

# PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE "SUNSHINE COMMITTEE"

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# PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

# "SUNSHINE COMMITTEE" November 15, 2022

### **SUMMARY**

The Public Records Exemptions Accountability Committee (Sunshine Committee) met quarterly in 2022 to review and discuss the following exemptions:

### **Counselors**

RCW 18.19.180—Counselor communications and disclosure statement

#### **Dissolution**

RCW 26.09.015—Dissolution mediation proceedings

### **Educational Information**

RCW 42.56.320(1)—Financial disclosures filed by private vocational schools RCW 42.56.320(4)—Gifts to educational entities where terms of gift restrict access

### **Employment and Licensing Records**

RCW 42.56.250(1)—Licensing, employment, and academic tests and scoring keys

### Financial, Commercial and Proprietary Information and Charitable Trusts

RCW 42.56.270(2)—Financial information supplied by bidder on ferry work and highway construction within five years of request for disclosure

RCW 42.56.270(3)—Financial information and records filed by persons pertaining to export services

RCW 42.56.270(4)—Financial information in economic development loan applications

RCW 42.56.270(5)—Financial information obtained from business and industrial development corporations

RCW 42.56.270(6)—Financial information on investment of retirement funds and public trust investments

RCW 42.56.270(7)—Financial and trade information supplied by and under industrial insurance coverage

RCW 42.56.270(12)(a)(i)—Financial and proprietary information supplied to the Department of Commerce

RCW 84.40.340—UTC records containing commercial information a court determines are confidential



### **Fireworks and Explosives**

RCW 42.56.460(2)—Records and reports submitted as required by the Washington Explosives Act, chapter 70.74 RCW

RCW 42.56.655—Requires the Washington State Public Records Accountability Committee to submit a report with recommendations as to whether the exemption in RCW 42.56.460(2) should be continued, modified or terminated

### **Health Care**

RCW 18.32.040—Dental licensing examination records RCW 42.56.360(1)(e)—Physicians in the impaired physicians program

### **Health Care Professions**

RCW 18.53.200—Information and records of optometrists

### **Other Chapters**

RCW 2.64.111—Judicial Conduct Commission investigations and initial proceedings

### **Scientific Research**

RCW 42.48.020—Personally identifiable public records used in scientific research RCW 42.48.040—Personally identifiable public records used in scientific research

### **State Government**

RCW 43.190.110—Complaint and investigation records of long-term care ombudsman

### **Trade Secrets**

RCW 19.108.020—Equitable remedies to preserve secrecy of trade secrets

### **Workers Compensation Records**

RCW 49.17.260—L&I investigative reports on industrial catastrophes



### **HISTORY OF 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 listsery, 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 recordings so 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 fifteenth annual report and summarizes the Committee's work since the November 2021 report was submitted.



The members are appointed to the Committee by the Governor, Legislature, Attorney General and State Auditor. The following individuals served on the Committee in 2022:

- Linda Krese, Chair, Former Snohomish County Superior Court Judge
- Lynn Kessler, Vice Chair, Former State Representative
- Kathy George, Attorney, Johnston George LLP
- Representative Jenny Graham (R)
- Senator Sam Hunt (D)
- Ann Marie Soto, Attorney, Madrona Law Group, PLLC
- Representative Larry Springer (D)
- Jennifer Steele, Assistant Attorney General
- Jaime Stephens, San Juan County Councilmember
- Rowland Thompson, Executive Director, Allied Daily Newspapers of Washington
- Senator Jeff Wilson (R)
- Taylor "Tip" Wonhoff, Counsel to the Governor
- David Zeeck, Former Publisher, Tacoma News Tribune

### **COMMITTEE PRACTICES AND PROCEDURES**

The Committee held four meetings in 2022 on March 22nd, May 24th, August 23rd, and October 18th. The meetings in March and May were held remotely because of COVID-19 guidelines. The public was provided with remote access to the meetings. The meeting in August was held in a public location at a conference room at the Lacey (WA) Community Center. The October meeting saw a return to our pre-COVID venue in Room ABC of the John Cherberg Building on the Capitol Campus in Olympia. The August and October meetings allowed members of the public to attend and comment either in person or remotely. All members of the Committee attended the August meeting remotely. For the October meeting some members appeared in person while others appeared remotely. The Committee provided an opportunity for public comment at each meeting and received some public comments through its website. In addition, the Committee received testimony and documentary input from public agency representatives, interested stakeholders, and other parties. Some members of the Committee also provided written memoranda for consideration by the other members. As a result, there was a considerable amount of material for the members to review in advance of each meeting.

The review process resulted in the recommendations set forth below. These recommendations are intended to improve statutory clarity in some instances and to protect both important privacy interests and appropriate public access to information.

Approved minutes of each meeting as well as video and/or audio recordings of the meetings are available on the Committee's website: www.atg.wa.gov/sunshine-committee.



# THE COMMITTEE RECOMMENDS RETAINING THE FOLLOWING EXEMPTIONS WITHOUT MODIFICATION:

**RCW 18.53.200**—This exemption provides that information and records of a licensed optometrist pertaining to a patient shall be privileged communication. The Committee voted unanimously to recommend retaining this exemption.

**RCW 18.19.180**—This exemption extends the confidentiality that applies to other health care providers to counselors and advisers certified to engage in private practice counseling per RCW 18.19.200. On a split vote (7-1), the Committee voted to recommend retaining this exemption.

**RCW 19.108.020**—This exemption provides remedies to preserve the secrecy of trade secrets. The Committee concluded it does not actually provide an exemption from disclosure of public records. The Committee voted unanimously to recommend retaining this exemption.

RCW 26.09.015—This statute makes mediation proceedings under chapter 26.09 RCW confidential except under certain limited circumstances. Chapter 26.09 RCW relates solely to dissolution of marriage and related proceedings, such as child support, parenting plans and disposition of property and debts as well as proceedings to modify final or temporary orders pertaining to these matters. These proceedings involve only private individuals. Proceedings by the state to enforce child support are brought under chapter 26.18 RCW. The Committee voted unanimously to recommend retaining this exemption.

**RCW 42.48.020 and RCW 42.48.040**—These two statutes apply to individually identifiable personal records provided to third parties for scientific research purposes. The statutes do not create any new exemptions but are designed to preserve the confidentiality of individuals' identifying information that would otherwise be "exempt from public disclosure, confidential, or privileged under state or federal law." The Committee unanimously, with one abstention, voted to recommend retaining these exemptions.

**RCW 42.56.250(1)**—This statute exempts test questions, scoring keys and examination data from licensing, employment, and academic examinations from disclosure. The Committee voted unanimously to recommend retaining this exemption.

**RCW 42.56.320(1)**—This statute exempts certain financial disclosures which private vocational schools may be required to file with the Washington State Student Achievement Council. The Committee voted unanimously to recommend retaining this exemption.

RCW 42.56.360(1)(e)—This statute provides an exemption for records obtained in an action under RCW 18.71.300 through RCW 18.71.340. Those statutes establish a program for physicians to address, on a voluntary basis, impairing or potentially impairing health conditions. The information covered by this exemption is also exempt pursuant to other state and federal statutes. The Washington Medical Commission provided information supporting the importance of these exemptions in ensuring physician participation and addressing potential safety concerns for patients. After hearing from the Commission, the Committee voted unanimously to



recommend retaining this exemption.

RCW 49.17.260—This exemption applies to Department of Labor and Industries investigative reports on industrial catastrophes, serious injuries, and fatalities occurring in any workplace subject to chapter 49.17 RCW and makes such reports confidential and available only upon court order. An exception to this exemption makes it available without a court order to government employees in performance of official duties, to the injured worker and their representatives, and employers whose actions are the subject of the report. On a split vote (6-2), the Committee voted to recommend retaining this exemption.

**RCW 84.40.340**—This exemption covers information taxpayers are required to produce during an investigation regarding properties that the taxpayer owns. The Committee voted unanimously to recommend retaining this exemption.

# THE COMMITTEE RECOMMENDS MODIFICATION OF THE FOLLOWING STATUTES:

**RCW 43.190.110**—This statute provides that "[a]ll records and files of long-term care ombuds relating to any complaint or investigation . . . and the identities of complainants, witnesses, patients, or residents shall remain confidential unless disclosure is authorized by the patient or resident or his or her guardian or legal representative." The statute further provides that if consent is not provided by any of the witnesses, residents, etc., that no disclosure can be made unless it is done without disclosing the identity of such individuals.

The Committee was informed by the current Director of the Ombuds Program that this statute is not applicable because the Ombuds Program is no longer administered by the state. Rather, pursuant to authorization in chapter 43.190 RCW, the program is run by a private nonprofit organization which provides services under the United States Older Americans Act. As a result, disclosures by the program are governed by federal law, not the Washington State Public Records Act. The Committee noted that pursuant to the applicable federal statute, 42 U.S.C. 3058g(d), the ombuds (or designee) has complete discretion over whether any records are released. Washington law, as indicated above, does not give any discretion to the ombuds, but rather allows for disclosure if the interested parties either give consent or if their identities are not disclosed.

The Committee considered various options, including recommending repeal of RCW 43.190.110, recommending retaining as is, or modifying the statute with the intent of making a statement in favor of encouraging the maximum allowable disclosure because of the importance to the public of having information regarding the welfare and safety of residents in long-term care. After discussion of these options, the Committee voted unanimously to recommend modification of RCW 43.190.110 to provide that the state Office of Long-Term Care Ombuds establish procedures for disclosure pursuant to 42 U.S.C 3058g(d) and that such procedures "provide for exercising discretion in favor of disclosure to the maximum extent consistent with federal law and the policies of chapter 42.56. RCW." See Exhibit A for the complete text of the proposed amendment.

**RCW 42.56.320(4)**—This statute provides an exemption for records not defined as public records in RCW 40.14.010 as follows: "[A]ny records or documents obtained by a state college, university, library, or archive through or concerning any gift, grant, conveyance, bequest, or devise, the terms of which restrict or regulate public access to those records or documents." The Committee considered this exemption at the



August and October meetings and received input from the University of Washington, the University of Washington Libraries, Central Washington University, The Evergreen State College, and Washington State University. The Committee also heard from a communications professor and a student journalist at Western Washington University who advocated for the public's right to know the source of funds donated to public institutions of higher education.

The issue that concerned the Committee members was whether this statute was being construed to provide anonymity for financial donors to the Washington State public institutions of higher education and, if so, if that was the intent of the Legislature in enacting this statute. Further, the Committee was concerned about the issue of the public's right to know the source of funds received by public universities and colleges and any restrictions or conditions on those donations.

The University of Washington representatives indicated that their institution does not treat RCW 42.56.320(4) as providing anonymity for financial donors. They indicated that if a donor does not desire to have their identity publicized, the university will honor that request, but informs the donor that if an appropriate public disclosure request is received that would result in disclosing the donor's name they will honor that request, but withhold other identifying information such as home address, telephone number, and email address. The remaining institutions all indicated that they do interpret RCW 42.56.320(4) as providing a legal basis to withhold the identity of a financial donor, if the donor requests that it be withheld. They also expressed concern that some donations would be lost if they could not guarantee anonymity for the donor.

The University of Washington Libraries interest was with regard to conditions placed on donations of private documents and papers. The Committee felt that RCW 42.56.360(4) clearly provided for restrictions on such papers and had no issue with that application of the statute.

However, the Committee felt that RCW 42.56.360(4) presented ambiguities as to whether it was intended to provide anonymity for financial donors and if that ambiguity was resolved in favor of allowing such anonymity, whether that appropriately accounted for the public's legitimate interest in knowing the sources of funding of public institutions. Taking into consideration all of the information received, the Committee reached consensus that the public's interest in knowing the source of public higher education funds and any restrictions or conditions on those funds, outweighed the donor's interest in anonymity. Therefore, in order to ensure that donor information would be available to the public upon request and to clear up any ambiguity, the Committee voted unanimously to recommend modification of this exemption. *See Exhibit B* for the exact language of the Committee's recommendation.

# EXEMPTIONS CONSIDERED BY THE COMMITTEE BUT SET OVER TO 2023 FOR FURTHER REVIEW:

**RCW 2.64.111**—This statute tracks the provisions of the Wash. Const. Art. IV, § 31(3)(4) to provide an exemption from disclosure pursuant to the Public Records Act for "All pleadings, papers, evidence records, and files of the [Judicial Conduct]



commission, including complaints and the identity of complainants, compiled or obtained during the course of an investigation or initial proceeding involving the discipline or retirement of a judge or justice . . . during such investigation or initial proceeding." The statute goes on to provide that "As of the date of a public hearing, all those records of the initial proceeding that were the basis of a finding of probable cause are subject to the public disclosure requirements of chapter 42.56 RCW."

This exemption raises a unique issue as far as the Committee has been able to determine in that it appears to be the only exemption under the Public Records Act based on a state constitutional provision. In addition, there are issues regarding the Legislature's authority over the records in question because the state constitution also provides that the Judicial Conduct Commission is "an independent agency of the judicial branch." Wash. Const. Art. IV, § 31(1).

The Committee considered this exemption at its August and October meetings. The Executive Director of the Judicial Conduct Commission addressed the Committee at both meetings and provided written input. In addition, the Committee has received input from the President of the board for the Washington Coalition for Open Government and the judicial members of the Judicial Conduct Commission. The Committee wishes to receive additional information and consider further an appropriate recommendation with regard to this exemption and, therefore, set it over for further review in 2023.

RCW 42.56.460(2) and RCW 42.56.655—The Committee attempted to begin its review of RCW 42.56.460(2) in order to submit its statutorily mandated report by December 1, 2023. Unfortunately, the Committee was unsuccessful in obtaining information from the Department of Labor and Industries before it completed its 2022 hearings. The Committee has recently received some limited input from the department and is hopeful that it will be provided with the necessary information to complete and submit its report as required during 2023.

# EXEMPTIONS DISCUSSED BUT PASSED OVER FOR CONSIDERATION BECAUSE THEY ARE NOT DUE TO BE REVIEWED AT THIS TIME:

RCW 42.56.270(2)-(7) and (12)(a)(i)—These exemptions all relate to provisions of financial information to various state agencies. After some discussion of these exemptions by the Committee it was discovered that the Committee had conducted a comprehensive review of all of the exemptions in RCW 42.56.270 and made a recommendation in its 2016 Annual Report for general amendments to this statute as well as adopting the definition of "trade secrets" in RCW 19.108.010(4). Based on the discussion in the 2016 Annual Report in Paragraph C of the October 25, 2016 section, the intent of the proposed amendments was to provide revised language that would "provide factors for public agencies to use to make a threshold assessment on whether the exemptions for financial, commercial and proprietary information in RCW 42.56.270 would apply," to provide a cross reference to RCW 19.108.010(4), and address attorneys' fee awards in court injunction requests. These proposed amendments have not been adopted by the Legislature. Because of the recency of the review and the continued relevance of the 2016 recommendations, the Committee determined that these exemptions are not ripe for review at this time and incorporates the previous recommendations in this report. The recommended 2016 amendments are attached as Exhibits C and D.



#### **REVISED RECOMMENDATION WITH REGARD TO RCW 18.32.040**:

The Committee's 2020 Annual Report recommended the complete repeal of RCW 18.32.040 which sets forth licensure requirements for dentists. The Committee's reasons for this were that it was informed that the provisions in RCW 18.32.040(3)(a) were no longer needed because the Dental Quality Assurance Commission no longer administers examinations but relies on third party examinations as allowed by the statute. The applicable provisions provide as follows:

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.

Since that recommendation was made in 2020, the Committee was informed that repealing the entirety of RCW 18.32.040 would result in eliminating all licensure requirements for dentists in Washington State. In addition, the Committee was also informed that while the Dental Quality Assurance Commission does rely on third-party examinations with regard to professional qualifications it administers its own examination with regard to provisions of Washington state law applicable to dentists. As a result of these issues, the Committee revisited its 2020 recommendation this year and reached an opposite conclusion. The Committee, on a split vote (7-1), now recommends that this exemption be retained as is.



### CONCLUSION

The Committee met four times in 2022. Our March and May meetings in 2022 were held remotely with public access to view and to make comments through GoToWebinar. Our final two meetings were open to the public in person, however, all the members of the Committee appeared remotely for August meeting. For the October meeting, the Committee was able to return to an in-person meeting at the John Cherberg Building on the Capitol Campus in Olympia, Washington. Some members appeared in person, while others appeared remotely. Our 2023 meetings are scheduled to be held in Room ABC of the John Cherberg Building on February 28, May 23, August 22 and October 17.

The Committee intends to continue reviewing exemptions from public disclosure based on the age of the exemption and the lack of previous review. In addition, the Committee will be reviewing the exemption regarding explosives (RCW 42.56.460(2)). RCW 42.56.655 requires the Committee to file a report by December 1, 2023, with recommendations as to whether the exemption should be continued, modified, or terminated.

Finally, the Committee hopes to work closely with the Legislature in the 2023 Session to discuss the Committee's recommendations and to facilitate implementation of the recommendations to the extent the Legislature concurs. In this regard, the Committee also recommends that the Legislature consider adopting various other recommendations made by the Committee over the past several years, many of which were approved unanimously by the members of the Committee. In many instances in which the Committee has recommended termination or modification of an existing statutory exemption, the affected agency has agreed that the exemption was no longer needed. If the Legislature wishes to revisit any of these past recommendations, the Committee would be happy to provide additional information regarding them.

Respectfully submitted,

Linda C. Krese, Chair

November 15, 2022

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## **Exhibit A**

### RCW 43.190.110

### Confidentiality of records and files - Disclosures prohibited - Exception.

All records and files of long-term care ombuds relating to any complaint or investigation made pursuant to carrying out their duties and the identities of complainants, witnesses, patients, or residents shall remain confidential unless disclosure is authorized by the patient or resident or his or her guardian or legal representative. No disclosures may be made outside the office without the consent of any named witnesses, resident, patient, client, or complainant unless the disclosure is made without the identity of any of these individuals being disclosed.

The office of the state long-term care ombuds shall establish procedures for disclosure pursuant to 42 U.S.C. 3058g(d). Such procedures shall provide for exercising discretion in favor of disclosure to the maximum extent consistent with federal law and the policies of chapter 42.56 RCW.



## **Exhibit B**

### RCW 42.56.320

### **Educational information.**

The following educational information is exempt from disclosure under this chapter:

- (1) Financial disclosures filed by private vocational schools under chapters 28B.85 and 28C.10 RCW;
- (2) Financial and commercial information supplied by or on behalf of a person, firm, corporation, or entity under chapter 28B.85 RCW relating to the purchase or sale of tuition units and contracts for the purchase of multiple tuition units;
- (3) Individually identifiable information received by the workforce training and education coordinating board for research or evaluation purposes;
- (4) Except for public records as defined in RCW 40.14.040, any records or documents obtained by a state college, university, library, or archive through or concerning any gift, grant, conveyance, bequest, or devise, the terms of which restrict or regulate public access to those records or documents other than the name and city of residence of a financial donor, the amount of the financial donation, and any restrictions or conditions on the financial donation; and
- (5) The annual declaration of intent filed by parents under RCW 28A.200.010 for a child to receive home-based instruction.



## **Exhibit C**

# RCW 42.56.270(11) - Financial, Commercial and Proprietary Information (DSHS vendor records)

The current statute at RCW 42.56.270\* exempts listed financial, commercial and proprietary information, including certain vendor information in subsection (11). The Committee approved the recommendation described below.

The Sunshine Committee recommends that this statute be amended to read as follows:

The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:

•••

(11) Proprietary data, trade secrets, or other information <u>submitted by any</u> <u>vendor to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care as defined in RCW 41.05.011 that relates to: (a) A vendor's unique methods of conducting business; (b) data unique to the product or services of the vendor; or (c) determining prices or rates to be charged for services, <del>submitted by any vendor to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care as defined in RCW 41.05.011;</u></del>



## **Exhibit D**

### RCW 42.56.270(11) - Financial, Commercial and Proprietary Information

The current statute at RCW 42.56.270 exempts listed financial, commercial and proprietary information. Chapter 19.108 RCW is the Uniform Trade Secrets Act. The Committee approved the recommendation described below.

The Sunshine Committee recommends that this statute be amended to read as follows:

The following financial, commercial, and proprietary information is exempt from disclosure under this chapter, PROVIDED, that the information is clearly marked as confidential and accompanied by a particularized explanation of expected harm from disclosure at the time of submission or the agency determines that disclosure of the information is substantially likely to cause public or private loss or unfair private gain:

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\*(11) Proprietary data, trade secrets, or other information that is submitted by any vendor to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care as defined in RCW 41.05.011, and that relates to: (a) A vendor's unique methods of conducting business; (b) data unique to the product or services of the vendor; or (c) determining prices or rates to be charged for services, submitted by any vendor to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care as defined in RCW 41.05.011;

...

\*\*(18) Financial, commercial, operations, and technical and research information and data submitted to or obtained by a health sciences and services authority in applications for, or delivery of, grants under RCW 35.104.010 through 35.104.060, to the extent that such information, if revealed, would reasonably be expected to result in private loss to providers of this information;

•••

\*\*\*(22) Financial information supplied to the department of financial institutions or to a portal under RCW 21.20.883, when filed by or on behalf of an issuer of securities for the purpose of obtaining the exemption from state securities registration for small securities offerings provided under RCW 21.20.880 or when filed by or on behalf of an investor for the purpose of purchasing such securities; and

\*\*\*(23) Unaggregated or individual notices of a transfer of crude oil that is financial, proprietary, or commercial information, submitted to the department of ecology pursuant to RCW 90.56.565(1)(a), and that is in the possession of the department of ecology or any entity with which the department of ecology has shared the notice pursuant to RCW 90.56.565; or



## \*\*\*(24) Trade secrets as defined in RCW 19.108.010(4).

In any action under RCW 42.56.540 to enjoin disclosure of financial, commercial or proprietary information pursuant to this statute, the court may award attorney fees to any defendant, including a requester or agency, to the extent that the defendant prevailed in opposing an injunction.

#### Notes:

- \* Subsection (11) had previously been addressed by the Committee in Exhibit A.
- \*\* Comma proposed to be removed.
- \*\*\* In 2016, the Legislature added new subsections to RCW 42.56.270 and the list of subsections now extends to (27). Therefore, while the statute's prior punctuation was addressed in this proposal and the proposed new subsection was numbered (24), if enacted the subsection would be (28).