



## REFORMING ACCESS TO PUBLIC RECORDS IN VERMONT

Democracy requires transparent government, and that includes reasonable access to public records. Vermont's Access to Public Records Act (PRA) is supposed to ensure that fundamental principle is respected. In practice, however, myriad recurring problems frustrate the PRA's purpose and intent, block public access to critical information, and result in needless litigation and costs. That is why the Center for Public Integrity recently gave Vermont an 'F' in access to public information.<sup>1</sup> We can do better.

### Recurring Problems and Violations

- There are over 260 exemptions to the PRA spread across Vermont's statutes, with new ones proposed every legislative session. In comparison, the federal Freedom of Information Act has only nine exemptions.
- Vermont state and local agencies regularly misconstrue and misinterpret existing PRA exemptions.<sup>2</sup>
- Vermont agencies commonly exhibit a reflexive "deny first" response to records requests, with no consequences for wrongful denials.
- Agencies charge inconsistent and exorbitant fees for record production, oftentimes rendering access to information cost prohibitive.
- Agencies also engage in inconsistent and improper denial of requesters' ability to inspect records free of charge, effectively placing those records off limits.
- Agencies do not consistently provide justifications for redactions and withholdings, as required.
- Despite statutory time limits, agencies face no consequences for lengthy delays in production.
- There is no recourse for requesters wrongfully denied records, short of costly litigation.
- The many barriers to public access can shield wrongdoing, leading to greater costs.

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<sup>1</sup> Jon Margolis, "Vermont gets D- in State Integrity Investigation," Center for Public Integrity (Nov. 9, 2015), <https://www.publicintegrity.org/2015/11/09/18542/vermont-gets-d-grade-2015-stateintegrity-investigation>.

<sup>2</sup> That includes exemptions for proprietary information or trade secrets; "personal" communications by public officials; police records; pending litigation; privacy exemptions (i.e., healthcare (HIPAA) and educational (FERPA)); as well as "categorical" exemptions through which agencies refuse to identify responsive records.

## **Smart Reforms Can Improve Access to Information**

The public must be able to access information about their government, and the current public records law is clearly not up to the job. It's time for a fresh start.

Ultimately, given the extraordinary complexity and inconsistent application of the PRA, the best approach to reforming Vermont's outdated public records law would be to start over. In doing so, Vermont could look to the Federal FOIA or other state records laws, such as Florida's "Sunshine" law, which have fewer exemptions and allow the public greater access to information while still preserving the government's ability to withhold certain information as appropriate.

Unless or until Vermont abandons this broken system, however, there are relatively simple steps we can take now to alleviate some of the most chronic problems with the PRA, including:

- Consolidate all public records exemptions, which are currently scattered throughout various statutes, into one place: the PRA.
- Clarify vague and inconsistent language in the law (e.g., clearly prohibiting the imposition of fees for inspection; reiterating the timeframe for responses; clarifying the definition of 'agency' to include state contractors; etc.).
- Clarify that written justifications are required for redactions and withholdings; require 'Vaughn' indexes for such withholdings.
- Waive fees and/or impose penalties for PRA violations, including wrongful denials, improper redactions, and unlawful delays.
- Waive fees when release of the records in question is in the public interest and for a non-commercial purpose.
- Charge fees only for the cost of copying, not for staff time in searching, compiling, or redacting.
- Require notice for any new exemption proposed and review by the House and Senate Government Operations Committees.
- Prohibit agency 'directives' that limit access to public records.
- Make all exemptions subject to a sunset provision (reviewed every 5 years).

## **Facilitating Public Access for All**

In addition to (not in lieu of) these needed reforms, we must do more to guarantee public access for all Vermonters—as a practical matter, most people are unable to sue the government to address PRA violations.

For that reason, Vermont should empower an ombudsman with decision-making and enforcement powers under the PRA, but still subject to appellate review. An ombudsman has the potential to help the state and the public avoid costly litigation, ultimately saving the state money and increasing public access to government records. Alternatively, Vermont could create a simplified court process—similar to small claims court—accessible to those whose requests are wrongfully denied.

Vermont deserves a modern and effective public records law—one that works for all Vermonters and better ensures meaningful access to public information.

For any questions, please contact Chloé White at 802-223-6304 or [cwhite@acluvt.org](mailto:cwhite@acluvt.org).