
**State Government Operations &
Accountability Committee**

HB 1758

Brief Description: Revising public disclosure law.

Sponsors: Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General.

Brief Summary of Bill

- Changes the attorney client exemption from public records disclosure.
- Prohibits agencies from denying public records requests because they are overly broad; allows agencies to respond to such requests on a "rolling basis."
- Changes requirements relating to how agencies must maintain and disclose public records.
- Requires the Attorney General to adopt a model rule relating to disclosure of public records.
- Changes the venue for certain suits against counties under the Public Disclosure Act.
- Imposes a one year statute of limitations for certain suits brought under the Public Disclosure Act.

Hearing Date: 2/9/05

Staff: Jim Morishima (786-7191).

Background:

I. Records Exempt from Public Inspection and Copying

The Public Disclosure Act (PDA) requires that 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 an 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).

In a recent decision, the Washington Supreme Court ruled that the statutory attorney-client privilege under RCW 5.60.060(2)(a) is a statutory exemption from public disclosure. Hangartner v. City of Seattle, 151 Wn.2d 439, 453 (2004). According to the court, this exemption protects only attorney-client communications and not "documents that are prepared for some other purpose than communicating with an attorney." Id., at 452.

II. 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.

III. 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 in Hangartner ruled that a public agency does not have to comply with an overbroad request. Hangartner, 151 Wn.2d at 448. 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.

IV. 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 fifteen cents per page.

V. 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. The person may also be awarded an amount between five and 100 dollars per day that the person was denied access to a public record.

Summary of Bill:

I. Records Exempt from Public Inspection and Copying

The attorney client privilege exemption articulated in Hangartner is changed to: (1) Records reflecting communications transmitted in confidence between a public official or employee and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice and (2) records prepared by the attorney in furtherance of the rendition of legal advice. Records are not exempt from disclosure merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel.

II. 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 or 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.

III. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records on the grounds that the request is overly broad. The agency may make records available on a "rolling basis" as records that are part of a larger set of requested records become available for inspection.

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.

IV. Copying Public Records

Any documentation of an agency's actual costs for copies are subject to audit for accuracy by the State Auditor.

V. 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. The amount of the award the superior court may grant a prevailing person is increased from between five and 100 dollars per day to between 50 and 500 dollars per day. 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 rolling basis.

Appropriation: None.

Fiscal Note: Requested on February 3, 2005.

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