 7106 (2002).

¹⁴⁹ *Id.*

¹⁵⁰ § 1708.

Crime victims receive special privacy protections, ranging from confidentiality of information provided during 911 calls (and then stored in system databases),¹⁵¹ to a victim's privilege to assert confidentiality in communications with crisis workers,¹⁵² to the Address Confidentiality Program for victims of domestic violence, sexual assault, and stalking.¹⁵³ These provisions are primarily safety measures, aimed at facilitating effective emergency and counseling services, and preventing future harm to victims of domestic and sexual violence. Special court procedures are available to protect further the confidentiality of Address Confidentiality participants:¹⁵⁴ documents such as marriage licenses¹⁵⁵ and birth certificates¹⁵⁶ can be kept clear of these confidential addresses, and unauthorized disclosure can be sanctioned with a civil penalty up to \$5,000.00, with each disclosure constituting a separate violation.¹⁵⁷ Government agencies must also keep confidential the addresses and contact information of crime victims who have requested notification when defendants are released.¹⁵⁸ Privacy laws also protect the identities of sexual abuse victims. Victims of offenses that require listing on the sex offender registry cannot have their identity revealed as part of that registry system.¹⁵⁹ Moreover, in proceedings "addressi[ng] a [medical] applicant's or licensee's alleged sexual misconduct, evidence of the sexual history of the victim..." cannot be used,¹⁶⁰ nor can opinion or reputation evidence of the victim's sexual conduct. The victim may also request that portions of the hearing be closed.¹⁶¹

Individuals under investigation, defendants, and convicted criminal offenders also have privacy rights within Vermont's statutes. These protections not only facilitate investigations and court procedures, but also protect individual reputations, the presumption of innocence, and, in the case of convicted offenders, the ideal that one's

¹⁵¹ tit. 30 § 7059 (Supp. 2007).

¹⁵² tit. 12 § 1614(b) (2002).

¹⁵³ tit. 15 §§ 1150-60 (2002).

¹⁵⁴ § 1156.

¹⁵⁵ tit. 18 § 5132 (2000).

¹⁵⁶ § 5083.

¹⁵⁷ tit. 15 § 1155(e)(4) (2002).

¹⁵⁸ tit. 13 § 5305(a) (1998).

¹⁵⁹ tit. 13 § 5302(b)(3) (Supp. 2007).

¹⁶⁰ tit. 26 § 1360(c) (2006).

¹⁶¹ Id.

time can be served and complete. Investigation records are protected in a number of different contexts. Examples range from investigation and examination reports of those licensed, authorized, or registered in banking and insurance,¹⁶² to records prepared for independent external reviews of mental health¹⁶³ and health care service decisions.¹⁶⁴ Investigation and complaint files of the human rights commission are confidential to all but the parties, their attorneys, and state or federal law-enforcement agencies, “upon reasonable request.”¹⁶⁵ Internal investigations records within the Department of Public Safety are also confidential, except as to the state police advisory commission, which has “full and free access to such records” and to “appropriate prosecutorial authorities having jurisdiction.”¹⁶⁶ Proceedings, records and reports of the professional peer review committee for health care are

“confidential and privileged, and shall not be subject to discovery or introduction into any civil action against a provider of professional health services arising out of the matters which are subject to evaluation and review by such committee....”¹⁶⁷

In comparison, the medical licensing board strikes a balance between “protect[ing] the reputation of licensees from public disclosure of unwarranted complaints ... and ... fulfill[ing] the public’s right to know of any action taken against a licensee ... based on a determination of unprofessional conduct,”¹⁶⁸ by creating a registry of complaints that reveals a licensee’s name when those complaints result in some disciplinary action.¹⁶⁹

While inmates within the Department of Corrections have limited rights in many ways, they do retain certain privacy rights regarding personal information. Inmate files, “except as otherwise ... indicated by the rules and regulations of the department” are “confidential and shall not be subject to public inspection except by court order for good cause shown....”¹⁷⁰ Pre-sentence and pre-parole reports are accessible only to those in

¹⁶² tit. 8 § 23 (2001).

¹⁶³ tit. 8 § 4089a(i) (Supp. 2007) (This provision also protects any health care information acquired during the course of such a review).

¹⁶⁴ § 4089f(d)(6).

¹⁶⁵ tit. 9 § 4555(a) (2006).

¹⁶⁶ tit. 20 §§ 1923(d)(1)&(2) (2000).

¹⁶⁷ tit. 26 § 1443(a) (2006).

¹⁶⁸ tit. 26 § 1318(a) (2006).

¹⁶⁹ § 1318(c)(2).

¹⁷⁰ tit. 28 § 601(10) (2000).

the Department of Corrections, the judge or parole board, and, in the court's or board's discretion, "the state's attorney, the defendant or inmate or his or her attorney, or other persons having a proper interest therein..."¹⁷¹ Confidentiality provisions also apply insofar as they facilitate the treatment and rehabilitation of offenders. "[C]ommunications by an inmate made for the purposes of treatment, assessment, evaluations, screening or programming while an appeal is pending" are to be kept confidential.¹⁷² Moreover, while victims can request information regarding an offender's compliance with probation conditions, "[n]othing in this section shall require ... disclos[ure] [of] confidential information revealed by the offender in connection with participation in a treatment program."¹⁷³ A person's criminal history record is generally confidential, though it may be disclosed under certain statutory provisions to researchers,¹⁷⁴ employers,¹⁷⁵ the department of buildings and general services,¹⁷⁶ private investigators,¹⁷⁷ and the department of banking, insurance, securities, and health care administration.¹⁷⁸ Researchers or employers who violate the provisions regarding unauthorized disclosure are subject to a civil penalty up to \$5,000.00, with each unauthorized disclosure constituting a separate violation.¹⁷⁹

Finally, Vermont has started to recognize the risks to privacy that have been generated by advancing technology, increased data storage, and information sharing. These issues span all of the categories of privacy protections and implicate every Vermonter in some manner. In the criminal context, Vermont keeps a DNA database of every person convicted of a violent crime,¹⁸⁰ which is used to help facilitate law enforcement and, arguably, promote public safety. DNA within the database is subject to general confidentiality, the violation of which carries stiff penalties of up to one-year imprisonment and/or \$10,000.00 in fines, as well as civil liability to the aggrieved

¹⁷¹ § 204(d).

¹⁷² § 903.

¹⁷³ tit. 28 § 205(d) (Supp. 2007).

¹⁷⁴ tit. 20 § 2056b (Supp. 2007).

¹⁷⁵ § 2056c.

¹⁷⁶ § 2056e.

¹⁷⁷ § 2056g.

¹⁷⁸ § 2056h.

¹⁷⁹ §§ 2056b(c) & 2056c(h).

¹⁸⁰ tit. 20 § 1933 (2000).

individual.¹⁸¹ If a person is pardoned, or found to have been wrongfully-convicted, the DNA sample “shall be removed and destroyed.”¹⁸²

Just as the DNA database is used to facilitate criminal investigations, information sharing facilitates just about every function of regulatory government. The Department of Banking, Insurance, Securities, and Health Care Administration (BISHCA), for example, stores and conveys massive amounts of information that implicate just about every individual’s personal financial or medical information. BISHCA has a number of privacy protections in place, including the general administrative provision outlining use and confidentiality of banking and insurance information.¹⁸³ This provision states that the commissioner may share and receive confidential and privileged materials and information as is necessary to perform the duties of the office, but that this information is still confidential.¹⁸⁴ Among other things, it may not be subpoenaed or subject to discovery in a civil action,¹⁸⁵ nor may anyone authorized to receive such information be “permitted or required to testify in any private civil action.”¹⁸⁶ Similarly, the Securities Act acknowledges that disclosure of its accumulated information could threaten those being regulated. Therefore, its protections explicitly list certain items, including social security numbers, residential addresses and phone numbers (unless used as a business address), trade secrets, records connected with an audit, and so on as confidential.¹⁸⁷

In the context of health care, Vermont has recently mandated that a health care database be developed to “enable the commissioner to carry out ... duties ... including ... (B) [i]dentifying health care needs and informing health care policy ... [and] (F) [i]mproving the quality and affordability of patient health care and health care coverage.”¹⁸⁸ The statute requires that the commissioner adopt a “confidentiality code to ensure that information obtained ... is handled in an ethical manner,”¹⁸⁹ and grants the

¹⁸¹ § 1941.

¹⁸² § 1940(a).

¹⁸³ Vt. St. Ann. tit. 8 § 22 (2001).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*, § 22(c).

¹⁸⁶ *Id.*, § 22(d).

¹⁸⁷ tit. 9 § 5607(b) (2006).

¹⁸⁸ tit. 18 § 9410(a) (Supp. 2007).

¹⁸⁹ § 9410(f).

commissioner the ability to impose penalties ranging from up to \$1,000.00, \$10,000.00, or \$50,000.00, depending on whether an unauthorized disclosure is made willfully or knowingly for pecuniary or personal gain.¹⁹⁰ Moreover, it provides that “[r]ecords or information protected by the ... physician-patient privilege ... or otherwise required by law to be held confidential, shall be filed in a manner that does not disclose the identity or the protected person.”¹⁹¹ Despite these provisions, however, many Vermonters are concerned by the depth and breadth of medical information that this database could contain,¹⁹² the number of people who will have access to it,¹⁹³ and the technological capacity to provide any meaningful protection once that information is electronically compiled in one place. What will the confidentiality code look like and will it be sufficient? In short, if the point of using database technology is to enhance information sharing, isn’t it inevitable that information will, in fact, be shared whether we want it to be, or not?

Conclusion

Vermonters love to think of their state as being different. Indeed, in certain circles, we often hear confident proclamations that “X would never happen in *Vermont!*” or “*Vermont* would never let Y come to pass.” But what does that mean? Who are we relying on when we say such things – the courts? The legislature? Citizens?

When it comes to privacy, Vermont does have a legislative and judicial history of protecting these rights. But, that history is not necessarily as extensive or unassailable as many might think. Vermont’s constitutional protections exceed clearly those of the federal constitution only in the context of search and seizure, and even there, they may

¹⁹⁰ § 9410(g).

¹⁹¹ § 9410(e).

¹⁹² In addition to the information mandated within the statute itself, “[t]he commissioner may by rule establish the types of information to be filed under this section, and the time and place and the manner in which such information shall be filed.” § 9410(d).

¹⁹³ “To the extent allowed by HIPAA, the data shall be available as a resource for insurers, employers, providers, purchasers of health care, and state agencies to continuously review health care utilization, expenditures, and performance in Vermont.” § 9410(h)(2)(B).

not be as protective as we wish them to be.¹⁹⁴ Statutory privacy provisions vary from statute to statute (and from one legislative session to the next) in how protective they are. It is no accident that the privacy provisions addressing HIV and AIDS are more extensive, and permeate greater numbers of different laws, than any other medical confidentiality provision. These protections exist because citizens, interest groups, and communities (including the medical community) impressed upon Vermont's legislators the importance of these privacy measures. Indeed, the lesson to be learned from the statutes seems to be that privacy protections will only be as strong as the citizen lobby is in its ability to convince legislators that the interest deserves protection.

If we want Vermont to remain "different," to remain a state where individual rights are afforded the greatest possible protection, we as citizens need to insist on this value at all levels of government. It's not enough that a privacy provision is included in a statute; we must make certain that corresponding rules are promulgated, that the relevant employees are educated and trained, that Vermont citizens are informed and aware, and that the laws are ultimately enforced.

¹⁹⁴ For example, Justice Morse's dissent in *State v. Brooks*, 601 A.2d 963 (Vt. 1991), is compelling. The case holds that there is no reasonable expectation of privacy in public parking lots and, therefore, that the state may use electronic eavesdropping devices to record conversations in this sphere. Justice Morse notes, though, that "In analyzing situations involving exactly the same bugging device, the Court allows Article 11 protection in the home but apparently nowhere else. The Court misses the point. The concept of home does not trigger Article 11 protection, ... the technological device's power to invade privacy triggers it. Article 11 focuses on personal expectations of privacy rather than defined places. ..."

"Because we reasonably expect more privacy at home for some activities or in some circumstances does not necessarily mean we never reasonably expect privacy away from home. It does not follow that our expectations of privacy outside the home are per se less reasonable." *Id.*, at 965 (internal citations omitted).