



Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
PO Box 40100 • Olympia WA 98504-0100 • (360) 753-6200

MEMORANDUM

June 4, 2002

TO: Washington State Agencies, Boards and Commissions
Washington State Association of Counties
Association of Washington Cities
Washington Association of Prosecuting Attorneys
Washington Association of Sheriffs and Police Chiefs
Committee on Terrorism
Anti-Terrorism Task Force
Emergency Management Association

FROM: Nancy Krier, Assistant Attorney General
Licensing & Administrative Law Division

Sara Finlay, Assistant Attorney General
Government Operations Division

SUBJECT: **2002 Legislation Related to Public Disclosure, Terrorism and Domestic Preparedness (Laws of 2002, Ch. 335, Effective June 13, 2002)**

INTRODUCTION

This Question and Answer analysis highlights several recent amendments to our state's public disclosure laws that were prompted by the tragic events of September 11, 2001. This analysis focuses on amendments adopted as a result of the passage of Substitute Senate Bill 6439 during the 2002 legislative session.¹ These amendments provide exemptions from public

¹ Four bills were passed in the 2002 legislative session that added a new subsection entitled (aaa) to RCW 42.17.310(1). Pursuant to RCW 1.08.015, the Code Reviser intends to codify those amendments as (aaa) through (ddd), according to their order of signature by the Governor. (1) **Substitute Senate Bill 6439**, Laws of 2002, ch. 335 (effective June 13, 2002) amended the public disclosure laws by modifying the vulnerability assessment/response plan exemption contained in RCW 42.17.310(1)(ww), and adding a new exemption (entitled (aaa)) related to computer and telecommunications infrastructure and security. Subsection (ww), as amended, is the focus of this analysis. (2) The amendment in **House Bill 2421**, Laws of 2002, ch. 172 (entitled (aaa), effective June 13, 2002) exempts specific and unique (a) vulnerability assessments or (b) emergency and escape response plans at correctional facilities, if public disclosure would have a substantial likelihood of threatening the security of a correctional facility or any individual's safety. (3) **Substitute Senate Bill 5543**, Laws of 2002, ch. 205 includes an amendment (entitled (aaa), effective March 27, 2002) that exempts information compiled by schools or school districts in the development of their comprehensive safe school plans, to the extent they identify specific vulnerabilities of school districts and each individual school. (4) **Engrossed Substitute House Bill 2453**, Laws of 2002, ch. 224 includes an amendment (entitled (aaa), effective June 13, 2002) regarding the discharge papers of veterans (and is not related to terrorism or domestic preparedness).

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

disclosure for certain public records related to terrorism and are effective June 13, 2002. This memo discusses the changes in the law and provides practical suggestions for complying with the law. State agency or local government staff is encouraged to consult with our Office, your assigned Assistant Attorney(s) General or legal counsel, as appropriate, when presented with questions about the disclosability of records.

THE LANGUAGE OF THE EXEMPTION(S)

As amended by Laws of 2002, ch. 335 (SSB 6439), RCW 42.17.310(1)(ww) exempts the following from public inspection and copying:

Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of:

(i) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans; and

(ii) Records not subject to public disclosure under federal law that are shared by federal or international agencies, and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism.

Question 1: How should you construe the new exemptions from disclosure for public records related to terrorism?

Answer:

As you are aware, the courts have recognized that Washington's Public Disclosure Act contains a strong mandate for public disclosure of agency records, and that exemptions from disclosure are to be narrowly construed. The policy of the state of Washington, as expressed in the Act, calls for openness in government in all activities, including domestic preparedness for possible further acts of terrorism. However, when release of those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts would have a substantial likelihood of threatening public safety, denial of requests for disclosure of such records may be warranted by the new exemptions.

Question 2: What must an agency demonstrate to qualify for exemption from disclosure of a public record related to terrorism under RCW 42.17.310(1)(ww)?

Answer:

To claim an exemption from public disclosure under the new RCW 42.17.310(1)(ww) as amended during the 2002 legislative session, an agency should be prepared to establish that the portions of public records:

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

Meet both of two general requirements, as follows:

- (1) the records must have been assembled, prepared or maintained to prevent, mitigate, or respond to criminal terrorist acts (which are defined as acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life); and
- (2) public disclosure of the records would have a substantial likelihood of threatening public safety.

Then, the record must fall within one of several types of specific records that are explicitly exempt from disclosure under RCW 42.17.310(1)(ww), as amended, as discussed below.

Question 3: What does the introductory phase “Those portions of records . . .” mean?

Answer: The "terrorism exemption" of SSB 6439 only exempts from disclosure those "portions of records" which meet the specific criteria for exemption. To the extent that such protected information can be deleted from the public record requested, the agency should delete the protected information and disclose a redacted version of the public record (if it is not otherwise exempt from disclosure under another exemption).²

Question 4: What is meant by the term “criminal terrorist act”?

Answer: The term is defined by the language of the statute as "acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life". The exemption is intended to protect documents "assembled, prepared or maintained to prevent, mitigate or respond" to such terrorist acts.

Question 5: What does the term “substantial likelihood of threatening public safety” mean?

Answer: This term is not defined in the statute. Agencies should make their best reasonable judgment, consistent with available information, about the consequences of release of a particular document(s). Agency officials need to be prepared to explain the basis for their determination in the event of court review of the nondisclosure. The burden will be on the agency, not the requesting entity, to show a reviewing court that the record is exempt.

² However, the redaction requirement does not preclude a vulnerability assessment, response or deployment plan from being withheld in its entirety if that complete record meets the requirements of the "terrorism exemption". Additionally, a record may be protected in its entirety if it is exempt from disclosure pursuant to other laws. See, for example, RCW 42.17.260(1) and RCW 42.17.311.

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

Question 6: What are the specific types of records that are exempt under the new "terrorism exemption"?

Answer: The following portions of public records are exempt from disclosure under RCW 42.17.310(1)(ww) (the "terrorism exemption"), if they are records assembled, prepared, or maintained to prevent, mitigate or respond to criminal terrorist acts and public disclosure would have a substantial likelihood of threatening public safety:

- (a) specific and unique vulnerability assessments;
- (b) specific and unique response plans;
- (c) specific and unique deployment plans;
- (d) compiled underlying data collected in preparation of or essential to those vulnerability assessments or response or deployment plans;
- (e) records that are not subject to public disclosure under federal law that are shared by federal or international agencies; and
- (f) information prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism.

Question 7: What does the requirement of "specific and unique" mean in relation to vulnerability assessments and response or deployment plans?

Answer: Although those terms are not defined in RCW 42.17.310(1)(ww),³ a vulnerability assessment, response or deployment plan should be considered "specific and unique" for purposes of the "terrorism exemption" if it is focused on possible terrorist acts, targets, hazards, system weaknesses or responses and was assembled, prepared or maintained to prevent, mitigate, or respond to criminal terrorist acts.

Question 8: How do you define "vulnerability assessment," "response," or "deployment" plans?

Answer: Although those terms are not defined in the statute, the legislative history makes it clear that the Legislature was addressing records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts in an emergency management planning context. A "vulnerability assessment" is typically part of a hazard or risk analysis that determines risks and consequences. A "response" plan usually is a detailed strategy and preparation for preventing,

³ Note that the new school safety plan exemption (in SSB 5543) relates to "specific vulnerabilities of school districts and each individual school", and the new correctional facility exemption (in HB 2421) refers to "specific and unique vulnerability assessments or specific and unique emergency and escape response plans".

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

mitigating, or responding to the hazards identified and addressed in a vulnerability assessment or other analysis of risks. A "deployment" plan generally addresses specific actions to be taken by law enforcement personnel, fire fighters, medical professionals, and others responding to an event.

Question 9: Can data or inventories of sensitive information be covered by the new "terrorism exemption"?

Answer:

Yes. If the other criteria for coverage by the "terrorism exemption" are met, the (ww) amendments made by SSB 6439 specifically include "compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans". By use of the term "compiled", this section protects information or records that are gathered in preparation of, or essential to, covered assessments, response and vulnerability plans. At the heart of the discussion over this amendment was an understanding that agencies may be, for the first time, bringing together compilations of data that are extremely sensitive in a compiled form. The exemption clearly seeks to protect such information where gathered specifically for preventing, mitigating or responding to terrorist acts.

Question 10: What types of records are not subject to disclosure under federal law that may be covered by the new "terrorism exemption"?

Answer:

Remember that to qualify for an exemption under RCW 42.17.310(1)(ww)(ii) as records that are exempt under federal law and shared by federal or international agencies, such records must be "assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts . . . the public disclosure of which would have a substantial likelihood of threatening public safety". The following are a few examples of records that may not be subject to disclosure under federal law pursuant to the federal Freedom of Information Act (FOIA) at 5 U.S.C. §552(b):

- A. Certain national defense or foreign policy records. FOIA Exemption 1 (5 U.S.C. §552(b)(1)) exempts certain matters that are specifically authorized under criteria established by presidential Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such Executive Order. For example, Executive Order 12958 (as amended by Executive Order 13142) allows certain information regarding the following matters to be classified by the federal government: military plans, foreign governments or relations, intelligence activities, national security, or vulnerabilities or capabilities of systems or plans relating to national security.⁴

⁴ Executive Order 12958 also allows the federal government to classify certain compilations of individually unclassified information; i.e., using what is known as the "mosaic" or "compilation" approach.

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

- B. Certain law enforcement records. FOIA Exemption 7 (5 U.S.C. §552(b)(7)) contains six specific exemptions regarding certain records or information compiled for law enforcement purposes. Generally, law enforcement records can be withheld under FOIA if their disclosure (1) could reasonably be expected to interfere with enforcement proceedings; (2) would deprive a person of a fair trial right; (3) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (4) could reasonably be expected to disclose a confidential source or certain information furnished by a confidential source; (5) would disclose certain techniques, procedures or guidelines for law enforcement investigations or prosecutions; or (6) could reasonably be expected to endanger the life or physical safety of any individual.
- C. Other examples of matters which may be interpreted as exempt under federal law include (1) matters specifically exempt from disclosure by other statutes⁵; (2) critical federal infrastructure information and vulnerability assessments (if they are determined to be predominantly internal documents and disclosure would significantly risk the circumvention of agency regulations or statutes or impede the effectiveness of law enforcement activities);⁶ and (3) confidential business information submitted to federal agencies by private entities, which may include vulnerability and infrastructure information of private assets.⁷

FOIA has a requirement that records be redacted to protect only those portions of the records that are nondisclosable.⁸ You should consult with the federal agency that created or shared the records with your agency to determine what federal exemptions apply, and notify the federal agency if a public disclosure request is made for records that may be exempt under federal law.

⁵ Examples of other statutes relied upon to exempt matters from disclosure pursuant to FOIA Exemption 3 (5 U.S.C. §552(b)(3)), are the National Security Act of 1947, as amended (50 U.S.C. §404-3(c)(6)), and the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. §403(g)). Each federal agency's FOIA Annual Report (available through www.usdoj.gov/04foia/other_age.htm) includes citations to statutes relied upon in denying disclosure and data as to the type of exemption relied upon.

⁶ The federal Department of Justice has encouraged federal agencies to use FOIA Exemption 2 (5 U.S.C. §552(b)(2)) to protect certain vulnerability assessments. (See, for example, U.S. Attorney General memo and DOJ documents available at www.usdoj.gov/oip/foiapost/2001foiapost19.htm.)

⁷ FOIA Exemption 4 (5 U.S.C. §552(b)(4)) relates to certain trade secrets and commercial or financial information.

⁸ The FOIA redaction requirement provides, in part, that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. §552(b).

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

Question 11: What is protected under the exemption for records “prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism”?

Answer: The Legislature heard testimony that federal officials were reluctant to share sensitive, terrorist-related information with state and local officials because information may be disclosable under state law. While the terms “national security” and “domestic preparedness” are not defined in the statute, this section provides protection to certain records that state and local officials may create as a result of national security briefings, as well as documents provided by federal agencies as part of a briefing of other government officials.

Question 12: What computer and telecommunications records are exempt under the second public disclosure amendment within SSB 6439?

Answer: Although not considered part of the "terrorism exemption" to the public disclosure law, certain records related to computer and telecommunications infrastructure and security are also now exempt (pursuant to Laws of 2002, ch. 335 (SSB 6439) exemption entitled (aaa)), as follows:

Information regarding the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities.

Question 12A: What is the focus of the computer and telecommunications exemption in SSB 6439?

Answer: This section provides that certain computer and telecommunications security information is exempt from public disclosure. The exemption reflects the interest in protecting the computer and telecommunications infrastructure of public agencies by safeguarding certain specified information. The goal in exempting this information is to provide additional protection for the information stored in these systems and prevent the interruption or destruction of the public agency networks, without depriving the public of information regarding government activities that the public has a right to know.

Question 12B: What types of information could be exempt from disclosure pursuant to the computer and telecommunications exemption in SSB 6439?

Answer: This section exempts certain specified public records or portions of records that contain certain

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

information regarding the infrastructure and security of computer and telecommunications networks; i.e. information consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities. The State Department of Information Services interprets this list as including, for example, information specific to employee access to computer and telecommunication network systems (such as user identification and password, PIN#, and digital certificate information), firewall information (such as type of firewall used and how and where firewalls are connected), circuit information, network diagrams, protocols that define a common set of rules that computers use to communicate on a network, how and where virus protection software is used on the network, security plans (as required by the State Information Services Board), plans to recover service after a disaster, and security risk assessments.

Question 12C: **What information would not be exempt from disclosure pursuant to the computer and telecommunications exemption in SSB 6439?**

Answer: This section does not exempt information such as: the type of application processing software used and version of that software (for example Excel or Lotus), maps or the location of computer or telecommunication data centers, or public internet protocol network identification numbers (IP addresses) for agency internet sites.

Question 13: **Are there any oversight provisions of how state agencies handle public disclosure requests for documents related to terrorism?**

Answer: Yes. With respect to the use of the "terrorism exemption" (ww) contained in SSB 6439 and the computer and telecommunications security exemption contained in SSB 6439 (entitled (aaa)), the new legislation requires the Joint Legislative Audit and Review Committee (JLAARC) to review the effect of those two exemptions on state agency performance by reviewing the record requests of five selected state agencies by September 2004.⁹

⁹ Section 2 of SSB 6439 provides as follows:

No later than September 1, 2004, the joint legislative audit and review committee shall review the effect of RCW 42.17.310(1)(ww) and (aaa) on state agency performance in responding to requests for disclosure of records under chapter 42.17 RCW. In conducting this review [JLAARC] shall select a representative sample of requests for public disclosure, and the agencies' responses to those requests, from up to five state agencies. The [JLAARC] shall report its findings to the legislature no later than November 30, 2004.

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

Question 14: Were there public disclosure amendments this session that specifically related to school records?

Answer: Yes. Information compiled by school districts or schools in the development of comprehensive safe school plans, to the extent that they identify specific vulnerabilities of school districts and each individual school, is now exempt pursuant to the Laws of 2002, ch. 205 (SSB 5543) exemption entitled (aaa). (This amendment was not part of what we generally refer to as the "terrorism exemption".) The specific language of this exemption is as follows:

Information compiled by school districts or schools in the development of their comprehensive safe school plans pursuant to section 2 of this act [Laws of 2002, ch. 205], to the extent that they identify specific vulnerabilities of school districts and each individual school.

Question 15: Were there public disclosure amendments this session that specifically related to correctional facility records?

Answer: Yes. The Laws of 2002, ch. 172 (HB 2421) exemption entitled (aaa) exempts specific and unique vulnerability assessments or specific and unique emergency and escape response plans at adult or juvenile state and local correctional facilities, if disclosure would have a substantial likelihood of threatening a correctional facility's security or an individual's safety. (This amendment was not part of what we generally refer to as the "terrorism exemption".) The specific language of this exemption is as follows:

Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans at a city, county, or state adult or juvenile correctional facility, the public disclosure of which would have a substantial likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility or any individual's safety.

PRACTICAL SUGGESTIONS

In addition to following standard public disclosure practices, and consulting with legal counsel whenever use of the SSB 6439 exemptions are contemplated, you may want to consider the following suggestions:

- A. Analyze Records Under the SSB 6439 (ww) and (aaa) Amendments.** Agencies should critically analyze and review whether records appropriately should be considered exempt under the revised (ww) or (aaa) exemptions of SSB 6439. Remember that many documents, even those that deal with terrorism, will be

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

disclosable or disclosable in part. Only those portions of records that fall within the specific standards and listed exemptions of the new law are exempt from disclosure, unless otherwise exempt under other laws.

- B. Clearly Identify Documents Consistent With the Language of the Statute.** If the document you are creating is, in reality, an assessment of particular vulnerabilities to terrorist acts or a plan for responding to a terrorist-related situation or event, or for deploying personnel in such a situation, clearly identify the document as a vulnerability assessment, response plan, or deployment plan.
- C. Label Records.** You may want to label agency records that are subject to the exemptions discussed in this Question & Answer analysis. For example:

If exempt records are shared between your agency and other agencies, label the records accordingly or request that the other agency label the records. The labels should identify that the records are exempt or nondisclosable under a specific state law, or if from a federal agency, under a specific federal law.. (If such records are subsequently claimed as exempt, the source of such information and cited exemption will be important. As discussed herein, you should also notify the agency of origin if records received from it are sought in a public record request. See RCW 42.17.330).

If records are prepared by your agency from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism, label the records accordingly. (If such material is subsequently claimed as exempt pursuant to RCW 42.17.310(1)(ww)(ii), the source of such information will be important.)

If records contain information regarding the infrastructure and security of computer and telecommunications networks, label the records accordingly.

Of course, labeling will not affect whether a public record is disclosable under state law. However, labeling could assist public agency staff responding to public records requests, and could assist a court conducting an *in camera* review of the records pursuant to RCW 42.17.340(3).

- A suggested label could read: "All or part of this document is exempt from public disclosure pursuant to RCW 42.17.310(1)(ww) [or such other exemption as appropriate]. Requests for public disclosure of this document, or parts thereof, should be referred immediately to [insert name and number of agency or individual]."
- Depending on the documents, the agency may also want to label them with language such as: "Further distribution of this document is prohibited," "Further distribution of this document is prohibited unless authorized in writing in advance

Deleted: 11
Inserted: 11
Deleted: 3
Inserted: 3
Deleted: 11

by [insert name and number of individual]," or "Distribution of this document beyond [insert list of agencies or individuals] is prohibited."

- D. **Attach or Reference Compiled Underlying Data.** Consider attaching or referencing compiled underlying data that was assembled in preparation of or essential to vulnerability assessments or response or deployment plans.
- E. **Address Records Access Procedures.** Identify who has access to records that may be exempt under the new amendments, and educate them about the exemptions from disclosure. Eliminate unauthorized or unnecessary access by agency personnel, consultants, vendors, etc., to records that may be exempt from disclosure. Consider placing records subject to the "terrorism exemption" in one location with limited access. In some situations it may be appropriate to utilize a sign-out or tracking procedure to control access to exempt documents.
- F. **Update Records Management Policies.** In light of the information provided in this memorandum, your agency may want to consider updating its records management policies and procedures.
- G. **Address Procedures for Sharing Records.** If your agency sends or receives exempt public records with other public or private entities, your agency should specifically review the suggested procedures in B through F above, including suggestions regarding record identification, labeling, attaching or referencing underlying data, and other records access procedures and management policies.
- H. **Maintain Database.** If you are with a state agency, you may want your agency's public record staff to maintain a database to facilitate response to JLAARC should your agency be one of the five chosen for review by September 1, 2004.
- I. **Consider Open Public Meetings Procedures.** If it is necessary to discuss an exempt record in a public meeting subject to the Open Public Meetings Act, consult with your agency's AAG(s) or legal counsel regarding the process for such discussion. A governing body subject to the Open Public Meetings Act is authorized to hold an executive session during a regular or special meeting to "consider matters affecting national security". (RCW 42.30.110(1)(a)). There is no case law interpreting this section.

CONCLUSION

The Attorney General's Office hopes this information and analysis is of assistance to you. Thank you.

cc: Attorney General's Office Management Team