

Public Records Exemptions Accountability Committee  
Thomas A. Carr, Chair  
P.O. Box 94769  
Seattle WA 98124-4769

November 15, 2007

Lt. Governor Brad Owen, President of the Senate  
Representative Frank Chopp, Speaker, House of Representatives  
Senator Darlene Fairley, Chair, Committee on Government Operations and Elections

RE: Annual Report of the Public Records Exemptions Accountability Committee

The Public Records Exemptions Accountability Committee – or “Sunshine Committee” - was created by Substitute House Bill 5435 in 2007.

In that bill, the Legislature stated that in light of the changing nature of information technology, recordkeeping, and the increasing number of public disclosure exemptions, periodic reviews of public disclosure exemptions are needed to determine if exemptions continue to serve the public interest. For this reason, the Legislature established the Committee to review all public disclosure exemptions, and make a recommendation 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 called for an annual report on the Committee’s recommendations. This is the first report, and summarizes the Committee’s work since its members were appointed in August 2007.

The following individuals were appointed to the Committee by the Governor, Legislature, Attorney General, and State Auditor:

Chair, Thomas A. Carr, Seattle City Attorney  
Senator Adam Kline  
Senator Pam Roach  
Representative Lynn Kessler  
Representative Jay Rodne  
Timothy D. Ford, Assistant Attorney General  
John Hughes, President of Allied Daily Newspapers of Washington

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Ken Bunting, Associate Publisher, Seattle Post-Intelligencer  
Frank Garred, retired newspaper publisher  
Roselyn Marcus, Director of Legal Affairs, Office of Financial Management  
Patience Rogge, Washington Library Association  
Ramsey Ramerman, Foster Pepper PLLC  
Candy Jackson, NATIVE Health of Spokane

The Committee has held four meetings. For 2008, the Committee anticipates adopting a regular meeting schedule to meet monthly during calendar year 2008.

Information about the Committee and its work is available to the public on the internet at [www.atg.wa.gov/opengovernment/sunshine.aspx](http://www.atg.wa.gov/opengovernment/sunshine.aspx). The Committee posts its agenda for the next meeting on the website. In addition, the website invites citizens to join a listserv so that they will receive a notification when new material is posted on the website.

TVW, the state's public affairs television broadcaster, has filmed each meeting, and the website contains links to the TVW website so that the public can watch tapes of previous meetings.

As required by the legislation, the Committee has adopted and published criteria for reviewing exemptions. A copy of the Committee's criteria is attached to this Report.

The Committee has also adopted a schedule for reviewing exemptions. The current schedule is posted on the Committee's website. We anticipate that the Committee will continue to amend the schedule.

The Committee meetings have been well attended. The Committee recognizes the importance of public comment, and will continue its efforts to provide notice to the citizenry of the Committee's meeting agenda in order to encourage citizen participation and comment. For example, prior to the two meetings at which the Committee considered specific exemptions, Committee staff attempted to identify groups that might have an interest in these specific exemptions, and provided email notice to them that the Committee would be taking public comment. The Committee posted on its website research on each exemption that had been prepared by Committee staff. The Committee was pleased that many individuals stepped forward to provide information and input to the Committee on these specific exemptions.

The Committee has received staff assistance from the Attorney General's Office and the Office of Financial Management, as directed by the legislation establishing the Committee. No money was appropriated to these agencies to provide this support, and the Committee has requested more staff time than was originally anticipated. The Committee urges the Legislature to approve a supplemental appropriation to fund the staff support these two agencies have been providing the Committee.

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The Committee considered four exemptions in public hearings in its October and November, 2007 meetings:

- 1) Information regarding the purchases, sales, or production of an individual ginseng dealer or grower that is held by the Department Agriculture;
- 2) The definition of "public record" to the extent that it exempts legislative records;
- 3) Information used to conduct infant mortality reviews that identifies individual cases and sources of information;
- 4) Applications for public employment, including resumes and related materials.

With respect to the legislative exemption, the committee received a letter signed by the leaders of the House and Senate asking that the Committee defer consideration pending the Washington Supreme Court's consideration of the question whether there is a constitutional basis for the legislative privilege in the Washington.

With respect to the other three exemptions, the Committee reviewed the legislative history to determine the original intent behind these exemptions. The Committee also took public comment on these exemptions. The Committee is currently in the process of deliberating what recommendations to make to the Legislature regarding these exemptions.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'T. Carr', written in a cursive style.

Thomas A. Carr, Chair  
Public Records Exemptions Accountability Committee



CRITERIA FOR REVIEWING SELECTED EXEMPTIONS

*Approved at November 6, 2007 Committee meeting*

- 1) Is the exemption narrowly crafted?
  - a) The Public Records Act mandates disclosure unless the records fall within specific exemptions which “exempts or prohibits disclosure of specific information or records.” RCW 42.56.070.
  - b) Exemptions are construed narrowly. RCW 42.56.030.
  
- 2) Is the exemption of information or records implied?
  - a) Agencies and parties may only rely on exemptions that are expressly authorized by statutory or constitutional provisions. RCW 42.56.070.
  
- 3) Is the exemption codified under RCW 42.56?
  - a) If not, is there a conflict between the mandate of disclosure under RCW 42.56, and the required non-disclosure of specific information or records under the other statute?
  - b) Should the exemption be re-codified or amended to specifically reference RCW 42.56?
  
- 4) Is the exemption mandatory?
  - a) Agencies are required to exercise discretion and redact specific information. RCW 42.56.070; RCW 42.56.210. “[T]he exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought.” RCW 42.56.210.
  - b) Should the exemption identify a specific vital government interest? The Legislature’s “choice of the word ‘vital’ must be given due respect.” AGLO 1976 No. 47.
  - c) Should the exemption be amended to allow the agency discretion to redact certain information?
  
- 5) Could the exemption include statistical information?
  - a) No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons. RCW 42.56.210.
  
- 6) Is the application of the exemption time-limited? If not, can it be time limited?
  
- 7) Can the exemption be clarified?

- 8) Does the exemption continue to be necessary given the passage of time and changes in government or policy interests?
- 9) Does withholding or release of the record put an individual's safety at risk?
- 10) Does the withholding or release of the record put an individual's or organization's privacy at risk?
  - a) "Invasion of privacy" is defined in the Public Records Act as where disclosure of information about a person would be (1) highly offensive to a reasonable person; and (2) is not of legitimate concern to the public. RCW 42.56.050.
  - b) It is not enough that disclosure of such personal information "may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).
  - c) "[T]he use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted." *Dawson v. Daly*, 120 Wn.2d 782, 795 (1993) (citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn2d 788, 798 (1990)).
  - d) There is no general exemption just for "privacy" under RCW 42.56. The Public Records Act does "not create any right of privacy beyond those rights that are specified in this chapter as express exemptions". RCW 42.56.050.
  - e) There are five sections in RCW 42.56 that specifically reference "privacy". RCW 42.56.050; .070; .210; .230; .240.
- 11) Does the withholding or release of the record put an individual's or organization's financial interest at risk?
- 12) Does the withholding or release of the record put safety of the general public at risk?
- 13) Does the withholding or release of the record promote a vital government interest/function?
- 14) Is there doubt about an exemption's applicability to specific information?
  - a) Where there is reasonable doubt regarding the applicability of an exemption to specific records or information, disclosure should be required.
  - b) No public agencies or officials "shall be liable, nor shall a cause of action exist, for any loss or damage" for disclosure of public records based upon a "good faith" effort to comply with the Public Records Act. RCW 42.56.060.
- 15) How does the exemption affect government accountability?
- 16) Is the withholding or release of the record directed by federal law or state constitution?

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