

STATE OF WASHINGTON 2020 ANNUAL REPORT

PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE “SUNSHINE COMMITTEE”

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State Auditor Pat McCarthy

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Sen. Dean Takko
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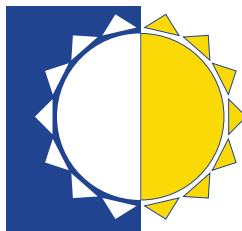
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PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

“SUNSHINE IN GOVERNMENT”

November 16, 2020

SUMMARY

The Public Records Exemptions Accountability Committee (Sunshine Committee) met four times in calendar year 2020 to review and discuss the following exemptions:

Boarding Homes Exemptions:

RCW 18.20.120 – Information Disclosure

Child Welfare/Support Exemptions:

RCW 74.13.500 – Disclosure of Child Welfare Records

RCW 74.13.505 – Disclosure of Child Welfare Records

RCW 74.13.510 – Disclosure of Child Welfare Records

RCW 74.13.515 – Disclosure of Child Welfare Records

RCW 74.13.520 – Disclosure of Child Welfare Records

RCW 74.13.525 – Disclosure of Child Welfare Records

Criminal Proceedings/Investigative Exemptions:

RCW 10.27.090 – Grand Juries

RCW 10.27.160 – Grand Juries

Deliberative Process Exemption:

RCW 43.41.100 – Office of Financial Management

Employer/Labor Statistics Exemption:

RCW 43.22.290 – Department of Labor and Industries

Financial, Commercial and Proprietary Information Exemptions:

RCW 24.03.435 – Washington Nonprofit Corporation Act

RCW 24.06.480 – Nonprofit Miscellaneous and Mutual Corporations Act

RCW 43.21A.160 – Department of Ecology

Fish and Wildlife Exemptions:

RCW 42.56.141 – Wolf Depredation

RCW 42.56.430(3) – Wolf Depredation

RCW 42.56.430(4) – Wolf Depredation

RCW 77.12.885 – Wolf Depredation

Health Care Profession Exemptions:

RCW 4.24.250 – Health Care Provider

RCW 18.32.040 – Dentistry

RCW 18.46.090 – Birthing Centers

RCW 18.83.110 – Psychologists

Investigative Record Exemption:

RCW 21.20.480 – Securities Act

Judicial Court File Exemption:

RCW 26.12.080 – Family Court

Motor Vehicle/Driver Record Exemption:

RCW 46.20.041 – Driver Licenses-Identicards

Voter and Election Information Exemption:

RCW 29A.60.110 – Ballot containers

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 <https://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 600 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 thirteenth annual report and summarizes the Committee’s work since the November 2019 report was submitted.



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 2020:

- Former State Representative Lynn Kessler, Acting Chair
- Representative Luann Van Werven (R)
- Representative Larry Springer (D)
- Senator Sam Hunt (D)
- Hon. Pete Holmes, Seattle City Attorney
- Taylor (Tip) Wonhoff, Deputy Counsel to the Governor
- Rowland Thompson, Executive Director, Allied Daily Newspapers of Washington
- David Zeeck, former Publisher, Tacoma News Tribune
- Jennifer Steele, Attorney General's Office Public Records Counsel
- Kathy George, Attorney, Johnston George LLP

COMMITTEE PRACTICE AND PROCEDURE - 2020

The Committee held four meetings in 2020. 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.

FEBRUARY 25, 2020

This was the first meeting of the year in 2020. Acting Chair, Lynn Kessler, spoke about former Chair Michael Schwab's contributions to the Sunshine Committee and thanked him for his service to the Committee.

It was moved and seconded to amend the agenda to include the addition of HB 1888. Motion to approve the agenda as amended was passed unanimously.

The 2019 Sunshine Committee Annual Report was presented. There was a comment that the Committee might want to consider a discussion regarding the purpose of this Committee.

It was reported that Rep. Van Werven and former Chair Michael Schwab drafted a bill from a recommendation from the 2019 Sunshine Committee's Annual Report that would protect juvenile crime victims.

Acting Chair Kessler shared the preamble to the Initiative from 1972 calling for transparency in government. Acting Chair Kessler asked for suggestions on how the Committee can better implement the purpose of open government. There was a general discussion regarding the Committee's role in re-examining exemptions to government transparency.

It was also reported that HB 1538 and SB 5246 were no longer alive in the Legislature.

The Committee discussed and passed a motion to contact the chairs and ranking members in the House and Senate to express our concerns around HB 1888 and apply their best judgement to how that turns out in the interest of government openness.

MOTION: To direct Sunshine Committee Acting Chair to contact chairs and ranking members of the appropriate committee in the House and Senate to express our concerns around HB 1888 and ask those committee chairs and ranking members to take a very close look and apply their best judgment to how that turns out in the interest of government openness. Moved by David Zeeck, seconded by Pete Holmes. Rowland Thompson abstained, motion approved.

After a discussion regarding RCW 74.13.500 (Disclosure of Information Regarding Abuse or Neglect of Child), it was moved, seconded and unanimously approved to table the child welfare exemption until the May meeting.

MAY 12, 2020

Due to health and safety concerns related to the COVID-19 pandemic, the May 12, 2020 meeting was canceled.

AUGUST 18, 2020

Acting Chair Kessler called the meeting to order remotely via GoToWebinar.

Kathy George presented her proposal for the process for reviewing exemptions as a follow-up to discussion at the February 25th meeting. Her proposal outlined reviewing 18 exemptions by the end of year 2020 and 35 in 2021. It was suggested that the Committee look at exemptions that have already had hearings, and review older exemptions.

MOTION: The Committee adopts this measure as a preliminary step to resolving the issue to be reviewed at the end of the year to see if we need to make modifications, and amended to give the Chair and Agenda Subcommittee the implicit authority to make sure that it is workable. Motion unanimously approved as amended.

Acting Chair Kessler brought to the Committee's attention that the Committee's report to the Legislature regarding wolf depredation (RCW 42.56.430(3) and (4); RCW 77.12.885; and RCW 42.56.141 – Information Identifying Persons Responding to Pet/Livestock Depredation by Wolves/Predatory Wildlife) is due in December 2021. Ms. George had asked the Fish and Wildlife representative at a previous meeting about the baseline data on threats. Acting Chair Kessler will reach out to the Director of Fish and Wildlife to obtain data on how many threats existed before the exemption passed and how many after the exemption passed. The public had been notified of the August 18th meeting; there was no public comment.

It was announced there would be a special meeting in September.

SEPTEMBER 21, 2020 (Special Meeting)

The following exemptions were reviewed, discussed and tabled to the October meeting:

RCW 4.24.250 (Reports of Misconduct by Health Care Professionals)

A discussion by Committee members was followed by a vote to table until the October meeting, and to reach out to the Department of Health for further information.

RCW 18.32.040 (Dentistry Licensing Examination Records)

A discussion by Committee members was followed by a vote to table until the October meeting for additional discussion.

RCW 18.46.090 (Reports Regarding Birthing Centers, Including Identification of Individuals, Received by Department of Health)

After discussion, a vote passed to table until October meeting, and to reach out to the Department of Health for further information.

RCW 10.27.090; RCW 10.27.160 (Grand Jury Evidence)

After discussion, a vote passed to table until October meeting and review memo on both of these grand jury statutes.

RCW 18.20.120 (Boarding Homes)

After brief discussion it was decided to table for October meeting.

RCW 18.83.110 (Psychologist-Client Privileged Communications)

Discussion, followed by motion to retain statute as amended, and to table until October meeting.

RCW 21.20.480 (State Director of Financial Institutions – Non-public Investigation Information)

After discussion it was recommended this statute be tabled until October meeting.

RCW 24.03.435; RCW 24.06.480 (Answers to Secretary of State Interrogatories to Corporations Regarding Compliance with Legal Requirements)

These statutes were tabled to October meeting in order to hear detailed presentations.

RCW 43.21A.160 (Authority of Director of State Department of Ecology to Exempt Disclosure of Information Related to Processes of Production)

Tabled to October Meeting for detailed presentation.

RCW 26.12.080 (Family Court May Seal File Where Publication of Matter Would Be Injurious to Children or Public Morals)

Motion to table until October meeting after discussion and recommendation to retain this statute unaltered.

RCW 43.22.290 (Confidentiality of Identity of Persons/Companies Reporting Employment Statistics to Department of Labor & Industries)

Background on this statute was presented. Further discussion tabled until October meeting.

RCW 43.41.100 (Director of State Department of Financial Management – Confidential Reports to Governor Regarding Administrative Matters)

This was held over to next meeting.

Public Comment:

Received one public comment from an election transparency advocate who addressed the categorical exemption prohibiting the inspection or copying of ballot images in our elections. He spoke in opposition to appellate court ruling.

Rep. Van Werven discussed HB 2484 that she introduced this past session indicating it passed the House but not the Senate. She reported that she plans to introduce the bill next session consistent with the Committee recommendation.


OCTOBER 20, 2020

Rep. Van Werven reiterated her plan to reintroduce HB 2484 related to 911 audio recordings concerning child victims without amendment next session (2021).

The Committee discussed 14 statutes.

RCW 4.24.250 (Health Care Professionals)

Committee originally heard this on September 21, 2020.



MOTION: To adopt Kathy's proposal with the suggested language "Records created by or specifically for and maintained by such committees or boards." Moved by David Zeeck, seconded by Rep. Larry Springer. Approved unanimously.

RCW 18.32.040 (Dentistry Licensing Records)

Discussion that included information from Senator Hunt that he spoke to the Health Care Professions and Dental Society people who said they no longer do this work, and this exemption can be taken off the books.

MOTION: To remove statute. Approved unanimously.

RCW 18.46.090 (Birthing Centers)

A discussion of information from the Department of Health stating that their Public Disclosure Unit hasn't used this statute, and they don't receive many complaints about birthing centers. If they do receive a Public Disclosure request, this may be the only statute that would provide confidentiality for patients.

No recommendation was proposed to the Legislature.

RCW 10.27.090 (Grand Jury Evidence)

Recommendation that the Legislature flip the language so that, instead of presuming secrecy and allowing disclosure at the court's discretion, records would be presumed open unless the court prohibits disclosure.

MOTION: Recommendation passed unanimously.

RCW 10.27.160 (Grand Jury Report)

After discussion regarding proposal presented, the Committee agreed to table the matter to a future meeting in 2021 to permit a full discussion.

RCW 18.20.120 (Boarding Homes)

Suggested that this statute be deleted given that boarding homes have been eliminated. No motion was necessary as RCW 18.20.120 has already been removed.

RCW 18.83.110 (Psychologist-Client)

Discussed at length at the last meeting.

A recommendation to maintain this statute was unanimously approved.

RCW 21.20.480 (Financial Institutions Investigations)

After much discussion it was decided to table this to discuss at a future meeting, and to invite a representative of the Department of Financial Institutions to testify.

RCW 24.03.435 and 24.06.480 (Secretary of State Interrogatories)

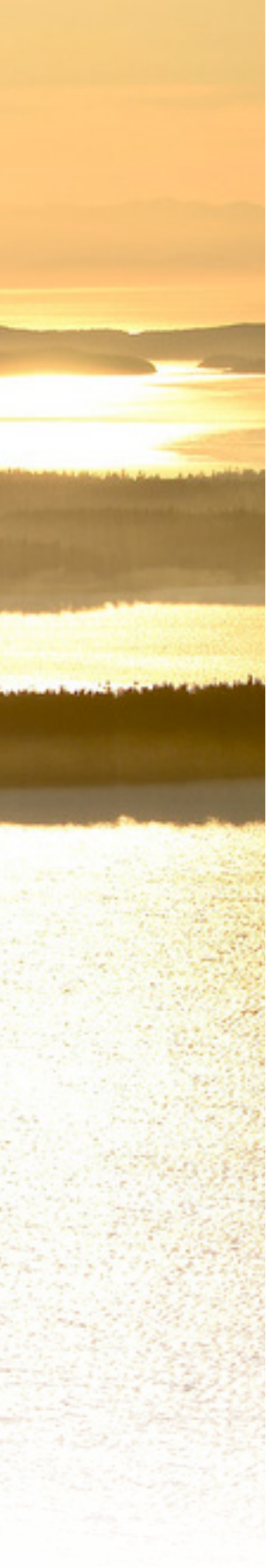
It was decided after discussion to table review and discussion of these statutes to the next meeting. Mr. Thompson will reach out to the Secretary of State's Office to see if they would be willing to remove the language. Ms. Ganga will assist with contacting the Secretary of State's office.

RCW 26.12.080 (Family Court Files)

Earlier discussed during the September meeting. It was recommended that the Committee reach out to the Board of Judicial Administration to see how this would impact GR 22.

Mr. Thompson offered to coordinate the effort to reach out to the Board of Judicial Administration.

RCW 43.22.290 (Employer/Labor Statistics)



This dates back to 1901 and amended in 1965. After discussion it was recommended to decriminalize the statute.

MOTION: To modify the language to remove the fines and imprisonment. Passed unanimously.

RCW 43.41.100 (Financial Management Reports to Governor)

After discussion it was tabled for hearing until 2021. Mr. Wonhoff will reach out to the Office of Financial Management regarding this exemption.

RCW 46.20.041 (Motor Vehicle/Physician's Statement Certifying Capability of Driver with Disability)

This exemption was reviewed by the Committee and it was recommended to maintain this exemption.

Public Comment by Tim White at the September meeting.

RCW 29A.60.110 (Sealed Containers for Election Ballots)

After discussion, the Committee determined this statute does not deal with records retention.

MOTION: Directing Acting Chair Kessler to send correspondence to Mr. White notifying him that the Committee lacks jurisdiction over this issue, and refer him to the Secretary of State's Office.

RECOMMENDATIONS

The Sunshine Committee hereby makes the following recommendations:

- Exhibit A – Recommend amendment to RCW 4.24.250 Health Care Professionals
- Exhibit B – Recommend amendment to RCW 10.27.090 Grand Jury Evidence
- Exhibit C – Recommend amendment to RCW 43.22.290 Employer/Labor Statistics
- Exhibit D – Recommend removal of RCW 18.32.040 Requirement for Licensure

CONCLUSION

The Committee plans to meet at least four times in 2021. Prior to the Coronavirus, the Committee met in February, then canceled the May meeting due to the virus. The Committee then met in August, September and October using GoToWebinar. Over the course of the year, the public was able to access our GoToWebinar meetings through a variety of methods that were listed on our website.

The Committee intends to move forward with its task of reviewing exemptions from public disclosure, concentrating on evaluating their continued relevance and necessity. The Committee would like to increase the number of exemptions to review.

Among the several exemption statutes to be reviewed, the Committee will move forward with a further analysis of the wolf depredation issue, an exemption enacted into law in 2017 that carried with it an assignment for the Committee to send a report to the Legislature by December 2021 evaluating the need to maintain the exemption.

The Committee will also continue to gather information regarding a statute that was passed in 2019 requiring a report from the Committee as to whether an exemption for records relating to Explosives should be maintained, modified or repealed.

Finally, the Committee intends to work closely with the Legislature in the upcoming 2021 Session in reviewing the Committee's recommendations, and focusing on meaningful contributions to public policy in Washington State, including the evolution of the Committee's original Public Disclosure mandate, as well as the development of an efficient and cost-effective public records dispute process.



Lynn Kessler
Acting Chair

November 16, 2020



EXHIBIT A

The Sunshine Committee recommends that the Legislature amend RCW 4.24.250(1) as follows:

(1) Any health care provider as defined in RCW [7.70.020](#) (1) and (2) who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. ~~The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, Records created by or specifically for and maintained by such committees or boards~~ are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW [7.70.020](#) (1) and (2).



EXHIBIT B

The Sunshine Committee recommends that the Legislature amend RCW 10.27.090(3) as follows:

No grand juror, public or private attorney, city attorney or corporation counsel, reporter, interpreter or public servant who held a witness in custody before a grand jury or special inquiry judge, or witness, principal or other person shall disclose the testimony of a witness examined before the grand jury or special inquiry judge or other evidence received by it, when such disclosure is prohibited by the court. ~~except when required by the court to disclose the testimony of the witness examined before the grand jury or special inquiry judge for the purpose of ascertaining whether it is consistent with that of the witness given before the court, or to disclose his or her testimony given before the grand jury or special inquiry judge by any person upon a charge against such person for perjury in giving his or her testimony or upon trial therefor, or when permitted by the court in furtherance of justice.~~

The Sunshine Committee recommends that the Legislature amend RCW 43.22.290 as follows:

Every owner, operator, or manager of a factory, workshop, mill, mine, or other establishment where labor is employed, shall make to the department, upon blanks furnished by it, such reports and returns as the department may require, for the purpose of compiling such labor statistics as are authorized by this chapter, and the owner or business manager shall make such reports and returns within the time prescribed therefor by the director, and shall certify to the correctness thereof.

In the reports of the department no use shall be made of the names of individuals, firms, or corporations supplying the information called for by this section, such information being deemed confidential, ~~and not for the purpose of disclosing personal affairs, and any officer, agent, or employee of the department violating this provision shall be fined a sum not exceeding five hundred dollars, or be imprisoned for up to three hundred sixty-four days.~~

EXHIBIT D

The Sunshine Committee recommends that the Legislature remove RCW 18.32.040 as follows:

Requirements for licensure:

The commission shall require that every applicant for a license to practice dentistry shall:

(1) Present satisfactory evidence of graduation from a dental college, school, or dental department of an institution approved by the commission;

(2) Submit, for the files of the commission, a recent picture duly identified and attested; and

(3)(a) Pass an examination prepared or approved by and administered under the direction of the commission. The dentistry licensing examination shall consist of practical and written tests upon such subjects and of such scope as the commission determines. The commission shall set the standards for passing the examination. The secretary shall keep on file the examination papers and records of examination for at least one year. This file shall be open for inspection by the applicant or the applicant's agent unless the disclosure will compromise the examination process as determined by the commission or is exempted from disclosure under chapter 42.56 RCW.

(b) The commission may accept, in lieu of all or part of the written examination required in (a) of this subsection, a certificate granted by a national or regional testing organization approved by the commission.

(c) The commission shall accept, in lieu of the practical examination required in (a) of this subsection, proof that an applicant has satisfactorily completed a general practice residency, pediatric residency, or advanced education in general dentistry residency program in Washington state accredited by the commission on dental accreditation of the American dental association, of at least one year's duration, in a residency program that serves predominantly low-income patients.