

# STATE OF WASHINGTON 2018 ANNUAL REPORT

## PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE “SUNSHINE COMMITTEE”

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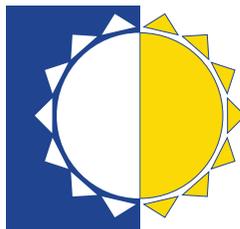
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# **PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE**

“SUNSHINE IN GOVERNMENT”

November 15, 2018

## **SUMMARY**

The Public Records Exemptions Accountability Committee (Sunshine Committee) met four times in calendar year 2018 to review and discuss the following exemptions:

### **Agriculture and Livestock Exemptions:**

- RCW 90.64.190 – Information from Livestock Producers
- RCW 42.56.610 – Information from Dairy Feedlots
- RCW 42.56.380(10) – Results of Animal Disease Tests
- RCW 42.56.380(11) – Records of International Livestock Importation
- RCW 42.56.380(12) – Records of Prohibited Agricultural Products
- RCW 15.19.080 – Information Regarding Ginseng Sales and Production
- RCW 16.65.030(1)(a) – Information in Public Livestock Market License
- RCW 49.70.119(6)(a) – Pesticide Records

### **Fish and Wildlife Exemptions:**

- RCW 42.56.430(1) – Commercial Fishing Catch Data
- RCW 42.56.430(2) – Sensitive Fish and Wildlife Data
- RCW 42.56.430(5) – Identifying Information in Recreational or Commercial Licenses
- RCW 42.56.430(6) – Information Deemed Confidential by Magnuson-Stevens
- RCW 42.56.430(3) – Wolf Depredation
- RCW 42.56.430(4) – Wolf Depredation
- RCW 71.12.885 – Predatory Wolf Wildlife Infractions

### **Juvenile Victim/Witness Exemptions:**

- RCW 42.56.240 – Information Regarding Child Victims of Sexual Assault
- RCW 10.97.130 – Information Regarding Child Victims of Sexual Assault
- RCW 7.69A.020(8) – Identifying Information of Child Victim
- RCW 7.69A.030(4) – Information Regarding Child Victims and Witnesses

### **Religious Affiliation:**

- RCW 42.56.235 – Information Regarding Religious Beliefs

### **Voter and Election Exemptions:**

- RCW 29A.56.670 – Information in Nominating Petitions
- RCW 29A.32.100 – Voter Pamphlet Arguments
- RCW 29A.92.100(3) – Secrecy of Vote



The review and discussion of these exemptions involved notice to the public and direct outreach to specific stakeholders. The Committee received testimony from public agencies and numerous interested parties, as well as extensive briefing by staff and Committee members, and considerable Committee discussion. This review process resulted in recommendations, contained in this report, which are designed to achieve statutory clarification and the protection of important privacy interests while ensuring appropriate public disclosure.

In summary, the Committee's 2018 recommendations are to amend the following voter and election exemptions and juvenile victim/witness exemptions, fully described below: RCW 29A.56.670, RCW 29A.92.100(3), RCW 7.69A.020(8), RCW 7.69A.030(4), RCW 10.97.130 and RCW 42.56.240(5). The Committee also recommends that the Legislature consider adopting the various other recommendations made by the Committee over the past several years, including but not limited to those introduced in the 2017 legislative session in HB 1160/SB 5418.

In 2019, the Committee anticipates it will continue its review of several other exemptions it began to discuss in 2018, in particular those related to the categories of information concerning fish and wildlife, agriculture and livestock, and juvenile law, amongst others.

## HISTORY OF THE COMMITTEE

The Committee was created by Substitute House Bill 5435 in 2007 (codified in RCW 42.56.140). The bill established the Committee to review all public disclosure exemptions, and make recommendations to the Legislature as to whether each exemption should be continued without modification, modified, scheduled for sunset review at a future date, or terminated. The Legislature stated that in light of the changing nature of information technology, record-keeping and the increasing number of public disclosure exemptions, periodic review of public disclosure exemptions is needed to determine if exemptions continue to serve the public interest.

Further information about the Committee and its work is available to the public on the Internet at <http://www.atg.wa.gov/sunshine-committee>. The Committee posts its agenda for each meeting on the website, and when available, the video of the meeting is also posted. In addition, the website invites citizens to join a listserv, so they may receive notification when new material is posted.

TVW, the state's public affairs television broadcaster, has filmed or recorded most of the meetings, and the website for the Committee contains links to the TVW website or the recording so that the public can view previous meetings.

As required by the Legislature, the Committee has adopted and published criteria for reviewing exemptions. A copy of the Committee's criteria is available on the Committee website.

The Committee receives an updated list of exemptions from the Office of the Code Reviser each year in August. A Schedule of Review is used by the Committee to organize its review activity. This schedule currently contains over 500 items and is posted on the Committee's website.

The Committee recognizes the importance of public comment and will continue to provide notice to the citizenry of the Committee's meeting agendas in order to encourage citizen participation and comment. The Committee receives staff assistance from the Attorney General's Office, as directed by the legislation establishing the Committee.

The Legislature called for an annual report of the Committee's recommendations. This is the eleventh annual report and summarizes the Committee's work since the November 2017 report was submitted.

A vertical photograph on the left side of the page shows a sunset over a body of water. The sun is low on the horizon, creating a bright glow and reflecting on the water's surface. The sky is a mix of orange, yellow, and blue.

## MEMBERS OF THE COMMITTEE

The members are appointed to the Committee by the Governor, Legislature, Attorney General and State Auditor. The following individuals served on the Committee in 2018:

- Chair, Michael E. Schwab, retired Yakima County Superior Court Judge
- Former State Representative Lynn Kessler - Vice Chair
- Senator Maralyn Chase (D)
- Senator Mark Miloscia (R)
- Representative Luanne Van Werven (R)
- Representative Larry Springer (D)
- Taylor (Tip) Wonhoff - Deputy Counsel to the Governor
- Rowland Thompson, Executive Director, Allied Daily Newspapers of Washington
- David Zeeck, Publisher, Tacoma News Tribune
- Hon. Pete Holmes, Seattle City Attorney
- Jennifer Steele, Attorney General's Office Public Records Counsel
- Kathy George, Attorney, Johnston George LLP
- Sara Di Vittorio, Snohomish County Public Records Deputy Prosecutor

## COMMITTEE PRACTICE AND PROCEDURE - 2018

The Committee held four meetings in 2018. Approved minutes of each meeting are available on the Committee's website. The following is a summary of the work done by the Committee at each meeting.

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### FEBRUARY 27, 2018

- a. This was the first meeting of the year in 2018 and the Committee engaged in an opening discussion of its Schedule of Review of exemptions. Representatives of the Code Reviser's Office were present, specifically the new Code Reviser Kathy Buchli, and her Deputy Pete Wogsland, assigned to the Sunshine Committee, to explain their office's activity in identifying and reporting on the exemptions in Washington State law as well as legislative bill drafting services. The Sunshine Committee Schedule of Review currently contains 554 exemptions and serves as the basis for the Committee's review process.
- b. A brief discussion ensued about the Sunshine Committee recommendation bills, HB 1160 and SB 5418, which were submitted and pending in the 2017 legislative session. A more lengthy discussion followed concerning SB 6617, which had been passed by the Legislature regarding the exemption of its own legislative records from disclosure. There was considerable concern expressed about the lack of public process used to pass the bill and the absence of judicial review and the powerful effort by the Legislature to shield its records. Following discussion, a motion was made and ultimately passed by a vote of seven members present, with one member abstaining, to request that the Governor veto the bill.
- c. In 2017, the Legislature enacted two new exemptions regarding wolf depredation and fish/shellfish harvest. The Committee had previously received testimony and discussed these exemptions in its meetings in 2017, as well as the four exemptions in existence prior to 2017. After further discussion, a motion was made and passed by a vote of 7-1 to recommend that the four pre-2017 exemptions be maintained, since they seemed to represent sound public policy and the preservation of appropriate privacy interests.
- d. The agriculture and livestock category contains numerous exemptions which had been the subject of lengthy discussion and testimony during committee meetings in 2017. Two of those exemptions referred to as the CAFO exemptions, RCW 90.64.190 and RCW 42.56.610, are the subject of a fairly intense debate between environmental organizations and cattle industry groups. The environmental groups asked that the Sunshine Committee recommend repeal of these exemptions. Since the cattle industry representatives were not present, it was decided to continue this discussion until the next committee meeting in May.

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- e. The Committee discussed voter and election information exemptions. David Elliott, Policy Director from the Washington State Secretary of State's Office discussed these exemptions and provided background on the history of public records requests in his office related to them. The Committee also received written input from the Washington State County Auditors Association indicating their position that the current exemptions should remain in effect. The Committee decided to continue the discussion regarding these exemptions to future meetings so that a full record of input from additional interested parties could be developed.
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#### **MAY 15, 2018**

- a. The Committee continued its prior discussion of the CAFO exemptions contained in RCW 90.64.190 and RCW 42.56.610. This discussion developed into a lengthy debate between environmental groups represented by Puget Soundkeeper Alliance and the Sierra Club, and cattle industry groups represented by the Washington Cattle Feeder's Association, Washington Dairy Federation, Washington Cattlemen's Association and the Washington Farm Bureau. The environmental groups urged the Committee to recommend repeal of these exemptions as being unnecessary and a hindrance to sound public policy regarding the protection of water quality. The cattle industry groups urged the Committee to recommend that these exemptions be maintained in order to protect proprietary confidential business information as legitimate privacy interests.

Following extensive debate, a motion was made and seconded that the Committee recommend repeal of these CAFO exemptions. A second motion was made and seconded to table the motion to repeal so that the Committee and the interested parties could engage in further study and discussion during the coming months to see if there was any room for compromise or at the very least to achieve greater understanding of the issues. This second motion was approved and the subject of the CAFO exemptions was continued for consideration at future meetings.

- b. The discussion regarding the CAFO exemptions took considerable time and the Committee was only able to engage in very limited discussion about other agriculture and livestock exemptions, fish and wildlife exemptions and voter and election exemptions. It was decided to continue the discussion of those exemptions to future meetings of the Committee.
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#### **AUGUST 21, 2018**

- a. The Committee continued its discussion about the agriculture and livestock exemptions, except for the CAFO exemptions. Six exemptions in this category were reviewed and discussed in 2017. A motion was made to maintain these exemptions, which was passed by a vote of 7-2. The exemptions involved are contained in RCW 42.56.380(10-12), RCW 15.19.080, RCW 16.65.030(1)(a), and RCW 49.70.119(6)(a).
- b. The Committee engaged in general discussion regarding the wolf depredation exemption, the CAFO exemptions, and the voter and election exemptions. All of these exemptions require further study and input from interested parties in order to make a sufficient record from which the Committee can make recommendations and all of these exemptions will be scheduled for review at future committee meetings.
- c. Committee Member Sara Di Vittorio formally introduced the topic of juvenile victim/witness exemptions contained in four sections of RCW 42.56.240(5). These exemptions impact her work in public records law at the Snohomish County Prosecutor's Office on a daily basis and in her opinion require modifications to clarify and improve their implementation.

Also present to discuss these exemptions were representatives of the Seattle City Attorney's Office, Law Enforcement Information and Records Association (LEIRA) and the Legal Voice organization.

After extensive discussion, the Committee decided to continue the review of these exemptions to future meetings so that proposals to modify the exemptions could be redeveloped.

## OCTOBER 23, 2018

- a. The Committee discussed voter and election exemptions. A motion to recommend the Legislature amend RCW 29A.92.100(3) was made, seconded, and unanimously approved. A motion to recommend the Legislature strike the last sentence of RCW 29A.56.670 was made, seconded and unanimously approved. Lastly, the Committee discussed writing a letter to the appropriate legislative committee chairs indicating that the Sunshine Committee is concerned about RCW 29A.08.710(2)(b) and invite their involvement in a discussion about the statute. A motion to direct the Committee Chair to write the letter was made, seconded and unanimously approved. The concern expressed by the Committee involves whether there should be increased access to public records involving juveniles who have registered to become voters.

The Committee continued its discussion of various juvenile victim/witness exemptions. RCW 7.69A.020(8), RCW 7.69A.030(4), RCW 10.97.130 and RCW 42.56.240(5) were discussed and testimony was heard about the impacts of these statutes. A motion to recommend that the Legislature amend these statutes was made, seconded, and unanimously approved.

- b. The Committee discussed whether to begin discussion on a new statute, RCW 42.56.235, regarding religious affiliation. The Committee decided to address the issue in 2019.
- c. Lastly, the Committee discussed the 2019 meeting schedule and the 2018 Annual Report to the Legislature.

## RECOMMENDATIONS

The Sunshine Committee hereby makes the following recommendations:

- Exhibit A – RCW 29A.56.670 (Recommend amendment)
- Exhibit B – RCW 29A.92.100(3) (Recommend amendment)
- Exhibit C – RCW 7.69A.020(8), RCW 7.69A.030(4), RCW 10.97.130 and RCW 42.56.240(5) (Recommend amendment)

See attached. The Committee also recommends maintaining certain exemptions as described, herein above. All of these recommendations are described in the exhibits and are proposed in order to increase appropriate access to public records in the case of voter and election exemptions and to protect the privacy interests of child victims and witnesses regarding child victim and witness exemptions.

The Committee also voted to write a letter to the appropriate legislative committee chairs indicating that the Sunshine Committee is concerned about RCW 29A.08.710(2)(b) and to invite their involvement in a discussion about the statute. Lastly, the Committee recommends that the Legislature consider adopting the various other recommendations made by the Committee over the past several years, including but not limited to those introduced in the 2017 legislative session in HB 1160/SB 5418.

## CONCLUSION

The Committee plans to meet at least four times in 2019 and intends to move forward with its task of reviewing exemptions from public disclosure contained in RCW 42.56 and other statutes. The Committee has developed considerable expertise in reviewing exemptions and will use that experience to address the many important issues that relate to the disclosure of public records. Finally, the Committee will endeavor to work closely with the Legislature in the upcoming session to discuss the Committee's recommendations and to seek meaningful contributions to public policy in Washington State, including the evolution of the Committee's original mandate, and the development of a more efficient and cost effective public records dispute process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael E. Schwab". The signature is fluid and cursive, with a large initial "M" and "S".

Michael E. Schwab  
Chair

November 15, 2018



## EXHIBIT A

The current statute at RCW 29A.56.670 is an exemption for checking signatures on nominating petitions. The Committee approved the recommendation described below.

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**The Sunshine Committee recommends that the Legislature amend RCW 29A.56.670 so it reads as follows:**

“Upon the receipt of the certificate of nomination, the secretary of state shall check the certificate and canvass the signatures on the accompanying nominating petitions to determine if the requirements of RCW 29A.56.640 have been met. Once the determination has been made, the secretary of state shall notify the presiding officer of the convention and any other persons requesting the notification, of his or her decision regarding the sufficiency of the certificate or the nominating petitions. Any appeal regarding the secretary’s determination must be filed with the superior court of Thurston county not later than five days from the date the determination is made, and shall be heard and finally disposed of by the court within five days of the filing. ~~Nominating petitions shall not be available for public inspection or copying.”~~



## EXHIBIT B

The Sunshine Committee recommends that the Legislature amend RCW 29A.92.100(3) so it reads as follows:

**RCW 29A.92.100(3):**

The plaintiff's constitutional right to the secrecy of the plaintiff's vote is preserved and is not waived by the filing of an action pursuant to ~~chapter 113, Laws of 2018~~ **[this act]**, and the filing **[vote]** is not subject to discovery or disclosure.

## EXHIBIT C

The Sunshine Committee recommends that the Legislature amend RCW 7.69A.020(8), RCW 7.69A.030(4), RCW 10.97.130 and RCW 42.56.240(5) so each reads as follows:

**RCW 7.69A.020(8):**

(8) "Identifying information" **[of living child victims or witnesses includes:]** means the child's name, address, **[telephone number, email address, social media identifier, image, location of child (except the location of the assault when not the child's address), and the surname of the child's parent if it is the same as the child's and the parent is not the alleged perpetrator. In cases where the child victim is a victim of sexual assault, "identifying information" also includes the relationship between the child and the alleged perpetrator when the alleged perpetrator is a relative or step-relative of the child victim.]** ~~location, and photograph, and in cases in which the child is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.~~

**RCW 7.69A.030(4):**

To **[exempt from public disclosure under chapter 42.56 RCW, identifying information as defined by RCW 7.69A.020(8), of]** ~~not have the names, addresses, nor photographs of the living child victim or witness~~ **[and to not have identifying information]** disclosed by any law enforcement agency, prosecutor's office, or state agency without the permission of the child victim, child witness, parents, or legal guardians to anyone except another law enforcement agency, prosecutor, defense counsel, or private or governmental agency that provides services to the child victim or witness.

**RCW 10.97.130:**

Information identifying child victims under age eighteen who are victims of sexual assaults is confidential and not subject to release to the press or public without the permission of the child victim or the child's legal guardian. Identifying information **[is defined in RCW 7.69A.020(8)]** ~~includes the child victim's name, addresses, location, photographs, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.~~ Information identifying the child victim of sexual assault may be released to law enforcement, prosecutors, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault. Prior to release of any criminal history record information, the releasing agency shall delete any information identifying a child victim of sexual assault from the information except as provided in this section.

**RCW 42.56.240(5):**

**[Identifying]** information **[, as defined by RCW 7.69A.020(8), of child victims and witnesses]** revealing the identity of child victims of sexual assault who are under age eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.