

Public Records Exemptions Accountability Committee
Thomas A. Carr, Chair
P.O. Box 94769
Seattle, WA 98124-4769

November 14, 2008

Lt. Governor Brad Owen, President of the Senate
Senator Lisa Brown, Senate Majority Leader
Representative Frank Chopp, Speaker, House of Representatives
Senator Darlene Fairley, Chair, Committee on Government Operations and Elections
Representative Sam Hunt, Chair, Committee on State Government and Tribal Affairs

RE: First Annual Report of the Public Records Exemptions Accountability Committee

The Public Records Exemptions Accountability Committee – or “Sunshine Committee” – was created by Substitute House Bill 5435 in 2007.

In that bill, the Legislature stated that in light of the changing nature of information technology, recordkeeping, and the increasing number of public disclosure exemptions, periodic reviews of public disclosure exemptions are needed to determine if exemptions continue to serve the public interest. For this reason, the Legislature established the Committee to review all public disclosure exemptions, and make a recommendation 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 called for an annual report on the Committee’s recommendations. This is the second report, and summarizes the Committee’s work since December 2007.

The following individuals were appointed to the Committee by the Governor, Legislature, Attorney General, and State Auditor:

Chair, Thomas A. Carr, Seattle City Attorney
Senator Adam Kline
Senator Pam Roach
Representative Lynn Kessler
Representative Jay Rodne
Timothy D. Ford, Assistant Attorney General
John Hughes, President of Allied Daily Newspapers of Washington
(resigned effective September 10, 2008, replaced by Rowland Thompson)
Ken Bunting, Associate Publisher, Seattle Post-Intelligencer
Frank Garred, retired newspaper publisher
Roselyn Marcus, Director of Legal Affairs, Office of Financial Management
Patience Rogge
Ramsey Ramerman, Foster Pepper PLLC
Candy Jackson, NATIVE Health of Spokane

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The legislation required that the Committee meet at least quarterly. In 2008, the Committee held 10 meetings, eight in Olympia, one in Ellensburg and one in Spokane. The Committee reviewed extensively 22 exemptions relating to agriculture and found no basis to recommend any changes. The Committee did adopt twelve recommendations to retain, modify, or terminate exemptions. These recommendations relate to 36 exemptions contained in either RCW 42.56 or other chapters of the Revised Code of Washington (see attached spreadsheet). The Committee received and considered public comment with regard to all of these exemptions prior to adopting these recommendations.

The Committee's recommendations are attached to this letter. They are divided into two sections. The first section contains eight unanimous recommendations on the following exemptions:

- Child mortality reviews - RCW 42.56.360(1)(f) and 70.05.170;
- Agricultural exemptions – RCW 42.56.380 and related statutes;
- State Investment Board criminal history record checks- RCW 43.33A.025;
- Employee wellness program information about individuals – RCW 41.04.364;
- Application materials for two state agency directors – RCW 28C.18.020 and 79A.25.150;
- Personal information of participants in transportation programs – RCW 42.56.330(4) and (5);
- Identity of persons and current investigations related to workplace discrimination – RCW 42.56.250(4) and (5); and
- Maritime employment salary survey data – RCW 42.56.250(6).

The second section contains four recommendations that were adopted by a majority vote, but not unanimously. The second section deals with the following exemptions:

- Applications for public employment – RCW 42.56.250(2);
- Definition of “employment” – RCW 42.56.250(2);
- Rideshare records – RCW 42.56.330(3); and
- Work product and attorney-client privilege – RCW 42.56.290.

The second section also contains minority reports relating to applications for public employment and rideshare records; and both a minority report regarding work product and attorney-client privilege, and a letter on that topic from a committee member who voted with the majority.

Very Truly Yours,



Thomas A. Carr, Chair
Public Records Exemptions Accountability Committee

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Attachments:

2008 – List of exemptions considered

12 recommendations

3 minority reports

Letter with attached proposal

**2008 Report to the Legislature
Public Records Exemptions Accountability Committee**

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
1	Agriculture	42.56.380(6)	Information on individual American ginseng growers or dealers	1996	Oct. 2007	June 2008
2	Personal Information - Research Data	42.56.360(1)(f)	Information relating to infant mortality pursuant to RCW 70.05.170	1992	Oct. 2007	Mar. 2008
3	Personal Information - Research Data	70.05.170	Medical records collected by a local department of health in the course of conducting a child mortality review	1992		Mar. 2008
4	Legislative Records	42.56.010(2)	Definition of "public records" for the senate and the house are limited to definition of legislative records in RCW 41.04.100 and budget, personnel, travel records and certain reports.	1995	Oct. 2007	No action as of Nov. 2008
5	Personal Information - Public Employment	42.56.250(2)	Applications for public employment, including names, resumes	1987	Oct. 2007	Mar. 2008
6	Agriculture	42.56.380(1)/ 15.86.110	Business records the Department of Agriculture obtains regarding organic food products	1992	Nov. 2007 Jan. 2008	June 2008
7	Agriculture	42.56.380(2)/ 15.54.362	Information regarding business operations contained in reports on commercial fertilizer	1987	Nov. 2007 Jan. 2008	June 2008
8	Agriculture	42.56.380(3)	Production or sales records required to determine payments to various agricultural commodity boards and commissions (Relates to exemptions in 10 commission statutes)	1996	Nov. 2007 Jan. 2008	June 2008
9	Agriculture	42.56.380(4)	Consignment information contained on phytosanitary certificates issued by the Department of Agriculture	1996	Nov. 2007 Jan. 2008	June 2008
10	Agriculture	42.56.380(5)	Financial and commercial information and records held by the Dept. of Agriculture for potential establishment of a commodity board or commission regarding domestic or export marketing activities or individual production information	1996	Nov. 2007 Jan. 2008	June 2008
11	Agriculture	42.56.380(7)	Identifiable information collected by Department of Agriculture regarding apple imports for report to the Legislature due December 31, 2002	1996	Nov. 2007 Jan. 2008	June 2008
12	Agriculture	42.56.380(8)	Financial statements provided to the Department of Agriculture for purposes of obtaining public livestock market license	2003	Nov. 2007 Jan. 2008	June 2008
13	Agriculture	42.56.380(9)	(Voluntary) National animal identification systems	2006	Nov. 2007 Jan. 2008	June 2008

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
14	Agriculture	42.56.380(10)/ 16.36	Animal disease reporting	2006	Nov. 2007 Jan. 2008	June 2008
15	Agriculture	42.56.270(17)	Farm plans that are voluntary and developed with conservation district assistance	2006	Jan. 2008	June 2008
16	Agriculture	42.56.610	Livestock nutrient management information: Certain information obtained by state and local agencies from dairies, animal feeding operations not required to apply for a national pollutant discharge elimination system permit disclosable only in ranges that provide meaningful information to public	2005 (c510s5)	Nov. 2007 Jan. 2008	June 2008
17	Agriculture	15.49.370(8)	Seeds: operations and production information	1969	Nov. 2007 Jan. 2008	June 2008
18	Agriculture	15.53.9018	Commercial Feed required reports	1975	Nov. 2007 Jan. 2008	June 2008
19	Agriculture	15.58.060(1)(c)	Washington Pesticide Control Act: Business information of a proprietary nature regarding pesticide formulas	1971	Nov. 2007 Jan. 2008	June 2008
20	Agriculture	15.58.065(2)	Washington Pesticide Control Act: Privileged or confidential commercial or financial information, trade secrets re: pesticides	1971	Nov. 2007 Jan. 2008	June 2008
21	Agriculture	15.65.510	Information regarding agricultural marketing agreements (including info from noncompliance hearings)	1961	Feb. 2008	June 2008
22	Agriculture	15.86.110	Business related information obtained by the Department of Agriculture regarding entities certified to handle and process organic or transitional food, or entities applying for such certification	1992	Nov. 2007 Jan. 2008	June 2008
23	Agriculture	17.24.061	Insect Pests & Plant Diseases (including: trade secrets or commercial or financial information obtained by Department of Agriculture regarding insect pests, noxious weeds, or organisms affecting plant life	1991	Nov. 2007 Jan. 2008	June 2008
24	Agriculture	22.09.040(9)	Financial information provided by applicants for a warehouse license to the Department of Agriculture	1987	Feb. 2008	June 2008
25	Agriculture	22.09.045(7)	Financial information provided by applicants for a grain dealer license to the Department of Agriculture	1987	Feb. 2008	June 2008
26	Agriculture	43.23.270	Financial and commercial information obtained by the Department of Agriculture for export market development projects	1996	Nov. 2007 Feb. 2008	June 2008
27	Personal Information	28C.18.020	List of nominees for director of Work Force Training & Education Board	1991	Feb. 2008	Sept. 2008
28	Personal Information	79A.25.150	Names of candidates for director of interagency committee for outdoor recreation	1989	Feb. 2008	Sept. 2008
29	Personal Information	43.33A.025	State Investment Board criminal history record checks of finalists for board positions	1999	May 2008	June 2008

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
30	Personal Information	42.56.250(3)	Address, phone numbers, email addresses, SSNs, etc. of public employees or volunteers held by public agencies.	1987	May 2008	No action as of Nov. 2008
31	Personal Information	42.56.230(1)	Personal information in files for students in public schools, patients or clients of public institutions or public health agencies, or welfare programs	1973 (1-276)	Nov. 2008	No action as of Nov. 2008.
32	Public Utilities & Transportation	42.56.330(3)	Personal information in vanpool, carpool, ride-share programs	1997	May 2008	Nov. 2008
33	Public Utilities & Transportation	42.56.330(4)	Personal information of current or former participants or applicants in transit services operated for those with disabilities or elderly persons	1999	May 2008	Oct. 2008
34	Personal Information	41.04.364	Personally identifiable information in state employee wellness program	1987	May 2008	July 2008
35	Public Utilities & Transportation	42.56.330(5)	Personal information of persons who use transit passes and other fare payment media	1999	May 2008	Oct. 2008
36	Misc. Government Functions	42.56.290	Agency records relevant to a controversy but which would not be available to another party under the rules of pretrial discovery for causes pending in the Superior courts	1973 (1-276)	June 2008	Nov. 2008
37	Personal Information	42.56.250(4)	Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed.	1992	Sept. 2008	Oct. 2008
38	Personal Information	42.56.250(5)	Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment.	1994	Sept. 2008	Oct. 2008
39	Personal Information	42.56.250(6)	Employee salary and benefit information collected from private employers for salary survey information for marine employees	1999	Sept. 2008	Oct. 2008
40	Personal Information	42.56.230(2)	Personal information in files on employees, appointees, or elected officials if disclosure would violate their right to privacy	1973 (1-276)	Nov. 2008	No action as of Nov. 2008.
41	Court Proceedings	13.34.100	Background information regarding a court appointed guardian ad litem.	1993	Oct. 2008	No action as of Nov. 2008.

2008 REPORT

PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

Section One

Unanimous Recommendations

**Sunshine Committee's Recommendations on the Child Mortality Review Exemption
Adopted March 25, 2008**

Two statutes exempt records related to child-mortality reviews from disclosure: RCW 42.56.360(1)(f) and RCW 70.05.170. The Sunshine Committee did not take issue with the goals behind these exemptions but felt the exemptions were broader than necessary to achieve these goals.

Justification for the child-mortality-review exemption

The legislative history demonstrates that the purpose of this exemption is to protect the confidentiality of those who provide information to the agency conducting the review. More specifically, the exemption is aimed at (1) encouraging the parents or guardians to provide information, understanding that because the investigation involves a dead child, parents or guardians might otherwise be hesitant to talk with the reviewer if the reviewer could not promise confidentiality; (2) encouraging other witnesses to participate who might not absent confidentiality; and (3) protecting medical records and other documents people might not provide but for a promise of confidentiality.

Recommended Changes

The Committee did not take issue with the justification for this exemption, but saw that the statutes exempted more information than necessary. The Committee recommends changes to address three issues.

First, when the PRA was recodified in 2005, this exemption was moved from being a standalone exemption to being part of the "health care information" exemptions in .360(1). This had the affect of re-writing the exemption so that it only applied to "health care information," which is contrary to the original intent of the statute.

To solve this problem, the exemption should be moved out of subsection (1) and into its own subsection.

Second, the exemption in RCW 42.56.360 does not track the exemption it cross-references in RCW 70.05.170.

To solve this problem, the exemption in the Public Records Act should be re-written to simply incorporate RCW 70.05.170 without adding any substantive content, except to identify the subject matter.

Third, RCW 70.05.170 itself, and RCW 42.56.360(1)(f) are both over and under inclusive for their stated purposes. The chief problem comes from subsections (3)(b) & (3)(c). These exempt "any records or documents ... maintained for the purpose of a child mortality review" and "Any

summaries or analyses of records [or] documents". This broad language seems to encompass every document related to the review, even if those documents do not contain any sensitive information.

To solve this issue, RCW 70.05.170 should be re-written so that it is more specific about what information and documents should be kept confidential. For example, the statute should expressly exempt information or documents that identify the child and the child's guardians, statements by all persons interviewed including the guardians, and all records provided (medical and non-medical). The provisions could thus serve the purpose of the exemption by encouraging cooperation while allowing for the disclosure of other information.

Sunshine Committee Recommendation

The Committee's recommendation on Agricultural exemptions (RCW 42.56.380) should be as follows:

When any exemption in the Public Records Act references another statute, the exemption in the Public Records Act should include a brief description of the subject matter so a user can determine if it is necessary to look up the referenced statute. It should be clear in RCW 42.56 that if there is a conflict between the brief description and the text of the statute, the statute controls.

Adopted June 10, 2008

Sunshine Committee

Criminal History Record Checks for the Board Staff Finalist Candidates (State Investment Board) RCW 43.33A.025

Exemption

The State Investment Board (SIB) is required to obtain a criminal history records check from both the Washington State Patrol and the Federal Bureau of Investigation (FBI) for specified board staff. RCW 43.33A.025 provides that the information received through this criminal history records check shall remain confidential and is not subject to the disclosure requirements of chapter 42.56 RCW, the Public Records Act.

Background

In 1999, at the request of the SIB, the Legislature provided the SIB the authority to obtain criminal background checks on final candidates for certain positions with the agency. In 2000, based on an FBI requirement, the SIB requested that the discretionary authority to obtain a criminal history records check be changed to a mandatory requirement. Both the original legislation and the subsequent amendatory legislation contained the provision that the information obtained remain confidential and exempt from disclosure. This exemption is based on an FBI requirement. Without this exemption, the FBI will not provide the SIB with criminal history records check information.

Additional Information

At the Committee's May meeting, Joe Dear, Executive Director of the State Investment Board expressed the importance of being able to receive FBI criminal history background checks for finalists seeking certain SIB positions. These are positions of trust, with great responsibility related to the management of public funds under the fiduciary responsibility of the board. Removing the exemption will not allow the information to be made available, since the FBI will no longer provide the information to the SIB. Losing this vital information will harm SIB's ability to investigate applicants for these sensitive positions. Without the exemption, the SIB will not be able to comply with its statutory and fiduciary duty to require FBI criminal history records checks.

Recommendation

Based on the narrow scope of the exemption, the need for the information being obtained and the consequences that could result from removing the exemption, it is recommended that:

The exemption should be retained without change.

The legislature may look to moving the exemption into chapter 42.56 RCW, or providing a cross-reference to this statute in chapter 42.56 RCW, to move towards having all exemptions either included or referenced in the public records act.

Adopted by the Committee: June 10, 2008

**Recommendation regarding
State Employee Wellness Program-Confidentiality of Individuals' Information
RCW 41.04.364**

Exemption

In 1987, the Legislature gave the Department of Personnel (DOP) the authority to develop and administer a voluntary state employee wellness program. See RCW 41.01.362. RCW 41.04.364 provides that the employee participation in the wellness program and individually identifiable information gathered as part of the program shall be held in confidence and shall not be used in any way to jeopardize an employee's job.

Background

With the recognition that wellness programs can both increase employee productivity and reduce the state's health care costs, DOP was provided the authority to develop and administer a voluntary state employee wellness program. Information regarding an employee's participation would be the type of personal information that would not be appropriate for public disclosure and was therefore made exempt. It would also be a barrier to participation if such personal information was subject to disclosure or could be used to the detriment of an employee's career. To that extent, in addition to the exemption, a specific prohibition regarding the use of the data was included in the statute.

Since the initial legislation, several things have changed. First, the State's Wellness Program is not longer administered by DOP, but is administered by the Health Care Authority (HCA). In addition, the information regarding the effectiveness of wellness programs and the increasing cost of health care have been the catalyst for both state and local governments implementing wellness programs and encouraging employee participation. Given rising health care costs, it remains important to encourage employee participation in programs designed to improve individual health.

Additional Information

Dennis Martin, HCA provided information regarding the wellness program as now administered by HCA. He believes that the Health Insurance Portability and Accountability Act (HIPAA) protects the information collected from participants in the wellness program. However, there is a question as to whether HIPAA protects all the data currently exempt from disclosure under RCW 41.04.362 or just protects the medically related data. Finally, this exemption does not apply to local government administered wellness programs.

Recommendation

Based on the nature of the information collected, narrow scope of the exemption, the need for the information being obtained, the lack of protection in any other law regarding information usage, and the consequence that would result from removing the exemption, it is recommended that:

The substance of the exemption should be retained and clarified. First, the exemption should be moved to chapter 42.56 RCW in that the program is no longer administered by DOP and it should apply to all local as well as state government administered wellness programs. Second, it should be clarified so that it expressly exempts all documents, including completed forms, submitted by

participants. Third, it should expressly provide that statistical information that does not identify any individual, including reports, are not exempt from disclosure.

Adopted by the Committee: July 8, 2008

Sunshine Committee
Recommendation on RCW 28C.18.020 and RCW 79A.25.150

The Committee has made a recommendation on application materials for government employee applications. The Committee believes that the Work Force Training and Education Board and the Recreation and Conservation Board should be subject to the same general rule as all other state boards and commissions. The Committee therefore recommends that the legislature repeal the public records exemption in RCW 28C.18.020 and RCW 79A.25.150, to permit these boards to be covered by the general rule recommended by the Committee.

Adopted September 9, 2008

Sunshine Committee, October 14, 2008 meeting
Recommendation regarding RCW 42.56.330

The Public Records Exemptions Accountability Committee considered the exemptions in RCW 42.56.330(4) and (5). The Committee recommends the following:

RCW 42.56.330(4). The Committee recommends that the exemption should be retained as it is currently written.

RCW 42.56.330(5). The Committee recommends that this exemption be changed in several ways. First, the disclosure provisions should be deleted and replaced with language similar to that contained in subsection (7) of RCW 42.56.330, which the Committee believes is more protective of privacy rights. Second, the Committee recommends that the language permitting financially responsible persons to obtain information about passes purchased for others should be retained, but clarified to limit the information disclosed to that necessary to prevent fraud.

Adopted by the Committee: October 14, 2008

Sunshine Committee, October 14, 2008 meeting
Recommendation regarding RCW 42.56.250(4) and (5)

The Public Records Exemptions Accountability Committee considered the exemptions in RCW 42.56.250(4), which provides confidentiality for the name of a person who seeks advice from the employing agency regarding potential discrimination; and RCW 42.56.250(5), which provides confidentiality for an employer's current discrimination investigation.

The committee recommends that the two exemptions be retained. However, the Committee recommends that the word current in RCW 42.56.250(5) should be clarified to mean active and ongoing investigation. The committee further recommends that the legislature adopt a meaningful definition of "active and ongoing" for this subsection.

Adopted by the Committee: October 14, 2008

Recommendation regarding RCW 42.56.250(6): maritime employment surveys

**Submitted by Ramsey Ramerman
For October 14, 2008 Sunshine Committee meeting**

Like many of the exemptions in the Public Records Act (PRA), subsection 250(6) provides little guidance as to what exactly is exempt and instead cites to another statute. To make the PRA more "user friendly," we recommend that the exemption be re-written to make it clear that it only exempts data (1) used in maritime employment surveys and (2) collected from private entities. The change would not affect the scope of the exemption. Otherwise, as currently written, unless a public records officer looks up the referenced statute, the public records officer might think it applies generally to salary and benefit information.

Current version of RCW 42.56.250(6):

(6) Except as provided in RCW 47.64.220, salary and employee benefit information collected under RCW 47.64.220(1) and described in RCW 47.64.220(2).

Potential revision to clarify scope:

(6) Except as provided in RCW 47.64.220, salary and employee benefit information for maritime employees collected from private employers under RCW 47.64.220(1) and described in RCW 47.64.220(2).

Adopted by the Committee: October 14, 2008

2008 REPORT

PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

Section Two

**Recommendations adopted,
but not unanimously,
and minority reports**

**Public Records Exemptions Accountability Committee Recommendation on RCW
42.56.250(2)-applications for public employment**

Background

RCW 42.56.250(2) exempts from disclosure applications for public employment. The bill originally passed by the legislature excluded from the exemption applications for executive position finalists. The Governor vetoed this exclusion.

Recommendation

The Committee recommends that RCW 42.56.250(2) be amended to permit public access to some applications for executive positions. Executive positions should be defined to include only positions in which the person applying would be in the highest management position in a public agency. This would include the executive directors of any state agencies, county departments, or local government departments. Applications for employment submitted by finalists should be subject to public disclosure. The committee recommends that confidential reference information remain exempt from disclosure. Documents subject to public disclosure should be available after the finalists are selected but before the agency makes the final selection.

Adopted by Committee, March 25, 2008

Minority Report on RCW 42.56.250(2) - Applications for Public Employment

By Ramsey Ramerman, Sunshine Committee member.

This minority report is prepared pursuant to Article VII of the Public Records Exemption Accountability Committee Bylaws.

While I agree with the Sunshine Committee that the public has a right to know the qualifications of public employees who hold "executive" positions, I think that the changes proposed by the Sunshine Committee would make it more difficult for public agencies to hire qualified persons for those executive positions. This would be contrary to the public's interest.

My disagreement with the majority is based on the proposed change to release applications and résumés for unsuccessful candidates who make the "finalist" list. Many applicants for "executive" positions will not want their current employer to know that they are looking for a new job until they have secured a new job. Therefore, if the Legislature amends the statute as proposed by the majority, agencies will see fewer qualified applicants for "executive" positions. If there are fewer applicants, inevitably agencies will have to hire less qualified people.

An open process, where applications are disclosed before the hiring decision is made, will also be harmful because it will unduly emphasize paper qualifications. This will negatively impact the hiring process because the best hiring decisions include consideration of intangibles that cannot be put down on paper.

Rather than allow disclosure of all finalists' application material, I recommend the Legislature amend the application to allow for the disclosure of the successful candidate's application material, subject to any other applicable exemptions. Application material for unsuccessful finalists would only be released if authorized by the unsuccessful candidate.

Accordingly, rather than the changes proposed by the majority, I instead propose that the statute be amended as proposed below so that (1) the application and résumé of the successful applicant for an executive position is subject to disclosure and (2) the applications and résumés of unsuccessful applicants are subject to disclosure if the applicants agree. Finally, a sentence could be added to make it clear that information on applications and résumés subject to other exemptions should be redacted. This would include social security numbers, addresses and phone numbers.

March 25, 2008

Sunshine Committee, September 9, 2008 meeting
Recommendation regarding RCW 42.56.250
Submitted by Tim Ford

The Public Records Exemptions Accountability Committee (committee) recommends that the legislature provide a definition within RCW 42.56.250(2) for the term "employment" in consideration of the following:

RCW 42.56.250(2) applies to exempt employment application information. Individuals who may apply to serve on boards and committees may not be entitled to receive salary or benefits, yet those individuals may be entitled to some minimal reimbursement of expenses. It is the committee's recommendation that the legislature clarify that such applications would not be exempt as an application for employment even where an individual may receive minimal reimbursement for actual expenses, or a stipend for such expenses.

RCW 42.56.250
Employment and licensing.

The following employment and licensing information is exempt from public inspection and copying under this chapter:

- (1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;
- (2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;
- (3) The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240;
- (4) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;
- (5) Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment; and
- (6) Except as provided in RCW 47.64.220, salary and employee benefit information collected under RCW 47.64.220(1) and described in RCW 47.64.220(2).

[2006 c 209 § 6; 2005 c 274 § 405.]

Adopted by Committee September 9, 2008 (8-3 vote)

Recommendation regarding RCW 42.56.330(3): Rideshare records

**Submitted by Ramsey Ramerman
For November 12, 2008 Sunshine Committee meeting**

This exemption protects information submitted by persons wishing to participate in rideshare programs. The Committee recommends that the exemption be retained, but modified as explained below.

The current exemption allows anyone participating in the program to obtain the information of anyone else in the program so participants can identify potential riders or drivers to share rides. While some level of disclosure to other persons is necessary to make the program work, the scope of this exception to the exemption could be seen as undermining the entire purpose of the exemption. This is because anyone who wanted the detailed information about participants only needs to join the program to get full access. Particularly for potential participants with security concerns (e.g., domestic violence and stalking victims), this exception to the exemption raises safety concerns and may dissuade some persons from participating.

The committee recommends that this issue be addressed in one of two ways.

First, a provision could be added that allows participants, for the purpose of personal safety, to identify individuals they do not want their information disclosed to, and the agency administering the program would then not disclose the information to the identified person. To limit liability, another provision should be added to make it clear that the agency is not liable if it erroneously releases the information.

Second, the exception could be narrowed so that it only allows the releases of limited information, such as names, general locations and email addresses. Participants could then exchange emails to obtain more details.

Adopted by the Committee, 5 votes "yes" and 4 votes "no", November 12, 2008

Minority Report on RCW 42.56.330(3); Rideshare records
November 14, 2008

By Sunshine Committee members Roselyn Marcus, Rowland Thompson and Frank Garred. Also voting in the minority is Ken Bunting.

This minority report is prepared pursuant to Article VII of the Public Records Exemption Accountability Committee Bylaws.

We agree with the Sunshine Committee's recommendation, passed by a vote of 5 to 4, that the exemption for rideshare program participants' personal information collected by an agency administering the program should be retained. We also agree with the Sunshine Committee that the exception to the exemption be retained (that the exemption allows anyone participating in the program to obtain the information of other program participants in order to identify potential riders or drivers to share rides), we do not agree with the following additional recommended requirement regarding release of the information:

First, a provision could be added that allows participants to identify individuals they do not want their information disclosed to, and the agency administering the program would then not disclose the information to the identified person. To limit liability, another provision should be added to make it clear that the agency is not liable if it erroneously releases the information.

This requirement adds an additional burden to agencies when responding to a public records request. It will require agencies to maintain, for each participant, a separate list of individuals to whom they prohibit disclosure. Agencies will need to research each participant whenever a request is made for rideshare information, adding to the time needed for agencies to respond and the cost of responding. Additional administrative requirements should not be added to exemptions without a clear need

It was stated that the intent of this additional requirement is to preserve public safety, with a focus on protecting domestic violence victims. Based on the nature of the program, we believe this premise is not correct and would provide a false sense of security to participants that they have some additional protection. In addition, we believe this change is not the best method to provide some protection for participants. The Secretary of State maintains the Address Confidentiality Program, which preserves personal safety through preserving a participant's contact information. Use of established programs like this is a better tool than adding administrative requirements to public records request administration.

Accordingly, we would not recommend the first additional change proposed by the majority of the Committee in a 5 to 4 vote.

Sunshine Committee
Work Product and Attorney- Clients Privilege Exemptions
to the Public Records Act
RCW 42.56.290
Prepared by Ken Bunting for Sept. 9, 2008 meeting
And amended at October 14, 2008 meeting

BE IT RESOLVED THAT:

It is the sense and intent of this committee that the state of applicable law in Washington state, on the attorney-client privilege and the work-product rule as they relate to open government matters, should be essentially what it was before the state Supreme Court's 2004 *Hangartner* ruling and its 2007 *Soter* ruling.

Adopted by the Committee, 7 votes "yes" and 3 votes "no"
November 12, 2008

Minority Report on the Attorney-Client Privilege Exemption to the Public Records Act

Public Records Exemptions Accountability Committee

November 15, 2008

By Senator Adam Kline, Ramsey Ramerman and Roselyn Marcus, Sunshine Committee members.

This minority report is prepared pursuant to Article VII of the Public Records Exemption Accountability Committee Bylaws.

By majority vote, the Commission has made a recommendation to the Legislature in the form of a statement that lacks the specificity required in legislative drafting. No specific change in the Revised Code of Washington can be gleaned from the statement. It seeks the return of the law governing the two privileges to its status before the Supreme Court decisions in *Hangartner* and *Soter*. The statement may be read to infer dissatisfaction with those two decisions, but little else can be gleaned from this statement. We have attempted to translate the words of the Commission's recommendation into plain and meaningful terms appropriate to Chapter 42.56 RCW, and can find no way to do this without adding new material beyond the scope of the recommendation.

Because many commentators, and the Court itself, argue persuasively that neither decision changed the status of the law, and because no specific action is provided in the majority's recommendation, there will continue to be disagreement as to the meaning of the privileges and will be an invitation to interested parties to re-litigate these two issues. Presumably, after much time, effort, and expense, the Superior Court, Court of Appeals, and finally the Supreme Court will re-decide these two issues. There is no reason to believe that the litigation will come to a different result.

If this body seeks to make recommendations for legislative action, it must say so in plain English. If it is the majority's intent that the two Supreme Court decisions should be changed legislatively, they should say so plainly, by setting forth the changes they intend in the statutory language. This recommendation fails to do that.

Here is an alternate proposal, based on other materials the Committee considered. It combines elements of Assistant Attorney General Tim Ford's proposal and Ramsey Ramerman's proposal. This draft legislation is intended to define the scope of the attorney-client privilege under the Public Records Act, not change existing law.

AN ACT Relating to public disclosure; amending RCW 42.56.290, and adding a new section to chapter 42.56 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. A new section is added to chapter 42.56 RCW to read as follows:

(1) Records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney or a public official in furtherance of the request for or rendition of legal advice, are exempt from disclosure under this chapter.

(2) Records are not exempt from disclosure under this section merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel, if the elements of subsection (1) of this section are not met.

(3) If an agency elects to produce a record that would otherwise be protected by the attorney-client privilege, any privilege is waived only as to the record produced. The production shall not waive the privilege as to the subject matter addressed in the produced record.

(4) Nothing in this section shall be deemed to change the applicability of the privilege set forth in RCW 5.60.060(2) to public agencies, nor its scope when claimed by a public agency.



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

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November 14, 2008

Mr. Thomas Carr
City of Seattle Attorney's Office
PO Box 94769
Seattle, WA 98124-4769

RE: Attorney General's Proposal to Sunshine Committee Regarding Attorney-Client Privilege and Attorney Work Product

Dear Mr. Carr:

Enclosed is the proposal that I submitted to the Public Records Exemptions Accountability Committee regarding the attorney-client privilege and attorney work product. Though this did not come to a vote by the Committee, I request that it be included in the November report of the Committee to the Legislature as an alternative for consideration by the Legislature.

In my opinion, this proposal has a number of advantages over the other proposals that were submitted to the Committee for consideration.

First, it contains specific legislative language that would clarify the state of the law. The proposal that was adopted by the Committee does not contain such specific language.

Second, it addresses the primary issues of concern that were presented to the Committee. During the course of the public hearings on attorney-client and attorney work product issues, the Committee heard testimony about misunderstanding or misapplication of the law. We heard concerns about agency staff copying attorneys on memoranda or using of attorneys to conduct investigations for the purpose of avoiding the disclosure of public records. This proposal would clarify that such practices cannot be used to avoid disclosure.

Finally, though there is a substantial body of case law applying the attorney-client privilege and the work product doctrine, agencies should not have to use (and pay) their lawyers to interpret that case law whenever there are requests for records that are written to or from attorneys in order to determine whether they are covered by the attorney-client privilege or constitute attorney work product. Codifying the law on these issues should make it easier for agency public records officers to respond to public records requests in a lawful and efficient manner.

Sincerely,

TIMOTHY D. FORD
Open Government Ombudsman

TDF/eg



**Draft Proposal on Attorney-Client Privilege and Attorney Work Product Exemptions
Public Records Exemptions Accountability Committee**

**Tim Ford
October 3, 2008**

The following draft legislation is intended to clarify the scope of the attorney-client and work product exemptions under the Public Records Act by making clear that they do not apply when an agency involves an attorney for the purpose of avoiding disclosure of otherwise disclosable documents under the Act.

AN ACT Relating to public disclosure; amending RCW 42.56.290, and adding a new section to chapter 42.56 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. A new section is added to chapter 42.56 RCW to read as follows:

(1) Records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney or a public official in furtherance of the request for or rendition of legal advice, are exempt from disclosure under this chapter.

(2) Records are not exempt from disclosure under this section merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel, if the elements of subsection (1) of this section are not met.

(3) This section governs exemption of records from the provisions of this chapter based on the attorney-client privilege as applied to public agencies and public officials in their official capacities

Sec. 2. RCW 42.56.290 is amended to read:

(1) Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

(2)(a) For purposes of this section, work product is exempt from disclosure to the same extent as it would be protected under CR 26(b)(4) of the Washington Civil Rules of Procedure.

(b) A party who disagrees with the assertion of work product may request an in-camera hearing. If the party contesting the assertion of work product demonstrates that the agency involved the attorney not for the purpose of benefiting from the attorney's professional judgment in representing the agency, but to prevent public disclosure of the document or portion of the document, the court shall order the document or portion of document released.