HOUSE BILL REPORT

ESHB 2876

As Amended by the Senate

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.

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:

OPEN PUBLIC RECORDS

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.

Under current law, a person may take a case to Superior Court to keep a requested record from being disclosed. The parties who may take such action include parties interested in the record and agencies themselves. The court cases hinge on the question of whether disclosure of the record would clearly not be in the public interest, and if disclosure would substantially and irreparably damage any person or vital governmental functions.

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.

OPEN PUBLIC MEETINGS

Definitions. Current law includes definitions of "public agencies" and "governing bodies." These definitions establish which groups are subject to the provisions of the open public meetings laws.

Regular Meeting Requirements. Agencies are currently required to provide the time of their regular meetings. Agencies are also required to take written minutes of their regular meetings, except for executive sessions. These minutes are open to public inspection and copying.

Also under current law, no governing body may adopt a rule, regulation, etc., except in an open public meeting which has been properly announced. Any action taken at a meeting which does not comply with this requirement is null and void.

Personal Liability. Under current law, if a member of a governing body attends a meeting where the member knows action has been taken in violation of the open public meetings laws, that member is personally liable for a civil penalty of $100.

Court Costs. Under current law, a person who prevails in court against a public agency regarding a violation of the open meetings chapter may be awarded all court costs, including attorney fees. If a public agency prevails and the trial judge finds that the action was frivolous, the agency may be awarded court expenses and attorney fees. Similar language regarding the collection of fees in frivolous action cases is also found in title 4 RCW.

Summary of Bill:

OPEN PUBLIC RECORDS

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.

Agencies are prohibited from seeking court action to enjoin disclosure of a record. The only parties who may take such action are persons named in the record or to whom the record specifically pertains. An agency has the option of notifying persons named in the record or to whom the record pertains that release of the record has been requested; however, an agency does not have this option if other statutes require the agency to provide notice.

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.

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.

Electronic Data and Records. A new section acknowledges the challenging public disclosure questions posed by electronic data and electronic records. The Legislature finds that the important public policy questions related to electronic records deserve their own specific deliberation with input from all interested parties, and urges the creation of a body to address electronic data issues.

Joint Select Committee on Open Government. The Joint Select Committee on Open Government, created last year by resolution, will address four issues this interim: consistent treatment of information under existing disclosure laws, treatment of investigatory records, groups to include under the state's open meeting laws, and options for insuring that closed executive sessions are conducted properly. 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.

OPEN PUBLIC MEETINGS

Definitions. The "governing bodies" of "public agencies" have certain obligations under the open meeting laws. Existing definitions of these terms are expanded to include state councils and authorities, as well as state and local government standing, special, and advisory committees, boards, commissions, task forces, subcommittees, and other subagencies, provided that these subagencies have been created by certain types of formal action delineated in the statute. A special exemption is provided for local government advisory groups; this is to be an area of interim study for the Joint Select Committee on Open Government.

The definition of "meeting" is expanded to include discussion of official business among a quorum of a governing body, including discussion through teleconferences and conference calls.

A new definition of "executive session" is added to statute. An executive session refers to a meeting, or portion thereof, conducted pursuant to certain statute, at which no one is permitted to attend other than members of the governing body, their attorneys, their staff, and persons whose presence is necessary to provide information to the group.

Changes in Regular Meeting Requirements.

- Scheduling. An agency is required to provide for the place as well as the time for regular meetings. The agency must give consideration to the convenience of the public when setting meeting times and places. The times must be reasonably related to the agency's actual needs for regular meetings.

- Agendas. Governing bodies must make available to the public an agenda no less than 72 hours prior to holding a regular meeting. Failure to make an agenda available requires adjournment of the regular meeting. At the beginning of the regular meeting, the governing body is to make known any changes to the earlier agenda, by either announcing the changes or providing a revised agenda.

- Minutes. The existing requirements for taking minutes at meetings are moved into the open meetings laws. The governing body is also given the option of tape recording

meetings rather than providing written minutes for public inspection and copying. The minutes requirements apply to regular and special meetings, but not to the executive session portions of meetings.

- Expansion of Null and Void Applicability. The conditions under which an action may be found null and void are expanded to actions taken at meetings where the executive session is conducted in violation of the open meetings laws. There are two exceptions to the null and void provisions: actions based on the void actions of an advisory committee, and action taken by the Utilities and Transportation Commission (UTC) to suspend a tariff filed by a public service company.

Changes to Executive Session Requirements. A majority vote is required for a governing body to move into executive session. Two changes are made in what is appropriate for governing bodies to consider in executive session. Current law allows governing bodies in executive session "to receive and evaluate complaints or charges brought against a public officer or employee." This language is modified to evaluation of "specific" complaints or charges "of misconduct." Also changed is language regarding what members of a governing body may discuss with legal counsel in executive session.

The presiding officer of the governing body may ask if anyone has an objection to the body moving into executive session. If someone does have an objection, that person may be allowed a brief statement of the cause of the objection. The governing body may not take any action in executive session other than actions it announced it was going to consider.

Personal Liability. The civil penalty that a member of a governing body may be liable for when a member attends a meeting and knows that action has been taken in violation of the open meeting laws increases from $100 to $500.

Court Costs. Language in the open meetings laws is deleted which refers to an agency's ability to collect court costs in the case of a frivolous law suit. This language is not deleted from title 4 RCW. In addition, an uncodified section is added to the open meeting laws stating that the purpose of removing this language is solely to remove duplicative language from the RCW, and that no substantive effect is intended by the deletion.

EFFECT OF SENATE AMENDMENT(S): The version of the bill that passed the House requires agencies to provide a reasonable estimate of the time an agency will require to respond to a

public record request. The Senate amendment provides examples of why an agency might need additional time to respond. The House bill specifically prohibits agencies or their representatives from going to court to enjoin disclosure of a record. The Senate amendment expressly provides that agencies or their representatives may go to court to enjoin disclosure of a record. The House bill allows a citizen who has been denied access to a record to seek an attorney general opinion on whether a record is exempt from disclosure. The Senate amendment establishes that making such a request does not establish an attorney-client relationship between the attorney general and the person making the request. The House bill makes a number of changes to the state's open meetings laws. The Senate amendment removes all changes to the open meeting laws and assigns study of open meeting issues to the Joint Select Committee on Open Government. The Senate amendment also assigns to the joint select committee the study of issues surrounding electronic data and records.

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.

VOTE ON FINAL PASSAGE:

Yeas 98