

## JANUARY SESSION, A.D. 2004

## RELATING TO COURTS AND CIVIL PROCEDURE – PROCEDURE GENERALLY

Referred To: House Judiciary

19 whether contained in files in the courthouses of the state or contained in the files of counsel for

1 the litigants.

2 (2) “Environmental hazard” means a release or threatened release of any substance that  
3 poses a threat to public health or safety by presenting a present or future danger of death, bodily  
4 injury, or physical or emotional disability to persons exposed to any such substance. Such  
5 substances may include any and all substances listed in any federal or state list of hazardous  
6 substances produced in accordance with federal or state statutes or regulations.

7 (3) “Final protective order” means an order of any court of competent jurisdiction entered  
8 pursuant to this chapter determining that a particular document or documents shall be protected  
9 from public disclosure.

10 (4) “Financial fraud” means any plan or scheme to sell an investment product to the  
11 general public without full disclosure of the risks associated with the purchase of the product,  
12 where the plan or scheme would cause or has caused financial loss to one or more persons in one  
13 or more transactions.

14 (5) “Public health and safety” shall include the health or safety of any one or more  
15 members of the public.

16 (6) “Trade secret” means and includes anything tangible or intangible or electronically  
17 kept or stored, which constitutes, represents, evidences or records secret scientific, technical,  
18 merchandising, production or management information, or a design, process, procedure, formula,  
19 invention or improvement, which gives the person owning it an opportunity to obtain an  
20 advantage over competitors who do not know or use it, and which is not itself evidence of a  
21 defective product or an environmental hazard or a financial fraud.

22 **9-9.1-4. Concealment of certain public hazards prohibited. --** Notwithstanding any  
23 other provision of law to the contrary, in actions alleging personal injury or wrongful death or  
24 monetary property damages caused by a defective product or an environmental hazard or a  
25 financial fraud, no confidentiality agreement, settlement agreement, stipulated agreement, or  
26 protective order to keep from public disclosure information that provides evidence of financial  
27 fraud, a defective product, or an environmental hazard shall be entered or enforceable upon the  
28 settlement or conclusion of any litigation or dispute, unless a final protective order regarding that  
29 information is entered by the court in accordance with section 9-9.1-5. Any agreements made by  
30 private litigants to conceal documents, which agreements are not contained within and sanctioned  
31 by a final protective order, shall be void and unenforceable as against public policy.

32 **9-9.1-5. Procedure for obtaining a final protective order. --** (a) Any litigant in any  
33 action may seek a final protective order from the court in which the action is pending upon the  
34 conclusion of the litigation.

1       **(b) A final protective order shall be sought by written motion of one or more parties. The**  
2 **motion shall identify the documents as to which a final protective order is sought, and shall**  
3 **contain a request for a hearing. Documents shall be identified in a manner sufficient to alert the**  
4 **court to their potential significance to the public and to the litigants but need not contain such**  
5 **detailed identification as to disclose the contents of the documents.**

6       **Documents which do not allege evidence of a financial fraud, a defective product, or an**  
7 **environmental hazard need not be identified for review by the court. Any party opposing such**  
8 **motion may file an opposition to the motion alerting the court to the opponent's position on the**  
9 **significance of the documents to the interest of the public and the litigants.**

10       **(c) Notice of a motion for a final protective order shall be posted in a public place in the**  
11 **courthouse in which the action is pending upon the filing of the motion. Such notice shall contain**  
12 **the caption of the case and the date scheduled for any hearing upon the motion. Such notice shall**  
13 **remain posted until the court has acted upon the motion.**

14       **(d) The clerk of the court in which the motion for a final protective order is pending shall**  
15 **provide written notice of the filing of such motion to the Rhode Island attorney general. Such**  
16 **notice shall contain the caption of the case and the date scheduled for any hearing upon the**  
17 **motion. Upon receipt of such notice, the attorney general shall notify any and all federal, state or**  
18 **local regulatory agencies and governmental bodies with an interest in the subject matter of the**  
19 **litigation of the filing of such motion and of the date scheduled for any hearing on the motion.**

20       **(e) The court shall conduct a hearing upon a motion for a final protective order. Such**  
21 **hearing shall be conducted no sooner than twenty-one (21) days after the filing of a motion for a**  
22 **final protective order, in order to afford due notice of the hearing date to the public**  
23 **representatives. The court may permit representatives of the public interest, including the**  
24 **attorney general, representatives of federal, state and local regulatory or governmental bodies,**  
25 **representatives of the media, and other persons, in addition to the parties to the litigation, to**  
26 **address the court on the issuance and scope of the proposed final protective order. The court shall**  
27 **retain the authority and discretion to conduct said hearing in the manner most conducive to just**  
28 **resolution of the issues, and may review documents in camera.**

29       **(f) The court shall independently examine the basis and scope of the proposed final**  
30 **protective order and shall make written findings pursuant to this section for each document**  
31 **proposed for nondisclosure under the final protective order. The court may, in its discretion, refer**  
32 **the matter to a master, with the costs taxed to the party moving for a final protective order, to**  
33 **make initial review and determination, subject to the approval of the court, as to whether a final**  
34 **protective order should enter for each individual document.**

1           (g) A final protective order shall be entered only for good cause shown in order to protect  
2 public health and safety and to encourage the broadest availability to the public of information  
3 that provides evidence of a financial fraud, a defective product or an environmental hazard. The  
4 burden of proving that a final protective order should issue rests upon the party seeking the order,  
5 and that party must satisfy the court by a fair preponderance of the evidence that a final protective  
6 order should issue.

7           (h) In exercising its discretion to grant a final protective order, a court may consider the  
8 following factors in addition to others:

9           (1) Whether the document as to which a final protective order is sought would have been  
10 excluded from introduction into evidence at trial because of any privilege, exclusionary rule, or  
11 testimonial disqualification, in accordance with the rules of evidence.

12           (2) Whether disclosure of the document would violate any interest or right protected or  
13 guaranteed by the constitution or laws of the United States or of the state of Rhode Island.

14           (3) Whether disclosure of the document would reveal trade secrets or confidential  
15 personal or business information which is not a trade secret, and that information does not  
16 provide evidence of a financial fraud, a defective product or an environmental hazard.

17           (i) If the court finds that a party is seeking issuance of a final protective order to prevent  
18 disclosure of trade secrets, which provide evidence of financial fraud, a defective product or an  
19 environmental hazard, the court may issue the final protective order if the court makes written  
20 findings which determine that there has been a particularized showing made of all of the  
21 following by the moving party:

22           (1) A final protective order will not conceal information which may enable members of  
23 the public to protect themselves from financial fraud, a defective product or an environmental  
24 hazard.

25           (2) The party seeking the final protective order has a cognizable interest in the document,  
26 in that the document contains trade secrets as defined in this chapter.

27           (3) Public disclosure would cause serious harm to the party requesting confidentiality. In  
28 making a finding under this paragraph, the court shall consider whether disclosure of the trade  
29 secret information that provides evidence of financial fraud, a defective product, or an  
30 environmental hazard, would benefit any competitor of the party requesting confidentiality.

31           (j) If the court in the exercise of its discretion grants a final protective order but finds that  
32 there exists information in the documents protected which provides evidence of financial fraud, a  
33 defective product or an environmental hazard, the court shall: (1) enter an order requiring the  
34 party seeking the protective order to preserve, until further order of the court, the subject

1 documents as identified to the satisfaction of the court; and (2) notify all interested federal, state  
2 and local regulatory agencies and governmental bodies, including the attorney general of the state  
3 of Rhode Island. Any agency so notified shall comply with the order to maintain confidentiality  
4 unless disclosure is required in its judgment to protect the health and safety of the public, in  
5 which case the agency may move for reconsideration of the order of the court or may appeal the  
6 final protective order.

7 (k) Any interested party, including parties to the litigation, the attorney general,  
8 representatives of federal, state or local regulatory agencies or governmental bodies, or  
9 representatives of the media or other interested persons, may appeal the grant or denial of a final  
10 protective order to the supreme court. For purposes of the appeal, the grant or denial of a final  
11 protective order shall be considered a final judgment.

12 (1)(1) Any person, other than a party to a contract or other agreement subject to this  
13 section, may contest any order, judgment, agreement, or contract that violates this section by  
14 motion in the court that entered the order or judgment, or by commencing an action for  
15 declaratory judgment. The motion or action shall specify the basis upon which the violation is  
16 alleged.

17 (2) Upon the filing of such motion or action, the court shall conduct a hearing and review  
18 of the challenged materials in accordance with subsections (b) through (k) of this section, and  
19 shall also consider whether the original concealment of the documents by the parties to the  
20 litigation was willful or was the result of excusable failure to comply with the procedures set forth  
21 above. If the court finds that the original concealment was in willful violation of this chapter, the  
22 court may award such sanctions as it deems appropriate. Any person injured by such willful  
23 violation of this chapter shall have a cause of action for damages against any persons found to  
24 have willfully violated this chapter, in including litigants and their counsel.

25 (3) Any person bringing an action under this subsection who prevails in any part of his or  
26 her motion or action, shall be entitled to costs and reasonable attorney's fees from the party  
27 seeking protection of the documents.

28 (4) If the court finds that the motion or action contesting the order, judgment, agreement,  
29 or contract is wholly insubstantial, frivolous, or not advanced in good faith, the court may award  
30 costs and reasonable attorney's fees to the party seeking protection.

31 (5) If more than one person files a motion or action pursuant to this subsection, the court  
32 may consolidate the proceedings. If more than one motion or petition raises the same issues, the  
33 court shall consolidate the proceedings.

34 (6) A motion or petition based on issues or facts asserted and decided in a prior motion or

1 petition shall be dismissed unless the new motion or petition established to the satisfaction of the  
2 court newly discovered facts or circumstances supporting the new motion or petition.

3 (m) Nothing in this section shall be deemed to compel disclosure of any document or  
4 material protected by the constitution or laws of the United States or of the state of Rhode Island.

5 (n) Nothing in this section shall be deemed to limit a court's authority or discretion to  
6 prohibit the enforcement of a part or all of any confidentiality agreement, settlement agreement,  
7 stipulated agreement or protective order in any other cases.

8 (o) Nothing in this section shall be deemed to prohibit the entry or enforcement of that  
9 part of a confidentiality agreement, settlement agreement, or stipulated agreement between the  
10 parties which requires the nondisclosure of the amount of any money paid in settlement of a  
11 claim, provided, however, that defendant shall not make any offer to settle a case contingent upon  
12 a claimant agreeing to a confidentiality agreement, settlement agreement, or stipulated agreement  
13 which requires the nondisclosure of the amount of any money paid in settlement of a claim. The  
14 making of such a contingent offer shall constitute an unfair and deceptive act or practice.

15 **9-9.1-6. Interim protective orders for trade secrets. --** Section 9-9.1-5 does not affect  
16 the issuance of any interim protective order or any discovery order protecting the confidentiality  
17 or nondisclosure of documents and materials which constitute trade secrets. However, any such  
18 interim protective or discovery order, which pertains to evidence of financial fraud, a defective  
19 product, or any environmental hazard shall expire automatically thirty (30) days after entry of  
20 final judgment. Nothing herein shall delay the production of documents or information in the  
21 ordinary course of discovery as provided for by the rules of civil procedure. Any document  
22 which provides evidence of financial fraud, a defective product, or an environmental hazard that  
23 was protected from disclosure by the terms or any such discovery order or interim protective  
24 order shall not be sealed or subject to further confidentiality pursuant to any agreement or interim  
25 protective order unless the court issues a final protective order pursuant to the provisions of  
26 section 9-9.1-5.

27 **9-9.1-7. Trade secrets generally. --** Except as set forth in section 9-9.1-5 a court shall  
28 preserve the secrecy of trade secrets by reasonable means, which may include granting protective  
29 orders in connection with discovery proceedings, holding in-camera hearings, and ordering any  
30 person involved in the litigation not to disclose an alleged trade secret without prior court  
31 approval.

32 **9-9.1-8. Mediation. --** When persons agree to conduct and participate in a mediation for  
33 the purpose of compromising, settling or resolving a dispute, in whole or in part:

34 (1) The limitations on continuing confidentiality under this chapter do not limit and are

1 without prejudice to the confidentiality of communications or negotiations and settlement  
2 discussions.

3 (2) Information which is available to the public or which is subject to discovery outside  
4 of the mediation shall not be deemed confidential or not subject to disclosure pursuant to this  
5 chapter solely by reason of its introduction or use in the mediation process.

6 **9-9.1-9. Severability. --** If any provision of this chapter or the application thereof to any  
7 person or circumstances is held invalid, such invalidity shall not affect other provisions or  
8 applications of the chapter, which can be given effect without the in valid provision or application,  
9 and to this end the provisions of this chapter are declared to be severable.

10 SECTION 2. This act shall take effect upon passage.

=====  
LC00646  
=====

EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF  
A N A C T  
RELATING TO COURTS AND CIVIL PROCEDURE – PROCEDURE GENERALLY

\*\*\*

- 1           This act would regulate the circumstances under which matters of public interest in  
2 private litigation should be kept confidential.  
3           This act would take effect upon passage.

=====

LC00646

=====



