SENATE BILL REPORT
SB 5735

As Reported By Senate Committee On:
Government Operations & Elections, March 1, 2005

Title: An act relating to public disclosure.

Brief Description: Revising public disclosure law.

Sponsors: Senators Brown, Finkbeiner, Keiser, Esser, Honeyford, Mulliken, Franklin, Prentice, McAuliffe, Stevens, Poulsen, Parlette, Deccio, Pflug, Rockefeller, Hewitt, Johnson, Oke, Shin, Rasmussen and Fairley; by request of Attorney General.

Brief History:
Committee Activity: Government Operations & Elections: 2/21/05, 3/1/05 [DPS].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 5735 be substituted therefor, and the substitute bill do pass.
Signed by Senators Kastama, Chair; Berkey, Vice Chair; Roach, Ranking Minority Member; Benton, Fairley, Kline, McCaslin, Mulliken and Pridemore.

Staff: Mac Nicholson (786-7445)

Background: The Public Disclosure Act (PDA) requires disclosure of all public records unless the record, or information on the record, is specifically exempt from disclosure. A public record is any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency.

There is no official format for a PDA request. A party seeking documents must state the request with enough clarity to give the agency notice that the request is a PDA request, and the request must seek identifiable public records. Agencies must respond to requests under the PDA within five business days by either providing the record; acknowledging receipt of the request and providing a reasonable estimate of time needed to respond; or denying the request. If the request is unclear, the agency may ask the requestor to clarify what information is sought.

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 that the requested record is exempt from disclosure or that the time estimate provided by the agency is reasonable. If the person requesting the public record prevails in court, he or she is awarded all costs, including reasonable attorney fees. The person may also be awarded an amount between $5 and $100 for each day the person was denied access to the public record.

Agencies may charge reasonable fees for providing copies of public records in accordance with actual per page costs or other costs that are established and published by the agency.

Numerous provisions of the PDA have been litigated since its enactment. Recently, the state Supreme Court, in Hangartner v. Seattle, had occasion to interpret several PDA provisions. Notably, the court held that a government agency need not comply with an overbroad PDA request; and that documents protected by the attorney-client privilege, codified at RCW 5.60.060(2)(a), are exempt from public disclosure.

Summary of Substitute Bill: The attorney-client privilege is codified as an exemption in the PDA statutes such that the following are exempt from public disclosure: 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 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. The attorney-client privilege in the PDA governs exemption of documents from disclosure consistent with the attorney-client privilege codified at RCW 5.60.060(2).

Agencies may not deny a PDA request solely on the basis that the request is overbroad. Public records that are part of a larger set of requested records may be made available on a partial or installment basis as they become available. If an agency makes a request available on an installment basis, the agency may charge for each installment as it is provided. If an installment is not picked up by the requestor, the agency is not obligated to fulfill the balance of the request.

Any documentation of an agency's actual costs for copies are subject to audit for accuracy by the State Auditor. An agency may require a deposit not to exceed ten percent of the estimated cost of providing copies.

Every state and local agency must appoint and publicly identify 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 public records disclosure requirements. A state or local agency's public records officer may appoint an employee or official of another agency as its public records officer. State agencies must publish this individual's identity in the state register, and local agencies must publish this individual's identity in a way reasonably calculated to provide notice to the public.

By February 1, 2006, the Attorney General must adopt an advisory model rule for state and local agencies addressing public disclosure issues. This rule may be revised at the discretion of the attorney general.

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 maximum amount of the award the superior court may grant a prevailing person is increased from $100 per day to $500 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 an installment.

Substitute Bill Compared to Original Bill: The substitute bill provides that the attorney-client privilege articulated in the bill is applied consistent with the attorney client privilege codified in the evidence statutes at RCW 5.60.060(2). The substitute allows an agency to require a deposit based on the estimated cost of providing copies. An agency may provide documents on an installment basis, rather than on a rolling basis as was provided in the original bill, and an agency is not obligated to fulfill the request if an installment is not picked up by the requestor. An agency may appoint an employee or official of another agency as its public records officer. The minimum fine for non-compliance is kept at the level in existing statute ($5 per day).

Appropriation: None.

Fiscal Note: Requested for substitute on March 1, 2005.

Committee/Commission/Task Force Created: No.

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

Testimony For: The common law attorney client privilege is difficult to understand, and the bill clarifies the privilege by providing a readily available definition that people can understand. Documents are not exempted simply because an attorney was present or saw the documents. The attorney client privilege safeguards an essential purpose of the attorney general, by encouraging agencies to seek advice and protecting the candid exchange of information when doing so. Allowing the release of documents on a rolling basis is an efficient way to deal with large requests, with the added benefit that the requestor may cancel the request if the document they are seeking is disclosed in the initial batch. Rather than allow agencies to simply not respond to an over broad request, the bill provides that the agency must work with the requestor to clarify the request. Its bad public policy to allow an agency to simply not respond to a disclosure request. There are a lot of detailed best practices that exist regarding public disclosure, and they should be written down so agencies don't have to reinvent the wheel when enacting public disclosure policies. The bill clarifies that the penalty assessed against an agency is a per day penalty. Increasing the penalty will deter agencies from denying disclosure requests. The statute of limitations for public records needs to be reduced from five years because some records are destroyed within five years of their creation which would prevent the agency from being able to disclose the record in the first place.

Testimony Against: Preserving the reference to the attorney client privilege makes more sense than adding new language. Adding new language divorces the privilege from all the common law that has been established throughout the years that has interpreted and refined the privilege. This will result in new litigation as the public and agencies must redefine what the privilege is and what it applies to. The attorney client privilege is a new exemption, as it deals with non-litigation situations which has never been an exemption under the PDA. Hangartner didn't expand anything and should not be re-litigated in the legislature. Higher fines against agencies will lead to harassment of the agency through PDA requests. Local governments get large numbers of requests, and there is a cost involved in responding to all the requests.

Who Testified: PRO: Greg Overstreet and Maureen Hart, Office of the Attorney General; Kenneth Babcock. OTHERS: Michele Earl-Hubbard, WA Coalition of Open Government; Ken Bunting, Seattle P-I; George Smith, WA Newspaper Publishers Association; Rowland Thompson, Allied Daily Newspapers.

CON: Lorraine Wilson, Tacoma Public Schools; Charlie Brown and Laura Clinton, King County School Coalition, Pierce County School Coalition, and Everett and Bellevue School Districts; Pat Fitzpatrick, City of Kent; Roger Wynne, City of Seattle.

<u>Signed in, Unable to Testify & Submitted Written Testimony:</u> Dave Wood, Families United; Tom McBride, WA Association of County Officers and WA Association of Prosecuting Attorneys; Bill Vogler, WA Association of Counties.