

**Report of the
Legislative Task Force on
Public Records**

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**Final Report
December 2018**

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Legislation Establishing the Legislative Task Force on Public Records.

In 2018, the Legislative Task Force on Public Records was established in Engrossed Substitute Senate Bill 6032¹. The Senate Facilities & Operations Committee and the House of Representatives Executive Rules Committee convened a 15-member legislative Task Force to examine establishing standards for maintaining and disclosing public records for the legislative branch of government.

Task Force Members.

The Task Force is composed of members representing the following entities or organizations:

Member	Representing	ESSB 6032/Adopted Work Plan ²
Senator Curtis King (Co-chair)	Washington State Senate, District 14	The Senate Facilities & Operations Committee will appoint two Senate members from each of the largest caucuses to the Task Force based on recommendations from their respective leaders, and will designate one Senate member to serve as co-chair of the Task Force.
Senator Randi Becker	Washington State Senate, District 2	
Senator Kevin Van De Wege	Washington State Senate, District 24	
Senator Sam Hunt	Washington State Senate, District 22	
Representative Larry Springer (Co-chair)	Washington House of Representatives, District 45	The House of Representatives Executive Rules Committee will appoint two House members from each of the largest caucuses to the Task Force based on recommendations from their respective leaders, and will designate one House member to serve as co-chair of the Task Force.
Representative Joan McBride	Washington House of Representatives, District 48	
Representative Mike Volz	Washington House of Representatives, District 6	
Representative Matt Shea	Washington House of Representatives, District 4	
Ray Rivera	Deputy Managing Editor for Investigations and Enterprise, The Seattle Times	Three members representing Washington-based media sources.
Diana Kramer	Director of Student Publications and Publisher of the Daily, University of Washington	

¹ Appendix A

² Appendix B

Andy Hobbs
Editorial Director, Sound
Publishing

Toby Nixon	President, Washington Coalition for Open Government	One member representing an open government organization.
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David Ammons	Vice Chair, Public Disclosure Commission	Three members representing the public, including persons with expertise managing and accessing government records.
Candice Bock	Director of Government Relations, Association of Washington Cities	

Marty Lovinger	Attorney
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The House Executive Rules Committee and Senate Facilities & Operations Committee selected Representative Larry Springer and Senator Curtis King, respectively, as co-chairs. Administrative support and other staffing was provided by:

- Senate Committee Services and the House Office of Program Research; and
- staff from the House and Senate Democratic and Republican caucuses.

Michael Kern, Director, Chris Page, Senior Project and Development Lead, and Shelby Thomas, Legislative Records Project Intern, from the William D. Ruckelshaus Center, served as moderators.

Task Force Meetings.

The Task Force convened four meetings over the course of the 2018 interim, occurring on September 5, October 9, November 5, and December 7. Summaries of the meetings are not designed to be comprehensive or a complete transcription of the meetings, but rather a discussion of the presentations and a brief summary of each agenda item. The Task Force meeting documents and TVW archives of the meetings are available at <http://leg.wa.gov/JointCommittees/LTFPR/Pages/default.aspx>. All meetings were open to the public.

Task Force Meeting on September 5, 2018.

Members Present: Senator King (co-chair), Representative Springer (co-chair), Senator Becker, Senator Van De Wege, Senator Hunt, Representative McBride, Representative Volz, Representative Shea, Ray Rivera, Diana Kramer, Andy Hobbs, Toby Nixon, Candice Bock, and Marty Lovinger.

Constitutional Issues Regarding Legislative Public Records. Professor Steven Huefner, Moritz College of Law, Ohio State University, discussed the notion of a legislative privilege emanating from the Speech or Debate Clause of the Washington and United States constitutions. The privilege against compelled disclosure of documents applies to committee work, staff work, and documents related to the legislative process. Legislative privilege is personal to each legislator in his or her essential legislative activities. There are strong arguments that the privilege can only be waived by the individual legislator, although legislative chambers may apply internal pressure. Whether the institution may waive the privilege is an unsettled question. Legislative privilege applies only to documents in the possession of an individual member; constituents or lobbyists may be compelled to produce documents over which a legislator might claim privilege. By eliminating executive or judicial control over legislative deliberations, the privilege promotes creative problem-solving and collaboration without fear of reprisal, other than at the voting booth.

The Freedom of Information Act was drafted to not apply to Congress to avoid dealing with the interaction with federal legislative privilege. Legislative privilege in Washington could arguably be construed more narrowly than under the United States Constitution because the wording refers only to "words spoken in debate" and a freedom from liability "in any civil action or criminal prosecution."

Judicial Rules Applicable to Court Records. Judge Marlin Appelwick, Division I, Washington State Court of Appeals, discussed the development of General Rule 31.1, which governs the production of administrative records of Washington courts. Chambers records and deliberative records are excluded from production requirements. The General Rule adopts Public Records Act (PRA) exemptions, federal exemptions, and constitutional protections. One substantial difference between General Rule 31.1 and the PRA is that requestors do not receive attorneys' fees or per diem charges if records are not produced on time.

Two unique factors about the judiciary informed the deliberations leading to the development of General Rule 31.1. First, judges have an ethical obligation to prevent anyone from interfering in the deliberation of a case under rules of professional conduct. Judges would have to personally review each external and internal document, which would be impractical with judicial caseloads. Additionally, ex parte contact by judges is prohibited and, like other forms of judicial misconduct, subject to investigation and enforcement by the independent Commission on Judicial Conduct.

Public Records Laws in Other States and Applicability to Legislative Records. Pam Greenberg, from the National Conference of State Legislatures, discussed statutes in other states governing the disclosure of public records by legislatures. There are three categories of state statutes:

- states which specifically include state legislatures in their public records acts, such as Delaware and Montana;
- states where the law has general references to government agencies, such as Georgia; and
- states where the law specifically excludes the legislature from the public records act, such as Oklahoma, or have a separate public records law for the legislature, such as California.

There are variations in how states treat legislative deliberative processes. Montana, for example, has no deliberative process exemption for records of its legislature, unless privacy would be violated. States also vary on the treatment of constituent correspondence: California closed constituent correspondence from public disclosure, while Colorado exempts correspondence from disclosure where the constituent would have a reasonable expectation of privacy or made a request for assistance. One consistent trend across states is that statutes are content-based, rather than format-based, so electronic records are subject to disclosure unless exemptions apply.

Moderated Discussion. Chris Page, Senior Project and Development Lead, William D. Ruckelshaus Center, moderated a discussion among the members relating to the disclosure of public records and exemptions.

Task Force Meeting on October 9, 2018.

Members Present: Senator King (co-chair), Representative Springer (co-chair), Senator Becker, Senator Van De Wege, Representative McBride, Representative Volz (by phone), Representative Shea, Ray Rivera, Diana Kramer, Andy Hobbs, Toby Nixon, David Ammons, Candice Bock, and Marty Lovinger.

Constitutional Issues Regarding Public Access to Information. Bruce Johnson, from Davis Wright Tremaine LLP, discussed the history of the First Amendment right to public access to government proceedings and the origins of the federal Speech or Debate Clause. Mr. Johnson discussed court cases that interpret the scope of the federal Speech or Debate Clause and the definition of "legislative acts." Mr. Johnson explained privileges that are implicit in the federal Speech or Debate Clause: the evidentiary privilege, which prohibits evidence of legislative acts

from being used against a member; the testimonial privilege which may be invoked when a member is questioned about their legislative act; and immunity from liability. Mr. Johnson further discussed court cases interpreting whether the federal Speech or Debate Clause prohibits the disclosure of privileged documents. He presented on the Speech or Debate Clause found in the Washington State Constitution and how it compares to the federal Speech or Debate Clause. Mr. Johnson discussed First Amendment rights in relation to speaker-based or content-based distinctions.

Principles Related to Exemptions from Public Disclosure. Katherine George, from Johnston George LLP, and Eric Stahl, from Davis Wright Tremaine LLP, presented as a panel on principles related to public disclosure exemptions. Ms. George discussed the history of exemptions to public disclosure, including provisions related to Initiative 276. She presented on the original ten exemptions approved by voters under Initiative 276, and explained that the exemptions were designed to protect private information not having to do with the conduct of government and to prevent harm to the government's own functioning. Ms. George stated that there has been an explosion of the number of exemptions since the adoption of Initiative 276 in 1973. She provided the Task Force with suggested key exemption principles.

Mr. Stahl discussed the principles behind the presumption of openness and explained the right to privacy. He presented on three main principles to follow when adopting policies related to public disclosure. First, records are presumed to be subject to disclosure and any exemptions must be narrowly construed. Second, rules for disclosure and exemptions should apply to the Legislature to the same extent that they apply to state agencies. Third, communications with a legislator or legislative staff about legislative work are matters of public interest and should be disclosable. Ms. George and Mr. Stahl explained the scope of various exemptions.

Moderated Discussion. Chris Page, Senior Project and Development Lead, William D. Ruckelshaus Center, moderated a discussion among the members relating to the disclosure of public records and exemptions.

Task Force Meeting on November 5, 2018.

Members Present: Senator King (co-chair), Representative Springer (co-chair), Senator Becker, Senator Hunt, Representative McBride, Representative Volz (by phone), Diana Kramer, Andy Hobbs, Toby Nixon, David Ammons, and Candice Bock.

Local Government Administration of the Public Records Act. Derek Young, Pierce County Councilmember, described the time and money spent on public records requests, and referenced a Joint Legislative Audit and Review Committee (JLARC) study showing significant compliance with the PRA. In Councilmember Young's opinion, abusive requests are the price of government.

Pat Johnson, Mayor of Buckley, discussed the need for public officials to exercise caution with email and social media. She described the increasing complexity of records. Regarding problems with abuse, Mayor Johnson suggested a statewide approach to dispute resolution should be explored. She views the Task Force as an opportunity to improve the PRA.

Both Councilmember Young and Mayor Johnson recommended that there should be a consistent public records policy for the state and local governments.

Application of Public Records Act Exemptions. Sara Di Vittorio, Deputy Prosecuting Attorney from Snohomish County, gave a brief overview of the PRA and certain exemptions, including the exemptions for personal information and deliberative process records. Ms. Di Vittorio then analyzed hypothetical legislative documents under the PRA and indicated what material would likely be redacted. These included letters from constituents, emails between members and staff, emails between members, and others. She explained that no general privacy exemption exists in the PRA and that the PRA analysis is often fact- and document location-specific. Redactions under the deliberative process exemption only apply while the deliberative process is ongoing.

Public Comment. Penalties in the PRA take the place of damages and allow ordinary citizens to learn about their government. Having the penalties support some other function would not reduce the awards and would harm ordinary citizens. There are a few abusers but usually PRA penalties are sought when the government is deliberately denying records.

The PRA should not apply to the Legislature. If it were to apply, there should be changes to protect constituent communications.

Upon invitation of Co-chair Springer, Representative Pollet addressed sensitive personal casework information. He stated that personal identifying information provided to Child Protective Services as part of a request for help, for example, is exempt under the two-part privacy test. If the same information is provided to the Legislature, he believes that courts would find that the information is exempt but, to be safe and very clear, this could be done in legislation. He distinguished a request for help from a communication that states why the Legislature should change the law and gives a personal example.

Moderated Discussion. Chris Page, Senior Project and Development Lead, William D. Ruckelshaus Center, moderated a discussion among the members relating to the disclosure of public records and exemptions.

Task Force Meeting on December 7, 2018.

Members Present:

Moderated Discussion. Chris Page, Senior Project and Development Lead, William D. Ruckelshaus Center, moderated a discussion among the members relating to the disclosure of public records and exemptions.

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Appendix A – ESSB 6032 Budget Proviso

NEW SECTION. Sec. 925. A new section is added to 2017 3rd sp.s. c 1 (uncodified) to read as follows:

(1) The senate facilities and operations committee and the house of representatives executive rules committee shall convene a legislative task force to examine establishing standards for maintaining and disclosing public records for the legislative branch of government.

(2) The meetings of the task force must be scheduled and conducted in accordance with the requirements of both the senate and the house of representatives. The expenses of the task force shall be paid jointly by the senate and the house of representatives. Task force meetings and expenditures are subject to approval by the senate facilities and operations committee and the house of representatives executive rules committee, or their successor committees.

(3) Legislative members of the task force may be reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members, except those representing an employer, governmental entity, or other organization, are entitled to be reimbursed for travel expenses as provided in RCW 43.03.050 and 43.03.060.

(4) Staff support for the task force shall be provided by the senate committee services and the house of representatives office of program research. Meeting facilitation and related services for the task force shall be provided by the William D. Ruckelshaus center as specified in section 603(25) of this act.

(5) The task force shall report its findings and recommendations to the appropriate committees of the legislature by December 1, 2018.

(6) This section expires December 31, 2018.

Appendix B – Work Plan

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LEGISLATIVE TASK FORCE ON PUBLIC RECORDS

OVERVIEW

During the 2018 interim, the Senate Facilities & Operations Committee and the House of Representatives Executive Rules Committee will convene a 15-member Legislative Task Force on Public Records to "examine establishing standards for maintaining and disclosing public records for the legislative branch of government."

Membership

The Senate Facilities & Operations Committee will appoint two Senate members from each of the largest caucuses to the Task Force based on recommendations from their respective leaders, and will designate one Senate member to serve as co-chair of the Task Force.

The House Executive Rules Committee will appoint two House members from each of the largest caucuses to the Task Force based on recommendations from their respective leaders, and will designate one House member to serve as co-chair of the Task Force.

The Senate Facilities & Operations Committee and the House Executive Rules Committee will jointly appoint the following additional members of the Task Force, after consulting with representatives of the media and open government organizations:

- Three members representing Washington-based media sources;
- One member representing an open government organization; and
- Three members representing the public, including persons with expertise managing and accessing government records.

All members will be expected to participate in the Task Force in good faith and in a respectful manner.

Operations

The Task Force will hold up to four meetings in Olympia. The Task Force meetings will be scheduled and conducted in accordance with the requirements of both the Senate and the House, and are subject to approval by the Senate Facilities & Operations Committee and the House Executive Rules Committee.

The Task Force meetings will be moderated by the William D. Ruckelshaus Center. Staff support for the Task Force will be provided by Senate Committee Services and the House Office of Program Research.

The Task Force will report its findings, activities, and any findings on which there was consensus by the entirety of the Task Force to the appropriate committees of the Legislature before the 2019 session.

SCHEDULE Date	Location	Type	Subject	Committee
August	Olympia	Work Session	Legislative and other branches of government	Full Committee
September	Olympia	Work Session	The value of open government	Full Committee
November	Olympia	Work Session	State and local administration of public records laws	Full Committee
December (House Committee Assembly)	Olympia	Work Session	Possible findings	Full Committee

DESCRIPTION

Background

The Public Records Act (PRA), enacted in 1972 as part of Initiative 276, requires that all state and local government agencies make all public records available for public inspection and copying unless certain statutory exemptions apply. Courts, however, interpret the PRA as inapplicable to the judicial branch. See Nast v. Michels, 107 Wn.2d 300 (1986). The Supreme Court has adopted its own rules for judicial records.

Over 500 specific references in the PRA or other statutes remove certain information from application of the PRA, provide exceptions to the public disclosure and copying of certain information, or designate certain information as confidential. The provisions requiring public records disclosure must be interpreted liberally while the exemptions are interpreted narrowly to effectuate the general policy favoring disclosure.

For purposes of the PRA, agency means all state and local agencies, which includes every state office, department, division, bureau, board, commission, or other state agency. In January 2018, the Thurston County Superior Court held, in a case currently pending appeal before the Washington Supreme Court, that the offices of individual state legislators are state offices, and thus agencies, for the purpose of PRA interpretation, subject to the PRA's disclosure

requirements. The court also held that the Legislature itself and its chambers, administered by the Secretary of the Senate and the Chief Clerk, were not agencies under the PRA.

During the 2018 session, in the Supplemental Operating Budget, the Legislature directed the Senate Facilities & Operations Committee and the House of Representatives Executive Rules Committee to convene a legislative task force to examine establishing standards for maintaining and disclosing public records for the legislative branch of government. See Section 925 of ESSB 6032 (2018).

Workplan

During the 2018 interim, the Task Force will convene four meetings. The first three meetings will focus on a specific topic and be structured in a similar manner. The agenda for each meeting will include presentations by experts to be followed by ample time for moderated discussions by members. The aim of each meeting will be to identify concerns, constraints, and opportunities for consensus.

In July, the Task Force will hold a work session focused on the legislative branch of government. The work session will include presentations by experts on:

1. Constitutional law, especially the separation of powers and the rights of constituents to privacy in sensitive communications, to function as whistle-blowers, and to petition their legislators for redress of grievances;
2. Legislative privilege and deliberative processes;
3. Judicial rules applicable to court records; and
4. Public records laws in other states and their applicability to the legislative branch.

In September, the Task Force will convene a work session focused on the value of open government. The work session will include presentations by experts on:

1. The media and its rights and responsibilities related to open government;
2. The principles supporting exemptions from public disclosure; and
3. Methods of accessing public records and obtaining other information.

In November, the Task Force will convene a work session focused on administration of public records laws by state and local governments. Topics of discussions will include deliberative process exemptions, confidentiality for victims and constituents, fees and fines, and abusive requests.

During House Committee Assembly in December, the Task Force will meet to adopt a report on its activities and any findings on which there was consensus by the entirety of the Task Force.