

PROPOSED

STATE OF VERMONT

VERMONT SUPREME COURT

_____ TERM, 2004

Order Promulgating Amendments to the

Vermont Rules for Public Access to Court Records

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. ' 1, it is hereby ordered that Rule 5 of the Vermont Rules for Public Access to Court Records be amended to read as follows (new matter underlined; deleted matter overstruck):

RULE 5. ADMINISTRATIVE RECORDS

(a) Policy. The public shall have access to all administrative records in accordance with this rule, except as provided in subsection (b) of this section. The procedures, ~~policies and exemptions~~ in 1 V.S.A. ' ' 316, ~~and 317(c),~~ and 318 shall apply to requests for inspection or to obtain copies of administrative records. The Court Administrator is designated as the A head of the agency@ for purposes of appeal from decisions of the administrative records custodian. The Court Administrator shall inform all administrative records custodians of the fee schedule authorized by 1 V.S.A. ' 316(d).

(b) Exceptions. The public shall not have access to the following judicial branch administrative records:

(1) records which are confidential, privileged or otherwise prohibited by law from disclosure;

(2) records created in the detection or investigation of a crime;

(3) personal and identifying information in judicial branch personnel records including, but not limited to, information relating to hiring, evaluation, promotion, pay grade evaluation, discipline, separation or medical records of an employee or prospective employee or an unpaid volunteer of the judicial branch; provided, however, that all such information shall be made available to the protected person or a designated representative;

(4) test questions, scoring keys, answers and other examination instruments or data used to administer a bar or employment examination; provided, however, that past test questions and model answers may be provided, pursuant to a written policy adopted under authority of the judicial branch, to assist potential test-takers to become familiar with the format of an examination;

(5) trade secrets, including, but not limited to, 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 or use it;

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

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

(8) records which are relevant to litigation to which the judicial branch or an agency or employee thereof is a party of record, provided any such records or parts thereof shall be available to the public after being ruled discoverable by the court before which the litigation is pending, but in any event upon the final termination of the litigation;

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

(10) 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;

(11) passwords, access codes, user identifications, security procedures and similar security information, and judicial branch internet sites protected by a separate password ;

(12) materials prepared for the internal deliberations of any judicial board or committee acting in a judicial or quasi-judicial capacity and their records of the internal deliberations, but not their decisions;

(13) materials prepared for and minutes of the administrative meetings of the Supreme Court and its committees, except for the standing rules committees, and of judicial officers and trial court clerks: however, records reflecting decisions of these bodies shall be subject to access unless excluded by an exception to these rules;

(14) legal research and other work product prepared by judges and their clerks which does not relate to a particular case, and communications between judicial branch personnel with regard to internal operations of the court, such as scheduling of cases, and substantive or procedural issues;

(15) social security numbers and bar examination scores of bar applicants and attorneys;

(16) home street addresses, e-mail addresses and telephone numbers of judges as defined in A.O. 10, Terminology [11], court personnel and attorneys.

(17) individual judge and court personnel direct work access e-mail addresses and telephone numbers;

(18) office e-mail addresses of attorneys not employed by the judicial branch until such time as e-mail is approved by the court as an a means for parties to provide official notice pursuant to court rules.

Reporter s Notes B 2004 Amendment

The original Committee charged with recommending proposed Rules for Public Access to Court Records submitted its recommendations to the Vermont Supreme Court in January, 2000. Reporter= s Notes to Rule 1. That Committee recommended the predecessor language of this Rule as a temporary solution to govern access to administrative records. The original rule simply adopted the A procedures, policies and exemptions@ of Vermont= s Access to Public Access Act, 1 V. S. A. ' ' 316-318. The successor Committee was charged by the Supreme Court with reviewing the operation of the Rules and recommending appropriate amendments to the Court. A.O. 40, ' 3. A subcommittee began its review in June 2001 and submitted a draft to the Committee. The Committee met seven times during 2002 and 2003 and before submitting its recommendations to the Court.

(a). The ' follows the presumption of access in the Act and predecessor Rule. The procedures for seeking access in 1 V.S.A. ' ' 316 and 318 are maintained. As the remainder of the Note explains, the thrust of the 2003 amendments are the exceptions to the general rule of access.

(b). Exceptions (1)-(12) are adapted from 1 V.S.A. ' 317(c) which sets forth the exceptions to access to public records. These rules utilize Vermont= s Access to Public Records Act as the point of departure for the exceptions. Some of the many exceptions set forth in the Act apply to particular public agencies or are otherwise inapplicable to administrative records of the judicial branch. These statutory exceptions are not included in this section. Other statutory exceptions have been modified where necessary to focus more specifically on records maintained by the judicial branch. The exceptions are not a departure from the prior rationale and policy of the Public Records Act or the decisions of the Vermont Supreme Court interpreting the Act. See Rule 4 and Reporter= s Notes thereto.

Exception (13) has been adopted to meet particular concerns of the judicial branch not addressed in the Public Records Act. As the notes explaining these sections, *infra*, indicate, these exceptions often follow suggestions of the Justice Management Institute, National Center for State Courts, Public Access to Court Records: Guidelines For Policy Development by State Courts (2002) (manuscript available at www.courtaccess.org/modelpolicy/,

hereafter Guidelines), and rules governing access to administrative records adopted by other state courts. While the Guidelines suggest resort to public access statutes as a point of departure, the Guidelines and other courts have recognized the need to adopt additional exceptions where public access would significantly hinder the work of the judicial branch. See, for example, *Id.* at pp. 29-35

(b)(1). The exception is adapted from ' 317(c)(1)-(4) of the Act. The exception includes Vermont Supreme Court rules and orders. A claim of confidentiality under this exception must be based upon an independent legal basis.

(b)(2). The exception is adapted from ' (c)(5).

(b)(3). This exception is adapted from ' (c)(7). The exception includes volunteers such as interns and guardian ad litem even if such persons are not paid for their services. The exception includes investigations to determine whether disciplinary action is appropriate.

(b)(4). This exception is adapted from ' (c)(8) and refers to the rights of access by the public, not that of individual test takers.

(b)(5). This exception tracks the language of ' (c)(9).

(b)(6). This exception closely tracks the language of ' (c)(10).

(b)(7). This exception tracks the language of ' (c)(12).

(b)(8). This exception closely tracks the language of ' (c)(14).

(b)(9). This exception tracks the language of ' (c)(15).

(b)(10). This exception tracks the language of ' (c)(29).

(b)(11). This exception is based upon ' (c)(25). The exception was expanded to include discussions between department personnel on judicial department internet sites protected by a separate password on which ideas about the possible future direction of department policy are shared with peers. The exception exists to encourage candid discussion of issues on an informal basis. Where such discussion results in action of interest to the public by a judicial department body, that decision is accessible pursuant to rule (b)(13). See Guidelines at pp. 33-34.

(b)(12). This exception is based on (c)(24) relating to internal materials prepared for a department board or committee and records of its deliberations. The exception governs only materials prepared for decision of a contested matter. The exception has been narrowed to provide for public access to decisions of these bodies. It is expected that the Court or its boards and committees will prepare a record of the decisions which will be accessible to the public. Records of the department pertaining to the judicial or quasi-judicial deliberations other than those covered by this narrow exception are governed by rule 6. See especially rules 6(b)(20) and (21).

(b)(13). This exception recognizes the need for frank and open discussion of issues important to the judicial branch and the desirability of keeping accurate records of meetings for future reference. Court systems which have adopted rules governing access to administrative records have recognized the need to except preliminary and pre-decisional records. 17A Ariz. Rev. Stat., R. 123 d (e)(6) (West 2002); Mich. Administrative Order 1997-10 d (B)(3). Similarly, the Guidelines recommend protection of A information collected, and notes, drafts and other work product generated during the process of developing policy relating to the court= s administration of justice and its operations or the operation of the clerk of court. @ Guidelines, *supra*, at 33-34. However, the exception also recognizes that the public should have access to decisions made by all administrative bodies of the department. *Id.* Minutes of the standing rules committees charged by the Supreme Court with recommending rules for the operation of the Vermont courts are entirely accessible.

The definition of A record@ in rule 3(a) of these rules includes materials received in electronic form. However, the definition includes only materials A made or received pursuant to law or in connection with the transaction of any official business by the court. @ See also rule 3(c) which defines administrative record as one pertaining to an entity of the judicial branch. A Florida statute which contains identical relevant language to that of rule 3(a) has been

interpreted to not include personal e-mail sent by a public employee. *Times Publishing Co. v. City of Clearwater*, 330 So. 2d 844 (Fla. Ct. App. 2002) (review granted March 10, 2003). *But cf. Tiberino v. Spokane County*, 13 P. 3d 1104 (Wash. App. 2000) (employee's personal e-mail treated as a public record where the e-mails had been printed in preparation for litigation concerning termination of the sender.) However, the vast majority of e-mail generated within the judicial branch would be covered by the broad definitions of A record@ and A administrative record@ in rule (3)(a)&(c) respectively and be presumptively accessible under rule 5(a).

Judicial branch e-mail may be excepted from public access because it fits an exception for a case record. See, for example, rule 6(b)(12). Where e-mail would constitute both an administrative and a case record under these rules, the e-mail should be considered a case record. Rule 3(b). E-mail may also be covered by an exception for administrative records apart from this sub-section. Rule 6(b)(12). While e-mail is to be treated the same as other forms of administrative records, this rule recognizes that the judicial branch cannot maintain all administrative records indefinitely. With regard to e-mail, for example, system capacity limitations will periodically require that e-mail which has not been saved be eliminated from the back-up system.

(b)(15). The exception is a limited one for a very small amount of information in records kept by the judicial branch and its boards. Social security numbers are protected by Vermont Statutes and would also be protected by (b)(1). There is little public interest in scores of test-takers and related information which is protected by 1 V.S.A. ' 317(c)(8) and ' 5(b)(4) of these rules.

(b)(16). Personal identifying information contained in personnel records is protected by ' (b)(3). This exception is intended to protect judges and court personnel and their families from possible intimidation or harassment at their homes as a result of dissatisfaction with actions of the court. The exception is also intended to protect the privacy of judges, court personnel and attorneys who have chosen to limit public access at their homes. Michigan, for example, exempts personal information to protect court personnel privacy. Mich. Administrative Order, 1997-10 ' (e)(1) . The Guidelines, *supra* at p. 34, recognize the desirability of withholding information about court personnel for security and privacy protection. The scope of the exception is quite limited: information not otherwise available to the public cannot be obtained by the expedient of resort to court records. However, the information obtained from judicial branch records should be disclosed to law enforcement personnel when needed, for example, to secure a warrant or obtain the services of a public defender.

(b)(17). Traditional mail addresses and general access telephone and e-mail addresses are readily available to the public to provide for complete access to the courts and other judicial branch entities. This exception is intended to prevent ex parte communication with judges or other inappropriate direct contact with judges and court personnel. Unlike phone calls, traditional mail or e-mail directed to the court generally which can be screened by court personnel for inappropriate communications, contact through individual direct phone numbers or e-mail addresses cannot be so screened. These direct methods of communication have been utilized for ex parte communications, other inappropriate attempts to influence the actions of court personnel and intimidation of court personnel in the past. The danger of misuse will become more acute as direct phone systems become more heavily utilized by the judicial system and use of direct electronic access to court personnel becomes more common. The exception also furthers the privacy goal recognized in rule b(16) above.

(b)(18). Members of the Vermont bar are required to submit their e-mail addresses so the court can utilize electronic transmission of material such as proposed rule changes to save on mailing costs and more efficiently utilize limited judicial branch staff. This exception would except only work e-mail addresses of private members of the bar, not those associated with the judicial branch and who are public employees. Persons other than attorneys not employed by the public sector are able to determine which methods of communication they wish to utilize in the conduct of their professional activities. The exception accords members of the bar the same privilege, preventing public access to the e-mail information by the expedient of contacting the judicial branch which has collected the information for a very specific purpose other than public disclosure. Office telephone numbers and mail addresses are readily available to the public.

The exception may exist for only a relatively limited period of time. If and when the court system approves use of electronic mail as an official form of notice, e-mail addresses of attorneys must be accessible to the public. The exception provides a transition period within which members of the bar can become acclimated to likely electronic transmission and storage of legal documents in state as well as federal courts.

These rules, as amended, is prescribed and promulgated to become effective on _____, 2004. The Reporter's Notes are advisory.

The Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. ' 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2004.

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Paul L. Reiber Associate Justice