

HOUSE BILL REPORT

SHB 1897

As Passed House:
March 13, 2007

Title: An act relating to disclosure of attorney invoices.

Brief Description: Expressing the legislature's intent that public disclosure requirements do not allow attorney invoices to be exempt in their entirety.

Sponsors: By House Committee on State Government & Tribal Affairs (originally sponsored by Representatives Williams and Hunt).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 2/23/07, 2/27/07 [DPS].

Floor Activity:

Passed House: 3/13/07, 94-2.

Brief Summary of Substitute Bill

- Declares that it is the intent of the Legislature to clarify that attorney invoices from private legal counsel are not exempt from disclosure under the Public Records Act.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Hunt, Chair; Appleton, Vice Chair; Chandler, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Green, Kretz, McDermott, Miloscia and Ormsby.

Staff: Alison Hellberg (786-7152).

Background:

The Public Records Act (Act) requires that all state and local government agencies make all public records available for public disclosure unless they fall within certain statutory

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exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exemptions narrowly in order to effectuate a general policy favoring disclosure.

Records that are relevant to a controversy to which an agency is a party that would not be discoverable to another party under the superior court rules of pretrial discovery are exempt from disclosure under the Act. Specifically exempt from disclosure is an attorney's work product. The definition of work product includes "factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusions." *Limstrom v. Ladenburg*, 136 Wn.2d 595 (1998).

The attorney-client privilege also exempts certain public records from disclosure. The attorney-client privilege, however, is a narrow privilege and protects only "communication or advice between attorney and client in the course of the attorney's professional employment." *Hangartner v. City of Seattle*, 151 Wn.2d 439 (2004).

Summary of Substitute Bill:

The Legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditures of public resources upon private legal counsel or private consultants.

It is the intent of the Legislature to clarify that no reasonable construction of the Public Records Act has ever allowed attorney invoices to be withheld in their entirety by a public entity. It is further the intent of the Legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, opinion, or are otherwise exempt under this act or other laws. The burden is on the public entity to justify each redaction and narrowly construe any exception to full disclosure.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) The public has a right to know the costs of outside legal counsel retained by governmental agencies. It is also essential that the attorney-client confidences be protected. This bill is designed to strike a balance between these two important competing interests. It is important that the public know how much government is spending on legal costs. This is also the case where risk pool costs increase on account of government liability.

Elected county commissioners in Thurston county are spending hundreds of thousands of tax dollars defending against sexual discrimination and retaliation. Taxpayers have a right to

know what is being spent and for what services. The Olympian has asked for this information in a public records request. The attorney that the commissioners hired to defend the county is refusing to share any information beyond the \$250,000 deductible, on the basis that it is between the insurance company and the county's attorney. The implication that a document needs to be in an agency's possession to be disclosable is wrong. This could result in agencies storing documents elsewhere to avoid disclosure. Full disclosure of the acts creating liability will better deter future liability. Attorneys being paid by taxpayer money should not be allowed to hide public records.

Other government agencies, such as the Seattle Monorail Authority, handed over similar information with numerous redactions. Nothing was released that would have harmed them in litigation. Also, under the bill, a government agency would be able to redact anything that is work product or would violate the attorney-client privilege. Current law already requires that this information be disclosed. This bill is merely a clarification.

When an attorney represents a public entity, he or she is not acting as a private attorney. There is a large body of caselaw that says that an attorney representing a public entity has a duty of conscientious service. That attorney must consider the public's concerns. This bill does not go far enough because what exists right now is a system of shadow government. Attorneys are working for associations or groups, like the risk pool, which are agencies in the twilight. There are no cases in point regarding this issue in Washington State.

(Opposed) The amount of the attorney invoices should be disclosed. That is accountability. The concern with the bill, however, is that the Public Records Act is not intended to create an advantage to one side in litigation involving government entities. This bill tilts the playing field in favor of those suing government by narrowing the scope of what courts have considered to be work product. This bill only includes a portion of what is typically considered work product. The best place to determine what is work product is in the courts. The entire sentence, starting at the end of line seven should be deleted from the bill. Or, the bill should be amended to include the entire definition of work product.

The bill also creates an incentive for public sector lawyers to be more ambiguous in their billing statements. This would be a disservice to the public.

Attorney invoices tell a story on how a lawyer develops a case. They serve as a roadmap to litigation. This bill creates an unfair advantage because a public sector attorney cannot ask the same of the other side. It will be very problematic for those who have to defend state and local governments. Public entities should be treated the same way as private litigants. Governments have the right to competent counsel. Guidance in this area could come from how the Bar Association (Bar) looked at billing generally. The Bar decided that in situations where an insurer hires counsel for the insured the dollar amounts are not confidential. The rest of the information is confidential.

Persons Testifying: (In support) Representative Williams, prime sponsor; Vickie Kilgore, The Olympian; Greg Overstreet, Office of the Attorney General; Andrew Cook, Building Industry Association of Washington; Judy Endejan, Washington Coalition for Open

Government; Arthur West; and Rowland Thompson, Allied Daily Newspapers of Washington.

(Opposed) Jeffrey Myers, Law Lyman Daniel Kamerrer & Bogdanovich PS; Mel Sorensen, Washington Defense Trial Lawyers; Charlie Brown, Puget Sound School Coalition; and Dan Lloyd, Lee Smart Cook Martin & Patterson.

Persons Signed In To Testify But Not Testifying: None.