

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

November 14, 2008

Lt. Governor Brad Owen, President of the Senate  
Senator Lisa Brown, Senate Majority Leader  
Representative Frank Chopp, Speaker, House of Representatives  
Senator Darlene Fairley, Chair, Committee on Government Operations and Elections  
Representative Sam Hunt, Chair, Committee on State Government and Tribal Affairs

RE: First 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 second report, and summarizes the Committee’s work since December 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  
(resigned effective September 10, 2008, replaced by Rowland Thompson)  
Ken Bunting, Associate Publisher, Seattle Post-Intelligencer  
Frank Garred, retired newspaper publisher  
Roselyn Marcus, Director of Legal Affairs, Office of Financial Management  
Patience Rogge  
Ramsey Ramerman, Foster Pepper PLLC  
Candy Jackson, NATIVE Health of Spokane

November 14, 2008

Page 2

The legislation required that the Committee meet at least quarterly. In 2008, the Committee held 10 meetings, eight in Olympia, one in Ellensburg and one in Spokane. The Committee reviewed extensively 22 exemptions relating to agriculture and found no basis to recommend any changes. The Committee did adopt twelve recommendations to retain, modify, or terminate exemptions. These recommendations relate to 36 exemptions contained in either RCW 42.56 or other chapters of the Revised Code of Washington (see attached spreadsheet). The Committee received and considered public comment with regard to all of these exemptions prior to adopting these recommendations.

The Committee's recommendations are attached to this letter. They are divided into two sections. The first section contains eight unanimous recommendations on the following exemptions:

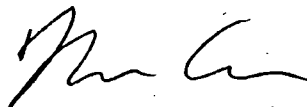
- Child mortality reviews - RCW 42.56.360(1)(f) and 70.05.170;
- Agricultural exemptions – RCW 42.56.380 and related statutes;
- State Investment Board criminal history record checks- RCW 43.33A.025;
- Employee wellness program information about individuals – RCW 41.04.364;
- Application materials for two state agency directors – RCW 28C.18.020 and 79A.25.150;
- Personal information of participants in transportation programs – RCW 42.56.330(4) and (5);
- Identity of persons and current investigations related to workplace discrimination – RCW 42.56.250(4) and (5); and
- Maritime employment salary survey data – RCW 42.56.250(6).

The second section contains four recommendations that were adopted by a majority vote, but not unanimously. The second section deals with the following exemptions:

- Applications for public employment – RCW 42.56.250(2);
- Definition of “employment” – RCW 42.56.250(2);
- Rideshare records – RCW 42.56.330(3); and
- Work product and attorney-client privilege – RCW 42.56.290.

The second section also contains minority reports relating to applications for public employment and rideshare records; and both a minority report regarding work product and attorney-client privilege, and a letter on that topic from a committee member who voted with the majority.

Very Truly Yours,



Thomas A. Carr, Chair  
Public Records Exemptions Accountability Committee

November 14, 2008

Page 3

**Attachments:**

2008 – List of exemptions considered

12 recommendations

3 minority reports

Letter with attached proposal

**2008 Report to the Legislature  
Public Records Exemptions Accountability Committee**

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
1	Agriculture	42.56.380(6)	Information on individual American ginseng growers or dealers	1996	Oct. 2007	June 2008
2	Personal Information - Research Data	42.56.360(1)(f)	Information relating to infant mortality pursuant to RCW 70.05.170	1992	Oct. 2007	Mar. 2008
3	Personal Information - Research Data	70.05.170	Medical records collected by a local department of health in the course of conducting a child mortality review	1992		Mar. 2008
4	Legislative Records	42.56.010(2)	Definition of "public records" for the senate and the house are limited to definition of legislative records in RCW 41.04.100 and budget, personnel, travel records and certain reports.	1995	Oct. 2007	No action as of Nov. 2008
5	Personal Information - Public Employment	42.56.250(2)	Applications for public employment, including names, resumes	1987	Oct. 2007	Mar. 2008
6	Agriculture	42.56.380(1)/ 15.86.110	Business records the Department of Agriculture obtains regarding organic food products	1992	Nov. 2007 Jan. 2008	June 2008
7	Agriculture	42.56.380(2)/ 15.54.362	Information regarding business operations contained in reports on commercial fertilizer	1987	Nov. 2007 Jan. 2008	June 2008
8	Agriculture	42.56.380(3)	Production or sales records required to determine payments to various agricultural commodity boards and commissions (Relates to exemptions in 10 commission statutes)	1996	Nov. 2007 Jan. 2008	June 2008
9	Agriculture	42.56.380(4)	Consignment information contained on phytosanitary certificates issued by the Department of Agriculture	1996	Nov. 2007 Jan. 2008	June 2008
10	Agriculture	42.56.380(5)	Financial and commercial information and records held by the Dept. of Agriculture for potential establishment of a commodity board or commission regarding domestic or export marketing activities or individual production information	1996	Nov. 2007 Jan. 2008	June 2008
11	Agriculture	42.56.380(7)	Identifiable information collected by Department of Agriculture regarding apple imports for report to the Legislature due December 31, 2002	1996	Nov. 2007 Jan. 2008	June 2008
12	Agriculture	42.56.380(8)	Financial statements provided to the Department of Agriculture for purposes of obtaining public livestock market license	2003	Nov. 2007 Jan. 2008	June 2008
13	Agriculture	42.56.380(9)	(Voluntary) National animal identification systems	2006	Nov. 2007 Jan. 2008	June 2008

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
14	Agriculture	42.56.380(10)/ 16.36	Animal disease reporting	2006	Nov. 2007 Jan. 2008	June 2008
15	Agriculture	42.56.270(17)	Farm plans that are voluntary and developed with conservation district assistance	2006	Jan. 2008	June 2008
16	Agriculture	42.56.610	Livestock nutrient management information: Certain information obtained by state and local agencies from dairies, animal feeding operations not required to apply for a national pollutant discharge elimination system permit disclosable only in ranges that provide meaningful information to public	2005 (c510s5)	Nov. 2007 Jan. 2008	June 2008
17	Agriculture	15.49.370(8)	Seeds: operations and production information	1969	Nov. 2007 Jan. 2008	June 2008
18	Agriculture	15.53.9018	Commercial Feed required reports	1975	Nov. 2007 Jan. 2008	June 2008
19	Agriculture	15.58.060(1)(c)	Washington Pesticide Control Act: Business information of a proprietary nature regarding pesticide formulas	1971	Nov. 2007 Jan. 2008	June 2008
20	Agriculture	15.58.065(2)	Washington Pesticide Control Act: Privileged or confidential commercial or financial information, trade secrets re: pesticides	1971	Nov. 2007 Jan. 2008	June 2008
21	Agriculture	15.65.510	Information regarding agricultural marketing agreements (including info from noncompliance hearings)	1961	Feb. 2008	June 2008
22	Agriculture	15.86.110	Business related information obtained by the Department of Agriculture regarding entities certified to handle and process organic or transitional food, or entities applying for such certification	1992	Nov. 2007 Jan. 2008	June 2008
23	Agriculture	17.24.061	Insect Pests & Plant Diseases (including: trade secrets or commercial or financial information obtained by Department of Agriculture regarding insect pests, noxious weeds, or organisms affecting plant life	1991	Nov. 2007 Jan. 2008	June 2008
24	Agriculture	22.09.040(9)	Financial information provided by applicants for a warehouse license to the Department of Agriculture	1987	Feb. 2008	June 2008
25	Agriculture	22.09.045(7)	Financial information provided by applicants for a grain dealer license to the Department of Agriculture	1987	Feb. 2008	June 2008
26	Agriculture	43.23.270	Financial and commercial information obtained by the Department of Agriculture for export market development projects	1996	Nov. 2007 Feb. 2008	June 2008
27	Personal Information	28C.18.020	List of nominees for director of Work Force Training & Education Board	1991	Feb. 2008	Sept. 2008
28	Personal Information	79A.25.150	Names of candidates for director of interagency committee for outdoor recreation	1989	Feb. 2008	Sept. 2008
29	Personal Information	43.33A.025	State Investment Board criminal history record checks of finalists for board positions	1999	May 2008	June 2008

	Category	RCW (effective 2006)	Description	Date Enacted	Materials Presented	Recom- mendation
30	Personal Information	42.56.250(3)	Address, phone numbers, email addresses, SSNs, etc. of public employees or volunteers held by public agencies.	1987	May 2008	No action as of Nov. 2008
31	Personal Information	42.56.230(1)	Personal information in files for students in public schools, patients or clients of public institutions or public health agencies, or welfare programs	1973 (1-276)	Nov. 2008	No action as of Nov. 2008.
32	Public Utilities & Transportation	42.56.330(3)	Personal information in vanpool, carpool, ride-share programs	1997	May 2008	Nov. 2008
33	Public Utilities & Transportation	42.56.330(4)	Personal information of current or former participants or applicants in transit services operated for those with disabilities or elderly persons	1999	May 2008	Oct. 2008
34	Personal Information	41.04.364	Personally identifiable information in state employee wellness program	1987	May 2008	July 2008
35	Public Utilities & Transportation	42.56.330(5)	Personal information of persons who use transit passes and other fare payment media	1999	May 2008	Oct. 2008
36	Misc. Government Functions	42.56.290	Agency records relevant to a controversy but which would not be available to another party under the rules of pretrial discovery for causes pending in the Superior courts	1973 (1-276)	June 2008	Nov. 2008
37	Personal Information	42.56.250(4)	Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed.	1992	Sept. 2008	Oct. 2008
38	Personal Information	42.56.250(5)	Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment.	1994	Sept. 2008	Oct. 2008
39	Personal Information	42.56.250(6)	Employee salary and benefit information collected from private employers for salary survey information for marine employees	1999	Sept. 2008	Oct. 2008
40	Personal Information	42.56.230(2)	Personal information in files on employees, appointees, or elected officials if disclosure would violate their right to privacy	1973 (1-276)	Nov. 2008	No action as of Nov. 2008.
41	Court Proceedings	13.34.100	Background information regarding a court appointed guardian ad litem.	1993	Oct. 2008	No action as of Nov. 2008.

**2008 REPORT**

**PUBLIC RECORDS EXEMPTIONS ACCOUNTABILITY COMMITTEE**

**Section One**

**Unanimous Recommendations**

**Sunshine Committee's Recommendations on the Child Mortality Review Exemption  
Adopted March 25, 2008**

Two statutes exempt records related to child-mortality reviews from disclosure: RCW 42.56.360(1)(f) and RCW 70.05.170. The Sunshine Committee did not take issue with the goals behind these exemptions but felt the exemptions were broader than necessary to achieve these goals.

**Justification for the child-mortality-review exemption**

The legislative history demonstrates that the purpose of this exemption is to protect the confidentiality of those who provide information to the agency conducting the review. More specifically, the exemption is aimed at (1) encouraging the parents or guardians to provide information, understanding that because the investigation involves a dead child, parents or guardians might otherwise be hesitant to talk with the reviewer if the reviewer could not promise confidentiality; (2) encouraging other witnesses to participate who might not absent confidentiality; and (3) protecting medical records and other documents people might not provide but for a promise of confidentiality.

**Recommended Changes**

The Committee did not take issue with the justification for this exemption, but saw that the statutes exempted more information than necessary. The Committee recommends changes to address three issues.

First, when the PRA was recodified in 2005, this exemption was moved from being a standalone exemption to being part of the "health care information" exemptions in .360(1). This had the affect of re-writing the exemption so that it only applied to "health care information," which is contrary to the original intent of the statute.

To solve this problem, the exemption should be moved out of subsection (1) and into its own subsection.

Second, the exemption in RCW 42.56.360 does not track the exemption it cross-references in RCW 70.05.170.

To solve this problem, the exemption in the Public Records Act should be re-written to simply incorporate RCW 70.05.170 without adding any substantive content, except to identify the subject matter.

Third, RCW 70.05.170 itself, and RCW 42.56.360(1)(f) are both over and under inclusive for their stated purposes. The chief problem comes from subsections (3)(b) & (3)(c). These exempt "any records or documents ... maintained for the purpose of a child mortality review" and "Any

summaries or analyses of records [or] documents". This broad language seems to encompass every document related to the review, even if those documents do not contain any sensitive information.

To solve this issue, RCW 70.05.170 should be re-written so that it is more specific about what information and documents should be kept confidential. For example, the statute should expressly exempt information or documents that identify the child and the child's guardians, statements by all persons interviewed including the guardians, and all records provided (medical and non-medical). The provisions could thus serve the purpose of the exemption by encouraging cooperation while allowing for the disclosure of other information.

### **Sunshine Committee Recommendation**

The Committee's recommendation on Agricultural exemptions (RCW 42.56.380) should be as follows:

When any exemption in the Public Records Act references another statute, the exemption in the Public Records Act should include a brief description of the subject matter so a user can determine if it is necessary to look up the referenced statute. It should be clear in RCW 42.56 that if there is a conflict between the brief description and the text of the statute, the statute controls.

**Adopted June 10, 2008**

## Sunshine Committee

### Criminal History Record Checks for the Board Staff Finalist Candidates (State Investment Board) RCW 43.33A.025

#### Exemption

The State Investment Board (SIB) is required to obtain a criminal history records check from both the Washington State Patrol and the Federal Bureau of Investigation (FBI) for specified board staff. RCW 43.33A.025 provides that the information received through this criminal history records check shall remain confidential and is not subject to the disclosure requirements of chapter 42.56 RCW, the Public Records Act.

#### Background

In 1999, at the request of the SIB, the Legislature provided the SIB the authority to obtain criminal background checks on final candidates for certain positions with the agency. In 2000, based on an FBI requirement, the SIB requested that the discretionary authority to obtain a criminal history records check be changed to a mandatory requirement. Both the original legislation and the subsequent amendatory legislation contained the provision that the information obtained remain confidential and exempt from disclosure. This exemption is based on an FBI requirement. Without this exemption, the FBI will not provide the SIB with criminal history records check information.

#### Additional Information

At the Committee's May meeting, Joe Dear, Executive Director of the State Investment Board expressed the importance of being able to receive FBI criminal history background checks for finalists seeking certain SIB positions. These are positions of trust, with great responsibility related to the management of public funds under the fiduciary responsibility of the board. Removing the exemption will not allow the information to be made available, since the FBI will no longer provide the information to the SIB. Losing this vital information will harm SIB's ability to investigate applicants for these sensitive positions. Without the exemption, the SIB will not be able to comply with its statutory and fiduciary duty to require FBI criminal history records checks.

#### Recommendation

Based on the narrow scope of the exemption, the need for the information being obtained and the consequences that could result from removing the exemption, it is recommended that:

The exemption should be retained without change.

The legislature may look to moving the exemption into chapter 42.56 RCW, or providing a cross-reference to this statute in chapter 42.56 RCW, to move towards having all exemptions either included or referenced in the public records act.

*Adopted by the Committee: June 10, 2008*

**Recommendation regarding  
State Employee Wellness Program-Confidentiality of Individuals' Information  
RCW 41.04.364**

Exemption

In 1987, the Legislature gave the Department of Personnel (DOP) the authority to develop and administer a voluntary state employee wellness program. See RCW 41.01.362. RCW 41.04.364 provides that the employee participation in the wellness program and individually identifiable information gathered as part of the program shall be held in confidence and shall not be used in any way to jeopardize an employee's job.

Background

With the recognition that wellness programs can both increase employee productivity and reduce the state's health care costs, DOP was provided the authority to develop and administer a voluntary state employee wellness program. Information regarding an employee's participation would be the type of personal information that would not be appropriate for public disclosure and was therefore made exempt. It would also be a barrier to participation if such personal information was subject to disclosure or could be used to the detriment of an employee's career. To that extent, in addition to the exemption, a specific prohibition regarding the use of the data was included in the statute.

Since the initial legislation, several things have changed. First, the State's Wellness Program is not longer administered by DOP, but is administered by the Health Care Authority (HCA). In addition, the information regarding the effectiveness of wellness programs and the increasing cost of health care have been the catalyst for both state and local governments implementing wellness programs and encouraging employee participation. Given rising health care costs, it remains important to encourage employee participation in programs designed to improve individual health.

Additional Information

Dennis Martin, HCA provided information regarding the wellness program as now administered by HCA. He believes that the Health Insurance Portability and Accountability Act (HIPAA) protects the information collected from participants in the wellness program. However, there is a question as to whether HIPAA protects all the data currently exempt from disclosure under RCW 41.04.362 or just protects the medically related data. Finally, this exemption does not apply to local government administered wellness programs.

Recommendation

Based on the nature of the information collected, narrow scope of the exemption, the need for the information being obtained, the lack of protection in any other law regarding information usage, and the consequence that would result from removing the exemption, it is recommended that:

The substance of the exemption should be retained and clarified. First, the exemption should be moved to chapter 42.56 RCW in that the program is no longer administered by DOP and it should apply to all local as well as state government administered wellness programs. Second, it should be clarified so that it expressly exempts all documents, including completed forms, submitted by