

1 S.116

2 Introduced by Senator Sears

3 Referred to Committee on Institutions

4 Date: February 25, 2015

5 Subject: Corrections; public defenders

6 Statement of purpose of bill as introduced: This bill proposes to make various
7 changes to laws related to the rights of offenders in custody of the Department
8 of Corrections.

9 An act relating to rights of offenders in the custody of the Department of
10 Corrections

11 It is hereby enacted by the General Assembly of the State of Vermont:

12 ~~*** Parole Board Independence ***~~

13 Sec. 1. 28 V.S.A. § 456 is added to read:

14 § 456. PAROLE BOARD INDEPENDENCE

15 (a) The Parole Board shall be an independent and impartial body.

16 (b) The Parole Board shall not be counseled or represented by any attorney
17 who, at the same time, has:

18 (1) an attorney-client relationship with the Department of

19 Corrections; or

1 ~~(2) an attorney-client relationship with an offender who has a hearing~~
2 pending before the Board.

3 * * * Due Process * * *

4 Sec. 2. 28 V.S.A. § 857 is added to read:

5 § 857. ADMINISTRATIVE SEGREGATION; PROCEDURAL
6 REQUIREMENTS

7 (a) Except in emergency circumstances as described in subsection (b) of
8 this section, before an inmate is placed in administrative segregation,
9 regardless of whether that inmate has been designated as having a serious
10 functional impairment under section 906 of this title, the inmate is entitled to a
11 hearing pursuant to subsection 852(b) of this title.

12 (b) In the event of an emergency situation and at the discretion of the
13 Commissioner, an inmate may be placed in administrative segregation prior to
14 receiving a hearing as described in subsection 852(b) of this title.

15 Sec. 3. 28 V.S.A. § 204 is amended to read:

16 § 204. SUBMISSION OF WRITTEN REPORT; PROTECTION OF
17 RECORDS

18 * * *

19 (d)(1) Any Except as provided in subdivision (2), any presentence report,
20 pre-parole report, or supervision history prepared by any employee of the
21 Department in the discharge of the employee's official duty, except as

1 ~~provided in subdivision 204a(b)(5) and section 205 of this title, is privileged~~
2 and shall not be disclosed to anyone outside the Department other than the
3 judge or the Parole Board, ~~except that:~~

4 ~~(2)(A) the~~ The court or Board may in its discretion shall permit the
5 inspection of the report, ~~or parts thereof~~ redacted of information that may
6 compromise the safety or confidentiality of a victim or witness, by the State's
7 Attorney, and by the defendant or inmate, or his or her attorney, or: ~~or; and~~

8 (B) the court or Board may in its discretion permit the inspection of
9 the report or parts thereof by other persons having a proper interest therein,
10 whenever the best interest or welfare of the defendant or inmate makes that
11 action desirable or helpful.

12 (3) Nothing in this section shall prohibit the Department for Children
13 and Families from accessing the supervision history of probationers or parolees
14 for the purpose of child protection.

15 * * *

16 Sec. 4. 28 V.S.A. § 601 is amended to read:

17 § 601. POWERS AND RESPONSIBILITIES OF THE SUPERVISING
18 OFFICER OF EACH CORRECTIONAL FACILITY

19 The supervising officer of each facility shall be responsible for the efficient
20 and humane maintenance and operation and for the security of the facility,
21 subject to the supervisory authority conferred by law upon the Commissioner.

1 ~~Each supervising officer is charged with the following powers and~~
2 responsibilities:

3 * * *

4 (10) To establish and maintain, in accordance with such rules and
5 regulations as are established by the Commissioner, a central file at the facility
6 containing an individual file for each inmate. Except as otherwise may be
7 indicated by the rules and regulations of the Department, the content of the file
8 of an inmate shall be confidential and shall not be subject to public inspection
9 except by court order for good cause shown ~~and shall not be accessible to~~
10 ~~inmates at the facility.~~ Information that may compromise the safety or
11 confidentiality of a victim or witness shall be redacted from a file prior to
12 inspection by an inmate. Except as otherwise provided by law, the contents of
13 an inmate's file may be inspected, pursuant to a court order issued ex parte, by
14 a ~~state~~ State or federal prosecutor as part of a criminal investigation if the court
15 finds that the records may be relevant to the investigation. The information in
16 the files may be used for any lawful purpose but shall not otherwise be made
17 public.

~~*** Access to Records ***~~

Sec. 5. 28 V.S.A. § 602 is added to read:

§ 602. RIGHT OF AN INDIVIDUAL TO ACCESS RECORDS

(a) At the request of any person in the custody or under the supervision of the Department, the Department shall provide records maintained by the Department concerning that person if that person is:

(1) a party in a case in any division of the Superior Court in which the Department is also a party; or

(2) a defendant in a hearing before the Parole Board in which revocation of parole is a possible outcome.

(b) Nothing in this title concerning the confidentiality of the Department's records shall be construed as limiting a person's right to access records about himself or herself, except as specified in subsections (c) and (d) of this section.

(c) The Department shall redact any information compromising the safety or confidentiality of a victim or witness prior to providing the record to a person under this section.

(d) The Department may seek a court order limiting disclosure of records. The order may be granted only if the court finds clear and convincing evidence that disclosure of records would create a substantial and identifiable risk to public safety.

1 ~~(e) As used in this section, "records" means records stored in any form,~~
2 physical or electronic.

3 * * * Postconviction Relief * * *

4 Sec. 6. 13 V.S.A. § 5233 is amended to read:

5 § 5233. EXTENT OF SERVICES

6 (a) A needy person who is entitled to be represented by an attorney under
7 section 5231 of this title is entitled:

8 * * *

9 (3) To be represented in any other postconviction proceeding which may
10 have more than a minimal effect on the length or conditions of detention where
11 the attorney considers:

12 (A) the claims, defenses, and other legal contentions to be warranted
13 by existing law or by a nonfrivolous argument for the extension, modification,
14 or reversal of existing law or the establishment of new law; and

15 (B) the allegations and other factual contentions to have evidentiary
16 support, or likely to have evidentiary support after a reasonable opportunity for
17 further investigation and discovery.

18 * * *

19 * * * Effective Date * * *

20 Sec. 7. EFFECTIVE DATE

21 This act shall take effect on passage.

~~Sec. 1. 28 V.S.A. § 456 is added to read:~~

~~§ 456. PAROLE BOARD INDEPENDENCE~~

~~(a) The Parole Board shall be an independent and impartial body.~~

~~(b) The Parole Board shall not be counseled or represented by any attorney who, at the same time, has:~~

~~(1) an attorney-client relationship with the Department of Corrections; or~~

~~(2) an attorney-client relationship with an offender who has a hearing pending before the Board.~~

~~Sec. 2. 28 V.S.A. § 857 is added to read:~~

~~§ 857. ADMINISTRATIVE SEGREGATION; PROCEDURAL REQUIREMENTS~~

~~(a) Except in emergency circumstances as described in subsection (b) of this section, before an inmate is placed in administrative segregation, regardless of whether that inmate has been designated as having a serious functional impairment under section 906 of this title, the inmate is entitled to a hearing pursuant to subsection 852(b) of this title.~~

~~(b) In the event of an emergency situation and at the discretion of the Commissioner, an inmate may be placed in administrative segregation prior to receiving a hearing as described in subsection 852(b) of this title.~~

~~Sec. 3. 28 V.S.A. § 204 is amended to read:~~

~~§ 204. SUBMISSION OF WRITTEN REPORT; PROTECTION OF RECORDS~~

~~* * *~~

~~(d)(1) Any Except as provided in subdivision (2) of this subsection, any presentence report, pre-parole report, or supervision history prepared by any employee of the Department in the discharge of the employee's official duty, except as provided in subdivision 204a(b)(5) and section 205 of this title, is privileged and shall not be disclosed to anyone outside the Department other than the judge or the Parole Board, except that:~~

~~(2)(A) the The court or Board may in its discretion shall permit the inspection of the report, or parts thereof redacted of information that may compromise the safety or confidentiality of any person, by the State's Attorney, and by the defendant or inmate, or his or her attorney, or; and~~

~~(B) the court or Board may, in its discretion, permit the inspection of the report or parts thereof by other persons having a proper interest therein.~~

~~whenever the best interest or welfare of the defendant or inmate makes that action desirable or helpful.~~

~~(3) Nothing in this section shall prohibit the Department for Children and Families from accessing the supervision history of probationers or parolees for the purpose of child protection.~~

~~***~~

~~Sec. 4. 28 V.S.A. § 601 is amended to read:~~

~~§ 601. POWERS AND RESPONSIBILITIES OF THE SUPERVISING OFFICER OF EACH CORRECTIONAL FACILITY~~

~~The supervising officer of each facility shall be responsible for the efficient and humane maintenance and operation and for the security of the facility, subject to the supervisory authority conferred by law upon the Commissioner. Each supervising officer is charged with the following powers and responsibilities:~~

~~***~~

~~(10) To establish and maintain, in accordance with such rules and regulations as are established by the Commissioner, a central file at the facility containing an individual file for each inmate. Except as otherwise may be indicated by the rules and regulations of the Department, the content of the file of an inmate shall be confidential and shall not be subject to public inspection except by court order for good cause shown ~~and shall not be accessible to inmates at the facility.~~ Information that may compromise the safety or confidentiality of any person shall be redacted from a file prior to inspection by an inmate. Except as otherwise provided by law, the contents of an inmate's file may be inspected, pursuant to a court order issued ex parte, by a ~~state~~ State or federal prosecutor as part of a criminal investigation if the court finds that the records may be relevant to the investigation. The information in the files may be used for any lawful purpose but shall not otherwise be made public.~~

~~Sec. 5. 28 V.S.A. § 602 is added to read:~~

~~§ 602. RIGHT OF AN INDIVIDUAL TO ACCESS RECORDS~~

~~(a) At the request of any person in the custody or under the supervision of the Department, the Department shall provide records maintained by the Department concerning that person if that person is:~~

~~(1) a party in a case in any division of the Superior Court in which the Department is also a party; or~~

~~(2) a defendant in a hearing before the Parole Board in which revocation of parole is a possible outcome.~~

~~(b) Nothing in this title concerning the confidentiality of the Department's records shall be construed as limiting a person's right to access records about him- or herself, except as specified in subsections (c) and (d) of this section.~~

~~(c) The Department shall redact any information compromising the safety or confidentiality of any person prior to providing the record to a person under this section.~~

~~(d) The Department may seek a court order limiting disclosure of records. The order may be granted only if the court finds by a preponderance of the evidence that disclosure of records would create a substantial and identifiable risk to public safety.~~

~~(e) As used in this section, "records" means records stored in any form, physical or electronic.~~

~~Sec. 6. 13 V.S.A. § 5233 is amended to read:~~

~~§ 5233. EXTENT OF SERVICES~~

~~(a) A needy person who is entitled to be represented by an attorney under section 5231 of this title is entitled:~~

~~* * *~~

~~(3) To be represented in any other postconviction proceeding which may have more than a minimal effect on the length or conditions of detention where the attorney considers:~~

~~(A) the claims, defenses, and other legal contentions to be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and~~

~~(B) the allegations and other factual contentions to have evidentiary support, or likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.~~

~~* * *~~

~~Sec. 7. EFFECTIVE DATE~~

~~This act shall take effect on passage.~~

~~Sec. 1. 28 V.S.A. § 456 is added to read:~~

~~§ 456. PAROLE BOARD INDEPENDENCE~~

~~(a) The Parole Board shall be an independent and impartial body.~~

(b) In a pending parole revocation hearing, the Parole Board shall not be counseled by:

(1) assistant attorneys general; and

(2) any attorney employed by the Department of Corrections.

(c) If any attorney employed by the Department of Corrections or an assistant attorney general or the direct supervisor of an assistant attorney general who represents the Department of Corrections in parole revocation hearings provides training to the Parole Board members on the subject of parole revocation hearings, the Defender General shall be notified prior to the training and given the opportunity to participate.

Sec. 2. 28 V.S.A. § 857 is added to read:

§ 857. ADMINISTRATIVE SEGREGATION; PROCEDURAL REQUIREMENTS

(a) Except in emergency circumstances as described in subsection (b) of this section, before an inmate is placed in administrative segregation, regardless of whether that inmate has been designated as having a serious functional impairment under section 906 of this title, the inmate is entitled to a hearing pursuant to subsection 852(b) of this title.

(b) In the event of an emergency situation and at the discretion of the Commissioner, an inmate may be placed in administrative segregation prior to receiving a hearing as described in subsection 852(b) of this title.

Sec. 3. 28 V.S.A. § 204 is amended to read:

§ 204. SUBMISSION OF WRITTEN REPORT; PROTECTION OF RECORDS

(a) A court, before which a person is being prosecuted for any crime, may in its discretion order the Commissioner to submit a written report as to the circumstances of the alleged offense and the character and previous criminal history record of the person, with recommendation. If the presentence investigation report is being prepared in connection with a person's conviction for a sex offense that requires registration pursuant to 13 V.S.A. chapter 167, subchapter 3, the Commissioner shall obtain information pertaining to the person's juvenile record, if any, in accordance with 33 V.S.A. §§ 5117 and 5119(f)(6), and any deferred sentences received for a registrable sex offense in accordance with 13 V.S.A. § 7041(h), and include such information in the presentence investigation report.

* * *

~~(d)(1) Any~~ Except as provided in subdivision (2) of this subsection, any presentence investigation report, pre-parole report, or supervision history or parole summary prepared by any employee of the Department in the discharge of the employee's official duty, except as provided in subdivision 204a(b)(5) and section 205 of this title, is confidential and shall not be disclosed to anyone outside the Department other than the judge or the Parole Board, except that:

~~(2)(A) the~~ The court or Board may in its discretion shall permit the inspection of the presentence investigation report, or parts thereof or parole summary, redacted of information that may compromise the safety or confidentiality of any person, by the State's Attorney, and by the defendant or inmate, or his or her attorney, or; and

~~(B) the court or Board may, in its discretion, permit the inspection of the presentence investigation report or parole summary or parts thereof by other persons having a proper interest therein, whenever the best interest or welfare of the defendant or inmate makes that action desirable or helpful. Nothing in this section shall prohibit the Department for Children and Families from accessing the supervision history of probationers or parolees for the purpose of child protection.~~

~~(e) The presentence investigation report ordered by the court under this section or section 204a of this title shall include the comments or written statement of the victim, or the victim's guardian or next of kin if the victim is incompetent or deceased, whenever the victim or the victim's guardian or next of kin choose to submit comments or a written statement.~~

* * *

Sec. 4. 28 V.S.A. § 601 is amended to read:

§ 601. POWERS AND RESPONSIBILITIES OF THE SUPERVISING OFFICER OF EACH CORRECTIONAL FACILITY

~~The supervising officer of each facility shall be responsible for the efficient and humane maintenance and operation and for the security of the facility, subject to the supervisory authority conferred by law upon the Commissioner. Each supervising officer is charged with the following powers and responsibilities:~~

* * *

~~(10) To establish and maintain, in accordance with such rules and regulations as are established by the Commissioner, a central file at the facility containing an individual file records for each inmate. Except as otherwise may be indicated by the rules and regulations of the Department, the content of the file of an inmate shall be confidential and shall not be subject to~~

~~public inspection except by court order for good cause shown and shall not be accessible to inmates at the facility. Except as otherwise provided by law, the contents of an inmate's file may be inspected, pursuant to a court order issued ex parte, by a state or federal prosecutor as part of a criminal investigation if the court finds that the records may be relevant to the investigation. The information in the files may be used for any lawful purpose but shall not otherwise be made public.~~

Sec. 5. 28 V.S.A. § 107 is added to read:

§ 107. OFFENDER AND INMATE RECORDS; CONFIDENTIALITY;
EXCEPTIONS; CORRECTIONS

(a) The Commissioner shall adopt a rule pursuant to 3 V.S.A. chapter 25 defining what are "offender and inmate records," as that phrase is used in this section.

(b) Offender and inmate records maintained by the Department are exempt from public inspection and copying under the Public Records Act and shall be kept confidential, except that the Department:

(1) Shall release or permit inspection of such records if required under federal or State law, including 42 U.S.C. §§ 10805 and 10806 (Protection and Advocacy Systems).

(2) Shall release or permit inspection of such records pursuant to a court order for good cause shown or, in the case of an offender or inmate seeking records relating to him or her in litigation, in accordance with discovery rules.

(3) Shall release or permit inspection of such records to a State or federal prosecutor as part of a criminal investigation pursuant to a court order issued ex parte if the court finds that the records may be relevant to the investigation. The information in the records may be used for any lawful purpose but shall not otherwise be made public.

(4) Shall release or permit inspection of such records to the Department for Children and Families for the purpose of child protection, unless otherwise prohibited by law.

(5) Shall release or permit inspection of designated offender and inmate records to specific persons, or to any person, in accordance with rules that the Commissioner shall adopt pursuant to 3 V.S.A. chapter 25, provided that the Commissioner shall redact any information that may compromise the safety of any person prior to releasing or permitting inspection of such records under the rules. The Commissioner shall authorize release or inspection of offender and inmate records under these rules:

(A) When the public interest served by disclosure of a record outweighs the privacy, security, or other interest in keeping the record confidential.

(B) To provide an offender or inmate access to records relating to him or her if access is not otherwise guaranteed under this subsection, unless providing such access would reveal information that is confidential or exempt from disclosure under a law other than this section, would unreasonably interfere with the Department's ability to perform its functions, ~~or would unreasonably jeopardize~~ or may compromise the health, safety, security, or rehabilitation of the offender or inmate or of another person. The rules may specify circumstances under which the Department may limit the number of requests that will be fulfilled per calendar year, as long as the Department fulfills at least one request per calendar year excluding any release of records ordered by a court, and at least one additional request in the same calendar year limited to records not in existence at the time of the original request or not within the scope of the original request. The rules also may specify circumstances when the offender's or inmate's right of access will be limited to an inspection overseen by an agent or employee of the Department. The rules shall reflect the Department's obligation not to withhold a record in its entirety on the basis that it contains some confidential or exempt content, to redact such content, and to make the redacted record available.

(c) Notwithstanding the provisions of 1 V.S.A. chapter 5, subchapter 3 (Public Records Act) that govern the time periods for a public agency to respond to a request for a public record and rights of appeal, the Commissioner shall adopt a rule pursuant to 3 V.S.A. chapter 25 governing response and appeal periods and appeal rights in connection with a request by an offender or inmate to access records relating to him or her maintained by the Department. The rule shall provide for a final exhaustion of administrative appeals no later than 45 days from the Department's receipt of the initial request.

(d) An offender or inmate may request that the Department correct a fact in a record maintained by the Department that is material to his or her rights or status, except for a determination of fact that resulted from a hearing or other proceeding that afforded the offender or inmate notice and opportunity to be heard on the determination. The rule required under subsection (c) of this section shall reference that requests for such corrections are handled in accordance with the Department's grievance process. If the Department issues a final decision denying a request under this subsection, the offender or inmate may appeal the decision to the Civil Division of the Superior Court pursuant to Rule 74 of the Vermont Rules of Civil Procedure. The Court shall not set aside the Department's decision unless it is clearly erroneous.

Sec. 6. 13 V.S.A. § 5233 is amended to read:

§ 5233. EXTENT OF SERVICES

(a) A needy person who is entitled to be represented by an attorney under section 5231 of this title is entitled:

** * **

(3) To be represented in any other postconviction proceeding which may have more than a minimal effect on the length or conditions of detention where the attorney considers:

(A) the claims, defenses, and other legal contentions to be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(B) the allegations and other factual contentions to have evidentiary support, or likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

** * **

Sec. 7. EFFECTIVE DATE; TRANSITION PROVISION

(a) This act shall take effect on passage.

(b) Except as provided in subsection (c) of this section, the Commissioner of Corrections may only release or permit inspection of offender or inmate records in reliance upon an exception to the confidentiality of offender and inmate records if the exception is created by law, including an exception created by rule adopted in accordance with the Administrative Procedure Act under the mandate in Sec. 5, 28 V.S.A. § 107(b)(5).

(c) The Department of Corrections may rely upon exceptions to the confidentiality of offender and inmate files under directives adopted by the Department prior to the effective date of this act until the Commissioner adopts rules pursuant to the rulemaking mandates of Sec. 5, 28 V.S.A. § 107(a) and (b)(5). On or before September 1, 2016, the Commissioner shall prefile rules with the Interagency Committee on Administrative Rules in accordance with these mandates. The Commissioner shall update the Joint Legislative Justice Oversight Committee on the status of its efforts to adopt the rules at the Oversight Committee's first meeting on or after September 1, 2016.

