

PUBLIC RECORDS ACT COMMITTEE

AG REQUEST LEGISLATION – 2009 SESSION



WASHINGTON STATE OFFICE OF ATTORNEY GENERAL
ROB MCKENNA



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BACKGROUND:

When state agencies face over-burdensome or harassing public records requests, an agency's budget is impacted and other requests for public records are delayed by the drain of agency resources. Citizens that are denied public records have no choice other than to go to court, spending valuable time and resources in the process. When a member of the public has difficulty obtaining records he or she has nowhere to go other than court to find out if the delay is reasonable, or if the denial is in compliance with the law. Going to court is simply out of reach for many citizens, leaving them without an avenue to pursue a resolution to their denied or delayed document requests.

Many citizens and members of the media report violations of the open meetings act. In some cases, local elected officials are unclear about their responsibilities under the law. In other cases there may be a concerted effort to skirt the law. An appointed committee is used in other states to train elected officials and to provide an avenue to resolve disputes about whether or not open meetings laws are being obeyed.

THE PROBLEM:

State and local government face a logjam of citizen complaints and costly litigation over the public records act and the public meetings act. An efficient and inexpensive solution is needed to resolve complaints and provide greater access to public records and public meetings while reducing costs to governmental agencies and the public. Many states use an administrative board or an appeal process to resolve complaints without litigation. These boards offer mediation, dispute resolution, investigate potential violations, issue penalties, offer legislative reform and train public officials about their responsibilities under the law.

LEGISLATION:

The Attorney General's legislation creates a committee to study the feasibility of creating a board that would adjudicate complaints alleging violations of the public records act and the public meetings act. The governor, attorney general and state auditor would each appoint three members. The president of the senate and speaker of the house would each appoint a member from each caucus. The terms of the committee would expire at the end of the 2010 legislative session. The committee shall study, prepare a draft report with recommendations, promptly seek public comment on the draft report, and submit a final report no later than November 15, 2009, on the creation of a state board with independent authority to:

- Review and adjudicate complaints alleging violations of chapter 14 42.56 RCW, the public records act, and of chapter 42.30 RCW, the open public meetings act, in an expeditious and inexpensive process;
- Enforce the provisions of the public records act and the open public meetings act;
- Offer and provide alternative methods for dispute resolution under the public records act and the open public meetings act;
- Issue interpretive opinions of the public records act and the open public meetings act;
- Provide confidential consultation regarding the duties under the public records act and the open public meetings act;
- Provide public training on the public records act and the open public meetings act;
- Recommend legislative improvements to the public records act and the open public meetings act; and
- Adopt rules to implement these enumerated powers, and other rules as may be consistent with or necessary to implement these enumerated powers.

The committee shall consider and report on how a proposed state board with such enumerated authority might further the goals of the public records act. All meetings of the committee shall be open to the public.



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Open government has never been more important in Washington state

Seattle Times editorial

THE public's window into government agencies has been sliding shut in recent years with hostile — though split — Supreme Court rulings, providing officials with more tools to keep controversial secrets.

One decision, known as the Soter decision, even affirmed the right of agencies to sue citizens just for requesting information.

Despite valiant efforts of influential and bipartisan open-government advocates, including Republican Attorney General Rob McKenna and Democratic state Auditor Brian Sonntag, the Legislature has been reticent to do anything substantive to restore access to government records and closed-door meetings.

Friday, the House Committee on State Government & Tribal Affairs will hold a hearing to consider evening the playing field between citizens and agencies. House Bill 1017, sponsored by Rep. Lynn Kessler, D-Hoquiam, an abiding friend to open government, would spur a study of whether to create a panel that investigates complaints alleging violations of the state open-records or open-meetings laws.

The concept is similar to the venerable and respected state Public Disclosure Commission, which investigates campaign-finance complaints and levies penalties.

Both McKenna and Sonntag are supporting HB 1017.

This session, the Legislature is also considering its first set of recommendations from the new Sunshine Committee, established to review the necessity of more than 300 exemptions to the state open-records law. Other bills would require more open-government training for officials and stipulate that closed-door sessions of councils, boards and commissions be taped.

Always, the lion's share of public-records requests come from citizens, though newspapers have played a higher-profile role as well, using public documents for important stories. With a shrinking corps of journalists in communities across the state, the power of the people to keep tabs on their government officials has never been more important.

The Legislature should make open-government legislation a top priority this session, and HB 1017 is a reasonable way to start.

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Budget leads issues before lawmakers, but refining 'sunshine' laws deserves action

Yakima Herald-Republic editorial board

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The state's projected \$6 billion gap between the cost of current programs and revenue in the 2009-2011 budget is, without question, the No. 1 issue facing lawmakers as they open the legislative session in Olympia this week.

But what is also common knowledge is that the real work on closing the gap between spending and revenue won't start in earnest before the next revenue forecast is announced by the state economist in March.

While they're gearing up to tackle the all-important budget, we hope lawmakers will also focus attention on some of the proposals to shore up the state's open public records and public meetings laws being backed by Republican Attorney General Rob McKenna and Democratic State Auditor Brian Sonntag.

McKenna unveiled a series of proposed adjustments to Washington's "sunshine" laws during a briefing on his broader legislative agenda in Olympia on Wednesday.

* After a narrow defeat during the 2008 legislative session of an even more sweeping proposal, McKenna and Sonntag will this time ask lawmakers to approve a measure that would require government entities already found in violation of open meetings laws to tape executive sessions. If questions arise about the legality of the sessions, a judge could determine if the group took illegal actions while the public was excluded from the room.

* A second measure being proposed by McKenna would require mandatory training on the state's Open Public Meetings Act for all elected officials.

Both measures deserve public and legislative support -- even if they don't go far enough.

The Sonntag-McKenna proposal to force city councils, county commissions and school boards to record executive sessions for two years after they have been caught "intentionally" violating the law is watered down from a 2008 plan that would have required all governmental closed-door sessions to be recorded. Some lobbyists representing local governments had a fit over that, claiming it would cost too much and clog the courts with requests for judicial review. Given the power of the municipal government lobby in Olympia, the new measure is probably as much of an improvement in the law as can be expected.

As for the new plan to mandate public meeting training for elected officials, we're all for it. But we would suggest an important add-on as lawmakers review the proposal: Make that training also mandatory for attorneys advising elected officials.

There is little question that improved knowledge of the state's Open Public Meetings Act would help city, county and other government officials be more aware of the limited circumstances under which excluding the public from a meeting is permissible. We have observed over the years that local government lawyers are often just as ignorant about this sliver of the law as the clients they serve.



The scenario is a common one. A government official, usually not wanting to air a controversial or embarrassing or sensitive topic in public asks the attorney if an executive session on the topic is permissible. The barrister finds the closest exemption to the law that fits the topic at hand and blesses the closing of the meeting. What typically follows is a disagreement between that lawyer and some media outlet and its lawyer. Way too often, in our experience, the government lawyer is wrong, the government entity gets needlessly embarrassed and is forced to start the decision-making process over. Worse yet, both the media and the local government are stuck paying hefty legal bills.

Whether or not government entities are taping closed-door meetings may seem unimportant. But it is important. Our democratic system is designed to allow for accountability, and decision-makers who don't open meetings open themselves up to even more distrust from an aggravated citizenry.

So while legislators wait for the budget fireworks to begin in Olympia, we encourage them to work on measures designed to assure the public's business is only conducted in private when appropriate. And to get there, make sure the lawyers are given a refresher course along with their clients.

We will be watching.

**** Members of the Yakima Herald-Republic editorial board are Michael Shepard, Barbara Serrano, Spencer Hatton and Karen Troianello.***

Our View: Panel exploring public records board good for state

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In Washington state, citizens who request public records are sometimes turned down, even when the law is on their side. Their only recourse, going to court, can be expensive, time-consuming and daunting.

So they can either shrug and drop the matter, or initiate legal action and accept the financial burdens that implies – for an uncertain outcome.

Having the law on your side doesn't mean a lot if you don't have the resources to set the law in motion.

That's embarrassing in the state that helped pioneer open-government movements when they were taking off in the 1970s. Some other states, which ultimately followed Washington's lead by adopting open-records and open-meetings laws, have gone a step further. They have established

separate commissions that deal administratively with alleged violations of their sunshine laws.

In Texas, the state attorney general's office deals with such appeals and issues binding decisions. Connecticut and New Jersey have state commissions that examine complaints and take enforcement action. In these and other places, citizens can expect a process that costs less than hiring a lawyer and paying filing fees and other legal expenses. That and they can get faster answers.

That, at least, is one of the perceptions of people who have talked about a similar structure in Washington. Those perceptions could be tested under a bill that will go before the 2009 legislative session when it convenes Jan. 12 in Olympia.

It's a nondescript measure, setting up a 13-member state committee to conduct a study of such an agency for this state. The panel would take a look at what's going on in other states and hear from stakeholders and other citizens here in Washington. By Nov. 15, it would be expected to make its recommendations to the Legislature, the governor, the state auditor and the attorney general.

It's a modest and thoroughly reasonable proposal, and it has bipartisan backing in the Washington House of Representatives to go along with the support of Republican Attorney General Rob McKenna and Democratic Auditor Brian Sonntag.

Self-government requires open government. Meetings and records that are part of the public process must be accessible to the public. That is fundamental to the political accountability that gives government its legitimacy.

Traditionally, members of the public have seen that truth more clearly than those under scrutiny. Public officials who withhold legitimate information create a troubling situation for citizens whose personal resources are no match for the public resources at the disposal of recalcitrant agencies.

Launching an earnest inquiry into other states' experience is a plausible step, and it could lead to a more citizen-friendly process in Washington. That's an outcome every Washingtonian should want.

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