



Seattle City Attorney

Thomas A. Carr

November 13, 2009

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: 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 third report, and summarizes the Committee’s work since November 2008.

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

Chair, Thomas A. Carr, Seattle City Attorney
Vice Chair, Timothy D. Ford, Assistant Attorney General
Senator Adam Kline
Senator Pam Roach
Representative Lynn Kessler
Representative Jay Rodne
Rowland Thompson, (effective September 10, 2008)
Ken Bunting, Associate Publisher, Seattle Post-Intelligencer
Frank Garred, retired newspaper publisher
Roselyn Marcus, Director of Legal Affairs,
Office of Financial Management (reappointed August 2009)
Patience Rogge

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Ramsey Ramerman, Assistant City Attorney, City of Everett
Candy Jackson, NATIVE Health of Spokane (term expired August 6, 2009)

In 2009, the Committee held 4 meetings, roughly on a quarterly basis. The Committee adopted eight recommendations to retain, modify, or terminate exemptions. These recommendations relate to 9 exemptions contained in either RCW 42.56 or other chapters of the Revised Code of Washington (see Appendices). The Committee received and considered public comment with regard to all of these exemptions prior to adopting these recommendations. The Committee also heard public testimony at several meetings on a proposal related to the records and information that is required to be gathered relating to court appointed special advocates, and on numerous additional exemptions related to the insurance industry.

The Committee's recommendations are attached to this letter. This year, the Committee's recommendations are presented as one package because they are supported by a majority of the members and there is no minority report.

1. At the March 18, 2009 meeting, the Committee voted to recommend the Legislature retain the exemption found in RCW 42.56.330(1), which exempts records filed with the utilities and transportation commission or Attorney General under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095. (See #5 below for the Committee's recommendation relating to RCW 80.04.095).
2. At the May 12, 2009 meeting, the Committee voted to recommend the Legislature retain the exemptions found in RCW 42.56.330(6), (7), and (8). The text of each of those exemptions, as well as the text of RCW 42.56.330(1) referenced above, is attached as Appendix A. For subsection (7), the committee recommended that the Legislature add a requirement that there be annual reports of the aggregate data on use of transponders to pay tolls.
3. At the May 12, 2009 meeting, the Committee voted to recommend the Legislature retain the exemption found in RCW 42.56.335.
4. At the August 31, 2009 meeting, the Committee voted to recommend that the exemption for Legislative records in RCW 42.56.010(2) be eliminated. The text of the Committee recommendation is attached as Appendix C.
5. At the October 13, 2009 meeting, the Committee voted to recommend that the exemption in RCW 42.56.330(2) be retained. The text of that statute is also included in Appendix A to this report.

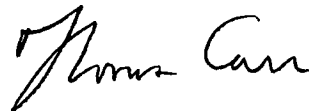
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6. At the October 13, 2009 meeting, the Committee voted to recommend that the exemption in RCW 80.04.095, for utility records filed with the Utilities and Transportation Commission containing commercially valuable information, be retained. The text of that statute is found in Appendix D to this report.
7. At the October 13, 2009 meeting, the Committee voted to recommend that the exemption in RCW 48.03.050, which allows the Insurance Commissioner to withhold reports of market conduct examination from public disclosure for five days, or for a longer period if the Commissioner believes it appropriate, be retained but that a requirement be added that the Commissioner include a time limit on how long the report can be withheld, and shall state why continued confidentiality of the report is necessary.
8. At the October 13, 2009 meeting, the Committee voted to recommend that any future exemptions from public disclosure be specifically referenced in Ch. 42.56 RCW, and be limited to five years, with a review by the JLARC in the year before expiration. The text of the Committee's recommendation is included as Appendix E to this report.

The Committee also reaffirms the recommendations contained in its 2008 report, and asks that they be considered by the Legislature in its 2010 session.

Very truly yours,



Thomas A. Carr, Chair
Public Records Exemptions Accountability Committee

Attachments:

- Appendix A-text of RCW 42.56.330(1), (2), (6), (7) and (8) (retain)
- Appendix B-text of RCW 42.56.335 (retain)
- Appendix C-text of recommendation to modify RCW 42.56.010
- Appendix D-text of RCW 80.04.095 (retain)
- Appendix E-recommendation regarding new exemptions
- Appendix F-- List of exemptions considered to date

Recommendation to retain exemptions in RCW 42.56.330(1),(2),(7)and (8)

RCW 42.56.330, Public utilities and transportation

The following information relating to public utilities and transportation is exempt from disclosure under this chapter:

(1) Records filed with the utilities and transportation commission or attorney general under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095;

(2) The residential addresses and residential telephone numbers of the customers of a public utility contained in the records or lists held by the public utility of which they are customers, except that this information may be released to the division of child support or the agency or firm providing child support enforcement for another state under Title IV-D of the federal social security act, for the establishment, enforcement, or modification of a support order;

(3) The names, residential addresses, residential telephone numbers, and other individually identifiable records held by an agency in relation to a vanpool, carpool, or other ride-sharing program or service; however, these records may be disclosed to other persons who apply for ride-matching services and who need that information in order to identify potential riders or drivers with whom to share rides;

(4) The personally identifying information of current or former participants or applicants in a paratransit or other transit service operated for the benefit of persons with disabilities or elderly persons;

(5) The personally identifying information of persons who acquire and use transit passes and other fare payment media including, but not limited to, stored value smart cards and magnetic strip cards, except that an agency may disclose this information to a person, employer, educational institution, or other entity that is responsible, in whole or in part, for payment of the cost of acquiring or using a transit pass or other fare payment media, or to the news media when reporting on public transportation or public safety. This information may also be disclosed at the agency's discretion to governmental agencies or groups concerned with public transportation or public safety;

(6) Any information obtained by governmental agencies that is collected by the use of a motor carrier intelligent transportation system or any comparable information equipment attached to a truck, tractor, or trailer; however, the information may be given to other governmental agencies or the owners of the truck, tractor, or trailer from which the information is obtained. As used in this subsection, "motor carrier" has the same definition as provided in RCW 81.80.010;

(7) The personally identifying information of persons who acquire and use transponders or other technology to facilitate payment of tolls. This information may be disclosed in aggregate form as long as the data does not contain any personally identifying information. For these purposes aggregate data may include the census tract of the account holder as long as any individual personally identifying information is not released. Personally identifying information

may be released to law enforcement agencies only for toll enforcement purposes. Personally identifying information may be released to law enforcement agencies for other purposes only if the request is accompanied by a court order; and

(8) The personally identifying information of persons who acquire and use a driver's license or identicard that includes a radio frequency identification chip or similar technology to facilitate border crossing. This information may be disclosed in aggregate form as long as the data does not contain any personally identifying information. Personally identifying information may be released to law enforcement agencies only for United States customs and border protection enforcement purposes. Personally identifying information may be released to law enforcement agencies for other purposes only if the request is accompanied by a court order.

[2008 c 200 § 6; 2007 c 197 § 5; 2006 c 209 § 8; 2005 c 274 § 413.]

RCW 42.56.335

Public utility districts and municipally owned electrical utilities — Restrictions on access by law enforcement authorities.

A law enforcement authority may not request inspection or copying of records of any person who belongs to a public utility district or a municipally owned electrical utility unless the authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this section is inadmissible in any criminal proceeding.

[2007 c 197 § 6.]

Recommendation Regarding 42.56.010(2)
(Legislative Exemption)

The Committee recommends that the legislature eliminate the Legislative exemption, which excludes from public scrutiny personal records of the legislature, including e-mails, correspondence, except when designated as a public record by a “official action of the Senate or House of Representatives.” Every other legislative body in the state of Washington is fully subject to the public records act. There is no principled reason why the state legislature should be exempt.

Implementing this recommendation would require amendment of RCW 42.56.010(2) as follows:

(2) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. ~~For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.~~

RCW 80.04.095

Protection of records containing commercial information.

Records, subject to chapter 42.56 RCW, filed with the commission or the attorney general from any person which contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, shall not be subject to inspection or copying under chapter 42.56 RCW: (1) Until notice to the person or persons directly affected has been given; and (2) if, within ten days of the notice, the person has obtained a superior court order protecting the records as confidential. The court shall determine that the records are confidential and not subject to inspection and copying if disclosure would result in private loss, including an unfair competitive disadvantage. When providing information to the commission or the attorney general, a person shall designate which records or portions of records contain valuable commercial information. Nothing in this section shall prevent the use of protective orders by the commission governing disclosure of proprietary or confidential information in contested proceedings.

[2005 c 274 § 358; 1987 c 107 § 1.]

The committee recommends that all future exemptions to the Public Records Act be limited to a term of five years and be examined by JLARC upon their expiration on a case by case basis to determine if they merit reauthorization or should be eliminated or revised. In addition all new exemptions should specifically reference the Public Records Act and state specifically that the exemption is intended to be an exemption to the Public Records Act. The Committee further recommends that the Legislature provide that any new law not meeting these criteria would not be passed. The Committee further recommends that the Legislature incorporate all existing and future exemptions into the Public Records Act.

The Committee makes the following recommendations for new legislation:

1. The Legislature incorporate all existing and future exemptions into the Public Records Act by express reference.
2. The Legislature limit all future exemptions to a term of five years and that such exemptions be examined by JLARC, the Sunshine Committee or other competent body a year prior to their expiration on a case by case basis to determine if they merit reauthorization or should be eliminated or revised.

**Schedule of Review
Public Records Exemptions Accountability Committee**

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
1	Agriculture Personal Information - Research Data	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	Oct. 2007	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	Aug. 2009
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	Recommendation
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	
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 (I-276)	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 (I-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 (I-276)	Nov. 2008	
41	Court Proceedings	13.34.100	Background information regarding a court appointed guardian ad litem.	1993	Oct. 2008	
42	Public Utilities & Transportation	42.56.330(7)	Personally identifying information of persons who use transponders and other technology to facilitate payment of tolls	2005	Mar. 2009	May 2009
43	Public Utilities & Transportation	42.56.330(8)	Personally identifying information on an ID card that contains a chip to facilitate border crossing.	2008	Mar. 2009	May 2009
44	Public Utilities & Transportation	42.56.330(2)	Residential addresses and phone numbers in public utility records	1987	Mar. 2009	Oct. 2009

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recommendation
45	Public Utilities & Transportation	42.56.330(6)	Information obtained by governmental agencies and collected by the use of a motor carrier intelligent transportation system or comparable information equipment	1999	Mar. 2009	May 2009
46	Public Utilities & Transportation	42.56.335	Records of any person belonging to a public utility district or municipality owned electrical utility	2007	Mar. 2009	May 2009
47	Public Utilities & Transportation	42.56.330(1)	Valuable commercial information, trade secrets, etc. supplied to the UTC	1987	Mar. 2009	Mar. 2009
48	Public Utilities & Transportation	80.04.095	Utility records filed with UTC containing valuable commercial information	1987	Mar. 2009	Oct. 2009
49	Insurance & Financial Inst.	42.56.400(2)	Information obtained and exempted by the Health Care Authority that is transferred to facilitate development, acquisition, or implementation of state purchased health care	2003	May 2009	
50	Insurance & Financial Inst.	42.56.400(3)	Names of individuals in life insurance policy settlements	1995	May 2009	
51	Insurance & Financial Inst.	48.102.030	Insurance viatical settlement broker records which may be required and examined by the Insurance Commissioner	1995	May 2009	
52	Insurance & Financial Inst.	42.56.400(4)	Insurance antifraud plans	1995	May 2009	
53	Insurance & Financial Inst.	48.30A.060	Insurance company antifraud plans submitted to the Insurance Commissioner	1995	May 2009	
54	Insurance & Financial Inst.	42.56.400(5)	Insurers' reports on material acquisitions and disposition of assets, etc. filed with the Insurance Commission	1995	May 2009	
55	Insurance & Financial Inst.	42.56.400(7)	Information provided to the Insurance Commissioner regarding service contract providers	1999	May 2009	
56	Insurance & Financial Inst.	48.110.040(3)	Monthly financial reports made by service contract providers to the Insurance Commissioner	2005	May 2009	
57	Insurance & Financial Inst.	42.56.400(8)	Information obtained by the Insurance Commissioner relating to market conduct examinations	2001	May 2009	
58	Insurance & Financial Inst.	42.56.400(12)	Documents obtained by the Insurance Commissioner to perform market conduct examinations. Report is disclosable under RCW 48.37.060.	2007	May 2009	
59	Insurance & Financial Inst.	42.56.400(13)	Confidential and privileged documents obtained in market conduct examination.	2007	May 2009	
60	Insurance & Financial Inst.	42.56.400(14)	Information provided to the Insurance Commissioner by insurance company employees asserting market conduct violations	2007	May 2009	
61	Insurance & Financial Inst.	48.37.080	Documents related to Insurance Commissioner's market conduct examination	2007	May 2009	
62	Insurance & Financial Inst.	42.56.400(9)	Proprietary information provided to the Insurance Commissioner regarding health carrier holding companies	2001	May 2009	

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
63	Insurance & Financial Inst.	42.56.400(10)	Data filed with the Insurance Commissioner that reveals identity of claimant, provider, or insurer	2006	May 2009	
64	Insurance & Financial Inst.	42.56.400(11)	Documents obtained by Insurance Commissioner relating to insurance fraud	2006	May 2009	
65	Insurance & Financial Inst.	48.135.060	Documents obtained by Insurance Commissioner relating to insurance fraud	2006	May 2009	
66	Insurance & Financial Inst.	42.56.400(15)	Documents obtained by Insurance Commissioner regarding misconduct by agent/broker	2007 Eff. 1/1/09	May 2009	
67	Insurance & Financial Inst.	48.17.595(6)	Information obtained by Insurance Commissioner in investigation of misconduct by agent/broker	2007	May 2009	
68	Insurance & Financial Inst.	42.56.403	Documents that provide background for actuarial opinion filed with Insurance Commissioner	2006	May 2009	
69	Insurance & Financial Inst.	48.02.120	Formulas, statistics, assumptions, etc. used by insurance companies to create rates; such information that is submitted to the Insurance Commissioner	1985	May 2009	
70	Insurance & Financial Inst.	48.05.385(2)	Statement of actuarial opinion is a public record. Documents that provide background for statement of actuarial opinion filed with Insurance Commissioner are exempt.	2006	May 2009	
71	Insurance & Financial Inst.	48.03.040(6)(a)	Examinations and investigations by state Insurance Commissioner	1937	May 2009	
72	Insurance & Financial Inst.	48.03.050	Examinations and investigations by state Insurance Commissioner	1937	May 2009	Oct. 2009
73	Insurance & Financial Inst.	48.05.465	Insurance companies risk based capital (RBC) reports and plans	1995	May 2009	
74	Insurance & Financial Inst.	48.43.335(1)	Insurance companies risk based capital (RBC) reports and plans (should not be used to compare insurance companies and are therefore confidential)	1998	May 2009	
75	Insurance & Financial Inst.	48.20.530	Proof of nonresident pharmacy licensure used by insurance companies to provide drugs to residents	1991	May 2009	
76	Insurance & Financial Inst.	48.21.330	Proof of nonresident pharmacy licensure used by insurance companies to provide drugs to residents	1991	May 2009	
77	Insurance & Financial Inst.	48.44.470	Proof of nonresident pharmacy licensure used by insurance companies to provide drugs to residents	1991	May 2009	
78	Insurance & Financial Inst.	48.46.540	Proof of nonresident pharmacy licensure used by insurance companies to provide drugs to residents	1991	May 2009	
79	Insurance & Financial Inst.	48.31B.015(2)(b)	Source of consideration (identity of the lender) for loan associated with acquiring an insurance company	1993	May 2009	

