

HOUSE BILL REPORT

ESHB 2876

As Passed Legislature

Title: An act relating to open government.

Brief Description: Making changes in public disclosure laws.

Sponsor(s): By House Committee on State Government
(originally sponsored by Representatives Anderson, McLean,
R. Fisher, Pruitt, Bowman and Basich).

Brief History:

Reported by House Committee on:
State Government, February 7, 1992, DPS;
Passed House, February 18, 1992, 98-0;
Amended by Senate;
Passed Legislature.

**HOUSE COMMITTEE ON
STATE GOVERNMENT**

Majority Report: *The substitute bill be substituted therefor and the substitute bill do pass.* Signed by 8 members: Representatives Anderson, Chair; Pruitt, Vice Chair; McLean, Ranking Minority Member; Bowman, Assistant Ranking Minority Member; R. Fisher; Grant; O'Brien; and Sheldon.

Minority Report: *Without recommendation.* Signed by 2 members: Representatives Chandler and Moyer.

Staff: Linda May (786-7135).

Background: Agency Responsibilities Under Current Law. Current law requires agencies to respond "promptly" to a public record request but does not specify what constitutes a prompt response.

Statutes which allow agencies to exempt certain records from public inspection and copying appear in the public disclosure section of the law as well as throughout the code.

Agencies have schedules in place regarding the maintenance and eventual destruction of their records. At times a public record that is the subject of a request may be scheduled for destruction as part of this routine schedule.

Review of an Agency's Public Records Decisions. Existing law provides that a person who has been denied access to a record may have the agency's decision reviewed in Superior Court. If the person prevails against the agency, the person is awarded court costs, including attorney fees. The court also has the option of awarding the person up to \$25 per day for each day that the person was denied access to the record.

Liability for Release of Records. There is some concern among state officials and employees that they would be personally liable for accidentally releasing information that was, in fact, exempt from disclosure.

Summary of Bill: Public Records Laws To Be Liberally Construed. A new section states that the public records statutes are to be liberally construed and record exemptions are to be narrowly construed to promote the public policy of openness.

Changes in Agency Responsibilities. Agencies are required to respond to a public record request within five business days, in one of three ways: (a) by providing the record; (b) by acknowledging receipt of the request and providing a reasonable estimate of the time the agency will require to respond to the request; or (c) by denying the public record request. In acknowledging receipt of a record request, an agency may ask the requestor to clarify what information that person is seeking. If the requestor fails to clarify the request, the agency does not have to respond to it.

For informational purposes, agencies must publish and maintain a current list of laws other than those in the public records statutes which the agency believes exempts any of the agency's records from disclosure. Also, the Office of the Attorney General is to publish a pamphlet explaining the provisions of the public records subdivision of the state's disclosure laws.

If a public record request is made at a time when a record exists but is scheduled for destruction in the near future, an agency is to retain the record until the request is resolved.

Review of an Agency's Public Records Decisions. A court may conduct a review of an agency decision to deny access to a record based only on affidavits. Also, a new dollar range is established that the court has the discretion to award to a person who prevails against an agency. The range is no less than \$5 per day and no greater than \$100 per day for each day that the person was denied access to the record.

In addition to judicial review, a second avenue is provided for a person whose public record request has been denied by a state agency. The person may ask the attorney general to review a state agency's determination that a record is exempt from disclosure. The attorney general is to provide the person with a written opinion on whether the record in question is exempt. Making such a request does not establish an attorney-client relationship between the person requesting the opinion and the attorney general.

The preceding review mechanisms are for situations when an agency has denied a public record request. A person may also take a case to Superior Court if the person believes that an agency has not made a reasonable estimate of the time the agency requires to respond to a public record request. In such a situation, the burden of proof is on the agency to show that the estimate it provided is reasonable.

Public Records Exemptions. An existing public record exemption is modified to expressly exempt information revealing the identity of persons who are witnesses to or victims of crime. A new exemption is added which protects information about an agency employee who is seeking advice or information about employee rights in connection with sexual harassment or other unfair practices.

Joint Select Committee on Open Government. The Joint Select Committee on Open Government, created last year by resolution, will address several issues this interim: electronic data and records, treatment of information under existing disclosure laws, treatment of investigatory records, and a number of issues related to open public meetings. The committee is to report back to the Legislature by January 1993.

Immunity. A new section in the bill offers immunity from liability for loss or damage based on the release of a public record, if the public agency, official, employee, or custodian was acting in good faith in releasing the information.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: There has been erosion in the public disclosure laws over the last 20 years. The media is in search of a number of procedural changes. This bill represents a tinkering with the laws to put the whip back into the hands of the people. Testimony against this bill is testimony from an uncomfortable government. There are a

number of ambiguities in the existing law. This bill offers a major tune-up, but more remains to be done. The proponents of this bill have worked with state and local governments. A number of things are no longer in this legislation that were in the original draft. Advisory committees are doing a lot of the public's work, and they should be covered by the open meetings laws. It is a good idea to include an agenda requirement for agencies. The Office of the Attorney General (AG) can absorb the costs for publishing a pamphlet on public records laws and for providing opinions in the case of denials of record requests by state agencies. The AG's office already has an opinion process set up, and that process could be used here as well. The proposed studies should provide useful information.

Testimony Against: (Regarding open public records provisions): It is wrong to remove an agency's access to court for review of a public record request. The court is an independent third party to look at the record and decide if it should be released. A governor's task force should look at four items: electronic records, what segment of government should be under the open meeting laws, treatment of investigatory records, and consistent treatment of information under existing public records exemptions. Having the AG's office provide opinions in the case of record denials by local governments would have a fiscal impact on the AG's office. Some agencies are required to give notice when someone requests a record, and those agencies should continue to have to do so. There will be some additional costs to agencies in meeting the five day record request response time.

(Regarding open public meetings provisions): New laws should not impose a financial and administrative burden on local governments. Boards and advisory committees should not be covered by these laws. Executive sessions should not be taped. A judge could call for release of these tapes, as happened once in Oregon. The federal court system may not respect state open meeting laws. Taping these sessions could restrict free discussion and could violate attorney/client privilege. A judge will assume there was legislative intent in removal of the frivolous lawsuit language. There is a practical problem in this bill with committees or subcommittees of three people being able to talk with one another. It would be nice to be able to tape meetings rather than have to do written minutes. It is not clear what a "formal action" is in defining groups under the open meetings laws. The null and void provisions should not include a violation of the new agenda requirement. Try the new agenda requirement for a while; if it is abused, add the additional hammer of the null and void provision. The UTC has a unique situation in regard to tariff filings: if the

UTC does not act, the tariff goes into effect. The UTC needs this one decision to be exempt from the null and void provision in the Open Meetings Act. Public volunteer groups should not have to meet all the requirements of the open meetings act; this could discourage volunteer participation.

Witnesses: Dick Welsh; Mike Killeen, and Davis Wright Tremaine, the Seattle Times; Rowland Thompson, Allied Daily Newspapers of Washington; and Becky Bogard, Washington State Association of Broadcasters (all in favor); Richard Dougherty, city of Pullman; Elaine Rose, city of Seattle; Pete Philley, Washington Association of Prosecuting Attorneys; Pete Wall, city of Hoquiam; Michael Waite, city of Everett; and Nacelle Heuslein, city of SeaTac (all opposed); Fred Hellberg, Office of the Governor; and Chip Holcomb, Office of the Attorney General (with proposed amendments); Susan Markey, Department of Fisheries (with concerns); Carol Monohon, Utilities and Transportation Commission; Dale Vincent, U.S. West; and Sherry Burkey, University of Washington.