

## Memorandum

Date: 9 December 2013

To: The Honorable Michael E. Schwab and members of the Sunshine Committee

From: Toby Nixon, President of Washington Coalition for Open Government on behalf of its Board of Directors

Re: Agenda Item 2.3 Proposed Exemption for Driver's License Numbers – RCW 42.56.230(5)

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Thank you for the opportunity to comment on this proposal. After consultation with members of our board and legal committee, we conclude that the Sunshine Committee should decline to recommend that the legislature identify and codify a specific exemption for driver's license numbers. Our reasons include:

**(1) Bad facts make bad law.**

This proposed exemption has been at least partly fueled by the petitions from the City of Lakewood for reconsideration or review of a case which raised a different issue concerning summary judgment and attorney's fees. In a long *footnote* at the end of the appellate court's opinion, the court stated that the legislature's failure to provide an "express PRA exemption" was "an unfortunate oversight." Indeed, the city in that particular case redacted the driver's license numbers; the failure was in the absence of any explanation for why they did so. The city has tried to shift the burden to the requester to explain how the exemptions do not apply rather than fulfilling their responsibility to explain how the exemptions do apply. The court's footnote is dicta.

**(2) Fear of potential bad actors may be misplaced.**

The state archivist has determined that driver's license numbers are of little value to identify thieves, at least if those extending credit are doing their jobs and not accepting insufficient proof of identity. With the explosion of information available to potential identity thieves from all sources, it would seem penny-wise and pound-foolish to create a blanket exemption from Washington's premier government transparency law for a unique identifier that can provide an important avenue in investigating government accountability.

**(3) Federal pre-emption deserves careful analysis.**

Assertions of applicability of the Driver's Privacy Protections Act of 1994, 18 USC §2721 (DPPA), are casually interesting but don't survive close legal analysis. By way of illustration, the DPPA defines personal information to include both names and driver's license numbers. No one is arguing that names should be exempt under DPPA from records such as police reports, so why

would driver's license numbers be exempt in the same records? Conflicts of law and pre-emptions are complicated concepts in the best of cases; the DPPA is not controlling nor particularly helpful by analogy.

**(4) Statutorily required redactions are not without cost.**

Any specific exemption *requires* redaction by the government providing the records, which can make responding to PRA requests more time-consuming and expensive. To require exemption and thus redaction of drivers' license numbers outside of the context of the request may force the requester to accept paper copies of what might have been provided in electronic records.

**(5) The left hand may not know what the right hand is doing.**

There was a flurry of action concerning public records during the 2013 session, including two amendments to RCW 42.56.230 that occurred without internal reference, and a surprising change to technology policy buried in the budget that has Public Records Act implications. As a result of failure of HB 1128 and pursuant to a budget proviso, the Ruckelshaus Center is examining public records requests at the local level, the scope of which includes potential safety concerns of people named in records and the potential for the disclosure to assist with criminal activity. At the very least, the Sunshine Committee should take notice of the level of activity that is occurring without apparent coordination.

**In our view, a more appropriate response to the issue may be a task force or sunshine review.** In addition to actions taking place in the 2013 session, multiple bills over the last several years, traveling through different committees of the legislature, driven by different stakeholder agendas and concerns, have touched on the issue of privacy and personal identifying information (PII). At present, there is no coordinative clearing house for these types of statutory actions. Some legislators have expressed concern at the absence of any assurance that actions taken to date are internally consistent and work in harmony with our state's vigorous position in favor of public records transparency.

**As a first step, we would recommend that the Committee, together with executive agency personnel, members of the legislature and interested parties, consider how to scope a potential evaluation and review of laws in Washington State relating to personally identifying information and a review of the impacts on both privacy and transparency.**