



Legislative Agenda

Approved by the Board of Directors October 5, 2007

“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”

RCW 42.56.030 and RCW 42.30.010

The Washington Coalition for Open Government represents individuals and organizations intent on preserving and protecting Washington's Open Government Laws, including the Public Records Act (RCW 42.56) and the Open Public Meetings Act (RCW 42.30). Its mission is to represent the public in matters where open government issues are raised, are threatened, or deserve broader exposure. The Coalition conducts public workshops and forums around the state, involving the public, public officials, and the media in discussing government accessibility as provided in the various statutes that assure such access and accountability from our public agencies.

The Coalition recommends that the Washington State Legislature enact the following improvements to the Public Records Act and the Open Public Meetings Act at the earliest opportunity. The Coalition encourages its members and concerned citizens throughout Washington to contact members of the Legislature and urge their support for these measures. The first section below identifies the changes that the Coalition views with the greatest urgency.

Top Priorities

Restore the Original Intent of the Attorney-Client Communications Exemption – The state Supreme Court decision in *Hangartner v. City of Seattle* allows virtually all communication between government agencies and their attorneys to be kept secret. Public-sector attorneys are public employees, too, and they must be held accountable for their work just like all other public employees. Indeed, the public has a right to know if agencies are asking for legal advice when they should, whether the advice received is timely and accurate, and whether or not the agency follows the advice – and if not, why not. Keeping all communication between agencies and their attorneys secret, even when no lawsuit is in progress, is a recipe for bad and unaccountable decision-making and for potential corruption. An investigation, study, or other report or document, contracted for by a public agency, which happens to have been prepared by an attorney, should not be exempt from disclosure simply because the person who prepared it is an attorney. Minutes of meetings at which attorneys are present should not be exempt from disclosure simply because of the presence of the attorney. Interactions between the government and its attorneys should only be considered privileged and exempt from disclosure when there's an actual lawsuit either threatened or in progress and the interaction is directly related to advice or strategy regarding the lawsuit. Routine inquiries to attorneys about interpretation of the law, and the responses received, should be open to public scrutiny. The legislature should restore the original intent of the Public Records Act with regard to communications between public sector attorneys and their clients (RCW 42.56.290), which is that communication between agencies and their attorneys is exempt from disclosure only in relation to an actual controversy and not on the speculation that

some future legal action might be taken; the testimonial privilege under RCW 5.60.060(2)(a) does not apply outside of that context.

Restore the Balance Between the Statute of Limitations and Penalties – During negotiations between stakeholders on HB 1758 prior to its introduction in 2005, the statute of limitations on filing of lawsuits related to public records requests was reduced from five years to one year, at the same time the penalties were to be increased by five to ten times. During the legislative process, the increase in penalties was removed from the bill, but the reduction in the statute of limitations was retained, resulting in a net decrease in expose to agencies of nearly 80%. This was exactly the opposite of what should have happened, since the penalties had not been revised since the creation of the Public Disclosure Act in 1972 and had been seriously eroded by inflation to the point where many agencies considered paying such penalties simply a “cost of doing business”. The penalties in the Public Records Act should be increased commensurate with inflation since 1972, the statute of limitations restored to its previous level, or both.

Improve Preservation of Records – A number of recent public records cases have involved failure by agencies to properly preserve records, thereby making them unavailable for inspection or copying upon request. The following five measures will help to correct some of the most important recurring problems.

- **Require Automatic Archiving of Email on Agency Mail Servers** – A recent change in federal law requires corporations to retain *all* emails sent by employees in case they are needed in later investigations and court discovery; a similar provision for blanket retention of email should exist in our state’s Public Records Act with regard to emails sent by government employees through agency email systems. Most government business is now conducted by email, and far too many emails are deleted before they can ever become the subject of a public records request. Because this provision is difficult to enforce on individual employees, it shall be enforced at the email server, so that a copy of every email that passes through the server is automatically retained in archival backup for the retention periods required by RCW 40.14.
- **Require Preservation of Backups of Electronic Records** – The records of agencies today are mostly, and in many cases almost entirely, electronic, and it is far too easy for electronic records to be inadvertently or intentionally deleted with attendant loss of history and accountability. Backups of stored records can be used to recover deleted records, but many agencies reuse, on a cycle as short as a few days, media used to store backup copies of electronic records. Recording over backup media in this manner risks irrecoverable loss of electronic records that are accidentally or intentionally deleted from active online storage. Agencies should be required by statute to preserve backup copies of records for the same retention cycles as other official records as required in RCW 40.14 in order to maximize the likelihood that records requested for inspection or copying will be available.
- **Prohibit Destruction of Public Records to Evade Disclosure** – Agencies should not be allowed to destroy public records and then claim that they are exempt from disclosure because they do not exist. Records not otherwise exempt from disclosure which would have been available for inspection or copying, but that are not available because they were improperly destroyed rather than having been retained in accordance with the provisions of RCW 40.14, shall be deemed to have been improperly denied to any person seeking to inspect or copy such records. Any person who prevails against an agency in any action in the courts seeking to inspect or copy any public record which has been improperly destroyed shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award significant penalties to requestors who were denied records because of premature destruction. In addition to these penalties, attorney fees, and court costs, agency employees found to be knowingly and willfully responsible for the improper destruction of public records shall also be subject to fines or imprisonment or both in accordance with RCW 40.16.010 or RCW 40.16.020.
- **Require Independent Review Before Destruction of Records** – Consistent with the spirit and intent of RCW 40.14.060 and 40.14.070, decisions regarding when or if public records should be

destroyed shall not be made by the same person who created the record or by any person who has a conflict of interest regarding that decision (such as being named in the record or potentially being held accountable for actions or decisions documented in the record). Destruction of records should only occur after independent objective review of their content and importance by the state or local records committee. Illegal destruction of records shall be punishable in accordance with RCW 40.16.010 or 40.16.020.

- **Clarify That Records Are Public Regardless of Physical Custody** – RCW 42.56.010(2) currently defines “public records” as “prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics”. This definition should be expanded to encompass records that are prepared, owned, used, or retained by any employee or contractor acting *on behalf of* any state or local agency, regardless of the physical location of the record or, in the case of electronic records, where they are stored. It should also be clear that employees or contractors have the same obligation to protect records from destruction, damage, or misuse as if the public records were in the physical custody of the state or local agency on whose behalf they are possessed.

Require Recording of Executive Sessions – Require agency boards to make audio recordings of *all* executive sessions. Such recordings, as well as minutes or notes of executive sessions, shall be exempt from disclosure under the Public Records Act unless a lawsuit is filed challenging the propriety of the executive session, in which case the recordings or minutes shall be reviewed by a court *in camera*. If the challenged executive session is found to have included improper discussions, the portions of the recording or minutes of the meeting that should have been public shall become available to the public. Such recordings or minutes are *beneficial* to agencies in that they can establish that an executive session was in fact proper, and can also be used to document legal advice received or other statements made during the executive session should a subsequent dispute arise over the correctness of such advice or content of the discussions that occurred during the session.

Preserve Disclosure of Public Employee Dates of Birth – House Bill 1942 (2007) proposes to amend RCW 42.56.250(3) to exempt the birthdates of public employees from disclosure. The Coalition ***strongly opposes*** this change. The proposal was in response to recent court case in which the City of Seattle was required to release the full birthdates of employees in response to a request from the Seattle Post-Intelligencer. The mayor of Seattle sent a memo to all city employees complaining about the decision and raising fears of identity theft, despite the fact that birthdates are already widely available from a number of sources and no large-scale identity theft has occurred as a result. Evidence clearly shows that the incidence of identity theft due to the availability of birthdates in public records is vanishingly small. The exemption of public employee birthdates from disclosure will make it much more difficult to match employee data to other lists to verify employee qualifications or disqualifications, such as lists of college graduates, licensees, felons, sex offenders, and a large number of other sources of investigation.

Preserve Disclosure of Pipeline Mapping Data – House Bill 1478 (2007) proposes to amend RCW 42.56.330 to exempt from disclosure high-resolution data regarding the location of pipeline facilities that has been provided to the Washington Utilities and Transportation Commission by pipeline companies, allow the disclosure of only low-resolution maps. The Coalition ***strongly opposes*** this change. The pipeline companies have asserted that availability of the high-resolution data would provide information useful to terrorists intent on damaging pipelines to injure the public and disrupt the economy, even though the pipelines are well-marked and pass through remote areas that are infrequently monitored. The actual result of withholding the high-resolution data from disclosure would be to prevent experts associated with pipeline watchdog groups from independently verifying the safety measures needed to protect the public from events such as the Bellingham pipeline explosion and to verify that regulatory actions are consistent with the law. Permitting the withholding of this data in the name of “security” because it *might potentially* be useful to terrorists or in responding to terrorist acts would set a dangerous precedent that could permit large numbers of public records to be withheld from disclosure on the same basis.

Public Records

Stop Agency Abuse of Third-Party Injunctions – Several public agencies have been abusing the provision of RCW 42.56.540 that enables the agency to notify a person named in a record or to whom the record pertains. Rather than asserting that the record is exempt from disclosure and defending that assertion directly – which would expose the agency to having to pay the requestors attorney’s fees, court costs, and penalties under RCW 42.56.550(4) – agencies have been inviting persons named in records, often their *own agency employees*, to file for an injunction under RCW 42.56.540 and claim that release of the records would “not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions”. The agency then intentionally *fails* to mount a meaningful defense against the named person’s motion, even sometimes allowing the injunction to be issued by default, and thereby avoiding any responsibility for fees, costs or penalties. This is an abuse of process, and a loophole in the law that must be closed. When an agency notifies persons named in a record or a lawsuit is filed by a person named in a record to block release, the agency must notify the requester, and requesters must always be permitted to intervene in such cases. If the requester is sued rather than the agency, the agency must be brought into the lawsuit by the party seeking the injunction as an essential party. Agencies so sued must either defend the citizen’s right of access to the records under the Public Records Act or clearly state its opposition to release and the applicable exemption from disclosure. If the agency opposes release of the records and does not prevail, the agency must be subject to the same fees, costs, and penalties under RCW 42.56.550(4) as it would have been if the agency had original opposed the release rather than the action having been initiated by a party named in the records.

Create an Independent Open Government Ombudsman – While the actions of the Attorney General to create an open government ombudsman are commendable, the fact remains that the primary mission of the Attorney General is to represent state agencies in legal actions, including defending agencies who claim exemption of public records from disclosure. This creates a clear conflict of interest that can prevent an ombudsman in the Attorney General’s office from acting independently in the interest of protecting the public’s right to know. The legislature should create an *independent* open government ombudsman to provide information on public records and open public meetings to state and local agencies and the public; represent the public in obtaining public records from state and local agencies; maintain a web site to assist the public in obtaining information and public records; and prepare model employee orientation and training materials on open government principles for agencies and elected officials.

Clarify That Public Records Requests Must Be Accepted in Any Form – Agencies must accept requests for public records by any means of communication, including but not limited to verbally in person, verbally by phone, in writing by mail or express service, by fax, by email, and through a web form. Every agency shall provide a simple form for making requests, which shall be available to requestors in paper form or by electronic download from the agency web site, but the requestor is not required to use the form provided. Every agency shall prominently display the contact information of its public records officer and procedures for making requests on the agency web site, in agency directories and other publications, and in agency offices.

Require Records to Be Provided in the Format Most Useful to the Requester – Agencies shall provide requested information in the form most useful to the requestor. If information can be provided in a choice of formats, agencies shall ask the requester for their preference rather than making an assumption of the form desired. Electronic records shall be provided in electronic form whenever possible; agencies shall not convert electronic records to paper form simply for the purpose of redaction or to establish a per-page copying charge. Agencies shall not deny access to electronic records on the basis that an extract of a subset of the data in an existing database constitutes “creating” a new record; electronics records which contain some exempt information shall be provided in an electronic form in which the exempt fields have been removed, rather than refusing to disclose the entire record, so long as such extracts can be provided through simple operations that do not require extensive programming. Electronic records shall be provided in commonly-used standard interchange formats such as text, comma-separated values, XML, or formats of commonly-available commercial software, enabling the data to be easily searched and processed, and not requiring

requestors to license expensive or custom software to make use of the data. Data shall not be converted to non-searchable formats such as secured PDF or TIFF files when it is possible for the data to be available in searchable form. The *potential* for conversion or redistribution of the data shall not be a factor in deciding the format in which it is made available to the requester. Agencies shall *not* charge “fifteen cents per page” for records that are in electronic form (see RCW 42.56.070(7) and 42.56.120), but are required to charge only the actual cost of extracting the data, writing it to a diskette or CD, and the actual cost of the media. Records requested by email that can be responded to by email (such as by attaching a file) shall be responded to by email. If a request is made for a copy of a record and that record is available for free online download from the agency’s web site or another online location, the requestor will always be informed of the availability of the online download instead of being forced to pay for a paper copy or physical electronic copy – unless they specifically request a physical copy. Whenever possible, electronic documents shall be provided in a file format that can be read by screen reading software used by persons who are blind or have low vision.; in particular, creation of PDF files by scanning of paper documents is discouraged when it is possible for original source documents to be made available or when PDF files can be created from source documents that permit the files to be accessed by screen reading software.

Require Agencies to Maintain a Log of Public Records Requests – To facilitate Public Records Act compliance audits by the State Auditor, agencies shall keep a log of public records requests they receive and process. The log shall include the source of the request, the timeline of interactions on the request, the name and contact info for the requester, a description of what was requested, what was provided in response to the request, the form in which the records were provided, the specific exemption cited for any denials, the exemption cited for any redactions, the amount charged for copies (or media for electronic records), and the disposition of the request. Agencies shall retain as public records all correspondence related to each request, including correspondence to and from attorneys regarding what information is or is not exempt from disclosure. The log and all related information are discloseable public records. The log shall have a searchable index so that portions of it can be requested based on various criteria. The log and index, and records used to create the log, cannot be destroyed but must be retained permanently.

Expand the Definition of Legislative Records Available for Inspection and Copying – RCW 42.56.010(2) and RCW 40.14.100 define “legislative records” in a way that excludes broad swaths of records that ought to be available to the public. The apocryphal quote oft attributed to Otto Von Bismarck regarding observation of the making of laws and sausages notwithstanding, the public is entitled to be fully aware of the process by which its laws are made. These limitations on the availability of legislative records should be eliminated and all such records available except for the narrow exemption in RCW 42.56.050 regarding information that would be highly offensive to a reasonable person and not of legitimate concern to the public.

Require Open Government Training for Government Employees and Elected Officials – *Every* government employee and elected official shall receive basic training during initial orientation at the beginning of their government service, and during mandatory annual in-service training meetings, regarding the principles of open government and their responsibilities under the law. Public records officers and other employees who have custody of records or respond to records requests will receive more comprehensive training consistent with their responsibilities. Every employee will understand that every record belongs to the public and is required to be accessible to the public unless specifically exempt, that they have a duty to “provide for the fullest assistance to inquirers and the most timely possible action on requests for information” (RCW 42.56.100), that they are required under RCW 40.14 to retain *all* public records (including electronic files and email messages) unless they are specifically allowed to be destroyed under the applicable retention schedule and that there are severe penalties under RCW 40.16 for illegal destroying of records, that executive sessions are allowed only for specific purposes and the permitted purpose must be declared before each session, and other key elements of open government law.

Expand Availability of Information on Public Records Officers – RCW 42.56.580(3) current requires local agencies to make the contact information for their Public Records Officers available “made in a way reasonably calculated to provide notice to the public, including posting at the local agency’s place of business, posting on its internet site, *or* including in its publications.” (*emphasis added*). Some agencies that have web sites have been interpreting this language as permitting the omission of this information from their web sites,

even though the agency web site is the *first* place most members of the public go to find agency information. This section should be amended to require contact information for Public Records Officers to be posted in agency offices, posted on agency web sites, *and* listed in agency publications. Furthermore, local agencies should be required to publish their Public Records Officer contact information in the state register in the same manner as state agencies; the Code Reviser should maintain an online listing of Public Records Officers in the same manner as currently maintained for state agencies.

Create Individual Criminal Penalties for Willful Violations of the Public Records Act – Make it a gross misdemeanor for a public official to willfully and maliciously fail to disclose documents under the Public Records Act, similar to the individual penalties applicable under RCW 40.16 for improper destruction of records.

Consolidate Public Records Disclosure Exemptions into the Public Records Act – The creation of the “Sunshine Committee” by the 2007 Legislature is a great step forward, but so long as new exemptions can be easily slipped into any RCW section the problem of “stealth” exemptions – and the expansion of exemptions – will continue. The “other statute” language in RCW 42.56.070(1) should be *repealed*. All exemptions from the Public Records Act disclosure requirements should be contained within the Public Records Act itself, or referenced from within the PRA, to make it easier to identify exemptions both at the time they are proposed in new legislation and at the time they are used by agencies. After a reasonable implementation period to allow appropriate references to be added to the PRA to exemptions contained in other statutes, exemptions not so referenced or moved to the PRA should become null and void and the records covered become available for public inspection and copying.

Clarify That Agencies Are Prohibited From Exempting Records from Disclosure by Contract – RCW 42.56.070 requires that all public records be available for inspection and copying unless specifically exempted by statute. Nevertheless, some agencies have entered into contracts which purport to extend the statutory exemptions to encompass the terms of the contract or other records. The Public Records Act should clearly state that agencies may not withhold records from disclosure on the basis of such contractual provisions unless a corresponding statutory exemption exist, and any such contractual exemptions in conflict with statute are null and void.

Mandate Adoption of Model Rules – RCW 42.56.070 requires every agency to publish rules specifying how it will comply with the Public Records Act. Every agency should be required to update its rules taking into consideration the model rules for implementation of the Public Records Act created by the Attorney General under RCW 42.56.570 which are codified in Chapter 44-14 WAC, with such amendments and extensions as are appropriate for the individual agency. Any deviation from the model rules approved by the agency after due process and public comment shall be justified in writing.

Require Disclosure of Records of Investigations of School Employees – Records of investigations and complaints of sexual or physical abuse or harassment of students by school personnel shall be available for public disclosure. Information that would lead to the identification of the victims or witnesses must be redacted before disclosure. Such documentation shall be indexed so that parents and other concerned citizens can readily identify whether particular school district employees have been investigated.

Release Employment Applications and Resumes After Hiring of Public Employees – The public should be able to independently verify claims made by public employees about their background. RCW 42.56.250(2) exempts employment applications and resumes from being disclosed, but after a public employee is hired (especially in a senior position) such information shall be available for public examination after appropriate redaction of personal information such as might be used for identity theft (enumerated in 42.56.250(3)).

Public Meetings

Require Declaration of the Specific Purpose of Executive Sessions – Make it clear in RCW 42.30.110(2) that generic declarations of the purposes of executive sessions are not permitted, that whenever an executive session is called the chair must declare which *specific* purpose under RCW 42.30.110(1) is being invoked, and that while the executive session is in progress, no other matters of business can be discussed except what is specifically covered under the declared purpose.

Create Individual Criminal Penalties for Willful Violations of the Open Public Meetings Act – Make it a gross misdemeanor for a public official to knowingly and intentionally violate the Open Public Meetings Act. The existing civil penalty is not sufficient to deter violations, and is appropriate only when a violation is due to ignorance or negligence. A more serious penalty is required when an official knows that a meeting should be open to the public and intentionally violates the Act by holding the meeting in secret or without proper public notice.

Increase Penalties Proportional to Inflation – The \$100 civil penalty per violation of the Open Public Meetings Act has not been increased since enactment in 1971, while inflation since that time has been in excess of 600%, seriously eroding the impact of the penalty. Far too many officials consider this penalty to be an acceptable risk and are hardly discouraged from engaging in illegal secret meetings. The penalties in the Open Public Meetings Act should be increased commensurate with inflation since 1972, to at least \$600 per violation.

Require Public Notice of Changes in Regular Meeting Times or Places – The Open Public Meetings Act currently appears to allow times of regular meetings to be changed without any notice to the public. RCW 42.30.060 requires the “date” of regular meetings to be fixed, and RCW 42.30.070 requires the “time” of regular meetings to be fixed, but neither one provides for notice of changes in times. Some city councils have intentionally changed the times of meetings at which controversial subjects are to be held, without notice, with the result that interested members of the public were excluded. Except in a case of emergency, last-minute changes in meeting times should not be permitted. The same notice requirements should apply to changes in location. *Anyone*, not just the news media, should be able to subscribe to receive email notice of meeting date, time, or location changes and to receive notices and agendas of special meetings, and all notices should also be required to be posted on the agency web site if one exists.