**PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE**

**(Sunshine Committee)**

**Meeting Minutes**

**May 17, 2016**

**Members Present:** Chair Michael Schwab, Nicholas Brown, Nancy Krier, David Zeeck, Kathy George, Senator Pam Roach, Sara Di Vittorio, Honorable Pete Holmes, Representative Larry Springer, Senator Maralyn Chase

**Members Absent:** Representative Jeff Holy, Lynn Kessler, Rowland Thompson

**Staff Present:** Assistant Attorney General Eric Sonju, Committee counsel; Melinda Brown, Committee staff

**Additional Staff Present:** Gary Smith, Seattle City Attorney’s Office; Jessica Nadelman, Seattle City Attorney’s Office

**1) Call to Order**

**1.1) Introduction/Roll Call and Establishment of Quorum**

Chair Michael Schwab called the meeting of the Sunshine Committee (Committee) to order at
9:05 a.m., May 17, 2016 at the Legislative Building, Senate Rules Room, Conference Room 220, Olympia, Washington.

Seven members out of 13 members were present at the beginning of the meeting. Kathy George, Senator Maralyn Chase and Senator Pam Roach joined shortly after the meeting began for a total of 10 out of 13 members present at the meeting.

 **1.2) Adoption of Agenda for May 17, 2016**

**Motion:** To adopt the May 17, 2016 agenda. Moved by Representative Larry Springer; seconded by Honorable Pete Holmes. Approved unanimously.

 **1.3) Review and Approval of February 16, 2016 Meeting Minutes**

**Motion:** To approve the February 16, 2016 meeting minutes. Moved by Sara Di Vittorio; seconded by Rep. Springer. Approved unanimously.

**2) Old Business**

**2.1(a) Continued discussion on proposal approved at August 18, 2015 meeting regarding method to review exemptions and create agendas**

 **(b) Analyze Schedule of Review**

 **(c) 2017 – Ten-Year Anniversary Check in**

Discussion of agenda item 2.1 was conducted later in the meeting.

**2.2) Employment and Licensing** [**RCW 42.56.250**](http://apps.leg.wa.gov/rcw/default.aspx?cite=42.56.250)

Chair Schwab introduced the agenda topic. This topic was a continued discussion from the February meeting concerning employment-related exemptions at RCW 42.56.250(3) and employer investigations under RCW 49.60 or discrimination laws at subsection (5). The discussion concerned whether the Committee may want to provide a recommendation to provide some clarity on these exemptions.

* **Proposal and Committee Discussion**

Ms. Di Vittorio provided a draft proposal that had been revised following the prior meeting’s discussion and following further discussion with Rowland Thompson. The proposal suggested amendments to RCW 42.56.250(1) (employment, volunteer and personnel records) and (5) (investigations under RCW 49.60 and discrimination laws). She summarized the proposal (see attachment to the minutes), and described it as an attempt to provide clarity on these exemptions. She described that subsection (3) is somewhat confusing and should be divided into subparts (a) and (b), and language should be added to exempt passport and visa numbers. She indicated that the proposal for subsection (5) would address the lack of clarity as to whether such pending investigative records in that exemption could be withheld as a categorical exemption.

Chair Schwab commented that these changes should incorporate Mr. Thompson’s interest in these issues, and Ms. Di Vittorio confirmed that. Ms. Di Vittorio stated she had heard some concerns with the proposed subsection (3)(a) amendments and the Committee may hear some public comment on that, and but she had heard no objections to proposed (3)(b) amendments or proposed amendments to subsection (5).

Rep. Springer, Mr. Holmes and David Zeeck commented. Mr. Zeeck also thanked Ms. Di Vittorio and Mr. Thompson for their work. There was further Committee discussion. Ms. Di Vittorio provided further explanation on proposed subsection (3)(a) regarding redacting residential addresses with respect to dicta in a Court of Appeals decision concerning city, state and zip codes in residential addresses.

* **Public Comment**

There was no public comment.

**Motion:** To adopt the proposal recommending the Legislature amend RCW 42.56.250(3) and (5). Moved by Ms. Di Vittorio; seconded by Mr. Zeeck. Approved unanimously. A copy of the Committee’s recommended proposal for amending RCW 42.56.250(1) and (5) is attached.

**2.3) Personal Information -** [**RCW 42.56.230**](http://apps.leg.wa.gov/rcw/default.aspx?cite=42.56.230)

Chair Schwab introduced the agenda topic. This topic was a continued discussion from the February meeting concerning possible amendments to RCW 42.56.230 (personal information). Chair Schwab invited Doug Klunder, Representative of American Civil Liberties Union of Washington, to provide comment. Chair Schwab thanked Ms. George for her work on this proposal.

* **Proposal, Committee Discussion, and Public Comment**

Ms. George explained the draft proposal and she provided a background memorandum. She described that the first proposed recommendation would 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, from the child’s parent or guardian. She described that the second proposed recommendation would repeal RCW 42.56.230(4) so as to: (i) eliminate some redundancy concerning protection of taxpayer information that is addressed in other laws, and (ii) 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” (those are only in other statutes), and as a policy matter the repeal would address excessive secrecy concerning tax benefits.

Chair Schwab asked for comments. Ms. Di Vittorio said she agreed with Ms. George’s proposed changes, and that the “unfair competitive disadvantage” provision is misplaced in this statute.

Mr. Klunder said he supported the first proposed recommendation, consent for disclosure by the subject of the record, since a person should have a right to control their information. He described concerns with the part of the second proposal that would remove the taxpayer exemption. He said he takes no position on the unfair competitive disadvantage language. He noted that with respect to removing cross references to other laws, in the past, the Committee has supported having cross-references to other laws as it is helpful for requesters and others. He said he disagreed with Ms. George’s description that a right to privacy exists only in the other laws, and there are common law rights to privacy. Ms. George said she is happy to work with Mr. Klunder on this proposal for subsection (4). She noted that it was hard to understand how this language fits into “personal information” of this statute.

Senator Roach inquired how other states look at this tax exemption issue. Representative Springer said he was troubled about the tax information proposal for repeal of subsection (4), and cautioned that the Legislature has been looking at disclosure of tax information and has been improving transparency. Mr. Zeeck queried how this proposal would affect that legislative effort, and Rep. Springer, Mr. Zeeck, and Ms. George further discussed the issues presented by repeal of subsection (4).

Chair Schwab asked if Ms. George would take out the proposal to repeal subsection (4) at this time, retaining only the proposal to amend the opening paragraph of RCW 42.56.230 regarding consent. Ms. George agreed to so modify her proposal at this time.

Senator Roach commented on giving out names of children when guardians consent, and when the children are victims. Ms. George, Senator Roach, Senator Chase, Mr. Zeeck, Ms. Di Vittorio discussed issues related to parental or guardian consent, and child victims. Mr. Klunder also noted that federal education laws have certain procedures about parental and guardian consent, and a Public Records Act court case also refers to consent. He recommended consent be made contemporaneous with disclosure.

Nancy Krier noted when an agency gets a public records request from the subject of a record, the agency may need to determine if that request is a consent to release. She described that the first part of the proposal to amend the introductory language of RCW 42.56.230 could bring some clarity and it is a good idea, and Chair Schwab agreed. Ms. Krier noted who can consent as a guardian is separate issue. She suggested that the State Department of Revenue may also want to comment on the tax exemptions proposal (to repeal subsection (4)).

The Committee also discussed there will be follow-up work with respect to the proposal to repeal the tax information exemption at RCW 42.56.230(4).

**Motion:** To adopt the first part of the proposal to amend the introductory paragraph in RCW 42.56.230 to address consent to disclosure by the subject of the record, or in the case of a child, the child’s parent or guardian. Moved by Ms. George; seconded by Nick Brown. Senators Roach and Chase abstained. The remaining eight members voted in favor, so the motion passed. A copy of the Committee’s recommended proposal for amending the introductory paragraph to RCW 42.56.230 is attached.

**3) New Business**

**3.0) State Employees’ Birth Dates**

Senator Chase commented that she had received calls regarding concerns of state employees with the release of their birth dates. Mr. Brown noted there are some recent public records requests to state agencies for employee information, and Senator Roach said she was aware of the issue. Chair Schwab said this will be looked at further.

**Old Business**

**2.1(a) Continued discussion on proposal approved at August 18, 2015 meeting regarding method to review exemptions and create agendas**

**New Business**

**3.1) Trade Secrets –** [RCW 42.56](http://apps.leg.wa.gov/rcw/default.aspx?cite=42.56) **and** [RCW 19.108.010(3)](http://apps.leg.wa.gov/RCW/default.aspx?cite=19.108.010)

Chair Schwab introduced this agenda item as a follow up on the Committee’s discussion from the last meeting. He described that at the last meeting, the Committee had discussed its Schedule of Review and a plan to consider categories of exemptions, and a frequent category is trade secrets.

The Committee was provided a background memorandum on trade secrets from Ms. Di Vittorio, with two draft proposals (A and B).

Sandy Goudy, Department of Commerce, and Assistant Attorney General Clark Shores, University of Washington Division, joined the discussion and provided information to the Committee. Ms. Di Vittorio gave an overview on the issue, described that whether a document is exempt as a trade secret comes up regularly, and gave as an example vendors giving a bid to a public agency and providing bid documents with trade secrets or proprietary information. She said agencies have to decide whether not to disclose (and create possible PRA liability), disclose (and create possible trade secrets liability), or obtain or require an injunction under RCW 42.56.540 (thus possibly delaying release).

Chair Schwab referred the Committee to Ms. Di Vittorio’s memorandum. Jessica Nadelman commented that the city of Seattle often gets requests from competing vendors, and the issue also comes up in the city’s regulatory framework.

Ms. Di Vittorio stated that RCW 42.56.270 is less than clear on its application and her memorandum seeks to address this. She described a goal to avoid litigation over these issues by creating a standard as to what is a trade secret. She said that while the proposals are not sufficient yet, they are for discussion purposes.

Gary Smith described how the state bid laws are handled as compared to local bids are handled to reduce litigation, and discussed the need to provide clarity and reduce litigation. Senator Chase inquired about reaching out to the State Department of Enterprise Services for comment.

Chair Schwab asked Ms. Krier to comment and she stated that there is tension between an agency, and the business and requester, when the agency is put in the middle and that this issue comes up regularly. Ms. Goudy commented that trying to recruit a business to Washington but not wanting it to end up in court is important, and clarification would be good. Mr. Shores stated that this topic comes up quite frequently. Mr. Holmes commented on the possibility of agencies losing good bidders and perhaps a “safe harbor” based on good faith reasonable representations from a vendor (as to the nature of the record or trade secret) may be a possible option.

Ms. Krier commented that the issue comes up in contracts. Mr. Shores commented on research and negotiated contracts and agreed with Ms. Krier that the issue comes up in a contracting situation, and that it would be helpful if the agency had a “safe harbor.” Senator Chase inquired if the University had a request where the records are impacted by intellectual property laws. Mr. Shores commented on issues regarding ongoing research and Ms. Krier noted the fair use issues under copyright law.

Ms. George stated the need for better clarification, noting harm resulting from non-disclosure, and a need to define “proprietary” and “commercial.” Mr. Shores, Ms. Di Vittorio, Mr. Holmes, and Rep. Springer provided further comment.

Chair Schwab inquired if the Committee should pursue this topic. Rep. Springer said yes. Mr. Brown gave an example of the *Wade’s Eastside Gun Shop* court decision with respect to possible agency PRA liability for penalties for non-disclosure. Chair Schwab stated the Committee has more work to do on this subject to get stakeholders interested, and there is a need for a proposal to identify solutions. Chair Schwab thanked the witnesses and said this was a worthy topic and the Committee discussion was a good first step.

**2) Old Business**

**2.1(a) Continued discussion on proposal approved at August 18, 2015 meeting regarding method to review exemptions and create agendas *(see above)***

 **(b) Analyze Schedule of Review**

Chair Schwab introduced the agenda topic and provided background on the Schedule of Review. Ms. Krier had an updated draft of the Schedule of Review exemptions list in each committee member packet. Ms. Krier explained the proposed corrections are in red. Ms. Krier explained that there were some errors in the current schedule. Updates will be provided at future Committee meetings. She stated the goal is to be current by the end of the year.

 **(c) 2017 – Ten-Year Anniversary Check in**

Chair Schwab commented that the time maybe has come to look at the overall work of the Committee to date. The Committee was formed in 2007. He noted a November 2009 Attorney General’s Office and State Auditor’s Office Open Government Task Force report, a copy of which was provided to the Committee. He noted that Mr. Thompson and Ms. Kessler served on the task force. Page 5 of the report recommends an independent oversight agency for open government. Ms. Krier provided some legislative history on efforts to address open government disputes, including fiscal issues. Ms. Krier referred to another handout describing open government agencies in three other states.

Chair Schwab described that perhaps the Committee could become part of an independent agency, serving as its governing board to do training, resolve disputes, issue opinions, etc., and that the committee could now be active in the transition to such a result.

Senator Chase noted several cities in her district that have problems with public records requests. Representative Springer noted some agencies are receiving harassing requests but it can be difficult to distinguish from a legitimate request. He noted the 2013 Ruckelshaus Center report. and stated the issues need oversight.

Senator Roach recommended a pilot project, and having agencies put more records online. Senator Chase also commented on going online with records. Ms. George was in support of putting public records and data online, and described that the Washington Coalition for Open Government may be organizing a technology summit. Mr. Holmes and Ms. Nadelman explained what the City of Seattle is doing to post records online, but the city still receives PRA requests.

Ms. Krier suggested that maybe the Committee could have a “10-year check in” discussion on its work at the August meeting.

Senator Roach commented she would like to pursue this topic further and asked her staff assist in looking at new mandates. Chair Schwab commented the Committee should be part of the discussion of a new approach for the Committee’s work. Representative Springer inquired about where this Committee is going from here, noting that its role is defined by the Legislature. There was further discussion by Committee members about getting public input about the Committee and its role. There was further discussion of current PRA challenges such as technology issues including posting records and emails online, using technology to sort through emails, redacting, using non-agency devices and extending disclosure to legislative emails, including online posting of legislative emails.

**4) Legislative Recap**

There was no discussion.

**5) Public Comment**

There was no additional public comment.

**6) Adjourn**

Chair Schwab announced the next Committee meeting is August 16th. Ms. Krier stated the next meeting will be also be held at the Senate Rules Room.

The Committee adjourned at 11:20 a.m.