

PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

Minutes of Meeting
June 10, 2008
Spokane, Washington

Members Present: Chair Tom Carr, Ken Bunting, Ramsey Ramerman, Tim Ford, Candy Jackson, John Hughes, Senator Adam Kline, Roselyn Marcus, Representative Lynn Kessler, Patience Rogge

Members Absent: Frank Garred, Representative Jay Rodne, Senator Pam Roach

Staff Present: Jean Wilkinson, Counsel; Nerissa Raymond, Staff Support; Kathleen Drew, Office of Financial Management

Opening: Chair Tom Carr called to order the meeting of the Public Records Exemption Accountability Committee at 9:03 a.m. on June 10, 2008, at the Spokane Falls Community College, Student Union Building, Spokane, WA.

- 1) **Draft Agenda:** Mr. Ramerman proposed amending the agenda to have a short committee discussion before Item 5. Agenda adopted as amended, passed unanimously.
- 2) **Approval of Final Minutes for May 13, 2008 Sunshine Committee Meeting.** Mr. Hughes moved to adopt, seconded by Ms. Jackson. Passed unanimously.
- 3) **Bylaws – Possible amendment regarding timely submission of written proposals.** At the May meeting, Ms. Marcus raised two issues regarding the availability of documents: there was not enough time to review documents, and there was insufficient availability to the public. She suggested a timeline be instituted by which to submit materials. Chair Carr read the proposal. Rep. Kessler moved to adopt, seconded by Mr. Hughes. After friendly amendments, the proposed bylaw amendment reads as follows:

Committee members who wish to submit a draft recommendation for Committee discussion must submit the draft to the Chair no less than ten calendar days prior to the meeting. Draft proposals should be available to the public no less than seven calendar days prior to the meeting at which they are discussed. Draft recommendations submitted in less time than required by this rule, may be considered after a 2/3's vote of committee members present.

The proposed amendment passed unanimously.

- 4) **Definition of Exemption.** Sen. Kline drafted a proposal to amend the committee's definition of exemption, stating that the committee's legislative mandate is to look at the Public Disclosure Act, not all possible exemptions from disclosure. Motion to adopt, seconded. Mr. Ramerman spoke against the proposal out of concern "other statutes" would not be subject to committee review. After friendly amendments accepted by Sen. Kline, the motion is to revise the definition to read as follows:

An exemption is a statutory provision that permits or requires temporary or permanent nondisclosure of specific information or records that would otherwise be disclosable under RCW 42.56. This includes provisions within RCW 42.56 that state that certain information is exempt from disclosure, as well as provisions elsewhere in the Revised Code of Washington that preclude the application of RCW 42.56.

Eight in favor, one (Mr. Ramerman) opposed. Motion passed.

- 5) **Agricultural Exemptions.** Mr. Ramerman asked if there is still an interest in an omnibus exemption. Although he thinks it would help streamline the Public Disclosure Act, he doesn't think the public is being denied any vital information with the exemptions as currently drafted. Mr. Ford thinks the exemption shouldn't be tinkered with just to make them more streamlined. Mr. Ramerman moved to recommend to the legislature only part 3 of his recommendation, Rep. Kessler seconded the motion. Sen. Kline suggests headnotes. Chair Carr read a draft recommendation.

Public comment:

John Larson, Executive Director, WA Association of Conservation Districts, says a lot of information and exchange went into the current exemptions; he doesn't think an omnibus bill would work; he supports the motion.

Jack Field, Executive Vice President of the Washington Cattleman's Association, supports the motion on the table.

Dan Wood, Washington Farm Bureau, stated that headings will be helpful to citizens, and supports the motion.

After additional friendly amendments, the recommendation to the Legislature reads 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.

Motion passed unanimously.

- 6) Discussion whether to cancel the July or August meetings. The August meeting is cancelled due to conflicts on many members' calendars.
- 7) Motion to move agenda items 8, 9, and 11 after 5. Seconded by Ken Bunting, passed unanimously.
- 8) **Exemption for criminal history checks for State Investment Board members – RCW 43.33A.025.** Ms. Marcus recommended not changing this exemption. Ms. Marcus moved to adopt her draft recommendation, Mr. Hughes seconded, passed unanimously.
- 9) **Exemptions for lists of candidates – RCW 28C.18.020 and RCW 79A.25.150.** The committee first considered these exemptions in February, and received two comments (from the chair of the Recreation and Conservation Funding Board and from the chair of the Workforce Training Board) urging the committee not to change the exemptions because confidentiality is important to keep up applicant interest. Committee discussion followed. Chair Carr drafted the following proposal:

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 Funding 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 exemptions 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.

This recommendation will be circulated to agencies prior to next meeting and put on agenda for July meeting.

10) RCW 41.04.364 – Personally identifiable information in state employee wellness program. Ms. Marcus presented her proposal. Ms. Marcus moved to adopt her draft recommendation, Mr. Bunting seconded. Mr. Ramerman would like to amend Ms. Marcus's proposal to move the exemption into RCW 42.56 and include local as well as state government. Mr. Ramerman suggested awaiting his redraft, and moved to table the issue until the July meeting. The motion to table passed unanimously.

11) Exemptions for records relevant to a controversy and attorney-client privileged records.

Public Comment:

Chris Kerley, Attorney with Evans Craven & Lackie, P.S. The *Soter* case did not change the state of the law. There are a lot of good reasons for getting attorneys involved early; the legislature should preserve the exemption; "fair play" is the policy behind the work-product doctrine.

Duane Swinton, Citizens for Open Government, Carla Savalli, Spokesman Review. They do not advocate the end of the work-product privilege, however, the public has to be able to monitor how agency lawyers go about doing their jobs. Facts should be available after litigation is complete to accommodate the public's right to know.

Eric Hsu, Benton County Deputy Prosecutor, spoke in favor of preserving the protection of attorney work-product. The committee should be mindful that the Public Disclosure Act doesn't discriminate between public, plaintiff, and potential plaintiff, and a public entity has just as much right to fair representation. He doesn't think it's feasible to filter out information that's factual. The public doesn't need attorney work product to get information; the public can request other types of information or documents from government agencies.

Bob Douthitt, Spokane School District board member, provided written comment on a handout stating ten different reasons to preserve the current exemptions.

Jim Craven, attorney, on behalf of WA Rural Counties Insurance Pool, stated the attorney-client privilege is the earliest legal privilege recognized in English common law and is at the very core of our judicial system. Public agencies are not evil. He urges caution and recognition of the history of the privilege and would worry about a blanket limitation on it.

Jeffrey S. Meyers, WA Cities Insurance Authority, provided a hand out and urged retention of exemptions. He helps public agencies by giving legal advice prior to the onset of problems, and it would be unfortunate to discourage that type of advice by making it disclosable.

Tim Connor, Communications Director, Center for Justice, provided handouts, and spoke to his experience with Spokane River Park Square controversy and Spokane's withholding of key documents. The public wants government to be accountable.

Pam Schroeder, Risk Manager, City of Spokane, favors retention of the exemption. Although the privilege can be abused, it would be unfair to eliminate the privilege because the taxpayers would be at a disadvantage on an uneven playing field in litigation.

Mike Connelly, Attorney for City of Spokane Valley, stated that, with few exceptions, public servants are trying to serve the public well, and the system in place now resolves disputes over what is disclosable. As a citizen he would want government to have the same sticks as his neighbor.

Michelle Wolkey, attorney, represents public agencies but also plaintiffs with claims against government. Attorneys take an oath to maintain confidentiality. It would be difficult to define when litigation is over.

Cynthia McMullen, attorney and school board member, has been both an attorney and a public agency client. It would inhibit legal advice if the advice was disclosable. The current law provides remedies for improper non-disclosure. The law shouldn't change because there have been mistakes. The law is well-balanced at this time.

Jay Cousins, "layman", states in his experience the law is flouted. He believes changes need to be made.

12) RCW 42.56.250 (3) – Address, phone numbers, email addresses, SSNs, etc. of public employees or volunteers held by public agencies.

Public Comment:

Donna McKereghan is concerned about the distinction between volunteer and employee. People serving on boards and commissions need to be transparent.

Mike Connelly, Attorney for City of Spokane Valley, stated that decisions are made by public employees that some people aren't happy with. To attract the best and the brightest, employee personal information should be protected. The exemption should be maintained.

Chair Carr adjourned the meeting at 3:44 p.m.

APPROVED: July 8, 2008