

November 15, 2010

Governor Chris Gregoire
Rob McKenna, Attorney General
Lt. Governor Brad Owen, President of the Senate
Representative Frank Chopp, Speaker, House of Representatives
Senator Darlene Fairley, Chair, Committee on Government Operations and Elections
Representative Sam Hunt, Chair, State Government & Tribal Affairs Committee

2010 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 fourth report, and summarizes the Committee’s work since the November, 2009 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 2010:

Chair, Thomas A. Carr, Seattle City Attorney (resigned June, 2010)
Senator Adam Kline
Senator Pam Roach
Representative Lynn Kessler
Representative Jay Rodne
Timothy D. Ford, Assistant Attorney General
Ken Bunting, Associate Publisher, Seattle Post-Intelligencer (resigned, June 2010)

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Frank Garred, retired newspaper publisher (originally appointed in 2007, and reappointed in September, 2010)

Roselyn Marcus, Director of Legal Affairs, Office of Financial Management (originally appointed in 2007 to a term ending 8/6/2009; reappointed in 2009 to a four year term)

Patience Rogge, Washington Library Association (term expired 9/2010)

Ramsey Ramerman, Foster Pepper PLLC

Rowland Thompson, Executive Director, Allied Daily Newspapers of Washington

David Zeeck, Executive Director, The News Tribune (appointed June 2010 to replace Ken Bunting)

Peter Holmes, Seattle City Attorney (appointed 9/2010 to replace Tom Carr)

The original terms of several members expired in 2009 and 2010, and three members resigned due to change of jobs that took them out of state. Members were recently appointed to fill those positions. The Honorable Susan Agid has been appointed by Governor Gregoire to assume the position of chair of the Committee, but will begin her term of office in January, 2011. One vacancy remains, due to the Governor's appointment of Lynn Kessler, formerly an appointee of the Speaker of the House, to a four year term.

The Committee held four meetings in 2010.

Information about the Committee and its work is available to the public on the internet at www.atg.wa.gov/opengovernment/sunshine.aspx. The Committee posts its agenda for the next meeting on the website, and when available, the audio or video recording of the meeting is also posted. In addition, the website invites citizens to join a listserve so that they will receive a notification when new material is posted on the website.

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

As required by the legislation, the Committee has adopted and published criteria for reviewing exemptions. A copy of the Committee's criteria is attached to this Report as Appendix A.

The Committee adopted a schedule for reviewing exemptions in 2007 containing 106 items, the majority of which have been considered by the Committee. The current schedule is posted on the Committee's website. In 2011, the Committee plans to create a new schedule of exemptions for review, some of which are long-standing, and some recently created.

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

The Committee considered numerous exemptions, and questions relating to the Public Records Act in 2010. The Committee reviewed the legislative history of these exemptions to determine the original intent behind these exemptions. The Committee also took public comment on these exemptions.

The Committee makes the following recommendations, based on its actions in 2010:

RETAIN THE FOLLOWING EXEMPTIONS WITHOUT MODIFICATION:

A. Exemptions related to materials gathered by the Washington State Pollution Liability Insurance Agency

RCW 70.149.090 (enacted 1995) Information obtained by director of staff of the agency relating to the solicitation of an insurer to provide liability insurance for leakage from underground storage tanks; or monitoring info relating to that insurer.

B. Insurance-related Exemptions

RCW 42.56.400(11) Insurance Fraud Investigations: Documents obtained by Insurance Commissioner relating to insurance fraud investigations under RCW 48.135.060.

RCW 48.135.060 Exempts investigative records compiled by the OIC fraud program, if nondisclosure is essential to effective law enforcement; also exempts identities of witnesses if necessary to protect safety or when individual expresses desire for nondisclosure.

RCW 42.56.400(15) Documents obtained by Insurance Commissioner under RCW 48.17.595(6).

RCW 48.17.595(6) Documents furnished by an insurer, insurance producer, title insurance agent or employee thereof, or obtained by the Insurance Commissioner in an investigation confidential.

RCW 42.56.403 Documents that provide background for actuarial opinion filed with Insurance Commissioner

RCW 48.02.120(1) Actuarial formulas, etc. submitted in support of a rate filing

RCW 48.05.385(2) Actuarial reports and supporting documents not subject to ch. 42.56 RCW, not subject to subpoena or discovery; not admissible in evidence in any private civil action).

RCW 48.43.335(1) Risk-based capital reports to the Insurance Commissioner must be kept confidential to the extent the information in the report is not required to be included in publicly available annual statements, reports, or similar documents

RCW 48.05.465 Risk-based Capital reports filed with or obtained by the Insurance Commissioner must be kept confidential to the extent the information in the report is not required to be included in publicly available annual statements, reports, or similar documents.

RCW 48.20.530 Proof of current licensure by nonresident pharmacies through which insurers, group disability plans, health care service contractors and health maintenance organizations provide coverage for prescription drugs which is obtained from the insurer, etc. by the Department of Health may constitute a full or partial customer list and must be kept confidential and exempt from public disclosure.

RCW 48.21.330 Same as RCW 48.20.530 (Customer lists collected by government)

RCW 48.44.470 Same as RCW 48.20.530 (Customer lists collected by government)

RCW 48.46.540 Same as RCW 48.20.530 (Customer lists collected by government)

RCW 48.31B.015(2)(b) Identity of lender providing funding for acquisition of an insurance company by a holding company, upon request.

RCW 48.62.101(2) Amount of funds reserved by local government insurance pool for potential liability on a particular claim or cause of action.

RCW 48.74.025(4) Annual memorandum from life insurers to Insurance Commissioner on sufficiency of company's reserves is kept confidential, unless the company uses the material in its marketing or releases it to the media, in which case the entire report can be made public.

RCW 48.94.010(5) Summary of Insurance Commissioner's basis for refusal to issue a reinsurance intermediary license.

RCW 48.13.220 Contents of Notice of Intent (from an insurer to the Insurance Commissioner) to acquire a majority of shares in a corporation. Notice is confidential unless Insurance Commissioner determines, after a hearing, that it should be made public.

RCW 48.130.070 Interstate Insurance Product Regulation Compact; Confidential information provided to other states under the compact remains confidential.

THE COMMITTEE RECOMMENDS THE FOLLOWING EXEMPTIONS BE MODIFIED:

- A. Exemption related to materials gathered by the Washington State Pollution Liability Insurance Agency**

RCW 70.148.060(1) The Committee recommends modifying RCW 70.148.060(1) to state that “information is public except for proprietary reports or information obtained by the director” and to modify **RCW 70.148.060(4)** to exempt only “proprietary information” and striking “examination reports” from the material that is exempt from disclosure.

B. The Committee recommends that the Legislature clarify the issue of disclosure of nonconviction data.

The issue of disclosure, or nondisclosure, of “nonconviction data” was discussed in several meetings. From the public testimony and a review of the statutes and court decisions, the Committee concluded that the statutes, primarily found in **Ch. 10.97 RCW** need to be clarified, as there appears to be little consensus on what data can be disclosed, and when.

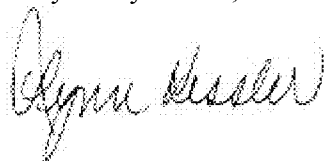
C. Recommend modifications to disclosure requirements under RCW 13.34.100, Court-appointed special advocates.

The Committee recommends that RCW 13.34.100 be amended to provide for disclosure to the public of the information about Court-appointed special advocates that is listed in RCW 13.34.100(3).

D. Modify RCW 42.56.230 as recommended (suggested language provided)

The Committee recommends that **RCW 42.56.230** be modified as set out on Appendix B, to clarify that financial information as defined in RCW 9.23.005, including Social Security Numbers, is information that agencies may withhold from producing in response to a public record request.

Very Truly Yours,



Lynn Kessler, 1st Vice-chair
Public Records Exemptions Accountability Committee

CRITERIA FOR REVIEWING SELECTED EXEMPTIONS

Approved at November 6, 2007 Committee meeting

- 1) Is the exemption narrowly crafted?
 - a) The Public Records Act mandates disclosure unless the records fall within specific exemptions which “exempts or prohibits disclosure of specific information or records.” RCW 42.56.070.
 - b) Exemptions are construed narrowly. RCW 42.56.030.
- 2) Is the exemption of information or records implied?
 - a) Agencies and parties may only rely on exemptions that are expressly authorized by statutory or constitutional provisions. RCW 42.56.070.
- 3) Is the exemption codified under RCW 42.56?
 - a) If not, is there a conflict between the mandate of disclosure under RCW 42.56, and the required non-disclosure of specific information or records under the other statute?
 - b) Should the exemption be re-codified or amended to specifically reference RCW 42.56?
- 4) Is the exemption mandatory?
 - a) Agencies are required to exercise discretion and redact specific information. RCW 42.56.070; RCW 42.56.210. “[T]he exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought.” RCW 42.56.210.
 - b) Should the exemption identify a specific vital government interest? The Legislature’s “choice of the word ‘vital’ must be given due respect.” AGLO 1976 No. 47.
 - c) Should the exemption be amended to allow the agency discretion to redact certain information?
- 5) Could the exemption include statistical information?
 - a) No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons. RCW 42.56.210.
- 6) Is the application of the exemption time-limited? If not, can it be time limited?
- 7) Can the exemption be clarified?

- 8) Does the exemption continue to be necessary given the passage of time and changes in government or policy interests?
- 9) Does withholding or release of the record put an individual's safety at risk?
- 10) Does the withholding or release of the record put an individual's or organization's privacy at risk?
- a) "Invasion of privacy" is defined in the Public Records Act as where disclosure of information about a person would be (1) highly offensive to a reasonable person; and (2) is not of legitimate concern to the public. RCW 42.56.050.
- b) It is not enough that disclosure of such personal information "may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).
- c) "[T]he use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted." *Dawson v. Daly*, 120 Wn.2d 782, 795 (1993) (citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn2d 788, 798 (1990)).
- d) There is no general exemption just for "privacy" under RCW 42.56. The Public Records Act does "not create any right of privacy beyond those rights that are specified in this chapter as express exemptions". RCW 42.56.050.
- e) There are five sections in RCW 42.56 that specifically reference "privacy". RCW 42.56.050; .070; .210; .230; .240.
- 11) Does the withholding or release of the record put an individual's or organization's financial interest at risk?
- 12) Does the withholding or release of the record put safety of the general public at risk?
- 13) Does the withholding or release of the record promote a vital government interest/function?
- 14) Is there doubt about an exemption's applicability to specific information?
- a) Where there is reasonable doubt regarding the applicability of an exemption to specific records or information, disclosure should be required.
- b) No public agencies or officials "shall be liable, nor shall a cause of action exist, for any loss or damage" for disclosure of public records based upon a "good faith" effort to comply with the Public Records Act. RCW 42.56.060.
- 15) How does the exemption affect government accountability?
- 16) Is the withholding or release of the record directed by federal law or state constitution?

RCW 42.56.230
Personal information.

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

- (1) Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients;
- (2) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;
- (3) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would (a) be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, or 84.40.340 or (b) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer;
- (4) Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial information as defined under RCW 9.35.005 including social security numbers , except when disclosure is expressly required by or governed by other law;
- (5) Personal and financial information related to a small loan or any system of authorizing a small loan in RCW 31.45.093; and
- (6) Documents and related materials and scanned images of documents and related materials used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard.