

**Elections Division
Office of the Secretary of State
October 15, 2009**

Release of Initiative and Referendum Petitions

Petitions are Public Records:

The Public Records Act requires state and local agencies to make all public records available for public inspection and copying, unless the record falls within a specific exemption established by the Legislature. The Public Records Act was passed by the people in 1972 as Initiative 276. [RCW 42.56.070](#).

There is no dispute that initiative and referendum petitions are public records. Once filed by the sponsors, the petitions are in the custody of a public state agency and contain information relating to the conduct of government or the performance of a governmental function. This qualifies the petitions as "public records." [RCW 42.56.010](#).

Consequently, the petitions are subject to public disclosure unless they fall within a specific exemption established by the Legislature.

Is there a Specific Exemption for Petitions?

No. Over the past 37 years, the Legislature has created hundreds of exemptions to the Public Records Act. The Legislature has never created an exemption to the Public Records Act for initiative and referendum petitions. Consequently, the petitions are subject to release.

Is the Personal Information on the Petitions Exempt from Release?

No. There is no general "privacy" exemption. [1988 AGO No.12](#). In 1987, the Legislature enacted several amendments to the Public Records Act. The Legislature provided a clear statement of intent:

The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in *In re Rosier*, 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records. Further, to avoid unnecessary confusion, "privacy" as used in section 2 of this 1987 act [now codified as [RCW 42.56.050](#)] is intended to have the same meaning as the definition given that word by the Supreme Court in *Hearst v. Hoppe*, 90 Wn.2d 123, 135 (1978)

Laws of 1987, ch. 403, sec. 1. The Legislature clearly intended to clarify or overturn certain aspects of the Supreme Court's decision a year earlier in *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986).

The 1987 Legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy. Agencies now must first identify a statutory provision wherein the Legislature evidenced its intent to exempt the record from inspection by the public.

[1988 AGO No.12](#). [RCW 42.56.050](#) was enacted in the 1987 legislation and states:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person:

- (1) Would be highly offensive to a reasonable person, and
- (2) is not of legitimate concern to the public.

The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

Consequently, a person seeking to *prevent* the release of the public records, here the initiative or referendum petitions, must prove that:

1. Disclosure of the information would be highly offensive to a reasonable person; *and*
2. The information on the petitions is not of legitimate concern to the public.

A court would first determine whether the record reveals the intimate details of a person's personal and private life. Even if the record does reveal such details, a court must then determine whether the public interest in the accountability of public agencies and their employees outweighs those privacy interests. *Cowles Publishing Co. v. Washington State Patrol*, 109 Wn.2d 712, 726-27 (1988).

The information on the initiative and referendum petitions does not reveal intimate details of any person's personal and private life. And there can be no debate as to whether the petitions, which trigger a change in state law, are of legitimate concern to the public.

Since "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.56.050 as an exemption.

The Attorney General's Open Government Internet Manual.

Could an Exemption be Created?

Yes. At any time, the Legislature could create an exemption in the Public Records Act for initiative and referendum petitions. In 37 years, the Legislature has declined to do so.

People in favor of *preventing* public release of the petitions are free to lobby the Legislature for such a change. The Legislature can weigh the pros and cons of such a policy.

Has the Secretary of State Released Petitions?

Yes, in compliance with the Public Records Act.

When an initiative or referendum sponsor submits the thousands of petitions sheets to the Secretary of State's Office, this Office preserves copies the documents. Until 2007, the accepted archival method for preservation was microfilm. Consequently, until 2007, the initiative and referendum petition sheets were microfilmed. Requesters generally did not have use for the petitions sheets since the format was microfilm. Requesters could pay to have each over-sized petition sheet photocopied, but that was very expensive since there are tens of thousands of petition sheets submitted for each ballot measure.

In 2007, the accepted archival method progressed from microfilm to digital imaging. Petition sheets submitted in 2007, 2008 and 2009 have been digitally imaged. These images can be transferred to a CD or DVD and provided to the requester in a format that the requester can view easily. The public records requests for petitions sheets have increased the past few years.

Here is a history of recent requests and inquiries regarding initiative and referendum petitions:

Fulfilled Requests:

Oct 2006	Kris Hanselman, I-917 and I-920
Jan 2007	Roy Ruffino, I-917 and I-920
Oct 2007	WA Conservation Voters, I-937
July 2008	Narda Pierce, I-1029
Mar 2009	WA Realtors, I-933
July 2009	NEA Charles Hasse, I-1033
Aug 2009	WAFST Anne Levinson, R-71 (released subject to court order prohibiting posting)

Pending Requests:

July 2009	WhoSigned.org Brian Murphy, R-71
July 2009	Toby Nixon, R-71
Aug 2009	Arthur West, R-71
Aug 2009	The Betty Pages Brian Spencer, R-71
Aug 2009	Rachel La Corte, R-71
Sept 2009	Bryan Wahl, I-722, I-745, I-747, I-776, I-900, I-912, I-917, I-920, I-960, I-985, I-1033

Inquiries with No Response:

July 2003	James Johnson, R-53
Mar 2006	Brian Murphy R-65, I-943, I-944
July 2006	WA State Republicans Ryan O'Barto, I-933
April 2007	Tim Eyman 2005 & 2006 Petitions
July 2007	Kris Hanselman, R-67
Sept 2007	John Wynne Jr., I-901
Oct 2007	WA Conservation Voters Brendon, I-937
Aug 2009	Senator Pam Roach, I-1033

R-71 Litigation in Federal Court:

The sponsors of Referendum 71, Protect Marriage Washington, filed a lawsuit in federal court to prevent release of the Referendum 71 petition sheets. Protect Marriage Washington is not arguing that there is a blanket exemption in the Public Records Act for all referendum petitions.

Rather, they are arguing that, due to the highly charged nature of the topic of Referendum 71, (domestic partnerships, gay rights, the traditional definition of marriage, etc.) that the personal information on the petitions for Referendum 71 warrant particular protection. Their argument is that, in the context of Referendum 71, the petitioners' Right of Free Speech should trump the Public Records Act.

The U.S. District Court agreed with the plaintiffs and issued a preliminary injunction on September 10, 2009 prohibiting release of the Referendum 71 petitions. The Ninth Circuit Court of Appeals reversed the District Court on October 15, 2009. The Ninth Circuit Court of Appeals concluded that the District Court relied on an incorrect legal standard. The briefs and court orders for that case are posted [here](#).

Public Records Act Litigation in Thurston County Superior Court:

Tim Eyman, Jack Fagan and Mike Fagan filed a lawsuit in Thurston County Superior Court to prevent release of all initiative and referendum petition sheets because petition sheets contain personal information, and because past employees in the Secretary of State's Office have a different opinion on

whether initiative and referendum petitions should be released. The plaintiffs point to 1938 and 1956 Attorney General Opinions that predate passage of the Public Records Act, and a 1973 Thurston County case that addressed how long public records should be retained. The Thurston County Superior Court issued a temporary restraining order on October 14, 2009 because it wanted to wait until the Ninth Circuit Court of Appeals ruled on the R-71 case.