

# STATE OF WASHINGTON 2016 ANNUAL REPORT

## PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE “SUNSHINE COMMITTEE”

**Governor Jay Inslee**

**Attorney General Bob Ferguson**

**State Auditor Troy Kelley**

**Lt. Governor Brad Owen**  
President of the Senate

**Sen. Mark Schoesler**  
Senate Majority Leader

**Sen. Pam Roach**  
Chair, Senate Government Operations and  
Security Committee

**Sen. Sharon Nelson**  
Senate Democratic Leader

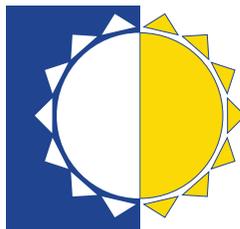
**Rep. Frank Chopp**  
Speaker of the House

**Rep. Pat Sullivan**  
House Majority Leader

**Rep. Dan Kristiansen**  
Minority Leader of the House

**Rep. Sam Hunt**  
Chair, House State  
Government Committee

**Rep. Sherry Appleton**  
Chair, House Local  
Government Committee



# **PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE**

**“SUNSHINE IN GOVERNMENT”**

**November 15, 2016**

## **SUMMARY**

The Public Records Exemptions Accountability Committee (Sunshine Committee) met four times in calendar year 2016 and initiated a comprehensive review of the following public records exemptions:

**RCW 42.56.250(3) and (5)** – Employment and Licensing

**RCW 42.56.230** – Personal Information

**RCW 42.56.270** – Financial, Commercial and Proprietary Information

**RCW 39.26.030** – State Procurement Records – Disclosure

**RCW 19.108.010(4)** – Trade Secrets - Definition

The review of these exemptions involved notice to the public and direct outreach to specific stakeholders. The Committee received testimony from public agencies and numerous interested parties, as well as extensive briefing by staff and Committee members, and considerable Committee discussion. This review process resulted in several recommendations, contained in this report, which are designed to achieve statutory clarification and the protection of important privacy interests while ensuring appropriate public disclosure.

## **HISTORY OF THE COMMITTEE**

The Committee was created by Substitute House Bill 5435 in 2007 (codified in RCW 42.56.140). The bill established the Committee to review all public disclosure exemptions, and make recommendations to the Legislature as to whether each exemption should be continued without modification, modified, scheduled for sunset review at a future date, or terminated. The Legislature stated that in light of the changing nature of information technology, record-keeping and the increasing number of public disclosure exemptions, periodic review of public disclosure exemptions is needed to determine if exemptions continue to serve the public interest.

Further information about the Committee and its work is available to the public on the Internet at <http://www.atg.wa.gov/sunshine-committee>. The Committee posts its agenda for each meeting on the website, and when available, the video of the meeting is also posted. In addition, the website invites citizens to join a listserv, so they may receive notification when new material is posted.

TVW, the state’s public affairs television broadcaster, has filmed or recorded most of the meetings, and the website for the Committee contains links to the TVW website or the recording so that the public can view previous meetings. When TVW has not been able to record the meetings but when other video recordings can be made, they are posted on the Committee’s website.

As required by the Legislature, the Committee has adopted and published criteria for reviewing exemptions. A copy of the Committee’s criteria is available on the Committee website.

The Committee receives an updated list of exemptions from the Office of the Code Reviser each year in August. A schedule of review, totaling over 500 items, is posted on the Committee's website. The Committee recognizes the importance of public comment and will continue to provide notice to the citizenry of the Committee's meeting agendas in order to encourage citizen participation and comment. The Committee receives staff assistance from the Attorney General's Office, as directed by the legislation establishing the Committee.

The Legislature called for an annual report of the Committee's recommendations. This is the ninth annual report and summarizes the Committee's work since the November, 2015 report was submitted.

## MEMBERS OF THE COMMITTEE

The members are appointed to the Committee by the Governor, Legislature, Attorney General and State Auditor. The following individuals served on the Committee in 2016:

Chair, Michael E. Schwab, retired Yakima County Superior Court Judge  
Former State Representative Lynn Kessler - Vice Chair  
Senator Maralyn Chase (D)  
Senator Pam Roach (R)  
Representative Jeff Holy (R)  
Representative Luanne Van Werven (R)  
Representative Larry Springer (D)  
Nicholas Brown - Counsel to the Governor  
Rowland Thompson, Executive Director, Allied Daily Newspapers of Washington  
David Zeeck, Publisher, Tacoma News Tribune  
Hon. Pete Holmes, Seattle City Attorney  
Nancy Krier, Assistant Attorney General for Open Government  
Kathy George, Attorney, Harrison-Benis LLP  
Sara Di Vittorio, Snohomish County Public Records Deputy Prosecutor

## COMMITTEE PRACTICE AND PROCEDURE - 2016

The Committee held four meetings in 2016. Minutes of each meeting are available online at the Committee's website. The following is a summary of the work done by the Committee at each meeting.

### FEBRUARY 16, 2016

- a. The Committee engaged in extended discussion about the records retention policy regarding Sunshine Committee records, whether in the possession and control of the Attorney General's Office and/or individual members of the Committee. This topic and discussion was brought about by public records requests that had been made to the Committee regarding records of members several members. The AGO staff explained the law's requirements and procedures to be utilized for the retention and preservation of Committee records.
- b. Each August the Code Reviser's Office is required by statute to provide the Committee with an updated list of exemptions to public disclosure laws. Based on that list the Committee develops a Schedule of Review which is consistent with the Code Reviser's list and serves as the basis for the Committee's efforts to systematically review over 500 exemptions.

The Committee has struggled since its inception with creating a meaningful strategy to review all of the exemptions. During this meeting the Committee discussed a plan to break down the Schedule of Review into categories and then to analyze and review the categories as a group rather than examining each individual exemption, unless circumstances called for it.

Chairman Schwab explained that with this categorization as a plan, initial efforts were underway to examine "trade secrets" as a category found in many different parts of the Schedule of Review. Extensive Committee discussion ensued regarding "trade secrets" and the

significance of that grouping to public policy.

- c. The Committee engaged in discussion on RCW 42.56.250 and RCW 42.56.230. These exemptions deal with employment-related exemptions and personal information. Specific proposals were not available at this meeting but Committee members George and Di Vittorio indicated that proposals could be ready for future meetings addressing concerns about employee zip codes, marital status, passports, gender/sex of dependents, medical and tax information.

---

## MAY 17, 2016

- a. At this meeting the Committee continued the discussion regarding employment-related exemptions at RCW 42.56.250(3) and (5) and employer investigations under RCW 49.60.

Committee member Di Vittorio presented a proposal that would amend RCW 42.56.250(3) and (5) by clarifying these exemptions. The proposal, attached herein as Exhibit A, was approved unanimously by the Committee after extensive discussion.

- b. The Committee also continued the discussion regarding amendments to the personal information exemption in RCW 42.56.230. Committee member George presented two proposals. The first proposal sought to amend RCW 42.56.230's introductory language to allow consent to disclosure by the subject of a record, or in the case of a child, by the child's parent or guardian. The second proposal sought to repeal RCW 42.56.230(4) so as to eliminate redundancy concerning protection of taxpayer information and reflect that release of taxpayer information that would result in an unfair competitive disadvantage to the taxpayer is not personal information with respect to a right to privacy.

After considerable discussion the first proposal addressing RCW 42.56.230's introductory language was approved by a vote of eight in favor and two abstaining. A copy of the proposal is attached herein as Exhibit B.

The second proposal addressing RCW 42.56.230(4) was withdrawn from official Committee consideration pending further review and research.

- c. The Committee began consideration at this meeting of the "trade secrets" category in the Schedule of Review. Committee member Di Vittorio submitted a comprehensive memorandum on the topic together with two proposals which addressed the concept of trade secrets in the bidding process and the creation of a standard as to what exactly is a trade secret.

Extensive discussion ensued regarding the importance of this subject for a robust and healthy public contract system and it was agreed that these proposals were a good starting point but that they needed further refinement.

- d. Committee member Krier provided a draft of an updated Schedule of Review and explained that considerable work was being done to modify the schedule and remove inaccurate, outdated and duplicate entries. This topic will be presented and discussed on an ongoing basis throughout the year.
- e. The Committee was formed in 2007 by the Legislature and the present Committee engaged in a discussion to review the work of the Committee over the past nearly 10 years. This discussion included criticism of the Committee's methodology and approach as well as favorable analysis of the Committee's recommendations and contributions to public policy discussion, and lastly suggestions regarding the evolution of the Committee in the coming years.



## AUGUST 16, 2016

- a. Once again the Committee continued ongoing consideration of the Schedule of Review and Committee member Krier provided another updated version of the Schedule. She stated that the goal was to have the Schedule fully current and updated by the end of 2016.
- b. A number of efforts were underway to discuss statewide public records issues such as dispute resolution and cost recovery. These efforts include legislative work groups and organizational efforts (including the Washington Coalition for Open Government and Association of Washington Cities). The Committee continued its discussion regarding these efforts and expressed its desire to participate in these discussions, including any measures to modify the Committee's mandate and create a new independent public records/public meetings agency.
- c. Several proposals were presented at this meeting regarding proprietary information and trade secrets provisions of RCW 42.50.270 and RCW 39.26.030.

Committee member Di Vittorio presented a proposal to amend RCW 42.56.270(11) to correct inartful drafting of the exemption which was intended originally to apply to Department of Social and Health Services records only. After extensive discussion, the proposal, a copy of which is attached hereto as Exhibit C, was approved by the Committee by a vote of nine in favor and two abstaining.

Ms. Di Vittorio also presented a second proposal which was designed to amend RCW 39.26.030's current exemption for certain bid documents at state agencies so as to include local government agencies.

Considerable discussion developed on the proposal concerning RCW 39.26.030 and other proprietary and trade secret information in RCW 42.56.270 and RCW 19.108.010(4). It was agreed to consider those topics again at the next or future meetings.

---

## OCTOBER 25, 2016

- a. There had been considerable discussion at Committee meetings during 2016 about important public records issues, including a dispute resolution process, cost recovery and the creation of an independent agency to provide a centralized mechanism to deal with these issues. During this final Committee meeting the discussion continued with the understanding that these issues will likely be taken up by the 2017 legislative session. It is unclear if any definitive legislative proposals on these topics will be ready for presentation in the upcoming session.
- b. The Committee considered a revised proposal concerning the bid process records in RCW 39.26.030. Committee member Di Vittorio presented a revised proposal which would repeal RCW 39.26.030 and replace it with a new section of the Public Records Act at RCW 42.56 to exempt listed bid documents (bids, quotations or proposals submitted to a public agency) at all state and local agencies during the bid process. The Committee discussed this revised proposal and voted to approve it unanimously. A copy of the proposal is attached herein as Exhibit D.
- c. At the August meeting the Committee had approved a proposal to amend RCW 42.56.270(11) to clarify that exemption's original intent. At the October meeting the Committee considered revised proposed language to amend other provisions in RCW 42.56.270 governing proprietary and trade secret information. Committee member George indicated that the revised proposal would amend RCW 42.56.270 to provide factors for public agencies to use to make a threshold assessment on whether the exemptions for financial, commercial and proprietary information in RCW 42.56.270 would apply, would provide a cross reference in RCW 42.56.270 to the trade secrets statute in RCW 19.108.010(4) and would address attorney fees awards in court injunction requests. The proposed added cross-reference in the PRA to the trade secrets statute was suggested to assist public agencies, private entities providing records to public agencies,

and records requesters in recognizing that the trade secrets law may exempt any such records requested under the PRA. Thus, this proposal would clarify the PRA in a more comprehensive and global manner. Considerable discussion was presented by Committee members as well as input from stakeholders on this proposal after which the Committee unanimously approved it. A copy of the proposal is attached herein as Exhibit E.

- d. The Washington State Auditor's Office conducted a performance audit on the effect of public records requests on state and local governments. Members of the State Auditor's Office made a presentation to the Committee outlining the results of this audit which indicated that there was considerable financial and staff costs involved in the production of public records. This audit has been provided to the Legislature and in anticipation of the Legislature's upcoming session in January 2017.

## RECOMMENDATIONS

The Sunshine Committee hereby makes the following recommendations:

Exhibit A – RCW 42.56.250 – Employment and Licensing

Exhibit B – RCW 42.56.230 – Personal Information

Exhibit C – RCW 42.56.270(11) - Financial, Commercial and Proprietary Information (DSHS vendor records)

Exhibit D - RCW 39.26.030 – State Procurement Records - Disclosure

Exhibit E - RCW 42.56.270 - Financial, Commercial and Proprietary Information

It should be noted that during 2016 the Legislature enacted prior Committee recommendations to repeal obsolete exemptions. HB 2663 (Chap. 182, 2016 Laws). In 2016 the Legislature also provided an exemption for certain financial, commercial and proprietary information held by a city retirement board, an exemption that was the subject of a Committee recommendation in 2015. SB 6170 (Chap. 8, 2016 Laws 1st Sp. Sess.) The Committee also recommends that the Legislature consider adopting the various other recommendations made by the Committee over the past several years.

## CONCLUSION

The Committee plans to meet at least four times in 2017 and intends to move forward with its task of reviewing exemptions from public disclosure contained in RCW 42.56 and other statutes. The Committee has developed considerable expertise in reviewing exemptions and will use that experience to address the many important issues that relate to the disclosure of public records. Finally, the Committee will endeavor to work closely with the Legislature in the upcoming session to discuss the Committee's recommendations and to seek meaningful contributions to public policy in Washington State, including any evolution of the Committee's mandate, and any development of a more efficient and cost effective public records dispute resolution process.

Respectfully submitted,



Michael E. Schwab  
Chair

November 15, 2016

## EXHIBIT A

### RCW 42.56.250 – Employment and Licensing

The current statute at RCW 42.56.250 exempts from disclosure listed employment and licensing information. The Committee approved the recommendation described below.

---

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

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

...

(3) The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency:

(a) Residential addresses (~~not including city, state, and zip codes~~), residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, passport/visa numbers, and emergency contact information of employees or volunteers of a public agency; and

~~(b) All identifying and contact information 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.~~

For purposes of this subsection (3), "employees" includes independent provider home care workers as defined in RCW 74.39A.240;

...

(5) Investigative records compiled by an employing agency conducting an active and ongoing 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. For purposes of this subsection, the exemption is categorical and exempts the records in their entirety while the investigation is on-going. Once the agency has notified the complaining employee of the outcome of the investigation, the exemption no longer applies;

...

**RCW 42.56.230 – Personal Information**

The current statute at RCW 42.56.230 exempts from disclosure listed personal information. The Committee approved the recommendation described below.

-----

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

**The following personal information is exempt from public inspection and copying under this chapter, unless the agency has received consent for disclosure from the subject of the information or, in the case of a child, from the child's parent or guardian:**

...

## EXHIBIT C

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

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

---

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

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

...

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

...

*Note:*

*\* The Committee also addressed RCW 42.56.270 in Exhibit E.*



## EXHIBIT D

### RCW 39.26.030 – State Procurement Records - Disclosure

The current statute at RCW 39.26.030 exempts state agency bid submission and bid evaluations from disclosure until the agency announces an apparent successful bidder. The Committee approved the recommendation described below to repeal this provision and add a new section into chapter 42.56 RCW to address both state and local agencies.

---

**The Sunshine Committee recommends that RCW 39.26.030 be repealed and a new section added to chapter 42.56 RCW to read as follows:**

**NEW SECTION. Bids, quotations, or proposals submitted to an agency for goods or services in response to a solicitation issued for such goods or services are exempt from disclosure until the agency announces the apparent successful bidder based on predetermined criteria or decides to not to accept any bids, quotations, or proposals.**

## EXHIBIT E

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

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

---

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

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

...

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

...

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

...

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

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

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

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

*Notes:*

*\* Subsection (11) had previously been addressed by the Committee in Exhibit C.*

*\*\* Comma proposed to be removed.*

*\*\*\* In 2016, the Legislature added new subsections to RCW 42.56.270 and the list of subsections now extends to (27). Therefore, while the statute's prior punctuation was addressed in this proposal and the proposed new subsection was numbered (24), if enacted the subsection would be (28).*