HOUSE BILL REPORT
2SHB 1758

As Amended by the Senate

Title: An act relating to public disclosure.

Brief Description: Revising public disclosure law.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General).

Brief History:

Committee Activity:

State Government Operations & Accountability: 2/9/05, 3/2/05 [DPS];
Appropriations: 3/5/05 [DP2S(w/o sub SGOA)].

Floor Activity:

Passed House: 3/15/05, 89-6.
Senate Amended.
Passed Senate: 4/12/05, 42-4.

Brief Summary of Second Substitute Bill

- Prohibits agencies from denying public records requests because they are overly broad; allows agencies to respond to requests on a partial or installment basis.
- Requires the Attorney General to adopt a model rule on public records disclosure
- Allows an agency to ask for a deposit or charge per installment for public records requests.
- Allows an agency to cease fulfilling a request if an installment is not picked up.
- Changes the venue for certain public records-related suits against counties.
- Imposes a one year statute of limitations for certain public records-related suits.

HOUSE COMMITTEE ON STATE GOVERNMENT OPERATIONS & ACCOUNTABILITY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Haigh, Chair; Green, Vice Chair; Nixon, Ranking

Minority Member; Clements, Assistant Ranking Minority Member; McDermott, Miloscia, Schindler and Sump.

Minority Report: Do not pass. Signed by 1 member: Representative Hunt.

Staff: Jim Morishima (786-7191).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government Operations & Accountability. Signed by 28 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; McDonald, Assistant Ranking Minority Member; Armstrong, Bailey, Buri, Clements, Cody, Conway, Darneille, Dunshee, Grant, Haigh, Hinkle, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, Miloscia, Pearson, Priest, Schual-Berke, Talcott and Walsh.

Staff: Owen Rowe (786-7391).

Background:

The Public Disclosure Act (PDA) requires all state and local government agencies to make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

For example, records that are relevant to a controversy to which a state or local agency is a party, but would not be available to another party under the superior court rules of pretrial discovery, are exempt from public disclosure. The Washington Supreme Court has defined "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." Dawson v. Daly, 120 Wn.2d 782, 791 (1993).

I. Requirements for Maintaining Records

Public records must be made available for inspection and copying during normal office hours. State and local agencies may make reasonable rules and regulations to provide full access to public records, to protect public records from damage, and to prevent excessive interference with other essential functions of the agencies.

State and local agencies are required to maintain indexes providing identifying information regarding certain records. Local agencies do not have to provide an index if doing so would be unduly burdensome. However, such local agencies must issue and publish a formal order specifying the reasons maintaining an index would be unduly burdensome and make available any indexes maintained for agency use.

II. Responding to Requests

Responses to requests for public records must be made promptly. Within five business days of a request, an agency must:

- provide the record;
- acknowledge receipt of the request and provide a reasonable estimate of the time that is required to respond to the request. Additional time may be taken to clarify the intent of the request, to locate the requested information, to notify third persons or agencies affected by the request, or to determine whether the requested information is protected by an exemption; or
- deny the request.

The Washington Supreme Court recently ruled that a public agency does not have to comply with an overbroad request. Hangartner v. City of Seattle, 151 Wn.2d 439, 448 (2004). According to the court, a proper request for public records "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents" (emphasis original). Id.

III. Copying Public Records

An agency must allow the public to use its facilities for copying public records unless to do so would unreasonably disrupt the operation of the agency. Agencies may not charge for locating public documents and making them available for copying. However, an agency may impose a reasonable charge for providing copies of public records and for the use of agency equipment. Charges for photocopying may not exceed the actual per page cost published by the agency. If the agency has not published a per page costs for copying, the costs may not exceed 15 cents per page.

IV. Judicial Remedies

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove, by a preponderance of the evidence, that the agency action was valid. If the person prevails in the action, he or she must be awarded all costs, including reasonable attorney fees.

Summary of Substitute Bill:

I. Requirements for Maintaining Records

By February 1, 2006, the Attorney General must adopt a model rule for state and local agencies addressing:

- providing fullest assistance to requesters;
- indexing for public records;
- fulfilling large requests in the most timely manner;
- fulfilling requests for electronic records; and
- any other issues pertaining to public disclosure as determined by the Attorney General.

II. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records solely on the grounds that the request is overly broad. The agency may make records available on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

Every state and local agency must appoint and maintain an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of the PDA.

III. Copying Public Records

An agency may require a deposit not to exceed 10 percent of the estimated cost of providing copies of a request and may charge a person per installment. An agency may cease fulfilling a request if an installment is not picked up.

IV. Judicial Remedies

Actions against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

Substitute Bill Compared to Original Bill:

The substitute bill removes the provisions in the original bill relating to the attorney-client privilege. The substitute allows agencies to fulfill requests on a "partial or installment" basis as the documents are "assembled or made ready," instead of on a "rolling" basis as the documents "become available and ready." The substitute bill prohibits an agency from denying a request solely because it is over broad. The substitute bill removes the provisions in the original bill that allowed the State Auditor to audit copying costs. The substitute allows agencies to ask for deposits and charge per installment when fulfilling requests. The substitute allows an agency to cease fulfilling a request if an installment is not picked up. The substitute removes the increase of the lower limit of the fine, but retains the increase of the upper limit that was made in the original bill.

EFFECT OF SENATE AMENDMENT(S):

The amendment exempts records from public disclosure if they are obtained, prepared, or maintained by an agency with jurisdiction over the release of sex offenders for the purpose of fulfilling the responsibilities of the End of Sentence Review Committee (ESRC) and the requirements of law dealing with sex offender assessment, risk level classification, and sending notification to the prosecuting attorney for civil commitment. The amendment alters the contents of the narrative notice sent to law enforcement regarding the pending release of a sex offender; the notice must contain the identity of the offender, the general relationship

between the offender and the victim, and the offender's criminal history. The amendment states that the narrative notice is a public record and subject to public inspection and copying. The amendment requires the ESRC to issue to law enforcement a law enforcement bulletin that contains the narrative description, identity, criminal history behavior, and risk level classification, of the offender; the law enforcement bulletin may be inspected by the public, but not copied.

The amendment allows an agency to cease fulfilling a public records request if an installment is not "claimed or reviewed," instead when an installment is not "picked up."

The amendment requires state and local agencies to appoint and publicly identify a "public records officer" to serve as a point of public contact and to ensure agency compliance with the public records law; the original bill required state and local agencies to appoint, "maintain," and publicly identify an "individual" for these purposes. The amendment allows a state or local agency to appoint an employee or official of another agency to be its public records officer. The amendment requires state agencies to publish the identity of the public records officer in the Washington State Register, instead of the Washington Administrative Code. The amendment requires local agencies to publish the identity of the public records officer in a manner reasonably calculated to provide notice to the public.

The amendment clarifies that the model rule adopted by the Attorney General is for advisory purposes. The amendment removes the requirement that the model rule address the indexing of public records.

The amendment applies the narrower definition of "public record" to state legislative offices. Currently, the definition applies to the offices of the Chief Clerk of the House of Representatives and the Secretary of the Senate.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (In support) It is important that people have access to government so that the public can see what agencies are doing. Every public document requested from an agency should be disclosed without discussion. This bill will reduce litigation, make it easier for people to get a record, and make it easier for agencies to follow the PDA. This bill codifies the attorney-client privilege to make it clear when the privilege applies; this will help prevent abuses of the attorney-client privilege exemption. The attorney-client privilege should not be expanded. A document should not be shielded simply because litigation may take place at some unidentified future time. This bill will help stop abuses of the "overbreadth" exemption identified in Hangartner. Public agencies should not be exempt from providing information to the people they serve.

(Concerns) The competing concerns of the PDA should be kept in mind: accountability, protection of private and confidential information, and maintaining government integrity and efficiency. The attorney-client privilege provisions of the bill may serve to codify the Hangartner decision. It is not clear that an attorney-client privilege exists for public lawyers. Hangartner changed the state of the law; prior to the decision, the relevant exemption was the "controversy" exemption.

Testimony Against: There needs to be a balance between the citizens' right to know, privacy and trust, and government efficiency. Hangartner did not affect the status of the law with regard to attorney-client privilege; the decision simply re-affirmed long-standing practice. There is no reason to believe that the attorney-client privilege will be abused. Because the attorney-client privilege is defined in the bill differently than it is defined under the current law, it is unclear whether courts can use the developed case law to determine the contours of the privilege. This bill could therefore lead to more litigation and uncertainty. The increased fines in the bill are too high and may give the public incentive to sue agencies. Some people currently use the PDA to blackmail agencies.

Summary of Second Substitute Bill:
Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For:
Testimony For: (Appropriations) None.

Testimony Against:
Testimony Against: (Appropriations) There are concerns with this bill and the fiscal impact on local governments. The local government fiscal note is indeterminate but there are two specific areas where there would be costs: the inclusion of language that prohibits public agencies from working with the requester to narrow down the request, and the increase in fines from $100 to $500. There are 179 cities with a population of less than 5,000 and approximately 100 that have a population of less than 1,500. These fines could quickly become burdensome for less sophisticated local governments.

Persons Testifying: (State Government Operations & Accountability) (In support) Representative Kessler, prime sponsor; Brian Sontag, State Auditor; Rob McKenna, Attorney General; Randall Gaylord, Washington Association of County Officials; Dan Wood, Washington State Farm Bureau; and Armen Yousoufian.

(Concerns) Michele Earl-Hubbard, Washington Coalition for Open Government; Jason Mercier, Evergreen Freedom Foundation; Bill Vogler, Washington State Association of Counties; Rick Slunaker, Associated General Contractors; Rowland Thompson, Allied Daily Newspapers of Washington; and David Koenig.

(Opposed) Lorriane Wilson and Patti Holmgren, Tacoma Public Schools; Roger Wynne, City of Seattle; Arthur Fitzpatrick, City of Kent for Coalition of Cities; and Denise Stiffarm, King County and Pierce County School Coalitions.

Persons Testifying: (Appropriations) Jim Justin, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: (State Government Operations & Accountability) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.