

Legislature's Response to Comments from Media and Open Government Advocates to Draft Workplan for PRA Task Force

1. At the bottom of page 2 where it says, "a specific definition of open records applies to the Legislature, " we disagree. The AG also disagrees, based on his amicus brief from January, which stated that the PRA has "explicitly covered state legislative offices along with all other state offices" since 1995. That particular sentence about a particular definition covering the legislature is, in my view, part of a losing argument before the Superior Court in Thurston County. I would just strike that sentence, because it is unnecessary. The remainder of that section, where it talks about the Superior Court's ruling in the dispute, is accurate and non argumentative. I don't see any point in raising this issue and creating a disagreement where none need exist.

The sentence will be removed.

2. It is unclear to me who will choose the "experts" for the various hearings/meetings. That is a critical role, and I think we would like to participate in deciding who advises the task force.

It is the Legislature's intent in sharing the draft work plan that the media and open government advocates feel a sense of ownership over the agenda. In particular, the entire second meeting is devoted to issues affecting the media and concerns of open government advocates. We welcome your suggestions for experts in those areas, and feedback on the topics we've outlined for that discussion.

We are reaching out to the National Conference of State Legislatures and the Attorney General's Office for experts in the other topics identified. Assistance will be provided by Senate Committee Services and the Office of Public Research (more about these entities below, under Comment 4).

3. For the July meeting there is a reference to "legislative privilege," when the Superior Court I believe has ruled their essentially is none as it applies to members of the Legislature. I think that wording is argumentative and, for the moment, inaccurate.

In this context, "legislative privilege" refers to the legal concept embodied in Article II, Section 17 of the state Constitution, or the state Speech or Debate Clause. The Speech or Debate Clause in our state and nationally protects not just oral speech, but also documentary evidence of legislative deliberations. The Lanese ruling did not address the issue of legislative privilege. Its applicability to our Public Records Act has largely gone

untested due to the traditional interpretation of the PRA as applied to the Legislature.

This discussion aligns with Item 8 below, regarding an “exemption of communication between or among legislators.” While we note your concerns with this topic, they seem appropriate for a robust discussion at the Task Force.

4. Regarding the December report, who actually drafts a report on the matters upon which we find consensus, if any? Is that staff of the Ruckelshaus Center, or is that legislative committee members and/or their counsel?

The report would be drafted by professional nonpartisan staff from the House Office of Program Research (OPR) and Senate Committee Services (SCS). The report would be subject to review and approval by the task force.

OPR and SCS provide nonpartisan staff support for task forces as well as standing committees. They conduct research, provide analysis, draft legislation, and provide administrative support. They regularly draft proposed task force recommendations and reports. The members of task forces and standing committees approve final recommendations and reports, consistent with applicable rules and operating guidelines. Nonpartisan staff remain personally and professionally neutral. Their work is expected to be objective, analytical, and free of bias.

The duties of nonpartisan staff (“Committee Counsel”) are distinctly different from those of House Counsel and Senate Counsel.

5. I think it may be easier to get to "findings" than "recommendations." Recommendations in some ways are pointless, when the Supreme Court decides what the law is. That court may be the best place for resolution of many of these issues.

We will make that change.

6. There is repeated mention in the draft of the need for privacy in constituent communications. Who the “experts” are in this discussion is critical. This doesn’t seem to be an issue in local government or the executive branch agencies; why should it be for state legislator communications with constituents? Selective experts might support such a need for confidentiality; others (and widespread experience) might negate that assertion.

As is our desire for all agenda items, if you have suggestions for specific experts on this issue, we welcome your input. We do intend to hear from representatives from local government and

executive branch agencies, so we anticipate learning from them whether this has been an issue, and why or why not.

7. We're curious as to why there is no mention of an enforcement mechanism if the legislature violates the PRA. We find it unacceptable that if the legislature fails to disclose records that the only recourse is to complain to a committee made up of legislators and staff, with no penalties, no attorney fees or costs, no appeal to any court or objective independent review of any kind. Any law needs to have teeth or it will be ignored with impunity.

This is not a discussion about a bill. We will not be analyzing 6617.

8. Likewise there needs to be broad "expert" discussion of any assertion of an exemption of communication between or among legislators. It doesn't exist in the law, which plainly says legislators can't be sued or otherwise punished for things they say in debate. There is no exemption for such communication among local government officials and they seem to function; we see no reason for such an exemption for the legislature.

See discussion above regarding Comment 3. There will be expert discussion on this topic.

9. There is some question about whether the Legislature needs its own section of the PRA. If there are reasonable enforcement mechanisms in a separate part of the act that covers the legislature, that would make a separate section more acceptable.

This is not a discussion about a bill. We will not be analyzing 6617.

10. The draft seems concerned about having one representative from the print press, one from broadcast and one from an internet outlet. That seems nonsensical in an age when the legacy newspaper newsrooms in the state are presently the largest, most expert and most prolific digital media in the state. Those print/digital newsrooms also possess the most expertise in using the public records Act. You could find three good journalists (print/digital and broadcast) who know the act and could represent the interest of the media without dividing it by antiquated and outdated categories such as "broadcast" and "print." The most important thing is that the representatives of the media be people who know, understand and use the public records act in their work. It might also be useful to name alternates, or to allow for the participation of alternates, should principals be unable to make all of the meetings.

It was not our intent to be so prescriptive, only to ensure a wide breadth of perspectives. We have received your recommendations for task force members from the media and open government organizations, and thank you for your input.

11. We have some concerns about the makeup of the task force. Will the public members be truly representative, or will they be cherry picked to support the perspective of legislative leadership on this issue?

It is our intent to have the public members represent a range of perspectives. Because the findings of the Task Force must be adopted by a consensus vote, there is no danger in drowning out a “minority” voice, on either side of the issue.

12. Toby Nixon is the obvious choice from the open-government community. Toby has seen this issue from multiple perspectives, each of which he brings to his views on the matter.

Thank you for your recommendation.