

# STATE OF WASHINGTON 2017 ANNUAL REPORT

## PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE “SUNSHINE COMMITTEE”

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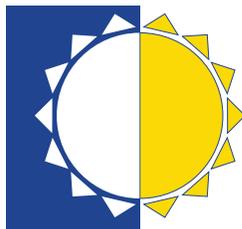
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# PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

“SUNSHINE IN GOVERNMENT”

November 15, 2017

## SUMMARY

The Public Records Exemptions Accountability Committee (Sunshine Committee) met four times in calendar year 2017 to review and discuss the following exemptions:

- RCW 42.56.250(2) – Applications for Public Employment**
- RCW 42.56.070(8) – Lists of Individuals for Commercial Purposes** *(Former Subsection (9), renumbered in 2017 to Subsection (8))*
- RCW 42.56.340 – Timeshare, Condominium Owner Lists, Etc.**
- RCW 5.60.070 – Mediation Communications**
- RCW 7.07.050 – Mediation Communications – Exceptions to Privilege**
- RCW 7.07.070 – Mediation Communications – Confidentiality**
- RCW 42.56.600 – Mediation Communications**
- RCW 42.56.430 – Fish and Wildlife**
  - *Pre-2017 exemptions in RCW 42.56.430, as two renumbered in 2017:*
    - (1) Commercial Fishing Data from Logbooks**
    - (2) Sensitive Fish and Wildlife Data**
    - (5) Personally Identifying Information of Persons Who Acquire Recreational Licenses** *(Former Subsection (3))*
    - (6) Information Subject to Federal Fishery Conservation Law** *(Former Subsection (4))*
  - *2017 amendments to RCW 42.56.430:*
    - (3) and (4) Wolf Depredation Records** *(Also reviewed RCW 77.12.885, and pursuant to Sunshine Committee’s new role in RCW 42.56.141)*
    - (7) Tribal Fish and Shellfish Harvest Information**
    - (8) Commercial Shellfish Harvest Information**
- RCW 42.56.380(10) – Results of Testing for Animal Diseases**
- RCW 42.56.380(11) – Records of International Livestock Importation**
- RCW 42.56.380(12) – Records Related to Entry of Prohibited Agricultural Products**
- RCW 15.19.080 – Ginseng Records**
- RCW 16.65.030(1)(d) – Livestock Market Financial Statements**
- RCW 42.56.380(8) – Financial Statements in Public Livestock Markets**
- RCW 90.64.190 – Records of Dairies, Animal Feeding Operations, Concentrated Animal Feeding Operations**
- RCW 42.56.610 – Information from Dairies and Feedlots**
- RCW 49.70.119(6)(a) – Pesticide Records That Identify an Employee**
- RCW 29A.08.710 – Voter Registration Records**
- RCW 29A.08.720 – Voter Registration Records**
- RCW 29A.56.670 – Nominating Petitions**
- RCW 29A.32.100 – Voters’ Pamphlet Arguments**

The review and discussion 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 recommendations, contained in this report, which are designed to achieve statutory clarification and the protection of important privacy interests while ensuring appropriate public disclosure.

In summary, the Committee's two 2017 recommendations are to amend RCW 42.56.250(2) and repeal RCW 42.56.340. See Exhibits A and B. The Committee also recommends that the Legislature consider adopting the various other recommendations made by the Committee over the past several years, including but not limited to those introduced in the 2017 legislative session in HB 1160/SB 5418.

In 2018, the Committee anticipates it will continue its review of several other exemptions it began to discuss in 2017, in particular those related to the categories of information concerning fish and wildlife, agriculture and livestock, and voting and elections.

## 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 is utilized by the Committee to organize its review activity. This schedule currently contains over 500 items and is posted on the Committee's website. The Committee recognizes the importance of public comment and will continue to provide notice to the citizenry of the Committee's meeting agendas in order to encourage citizen participation and comment. The Committee receives staff assistance from the Attorney General's Office, as directed by the legislation establishing the Committee.

The Legislature called for an annual report of the Committee's recommendations. This is the tenth annual report and summarizes the Committee's work since the November 2016 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 2017:

- Chair, Michael E. Schwab, retired Yakima County Superior Court Judge
- Former State Representative Lynn Kessler - Vice Chair
- Senator Maralyn Chase (D)
- Senator Mark Miloscia (R)
- Representative Luanne Van Werven (R)
- Representative Larry Springer (D)
- Nicholas Brown - Counsel to the Governor
- Taylor (Tip) Wonhoff - Deputy 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, Johnston George LLP
- Sara Di Vittorio, Snohomish County Public Records Deputy Prosecutor

## COMMITTEE PRACTICE AND PROCEDURE - 2017

The Committee held four meetings in 2017. Approved 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 21, 2017

- a. At this meeting, the Committee reviewed its Schedule of Review of exemptions, which describes each exemption to be reviewed by category and statutory citation. The Schedule of Review is updated after the Code Reviser provides the list of exemptions to the Committee each August. The Schedule of Review serves as a basis for the Committee's efforts to systematically review over 500 exemptions.
- b. The Committee also received a legislative update on the introduction of two bills with the Committee's 2016 recommendations (HB 1160/SB 5418). The Committee members were also informed that a legislative work group had discussed various ideas to amend the Public Records Act and two bills were introduced as a result (HB 1594 and HB 1595).
- c. The Committee discussed and received public testimony on RCW 42.56.250(2) which exempts applications for public employment and related materials. The matter was referred to the agenda subcommittee for further consideration.
- d. The Committee discussed and received public testimony on former RCW 42.56.070(9) (renumbered during the 2017 legislative session to subsection (8)), which is a restriction on providing lists of individuals for a commercial purpose. The Committee was provided background information about formal Attorney General Opinions and a recent appellate decision concerning the exemption, *SEIU Healthcare 775NW v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016). The Committee anticipated discussing the exemption again at a future meeting.
- e. Two members of the public provided testimony about their experiences in attempting to obtain records related to a public agency's mediation. Statutes at RCW 5.60.070, RCW 7.07.050, RCW 7.07.070, as well as RCW 42.56.600, exempt certain mediation communications. The Committee was provided the legislative history of the exemptions for mediation communications, which resulted from Washington's adoption of the Uniform Mediation Act. Further discussion was anticipated at a future meeting.
- f. The legislative history of RCW 42.56.340 was discussed. That statute exempts membership lists of timeshare projects, subdivisions, camping resorts, condominiums, land developments or common interest communities. The exemption concerns records of the Washington Department of Licensing (DOL). The Committee learned that DOL had not used the exemption on the last 18 months. Additional stakeholder outreach on this exemption was anticipated as a next step.

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### MAY 16, 2017

- a. As stated herein above, the Committee has created a Schedule of Review, which currently contains over 500 exemptions to public disclosure, and which serves as the basis for determining which exemptions will be included for review on the Committee's quarterly agenda. Chair Schwab and Committee member Nancy Krier described the process used to update and revise the schedule and the need to coordinate the schedule with the annual list of exemptions provided by the Code Reviser's Office. Chair Schwab also indicated that the Committee has agreed to review exemptions by category such as "insurance" or "trade secrets" which will be a more efficient method of reviewing the large and extensive list rather than reviewing only one exemption or part of exemptions at one time.
- b. Consistent with this philosophy the Committee began discussion of the "fish and wildlife" category of exemptions. Prior to the 2017 legislative session, there were four exemptions in this category on the Schedule of Review. RCW 42.56.430(1) - (4). During the 2017 legislative session, the Legislature renumbered two of these exemptions, and also enacted two new types of exemptions in this category, one dealing with wolf depredations and the other with sensitive fish and shellfish information, in SB 5761 (Chap. 71, 2017 Laws) and, HB



1465 (2017) (Chap. 246, 2017 Laws). The Committee received testimony from Washington Department of Fish and Wildlife (WDFW) staff about the exemptions, as to their origin and history, especially regarding public records requests. Extensive discussion by the Committee ensued, particularly in connection with the wolf depredations exemption, which created a specific responsibility for the Committee to report back to the Legislature in 2021 on the resulting activity and viability of the exemption.

- c. The Committee continued its discussion of RCW 42.56.250(2) which relates to applications for public employment. After considerable discussion and debate, including the presentation of several motions, Committee member Nancy Krier made a motion that addresses applications for employment submitted with respect to vacancies in elected positions, recommending the Legislature amend the statute. This motion was passed unanimously and a copy of the proposal is at Exhibit A.
- d. The Committee also continued discussion regarding the restriction on agencies providing lists of individuals for commercial purposes (RCW 42.56.070(9), recodified by the 2017 Legislature to RCW 42.56.070(8)). The Committee also discussed timeshare and condominium owner lists (RCW 42.56.340) and exemptions regarding mediation communications (RCW 5.60.070, RCW 7.07.05, and RCW 7.07.070, as well as RCW 42.56.600) but no recommendations were presented or considered regarding those exemptions.

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#### **AUGUST 15, 2017**

- a. At this meeting, the Committee learned that Oregon enacted legislation in 2017 that created a public records exemption review committee similar to Washington's Sunshine Committee. The Committee was informed that persons from Washington provided input to Oregon on that effort.
- b. The Committee was also provided the annual list of exemptions from the Code Reviser, as updated through the 2017 legislative sessions.
- c. The Committee continued to discuss and received public testimony on the category of several "fish and wildlife" exemptions in RCW 42.56.430, a discussion it began at its May meeting. The Committee also discussed its new role to review the new wolf depredations exemption and its requirement to report back to the Legislature in 2021 RCW 42.56.141. The Committee discussed that it would need to receive baseline data from WDFW with respect to harassing/death threats to persons involved in wolf depredation activities, so the data can be compared to threats made after the 2017 legislation was enacted. Persons testifying at this meeting included WDFW staff, and those representing requesters, shellfish interests, conservation interests, private forest landowners, and tribal interests. It was anticipated that the discussion on these fish and wildlife exemptions would continue at a future meeting, and no proposals were offered at this meeting.
- d. The Committee began its review of the category with several "agriculture and livestock" exemptions. Those exemptions are at RCW 42.56.380(10) - (12), RCW 15.19.080, RCW 16.65.030(1)(d)/RCW 42.56.380(8), RCW 90.64.190, and, RCW 42.56.610. Washington State Department of Agriculture (WSDA) staff provided the background and history of the exemptions. The Committee was reminded it had previously reviewed another exemption concerning ginseng records. The Committee received testimony from WSDA staff, a person representing cattle interests, and a person representing requesters. No proposals were offered at this meeting. Another exemption in this category at RCW 49.70.119(6)(a) concerning records involving the Department of Labor and Industries (LNI) was set over to a future meeting
- e. The Committee continued its prior discussion of RCW 42.56.340, which exempts certain timeshare/condominium owner lists and other several similar lists. The Committee learned that Washington Department of Licensing (DOL) has not been actively collecting these lists. Following motions by Committee member Representative Larry Springer, the Committee voted unanimously to recommend the Legislature: (1) repeal the exemption, and, (2) no longer have DOL collect the lists that are the subject of the exemption. See Exhibit B.

OCTOBER 24, 2017

- a. The Committee engaged in a further discussion at this meeting regarding the previously introduced exemption categories of “fish and wildlife” and “agriculture and livestock” in order develop a thorough and complete record prior to making any recommendations. These exemptions are complex and represent important aspects of the state’s economy and habitat. Staff from various relevant state agencies, including the Washington State Department of Agriculture (WSDA) and the Washington Department of Labor and Industries (LNI), appeared and presented additional testimony to supplement previous submissions. In addition, representatives from nonprofit environmental organizations provided testimony regarding these exemptions, which included vigorous and their detailed recommendations to repeal some of the exemptions. The Committee will continue to review all the material submitted in connection with these categories and it is expected that consideration will be given to making final recommendations concerning these categories during the 2018 Committee meeting schedule.
- b. Chair Schwab introduced a new category for Committee consideration, namely “voter and election information” (exemptions at RCW 29A.08.710, RCW 29A.08.720, RCW 29A.56.670, RCW 29A.32.100). A representative from the Washington Office of the State Secretary of State (OSOS) appeared and presented brief testimony regarding these exemptions. As in the case of “fish and wildlife” and the “agriculture and livestock” categories, a full record will be made on this category during the 2018 meeting schedule prior to any final Committee recommendations.

## RECOMMENDATIONS

The Sunshine Committee hereby makes the following recommendations:

Exhibit A – RCW 42.56.250(2) (Recommend amendment)

Exhibit B – RCW 42.56.340 (Recommend repeal)

See attached. The Committee also recommends that the Legislature consider adopting the various other recommendations made by the Committee over the past several years, including but not limited to those introduced in the 2017 legislative session in HB 1160/SB 5418.

## CONCLUSION

The Committee plans to meet at least four times in 2018 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 the evolution of the Committee’s original mandate, and the development of a more efficient and cost effective public records dispute process.

Respectfully submitted,



Michael E. Schwab  
Chair

November 15, 2017



## EXHIBIT A

The current statute at RCW 42.56.250(2) is an exemption for applications for public employment and related materials. The Committee approved the recommendation described below.

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**The Sunshine Committee recommends that the Legislature amend RCW 42.56.250(2) so it reads as follows:**

**“All applications for public employment other than for vacancies in elective office, including the names of applicants, resumes, and other related materials submitted with respect to an applicant.”**



## EXHIBIT B

The current statute at RCW 42.56.340 exempts from disclosure “Membership lists or lists of members or owners of interests of units in timeshare projects, subdivisions, camping resorts, condominiums, land developments, or common-interest communities affiliated with such projects, regulated by the department of licensing, in the files or possession of the department are exempt from disclosure under this chapter.”

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**The Sunshine Committee recommends that the Legislature repeal this statute. The Sunshine Committee also recommends that the Department of Licensing not be required to collect these lists.**