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Washington State's Public Records Act: A Battle in the 2018 Legislature and Beyond

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Abstract

This case study documents the battle over the Washington State Public Records Act, which raged from 2017 through the end of 2019, reaching a crucial point through an extraordinary combination of citizen activism, journalistic pressure, and court action. The act, adopted in 1972 by a voter initiative, covers all "agencies," but state legislators rejected the classification and refused to honor records requests. Journalists successfully challenged the Legislature in court, and in response lawmakers attempted to update the act to allow for secrecy, but failed. Lessons learned from the scuffle may be applied by legislators and transparency advocates in Washington state and throughout the country.

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Introduction

One key to preserving a healthy democracy is for the governed to have the right of access to government information, and thus oversight. The 1976 U.S. Supreme Court ruling *Buckley v Valeo*, regarding disclosure of campaign contributions and election expenditures in a post-Watergate America, quoted a Supreme Court justice of a previous generation, Louis Brandeis, observing that “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman” (Brandeis, 1976, p. 62).

Besides the Freedom of Information Act covering federal agencies, all 50 states and the District of Columbia have some sort of public records laws, of varying history and effectiveness. A recent examination by Mulvey and Valvo shows that only 12 states do not permit access to legislative records, either by statute or legal precedent. Thirty-eight have statutes that provide at least some access to legislative records (Mulvey and Valvo, 2019). Many of the earliest access laws came about after prodding by media and citizen activists. For example, newspaper associations in California advocated for open-records legislation approved in 1953, and a chapter of Sigma Delta Chi (now the Society of Professional Journalists) in Florida promoted the first legislation in 1957 (Jones, 2011).

This paper examines the status of access to legislative records in Washington state, focusing on the impact of a recent battle that saw the people of the state exercise their right to speech, press, and petition inspired by the same spirit with which the people enacted the state’s Public Records Act (PRA) nearly 50 years ago.

The first section of this article reviews the history and origin of the Act, which provides insight into the motivation and methodology of the citizenry seeking to ensure their continued knowledge and the means of acquiring it. The second section describes the Legislature’s recent effort to categorically exclude itself from disclosure laws, and the response of the people to that action, which was reminiscent of the campaign that brought the Public Records Act into existence. The third section examines the effect of this recent effort by Washingtonians, as well as the likely ongoing application of such populist energy in the issue of access to legislative records.

The article concludes with lessons learned from this experience, both in Washington state and in other jurisdictions where legislators attempt to exclude themselves from public disclosure laws.

Initiative of the people

Washington’s Public Records Act (RCW 42.56) was enacted in 1972 as part of a broad government transparency ballot initiative in 1972 (Kramer, 1972a). Initiative 276 was written and promoted by citizen activists in the early days of Watergate on the national stage, and the people of the state demanded government accountability. The PRA’s intent is eloquently declared in its preamble, which states that:

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)

This introduction describes the intent and motivation of the proposal that became the PRA, and it was introduced as a ballot issue covering a number of related issues. The descriptive title of the initiative was as “an act relating to campaign financing, activities of lobbyists, access to public records, and financial affairs of elected officials and candidates.” It proposed disclosure of the origin of campaign contributions, setting limits on donation amounts, regulating lobbyist activities and establishing the Public Disclosure Commission that continues to operate to this day (Kramer, 1972b).

“Our whole concept of democracy is based on an *informed* and involved citizenry. Trust and confidence in governmental institutions is at an all time low,” the advocates wrote in the voters pamphlet, invoking without naming the scandal unfolding in the other Washington (Kramer, 1972b, p. 10). They emphasized its oversight of campaign contributions, adding: “Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying. Certain records are exempted to protect individual privacy and to safeguard essential governmental functions” (Kramer, 1972b, p. 10). The committee that wrote the voters pamphlet statement included two state legislators, Democratic Sen. Nat Washington and Republican Rep. Art Brown; as well as representatives of the League of Women Voters of Washington, the American Association of University Women, the Washington Environmental Council, and the Washington State Council of Churches.

The fourth major part of Initiative 276 related to “public records,” a term defined as including “...any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics” (Kramer, 1972b, p. 56). The initiative proposed making all such “public records” of both state and local agencies available for public inspection and copying by any person, subject only to certain exceptions relating to individual rights of privacy or limited other situations. Agencies were also expected to maintain an index all of their records. The assumption of the organizers and foes alike was that the law would apply to all three branches of government in the state – executive, judicial, and legislative (Cuillier, Dean, & Ross, 2004).

The secretary of state’s office analysis of Initiative 276 at the time noted that in 1972 access to public records was generally provided primarily through court orders, and that otherwise officials generally had sovereignty over their records: “in the case of records which the official having custody is not required by law to maintain, the disclosure or nondisclosure of information contained therein is largely within the discretion of this official” (Kramer, 1972b, p. 11).

Opposition to Initiative 276 was voiced by two Republican legislators, Rep. James Kuehnle and Sen. Charles Newschwander. Their statement against the initiative warned that “Initiative 276 threatens individual privacy” notably by requiring “public identification of everyone making a political contribution of \$5.00 or more; such personal support then becomes a matter of public records, before the election!” (Kramer, 1972b, p. 11). They predicted that the “reporting burdens of Initiative 276 and constant threat of frivolous or acrimonious citizen suits” would discourage citizen participation in politics as either candidates or supporters, writing, “It will definitely destroy incentive for anyone to run and serve in low-paying part-time offices.” The Statement Against did not address the section that became the Public Records Act.

Voters did not buy the opponents’ warnings, approving Initiative 276 with 72% of the vote.

Media sue Legislature

Since its adoption, the PRA has largely retained its core language of 1972, and certainly maintains its spirit. When the law took effect in 1973, only 10 narrow exemptions were specified, but over time hundreds more were added through legislative action, and the Public Records Act (PRA) itself has been amended and clarified, notably to accommodate digital records and to insist agencies treat them the same as any other records. Over time, the Legislature deemed itself exempt from the law, eventually coming to blows with the media in 2017.

In 2017, media representatives submitted public records requests to all legislators, seeking their calendars and specified email messages. Only a handful of legislators complied; most claimed exemption from disclosure. In September of that year, in response to the denials, a consortium of media sued the Legislature, led by The Associated Press and accompanied by Northwest News Network (public radio), KING-TV, KIRO 7, *The Seattle Times*, *The News Tribune* in Tacoma, *The Spokesman-Review* in Spokane, Allied Daily Newspapers of Washington (representing all Washington dailies), Sound Publishing (which publishes 46 community newspapers in Washington), and The Washington Newspaper Publishers Association (representing more than 100 community newspapers). The attorney general of the state filed an amicus brief supporting the journalists. Representing the group was Seattle attorney Michele Earl-Hubbard, a former journalist who has litigated numerous public records cases and attorney of record for a number of news organizations, including the WNPA.

Judge Chris Lanese of Thurston County Superior Court, in *Associated Press, et. al. v. Washington State Legislature*, ruled January 19, 2018, in favor of the media, citing “the plain and unambiguous language of the Public Records Act,” and stating that RCW 42.56 applies to the offices of the state’s senators and representatives (Thurston County Superior Court, 2018). Judge Lanese noted “the mandate that the Public Records Act be liberally construed” when declaring individual legislators’ offices were “agencies” that were in violation of the PRA by failing to respond to the media’s records requests that launched the litigation. Even if the definition of “agency” could be argued in 1972, a 1995 amendment to the PRA had applied the law to “all state agencies” including “every state office” (Revised Code of Washington, 1995, Ch 397, 1(1)), which was reinforced in subsequent amendments.

Granted, while individual legislators’ offices were deemed subject to the PRA, the court stated that the Washington State Legislature as a body overall is not an “agency,” but rather a branch of government, and therefore not subject to the PRA; this is one of the Legislature’s most vehement ongoing arguments that it is not subject to the PRA. Likewise, this is the status of the judiciary. In lieu of abiding by the PRA, Washington’s courts adopted in 2004, after several years of hearings and discussion, General Rule 31, which essentially affirms the same spirit of access, stating, “It is the policy of the courts to facilitate access to court records” and prohibits fees for viewing records at a courthouse (Washington Courts, General Rules).

Legislative battle of 2018

The Legislature, a part-time governing body that convenes annually in Olympia starting in January, had been in session for about three weeks when Judge Lanese issued his order in *Associated Press, et. al. v. Washington State Legislature*. While the state would appeal the decision

to a higher court, legislators were not going to wait around; they got to work quickly, intent on passing legislation that would negate the court ruling.

One of the legislators' concerns about the PRA applying to the Legislature was that they would have to disclose their "work product" – the behind-the-scenes discussions, drafts, and other sausage-making that lead to the proposed legislation before it "drops," or is formally introduced as a bill and assigned a number (Legislative Task Force, 2018a). One can only imagine the behind-the-scenes flurry that preceded introduction of Senate Bill 6617, which stated in its description, "An act relating to records disclosure obligations of the legislative branch." It was introduced for first reading on Thursday, February 22, 2018, when the Senate suspended the rules to place the bill on the second reading calendar immediately. Since the bill zoomed to second reading status, it was not assigned for review and scrutiny by a legislative committee; rather, the Senate immediately convened a legislative work session that provided the only opportunity for citizen comment in person in a legislative gathering. The haste of the Legislature's action did not allow dissemination of the schedule, and so only those who were nearby were likely to be able to attend and watch the proceedings.

Senate Bill 6617 stated that the Legislature was not an agency ("like the judiciary, is a branch of government") and was exempt from the PRA's disclosure requirements. It touted the Legislature's practices of transparency, noting that "the state Constitution requires the doors of the chambers to remain open" and that "presiding officers must sign legislation in open session." The legislation stated that the secretary of state was charged with maintaining "records of the official acts of the Legislature" and acknowledged that "the state Constitution also protects the right of the people to petition and communicate with their elected representatives." These obligations and practices, the bill's sponsors contended, affirmed its commitment to access. The text of the bill included this statement:

For these reasons, the Legislature intends to establish records disclosure obligations that preserve the independent deliberation of the people's representatives while providing access to legislative public records. The legislative records disclosure obligations in this act establish continued public access to specified records of the Legislature as originally codified in the public records act in 1995, as well as additional records as provided in this act. (Washington State Legislature, SB 6617)

This proposed legislative public records act mirrored some of the existing PRA provisions, such as making public records available for public inspection and limiting fees for copying documents. It would also follow the PRA standards of requiring a response within five business days, either to release the document, seek clarification, request additional time for specified and standard reasons, or to deny access and cite the legal exemption. SB 6617's specific list of coverage was:

(a) Correspondence, amendments, reports, and minutes of meetings, made by or submitted to legislative committees or subcommittees;

(b) Transcripts, other records of hearings, or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions;

(c) Internal accounting and financial records, such as records of payments in lieu of per diem or reimbursement of member expenses;

(d) Personnel leave, travel, and payroll records;

- (e) Records of legislative sessions such as journals, floor amendments and recordings of floor debate;
- (f) Bills and bill reports;
- (g) Reports submitted to the Legislature;
- (h) Final dispositions of disciplinary proceedings by the facilities and operations or executive rules committees;
- (i) Legislators' calendar notations of dates, events, and names of individuals or organizations, for meetings or events that are related to official legislative duties and that occur July 1, 2018, and thereafter;
- (j) Legislators' correspondence dated July 1, 2018, and thereafter on legislative business to and from persons outside the Legislature who are not constituents; and
- (k) Any other record designated a legislative public record by any official action of the Senate or the House of Representatives.

It is important to note that many of these items, such as bills and bill reports, transcripts and recordings of hearings, submitted testimony and reports, budget and payroll records were already treated as public records and are proactively available on state and legislative websites. The only significant addition was the Legislature's offer to make public its members' calendars and their communications with lobbyists, who were the "non-constituents" referenced in item j, and to release the final dispositions of investigations. However, the legislation would keep a range of emails confidential, including correspondence between legislators and constituents, as well as email among legislators, or between lawmakers and their staff. The bill, if passed, was to take effect immediately, limiting access to some of the documents sought by the media plaintiffs and essentially an attempt to "reverse the effect of a court ruling," according to Hugh Spitzer, acting professor at the University of Washington School of Law (O'Sullivan, 2018). The legislation didn't mention the *AP et. al.* litigation, but its threat clearly loomed above the brief discussion in the legislative chambers.

Although the Legislature touted SB 6617 as promoting access to government, the process of its introduction and consideration was hardly transparent. Because SB 6617 was not available for review until it was introduced, and then legislative action was accelerated to limit discussion and outside testimony, citizens groups were caught with short notice of the proposed law. Media reported on the bill promptly and widely, recognizing it as an attempt to address the court case. "Washington state lawmakers make speedy move to shield their records from the public," was the headline in *The Seattle Times* article posted on February 23, 2018. The subhed read, "Ever seen legislation in Olympia move this fast? With no debate, the Washington state House and Senate approved a bill Friday that makes some legislative records public starting in July — but shields records that already exist." The report from Olympia bureau reporter Joseph O'Sullivan suggested, "Forget everything you ever learned about how a bill becomes a law. Forget those public hearings, floor debates and deliberations." He traced SB 6617's race through the chambers, and related the status of the *AP et. al.* case, to which the *Times* was a party (O'Sullivan, 2018).

The Spokesman-Review, a Spokane daily newspaper, offered a biting headline: "Legislature quickly passes bill exempting itself from much of state Public Records Act." The February 23, 2018, article noted the opposition, and hinted of leadership pressure to stifle debate and keep opposition quiet: "Although 14 House members voted against the bill, none of them spoke against it or objected when the rules were set aside to bring the bill to the floor. Rep. Melanie Stambaugh, R-Puyallup, one of those who voted no, said opponents were told not to speak against it," wrote Olympia correspondent Jim Camden. "In an email to the Washington Policy Center, a

group that opposes the bill, Stambaugh wrote she was disappointed at what she called ‘a blatant disregard for transparency in the legislative process’” (Camden, 2018).

The brief deliberation and hasty process drew eloquent ire from Toby Nixon, a Kirkland city councilmember and former state legislator. “What do legislators have to hide? Why should this be done in secret, outside the normal legislative process, well after cutoffs when bills are supposed to be dead? Is it that they know this is terrible public policy and are afraid to do it in the light of day?” (T. Nixon, personal communication, February 21, 2018). He was especially distressed that the Legislature was allowing “public comment” but not testimony during the “work session,” which was not a full hearing, and that the event was scheduled with less than 24 hours of notice. Nixon called the legislators’ schedule “an abuse of process.”

Nixon also served as president of the Washington Coalition for Open Government, a nonprofit, nonpartisan organization that promotes information and use of Washington’s sunshine laws. The organization provides training, resources, referrals, and information about pending legislation – and the mild-mannered Nixon was incensed that the Legislature was acting so quickly that WCOG could not effectively alert its members, and he would also be unable to attend and take advantage of the thin opening for direct input by the public.

Only five constituents were present and allowed to speak at the brief Senate session on February 22: Kasia Pierzga, former publisher of the *Whidbey Record* newspaper who lived in Olympia; Navy retiree Gordon Padget of Vancouver, Washington; *The News Tribune* Publisher and President David Zeeck; Rowland Thompson, lobbyist for Allied Daily Newspapers of Washington and the Washington Newspaper Publishers Association; and political gadfly and ballot initiative promoter Tim Eyman. The way the bill was sneaked through needed to be addressed, Padget said, for whom the matter was a First Amendment issue (G. Padget, personal communication, September 21, 2018). “There would be 20 publishers here, had we had more notice,” Zeeck told the legislators (*Times*, 2018).

The Senate heard the spare but adamant comment from constituents on February 22, approved SB 6617 on February 23 by a vote of 41-7 with one absent, and sent the bill to the House, which acted within 20 minutes of the Senate passage. The House accepted the bill for first reading and, just as the other chamber had done, suspended the rules to place the legislation on second reading immediately. After the second reading, the House accelerated the proceedings and scheduled SB 6617 for its third reading. After comments from two representatives who, with no apparent irony, praised the legislation as an example of improved access for citizens to their elected officials, the House approved the bill by a vote of 83-14 with one member excused from voting. The leaders of both chambers immediately signed the measure. On the same day, February 23, SB 6617, which exempted the Washington State Legislature from the voter-initiated Public Records Act but made public the members’ calendars and some of their correspondence, went to the governor’s desk to await his signature less than 48 hours after its introduction. Gov. Jay Inslee, a second-term Democrat, was out of town but was expected to return within days.

Activists sprang to work. The WCOG sent emails to their members and mailing lists, and told the story on social media. Alerts also went out from other civic organizations. Thompson alerted members of Allied Dailies and WNPA, which he also represented as a lobbyist in Olympia. The constituents and lobbyists were under a tight deadline; Washington law gives the governor five business days to sign or veto legislation.

Some legislators were distressed at the media response. Democratic Rep. Gerry Pollet, an open government advocate who had introduced a broader bill in the House that he said was supported by only six of his colleagues, released a lengthy statement to constituents on February

26, explaining that he supported SB 6617 as an initial step toward greater accountability. He pointed out that he was one of just three legislators to release his emails and calendar to the media in response to the PRA request that was the basis of the *AP et. al.* lawsuit. On the House floor on February 23, he said, “There are things we need to move further in the future. I hope we will take this as a first step. Let’s all go forward into the sunshine.” (Washington House of Representatives, 2018)

But the news coverage was not the most striking response from the media. On Tuesday, February 27, readers all over the state awoke to an unusual sight on the front pages of their local newspapers. Thirteen Washington dailies took the unusual step of running page one editorial commentary urging Gov. Inslee to veto the theoretically veto-proof SB 6617, and rallying their readers to send the same message. Two university newspapers, the *Daily Evergreen* at Washington State University and *The Western Front* at Western Washington University, joined the campaign with front-page editorials urging students to contact the governor’s office, and explaining why public records matter to college students. Nearly all of the state’s community weeklies ran editorials, although most of those ran inside on the editorial page.

“Governor, citizens: Please stand up for open government,” exhorted the *Skagit Valley Herald* in an opinion piece spread vertically across the front page of the community daily. “They decide. That’s the message from state lawmakers to the public last week when they made changes to the Public Records Act at break-neck speed. They weren’t speaking for We the People.” The newspaper, like its colleagues across the state, urged readers to tell the governor to veto the bill, saying the legislation made a mockery of the transparency it purported to promote. The Legislature’s hometown newspaper, *The Daily Olympian*, published a page one editorial headlined, “Inslee should veto public records bill” and explained that publishing an editorial on the front page is an unusual step taken in solidarity with other newspapers. It described the Legislature’s action as “a shocking display of secrecy, stealth and a Big Brother’s twist of truth.” Several television stations repeatedly ran short editorials describing the Legislature’s action on SB 6617 and urging viewers to contact the governor’s office in opposition to the legislation.

The Seattle Times, whose editorial page editor, Kate Riley, helped organize the media’s effort, wrote an editorial for the front page, only the second time in 110 years the newspaper had published a page one editorial. “Gov. Inslee, stand up for the people and veto bill on legislative secrecy,” was the headline over the piece that described “an egregious breach of the public trust” and supplied the governor’s email address and telephone number. The governor’s office reported receiving more than 19,000 calls and emails since passage of SB 6617, the vast majority of them urging the governor to veto the measure both for its content and for the process of its passage.

Not only the governor’s office got calls; legislators were hearing from their constituents, as well. Many legislators in favor of SB 6617 sent or posted statements to their constituents that were remarkably similar to each other. Their message was that SB 6617 was necessary to protect constituents’ privacy and referenced the media lawsuit as the impetus to take quick action. They claimed that the Thurston County Superior Court ruling designating legislative offices as “agencies” that needed to follow the PRA created an untenable burden on each individual legislative staff. And they echoed Rep. Pollet’s claim that this legislative action represented progress toward transparency. For example, the office of Democratic Sen. Jamie Pedersen released a message on February 26 explaining his support for the bill as a new scope of accountability by legislators. The statement to constituents read:

The bill does not merely codify the Legislature's current interpretation of the Public Records Act. It also adds substantial new categories of records, including legislators' calendars and letters and emails from lobbyists, that will be subject to public disclosure. These documents have never been public before. (Pederson, 2018)

The motivations of the legislators who voted against the bill were neither uniform nor clear. Some indicated it was an insufficient gesture of transparency, although some legislators who advocated greater disclosure, such as Rep. Pollet, supported it as a first step. Some expressed dismay at the bill's rapid process through the legislative chambers, and a few were so wary of mandated access that they did not wish to release even their office calendars for public scrutiny.

Resolution

As is fitting a legislative confrontation, a series of compromises brought resolution – at least for this chapter of the story. A way needed to be found for the legislators to save face. The governor's office reached out to the leadership of both houses, a legislator who asked not to be identified confirmed for this research.

The governor's office received separate letters dated March 1, 2018, from the House Democratic Caucus, the House Republicans Caucus and the Senate Democrats, all urging him to veto SB 6617. Correspondence from the minority party House Republican Caucus expressed their frustration that the Democratic leadership had refused to schedule hearings on an alternative bill also addressing public access to legislative records. In their correspondence to the Governor, the House Republican Caucus members explained their concerns, writing:

As members of the minority caucus we don't get to choose which bills run or when they run. We only get to choose to vote yes or no. While SB 6617 was the only solution allowed by the Democrats, many of our members thought this was at least a step in the right direction. However, all 48 of our members wished they could have voted for a better bill. (Republican Caucus, 2018)

The Democrats were also blunt, but took a different approach. Correspondence from the Senate and House were identical, and their letter to Gov. Inslee said:

We have heard loud and clear from our constituents that they are angry and frustrated with the process by which we passed ESB 6617, the Legislative Public Records Act. We supported the bill because of the important transparency reforms that it would enact. ... However, we made a mistake by failing to go through a full public hearing process on this very important legislation. The hurried process has overshadowed the positive reforms in the bill. The Democrats joined the thousands of constituents by asking, 'we think that the only way to make this right is for you to veto the bill and for us to start again.' (Democratic Caucus, 2018)

Another ingredient of the sausage-making was the group of media plaintiffs. Attorney Earl-Hubbard wrote to the Governor also urging a veto on behalf of her clients, suggesting a

compromise may be possible, and expressing willingness to “work collaboratively with legislators and other stakeholders to resolve our differences transparently. It is our belief the public has the right to weigh in on any potential changes to public records law before it is enacted.” (Earl-Hubbard, March 1, 2018) The plaintiffs offered to jointly with the defendants seek a stay of proceedings in the trial court, and promised to not seek to enforce the order during appeal. They also agreed to not launch an initiative or referendum, the very method that had provided voter relief 45 years earlier and enacted the Public Records Act, during the stay and while the plaintiffs worked with the Legislature on new legislation or another remedy.

This truce took effect on March 1, 2018, when Gov. Inslee issued a statement vetoing the beleaguered bill in its entirety “so that the Legislature can engage with the public and stakeholders in a transparent process to discuss and consider legislative public records issues.” As a further nod to legislators, he acknowledged that SB 6617 was well-intentioned but its path through the legislative process allowed insufficient comment from interested parties. His statement noted that “while a wide majority of lawmakers voted for [SB 6617] as a genuine effort to create clarity and increase transparency, the process was seriously flawed.” The constituents, too, got a shout-out in recognition of the extraordinary effort: “I applaud Washingtonians for making their voices heard as well as legislators’ thoughtful reconsideration.”

Stakeholders were pleased but wary, and eager to participate in any discussion of future legislation. Washington Coalition for Open Government’s Nixon released a statement on behalf of the organization, expressing both its contention that the Legislature should be covered by existing law, but willingness to meet with lawmakers and discuss their concerns. He said:

When the people enacted Initiative 276, they intended for it to apply to every branch of state and local government. WCOG looks forward to actively participating in a thorough and deliberative stakeholder process, as should have taken place before the introduction of SB 6617, to provide the greatest possible access to legislative records under the Public Records Act while addressing concerns raised by legislators about constituent privacy and other matters. (Nixon, 2018)

The ubiquity of interest among Washingtonians is aptly illustrated with an anecdote shared by Jason Mercier, director of the Center for Government Reform, who tracks legislation for this branch of the Washington Policy Center, an independent, nonprofit think tank. Mercier, who reports on legislative action through his “Olympia Watch” newsletter, shared that his Uber driver to the airport the week of the veto told him, “Did you hear about that Washington Legislature public records thing? That wasn’t right. I contacted the governor to tell him it was wrong.” (J. Mercier, personal communication, March 9, 2018) Clearly, the news media’s coverage and unusual editorials had drawn widespread attention; the people were indeed insisting on “remaining informed so that they may maintain control over the instruments that they have created,” as the preamble to the PRA states, and they had spoken up to remind the Legislature of their expectation.

In the wake of the 2018 legislative session, a Legislative Task Force of 15 legislators, media representatives and other stakeholders met four times in late 2018 to discuss their concerns about access to legislative records and try to reach a common ground for legislation in the 2019 session. No draft legislation resulted; the task force issued a short list of eight consensus statements that identified issues to address in any potential legislation involving access to records, such as ensuring constituent privacy, setting procedures for responses and disputes, and a resource for independent guidance. Six Task Force members released independent statements in the appendix

of the report, generally expressing support for the process but also voicing their particular concerns, ranging from protection of the deliberative process to a call for legislative compliance with the broad access described in I-276. It should be noted that the first Task Force finding was “The Legislature should strive for greater transparency” (Task Force, 2018c).

The 2019 legislative session concluded without addressing the Legislature’s role under the Public Records Act. Only SB 5784, invoking the original language of the initiative, ventured into this territory, seeking to clarify the definition of the Legislature and its committees as a branch of government and not a state agency, which was essentially the Legislature’s argument in the *AP, et. al.* lawsuit. SB 5784 had one brief hearing in the Senate Committee on State Government, Tribal Relations & Elections, which did not vote on the bill (Washington State Legislature, SB 5784).

Arguments in *AP, et. al. v. Washington State Legislature* were heard in the Supreme Court of the State of Washington on June 11, 2019, and on December 19, 2019, the court ruled 7-2 that while the Legislature itself – as a branch of government – is not an “agency,” that individual state legislators’ offices are agencies subject to the state Public Records Act. The legislators are subject to the PRA’s “narrower public records disclosure mandate by and through each chambers’ respective administrative officer,” according to the ruling, (*AP, et. al. v. Washington State Legislature* (2019)), which affirmed the logic in the January 2018 ruling by Thurston County Superior Court Judge Lanese, who referenced the clear intent of the people in the 1972 initiative that enacted the Public Records Act.

Discussion

This examination of legislative action and the reaction of Washingtonians in 2018 yields several lessons for this and other jurisdictions.

The most straightforward finding is that legislation purportedly promoting transparency will not succeed if it is presented without oversight; that the people expect to be informed about proposed changes in the law and have the opportunity to share their concerns, suggestions and perhaps even praise to the legislators before they take action. However, this expectation can be thwarted; SB 6617 did in fact pass both houses of the Washington State Legislature and landed on the governor’s desk, where he initially was expected to sign it into law because the legislative votes of approval were larger than needed to override a veto.

This experience reinforces the importance of the component participants in the process of governing: The courts, which were both weighing challenges to existing laws and casting a foreboding shadow on the legislative targets of the media’s litigation; the Legislature, which was moved to take action before a new process might be thrust upon them through a court ruling; the executive, who was willing to reach out to the Legislature and consider an alternative, even compromise action; and the people, who eagerly and vehemently exercised their right to petition their representatives. The law under consideration in this study is the Public Records Act, but also highly relevant to the scenario described here is Article 1, Section 4 of the Washington State Constitution, which asserts the Right of Petition and Assemblage. It states: “The right of petition and of the people peaceably to assemble for the common good shall never be abridged” (Washington State Constitution). This section precedes the right to free speech, which is affirmed in Section 5 of the same document. Of course, another relevant balance is found in Article 2, part a, which states that “the first power reserved by the people is the initiative” (Washington State Constitution).

It should be acknowledged that both the right to petition and the act of alerting citizens to practice their rights are enhanced by a broad base of communications options and technologies. Even though Washington did not have as many traditional news media outlets in 2018 as it did in 1972, other media was an effective component of this experience. Activists spread the word about SB 6617 via social media; newsletters went out on email instead of paper, and were received in time for people to take action. News organizations posted coverage online more quickly than it could appear in print, and also promoted their coverage on social media. Broadcast media repeatedly ran short announcements. The governor and legislators received constituent communications not only by telephone but also by email and through web-based forms on their own websites. Washington experienced an effective 21st-century lobbying effort that offers a striking example for any jurisdiction, that shining light on clandestine legislative action through coordinated media coverage and citizen activism using social media and other quick communications technology can jolt elected officials into responsiveness.

Although state laws and legislative procedures differ, many principles and procedures are in common and this case study should provide ideas, guidance, and encouragement for other jurisdictions. Further research is possible by continuing to monitor the action in Olympia, Washington, and also in watching for similar efforts in other states.

The uprising of Washingtonians against SB 6617 is reminiscent of the citizen activist spirit that enacted the PRA, and the people of the state will likely need to draw on that resolve and energy to continue that fight for access to legislative records. The Supreme Court of the State of Washington ruled for the plaintiffs in *AP et. al. v Washington State Legislature*, and state legislators are adjusting their office practices to comply with their responsibilities under the PRA. They may try again to pass relevant new law, addressing some aspect of the PRA they dislike or find difficult to comply with. Shoving through legislation in the dead of night during the 2018 session didn't work because media and activists paid attention, which is also a lesson that crosses jurisdictions. Legislature-watchers are likely to keep a closer eye on Olympia given their experience in 2018.

Conclusion

This case study is offered as an examination of the fate of proposed changes to the Washington State Public Records Act that revived the spirit and power of petition that enacted the sunshine law 45 years earlier. Ironically, the incident shines a light on how *not* to pass sunshine legislation – that is, in the dark – but determines that 2018 legislative action failed for exactly the same reason the state has a relatively strong Public Records Act today: The vigor of the people in exercising their right to petition their elected officials and demand accountability from them. Initiative 276 passed in 1972 and took effect in 1973; decades later the Legislature sought to clarify its role in sunshine laws of Washington and again felt the power of the petition of the people. The experience demonstrates that the people's voice remains as effective in 2018 as it was in 1972.

This incident also suggests that the Legislature may have lost its best shot at taking control of the scope of transparency rules that it now must follow, given the 2019 ruling of the State Supreme Court in *AP et. al.* The people of Washington rose to the occasion in unprecedented numbers and vigor and are unlikely to ignore future similar scenarios (with a little nudge from the media and activists). In fact, this story didn't have to unfold this way. At least two other bills addressing sunshine laws for the state Legislature languished during the 2018 session; either of them, or even SB 6617, might not have met the same fate had the Legislature followed its

proscribed process of introduction, hearings, and deliberation, which sees a bill wind through the legislative process in weeks, not in hours, and welcomes analysis and public comment.

Despite the state Supreme Court ruling, this story is still unfolding; state legislators are struggling to change their practices and policies to comply with the PRA. They may seek new exemptions to record disclosure under the PRA, perhaps revisiting some of the concerns voiced during the meetings of the Legislative Task Force. Media, activists, and other stakeholders would do well to scrutinize legislation for actions that chip away at the newly-won access to legislative records.

This scenario remains an admonition to every jurisdiction of the power of petition by the people. It demonstrates the successful strategy of forcing acknowledgement of accountability in a jurisdiction that has a history of supporting transparency in most of its government, and it shows what happens when the people exercise their authority, which is a key principle behind any access laws.

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