



STATE OF WASHINGTON 2014 ANNUAL REPORT

PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE “SUNSHINE COMMITTEE”

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Chair, Governmental Operations Committee

Rep. Sam Hunt
Chair, Government Operations
and Elections Committee



PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE

“SUNSHINE IN GOVERNMENT”

November 15, 2014

SUMMARY

The Public Records Exemptions Accountability Committee (Sunshine Committee) met four times in calendar year 2014 and initiated a comprehensive review of the following public records exemptions:

- RCW 42.56.240(2) – Investigative Exemption
- RCW 42.56.250(3) - Drivers’ Licenses
- RCW 42.56.230 and RCW 38.52 – Incoming 911 Voice Data
- RCW 42.56.420(4) – Computer Security
- RCW 42.56.230(2) – Parent/Guardian Contact Information
- RCW 42.56.260 – Real Estate Transactions

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/opengovernment/sunshine.aspx>. The Committee posts its agenda for each meeting on the website, and when available, the audio or 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 audio recording so that the public can view previous meetings. When TVW has not been able to record the meetings, audio recordings are made, and 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 adopted an original schedule for reviewing exemptions in 2007 containing 106 items. The Committee receives an updated list of exemptions from the Office of the Code Reviser each year in August. A new schedule of review, totaling over 500 items, is now posted on the Committee's website. The Committee recognized 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 seventh annual report and summarizes the Committee's work since the November, 2013 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 2014:

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 Larry Springer (D)
Nicholas Brown - Counsel to the Governor
Frank Garred, retired newspaper publisher - Port Townsend Leader (term expired August, 2014)
Ramsey Ramerman, Assistant City Attorney, City of Everett
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

COMMITTEE PRACTICE AND PROCEDURE - 2014

The Committee held four meetings in 2014. 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 18, 2014

a) The Committee continued to discuss the investigative exemption located in RCW 42.56.240(2). This has been an ongoing topic for consideration for over a year and involves efforts to achieve clarity and reduce ambiguity in the process of determining when law enforcement can release or withhold witness identifying information. Significant privacy and public safety interests are involved in this discussion as well as important public awareness of the activities of law enforcement agencies.

Committee member Ramsey Ramerman has provided extensive effort in trying to develop a principled approach to modifying this exemption by creating standards and practices for public agencies to follow in reaching a reasonable determination to release or withhold.

The Committee received presentations from various public and private agencies, attorneys, ACLU, Washington Coalition for Open Government (WCOG) as well as Committee members on the various proposals to amend the exemption. Concerns were expressed about giving agencies too much subjective authority without requiring those agencies to make an appropriate record to explain their decisions.

The Committee concluded that this issue required further analysis and discussion before a proposal could be submitted for a vote.

b) Discussion also continued on the subject of exemptions of driver license and identicaid information from disclosure. Committee member Nancy Krier reported that the Legislature was considering several bills in this regard. It was decided that the Sunshine Committee should send a letter to the appropriate legislative committees supporting HB 2376, which adds protections for driver license and identicaid information. The recommendation also continued to a conclusion the extensive discussion held by the Committee at a special meeting in December, 2013.

c) The Committee pursued further discussion on Incoming 911 voice data at RCW 42.56.230 and RCW 38.52, and noted that efforts by the Legislature to address this issue had not yet been fully realized. No proposal was ready for the Committee at this meeting.

d) The Committee considered a proposal to amend the security-related exemption at RCW 42.56.420(4) which was a statute passed by the Legislature in the final days of the 2013 session. Committee member Ramsey Ramerman explained that the statute needed to be amended to prevent it from being broadly interpreted to allow the exemption of more technology-related information than was intended. A proposal to do so was passed by a vote of 6-1.

e) The Committee also engaged in discussion of the current legislative session and the recommendations contained in the Ruckelshaus Center report on the status of public disclosure and open government laws in the State of Washington.

MAY 20, 2014

This meeting of the Committee involved extensive discussion of the investigative exemption at RCW 42.56.240(2) and the 911 privacy issues, amending RCW 42.56.230 and creating a new section at RCW 38.52.

A wide range of public and private agencies and municipal entities expressed interest and concern in these issues. No proposals were ready for Committee action and the matters were referred for further analysis.

The Committee also discussed the recent legislative session and the ongoing interest in the Legislature's consideration of Sunshine Committee recommendations. In additions, Committee member Nancy Krier briefed the Committee on the recently passed Open Government Training Act which went into effect July 1, 2014. Arrangements were discussed to provide the Committee with training at its next meeting in August.

AUGUST 19, 2014

a) Once again the Committee engaged in consideration of the investigative exemption and the 911 privacy issues. The Committee again received input and presentations from interested organizations, citizens, law enforcement groups, and municipal officials. The focus of much of these discussions involved considerations of public safety and victim privacy, and the maintenance of data received by public agencies. Even though there was Committee support for action on several proposals, the Committee concluded that the various proposals needed further work and refinement.

b) A representative of the City of Fife presented an issue related to the release of personal information involving guardians and family of children in RCW 42.56.230. Under present law the identities of children are protected from disclosure, but their guardians and family members are not, thus creating the danger of compromising the safety of children in certain situations. The Committee discussed this issue at length and indicated an interest in considering a proposal at the next meeting to alleviate the problem.

There was also a discussion regarding the privacy rights of juvenile crime victims and witnesses.

c) RCW 42.56.260 involved the exemption of information regarding real estate transactions conducted by public and municipal agencies. The City of Kent made a presentation to the

Committee seeking modification of the exemption to provide protection for information involved in the transaction process and, therefore, enabling the public agencies to achieve greater benefits for taxpayer dollars. After extensive Committee discussion, it was decided to pursue the development of a proposal for Committee action for the meeting in October.

d) The Committee received presentations from municipal officials and concerned citizens regarding cost recovery measures involved in public records requests. This is a subject of great interest all around the state and represents a systemic concern rather than the consideration of review of public disclosure exemptions within the Committee's mandate.

e) Chair Schwab reported that the Code Reviser's Office had issued its 2014 List of Exemptions. The list now contains over 500 entries and increases each year. Schwab indicated that the Sunshine Committee should be addressing its review of exemptions on the list based on relevant and contemporary issues and problems reported to the Committee, rather than an abstract and purely academic review.

OCTOBER 28, 2014

a) After many months of discussion and analysis, a proposal to modify RCW 42.56.240(2) was submitted by committee member Ramerman. This proposal eliminates the anomaly of only allowing a victim/witness desire to control if it is made at a particular time. The Committee unanimously approved the proposal.

Further work on this exemption was contemplated in order to achieve greater statutory clarity.

b) The Committee conducted further review of the 911 privacy issues and decided that a proposal was still not ready for Committee action. The matter was deferred to the February, 2015 meeting.

c) A proposal to modify RCW 42.56.230(2) regarding disclosure of family and guardian information was presented by Committee member Ramerman. This represents the follow-up of the issue presented at the August meeting. After Committee discussion and public comment, the proposal was adopted unanimously.

d) The Committee discussed the issue of real estate transactions conducted by local agencies (RCW 42.56.260) which was also introduced at the August meeting. A proposal to amend the exemption to protect records that could give away a public agency's negotiation tactics was presented by Committee member Ramerman. After Committee discussion and public comment, the proposal was adopted unanimously.

RECOMMENDATIONS

The Sunshine Committee hereby makes the following recommendations:

- Exhibit A – RCW 42.56.240(2) – Investigative Exemption
- Exhibit B – RCW 42.56.230(2) – Child Contact Information
- Exhibit C – RCW 42.56.260 – Real Estate Transactions
- Exhibit D – RCW 42.56.420 – Computer Security

The Committee also recommends that the Legislature consider adopting the various recommendations made by the Committee over the past 4 years.

During the 2013 and 2014 sessions the Washington State House passed HB 1298. This bill contained several of the previous recommendations proposed by the Committee. Unfortunately, the bill did not successfully pass through the Senate and was not enacted. The Committee recommends that this bill be resubmitted for consideration, along with the other recommendations contained herein.

It should be noted that several recommendations previously worked on by the Committee, including those involving public utility customer information and driver's license information, have been approved by the Legislature after being forwarded and presented to the Legislature by interested stakeholders.

CONCLUSION

The Committee plans to meet at least four times in 2015 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 expansion of the Committee's mandate, the creation of an independent public records/public meetings agency, and the development of a more efficient and cost effective public records dispute resolution process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael E. Schwab", written in a cursive style.

Michael E. Schwab
Chair

November 15, 2014

RCW 42.56.240(2) – Investigative Exemption

The current statute reads as follows:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person’s life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;

The Sunshine Committee recommends that the statute be amended to read as follows (this recommendation includes the Committee’s recommendations from 2013):

(2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the public disclosure commission, if disclosure would endanger any person’s life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern thereafter. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;²

Note: This recommendation eliminates an arbitrary restriction on a crime victim’s right to protect contact information.

It adds language to clarify that the “commission” is the Public Disclosure Commission (PDC), and it removes the provision that only applies to PDC complaints to be recodified in RCW 42.17A where the other procedures for filing a PDC complaint are listed. These changes regarding the PDC correct legacy problems overlooked in 2005, when removed from the Public Disclosure Act (former RCW 42.17) and recodified in RCW 42.56.

RCW 42.56.230(2) – Child Contact Information

The current statute reads as follows:

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

(2)(a) Personal information:

(i) For a child enrolled in licensed child care in any files maintained by the department of early learning; or

(ii) For a child enrolled in a public or nonprofit program serving or pertaining to children, adolescents, or students, including but not limited to early learning or child care services, parks and recreation programs, youth development programs, and after-school programs.

The Sunshine Committee recommends that the following section be added to the statute:

(iii) For the family members or guardians of a child who is subject to the exemption under subsection (i) and (ii) above. If the family member or guardian has the same last name of the child, or if the family member or guardian resides at the same address of the child, and disclosure of the family member or guardian’s information would result in disclosure of the personal information exempted under subsection (i) and (ii).

Note: This recommendation adds a provision to the exemption for contact information for children in certain programs to allow the redaction of the contact information for the juvenile’s guardian if the information is the same as the juvenile.

RCW 42.56.260 – Real Estate Appraisals

The current statute reads as follows:

Except as provided by chapter 8.26 RCW, the contents of real estate appraisals, made for or by any agency relative to the acquisition or sale of property, until the project or prospective sale is abandoned or until such time as all of the property has been acquired or the property to which the sale appraisal relates is sold, are exempt from disclosure under this chapter. In no event may disclosure be denied for more than three years after the appraisal

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

(1) Subject to the time limitations in subsection (2), the following documents relating to an agency’s real estate transactions are exempt from disclosure under this chapter:

(a) Except as provided by chapter 8.26 RCW, the contacts or real estate proposals, made for or by any agency relative to the acquisition or sale of property; and

(b) Documents prepared for the purpose of considering the selection of a site or the acquisitions of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price, including records prepared for executive session pursuant to RCW 42.30.110(1)(b);

(c) Documents prepared for the purpose of considering the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price, including records prepared for the executive session pursuant to RCW 42.30.110(1)(c).

(2) The exemptions in subsection (1) do not apply when disclosure is mandated by another statute or after the project or prospective project is abandoned or all properties that are part of the project have been purchased, sold or leased. Furthermore, no appraisal shall be withheld that is more than three years old.

Note: This recommendation allows agencies to withhold additional records where disclosure would have a negative impact on the agency and thus the taxpayers. The exemption would expire when the project is completed or abandoned. This recommendation closely follows the existing grounds for “executive sessions” in the Open Public Meetings Act (OPMA).

RCW 42.56.420(4) – Computer Security

The current statute reads as follows:

The following information relating to security is exempt from disclosure under this chapter.

(4) Information regarding the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities, and other such information the release of which may increase risk to the confidentiality, integrity, or availability of agency security, information technology infrastructure, or assets;

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

(4) Information ~~regarding related~~ to the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results and other such information to the extent that they it identifies y specific system vulnerabilities, and other when the release of such information the release of which may materially increase risk to the confidentiality, integrity, or availability of agency security, or information technology infrastructure, or and assets;

Note: This recommendation clarifies the exemption after the 2012 amendment used language that could be interpreted in an extremely broad manner.