

State lawmakers should be held to same open public disclosure requirements as local officials

By Jason Mercier, Director, Center for Government Reform

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Key Findings:

Access to public records is critical for the public to hold officials accountable.

Thanks to public records, we learned the true reason Seattle officials passed a local income tax was to get the state supreme court to authorize an income tax statewide.

A recent court ruling and Attorney General opinion reaffirm that the legislature does not have a special exemption to people's right to public records disclosure.

All that changed, however, due to swift passage of SB 6617, which seeks to exempt lawmakers from public records requests.

The bill was introduced, heard in a "Work Session," and passed in less than 48 hours, with almost no public notice or comment.

Bills should be passed using a deliberate process with transparency, public notice, formal hearings and ample chance for public input.

State lawmakers should be held to the same standard as every local lawmaker; the state should not set up a double standard for public disclosure.

Introduction

Open access to public records is a critical tool for the public and is absolutely necessary to hold public officials accountable. Without public records access we are at the mercy of whatever those in power want us to know, and what they want to keep secret. I prefer following the advice of President Reagan, who said "Trust but verify...watch closely and don't be afraid to see what you see."¹

1 "Farewell address to the American people, President Ronald Reagan, January 11, 1989, at <http://www.nytimes.com/1989/01/12/news/transcript-of-reagan-s-farewell-address-to-american-people.html?pagewanted=all>.

This is what public records allow us to do. Consider the recent example in Seattle. Without public records we would be left to believe that the reason Seattle enacted an income tax was out of fear of something President Trump might do.

Thanks to public records, however, we now know without a doubt that the true motivation and scheming of Seattle officials was to set up a lawsuit to see if the state supreme court would allow a statewide income tax without the people first approving a constitutional amendment.²

Using public records to hold the legislature accountable

After untangling the web of true intentions behind Seattle's income tax, I planned to do the same concerning the current proposal in the legislature for HB 2967, a bill to impose a capital gains income tax in Washington state.³ When legislative session ended I was going to submit a public records request to learn what lawmakers really thought and were crafting.

Was this proposal really about property tax cuts or, like Seattle, was it an attempt to set up a test case to get the state supreme court to authorize an income tax that voters do not want? Do lawmakers not understand what an excise tax is or is this effort one of deceit?

To find out, I was going to be able to send a records request because of a recent court ruling and legal opinion from the Attorney General reaffirming that the state legislature does not have special rights when it comes to

2 "Local income taxes are illegal, but that's not stopping Seattle," by Jason Mercier, *The Seattle Times*, November 3, 2017.

3 HB 2967, to ask the state's citizens to reduce the state property tax levy and replace it with the capital gains excise tax, Washington state legislature, 2017-18 Session, introduced January 30, 2018, at <http://app.leg.wa.gov/bill/summary?BillNumber=2967&Year=2018>.

people's right to know and is subject to public records disclosure.⁴

State lawmakers exempt themselves from public disclosure law

In a blink of an eye, however, all that changed thanks to SB 6617, (a bill "concerning records disclosure obligations of the legislative branch").

Notwithstanding the court ruling, several bills were introduced this session to reaffirm that the legislature has to play by the same public records rules as everyone else.⁵

None of those bills were acted on by lawmakers this session. One did get a public hearing, but even that was not easy with the bill being added, dropped, and then added back again to a late-January hearing in the Senate State Government, Tribal Relations and Elections Committee.

By Friday, February 23rd, however, lawmakers passed and sent to the governor a brand new bill, just introduced the day before, to entirely vacate the court ruling that said lawmakers are subject to public records disclosure in their official work.

Here is how Toby Nixon, President of Washington Coalition for Open Government, felt about this new development:

"On Wednesday, after 4PM, Washington Coalition for Open Government received notice of a legislative work session Thursday at noon (less than 20 hours notice) on a TERRIBLE bill that the legislature is proposing to jam through with no meaningful public engagement, that would let them withhold any public record with no opportunity to challenge them in court (just in a legislative committee).

They have an emergency clause on it, so there would be no possibility of a referendum before the bill goes into effect

⁴ "Washington attorney general says lawmaker records are subject to public disclosure," by Rachel La Corte, *The Seattle Times*, January 10, 2018.

⁵ Examples include HB 2255, HB 2886 and SB 6139, Washington State Legislature, 2018 Regular Session.

-- it would take an initiative to overturn it. And they declare it to be retroactive, so they can try to make the existing legislative records court case (which they lost and are appealing) just go away. And we're hearing that they think they have the votes to override a gubernatorial veto.

This is despicable. It is an outrage. It is a ridiculous assault on transparency."⁶

Governor Inslee refuses to issue veto threat

Governor Inslee was asked if he would veto SB 6617 and allow access to public records produced in the legislature.

"When asked if he would sign such a measure, Gov. Jay Inslee said he hadn't yet seen the bill but that he believes lawmakers 'could succeed in their duties while being fully transparent like the rest of state government.'

But he noted that if the measure passes both chambers with two-thirds of lawmakers voting in support, a veto would be futile, since the Legislature would just override it."⁷

It is odd to hear the governor make a veto decision based on the vote total of a bill since just last year he vetoed a Business and Occupation manufacturing tax cut that was part of the state budget deal saying it was adopted in a non-transparent way.

The fact that the tax cut received a supermajority vote of lawmakers did not stop him from vetoing it.⁸ The tax-cut measure passed the Senate by a vote of 33 to 16 and passed the House by a vote of 83 to 10.

In his veto message the governor said,

⁶ "Feeling angry," by Toby Nixon, Facebook post, February 21, 2018, at <https://www.facebook.com/toby Nixon/posts/10156097354303698>.

⁷ Washington state lawmakers introduced bill to circumvent public records ruling, by Rachel La Corte, *The Seattle Times*, February 21, 2018.

⁸ SSB 5977, relating to revenue, partially vetoed by Governor Inslee on July 7, 2017, Washington State Legislature, at <http://app.leg.wa.gov/billsummary?BillNumber=5977&Year=2017>.

“...tax reductions should be considered in a thoughtful, transparent process that incorporates public input...”⁹

The process for passing SB 6617 has been even less transparent than the one used to pass last year’s Business and Occupation tax cut. That effort, unlike SB 6617, actually had a public hearing and committee action first.

Reducing the right of appeal

The horrible process that unfolded for adoption of SB 6617 aside, the most problematic part of the bill is how citizen appeals would be handled when public records requests are denied. Under the current law, if a public official denies a records request a citizen has the right to challenge that decision before an independent judge in court.

Under Section 108 of SB 6617, any appeal for legislative records denial could not go to court but instead would be heard and administered by entities in the legislature. At a minimum, any appeals should be handled by a truly independent party in the courts, not by the employees of the very officials who are denying public access to the records.

Short-circuiting the legislative process

Whether or not one supports the full details of SB 6617, one thing everyone should be able to agree on is that the process used to adopt it is totally unacceptable. Here is a summary:

- On the afternoon of February 21st the text of SB 6617 was posted online;
- On the evening of February 21st, notice of a Work Session (not a formal hearing) to be held the next day was released.
- No public committee hearing or committee vote was held;

- The full Senate and House adopted the bill and sent it to the governor on February 23rd.

The entire process of introducing bill text, holding a non-voting “Work Session,” and passage by both houses of the legislature took less than 48 hours.

Conclusion

The reason there is supposed to be five-day notice requirements and committee action before full floor votes is to provide time for public involvement in the enactment of state policy. Even during the legislative session, a person should be able to miss two days of legislative action without a brand-new bill being adopted before anyone notices.

We do not allow elected officials at the local level to adopt policy this slipshod way. Why would the public tolerate this type of non-transparent and hasty lawmaking from the legislature with little public involvement?

There is a better way to adopt bills, using a deliberate process with transparency, public notice, formal hearings and ample chance for public input.

The bottom line is that SB 6617 was passed with lightning speed and sent to the governor, which raises an essential question: Should state lawmakers be held to the same records disclosure requirements as every local lawmaker, or should the state set up a double standard for public disclosure?

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Reform.

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⁹ “Veto message on SSB 5977 (which included proposed B&O tax cut),” Governor Jay Inslee, Washington State, July 7th, 2017, at <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Veto/Senate/5977-S.VTO.pdf>.