
State Government & Tribal Affairs
Committee

HB 2736

Brief Description: Establishing the office of open records.

Sponsors: Representatives Kessler, Kretz, Hurst, Wallace, Sullivan, Kelley, Angel and Roach;
by request of State Auditor and Attorney General.

Brief Summary of Bill

- Creates an independent Office of Open Records.

Hearing Date: 1/26/10

Staff: Tracey O'Brien (786-7196).

Background:

The Public Records Act (PRA) requires that all state and local government agencies 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 exemptions narrowly in order to effectuate a general policy favoring disclosure.

The PRA requires agencies to respond to public records requests within five business days. The agency must either provide the records, provide a reasonable estimate of the time the agency will take to respond to this request, or deny the request. Additional time may be required to respond to a request where the agency needs to notify third parties or agencies affected by the request or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. For practical purposes, the law treats a failure to properly respond as denial. A denial of a public records request must be accompanied by a written statement of the specific reasons for denial.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Any person who is denied the opportunity to inspect or copy a public record may file a motion to show cause in superior court why the agency has refused access to the record. The burden of proof rests with the agency to establish that the refusal is consistent with the statute that exempts or prohibits disclosure. Judicial review of the agency decision is de novo and the court may examine the record in camera.

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees. In addition, the court has the discretion to award such person no less than \$5 but not to exceed \$100 for each day he or she was denied the right to inspect or copy the public record. The court's discretion lies in the amount per day, but the court may not adjust the number of days for which the agency is fined.

An agency or its representative, or a person who is named in the record or to whom the record specifically pertains, may file a motion or affidavit asking superior court to enjoin disclosure of the public record. The court may issue an injunction if it finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.

Summary of Bill:

The Office of Open Records ("Office") is established.

The Office of Open Records.

The Office is directed to provide impartial administrative reviews of appeals by persons or agencies entitled to relief under the Public Records Act (PRA) and provide information relating to the implementation and enforcement of the PRA. In addition, the Office is directed to adopt rules pursuant to the Administrative Procedures Act (APA) to provide clear guidelines for an appeal process before the Office resulting from decisions of agencies subject to the PRA. The adjudicative proceedings provisions of the APA do not apply to the Office. The Office must employ or contract with attorneys to serve as administrative law judges (ALJ) to review appeals. Each ALJ must complete a training course provided by the Office prior to serving as an ALJ. An ALJ must follow the procedures established in this act.

Also, the Office must provide training courses on the PRA for agencies, public officials, and public employees. The training materials must be made available at no charge on its website.

An annual report by the Office to the Governor and the Legislature is required. The report must include activities and findings as well as legislative recommendations if appropriate.

The Office may contract with the Office of Administrative Hearings to use its facilities, equipment, ALJs, and clerical and technical staff to create efficiencies and cost savings.

The Executive Director.

The Office shall be supervised by an executive director. The executive director must be appointed by the Governor within the first 90 days of 2011. The appointment, which is for five years, is subject to confirmation by the Senate. An executive director may be reappointed. He or she must be admitted to practice law in Washington and may be removed for cause. The State

Committee on Agency Officials Salaries shall make recommendations regarding compensation for the executive director, but the salary shall be fixed by the Governor.

The executive director shall appoint Washington licensed attorneys to act as ALJs. He or she shall also appoint additional clerical, technical and professional staff as appropriate. The Executive Director may contract for additional services required for the performance of his or her duties.

The executive director shall determine the salaries of the ALJs after recommendations from the State Committee on Agency Officials' Salaries.

The executive director shall serve as the Office's chief administrator and shall ensure that the duties of the Office are carried out. He or she must also monitor cases appealed to the Office and may review appeals.

The budget appropriation for the Office shall be a separate line item recommended directly by the executive director.

Who May Appeal to the Office.

An appeal with the Office may be filed by:

- a person entitled to seek judicial review of an agency action under the PRA;
- a person entitled to seek court protection of a public record from a PRA request; or
- an agency entitled to seek court protection of a public record from a PRA request.

A person entitled to seek judicial review of an agency action may file a written appeal with the Office within 30 days of the date of the agency's claim of exemption or the last production of a record on a partial or installment basis. At any time before the production or denial of the records, a person may file an appeal challenging the reasonable estimate of time required to respond to the request.

A person entitled to seek court protection of a record may file a written appeal with the Office within 10 business days of the date of the agency's notice of intended disclosure by the agency.

An agency entitled to seek court protection of a public record may file a written appeal with the Office within 30 days of the date of the agency's claim of exemption or the last production of a record on a partial or installment record. An agency may also file a written appeal within 10 business days of the date of the agency's notice of intended disclosure by another agency possessing the requested record.

The Office may issue a temporary restraining order (TRO) for persons or agencies seeking court protection of a public record. The TRO shall enjoin the agency from disclosure of the public record until the Office renders a final order.

Any person or agency filing an appeal or intervening in an appeal must pay the Office a filing fee of \$35. An ALJ may waive the filing fee upon a showing that the person filing the appeal is indigent.

Appeals Process.

An appeal to the Office is not the exclusive remedy for the enforcement of the PRA. However, if an appeal with the Office is filed prior to the filing of a civil suit in superior court, the Office retains primary jurisdiction.

The Office shall assign an ALJ to review appeals and issue a final order granting or denying relief under the PRA. At the discretion of the executive director, an ALJ may confer with legal counsel and other employees of the Office who do not otherwise participate in the case.

An ALJ may grant a timely request to intervene in an appeal if a person is entitled to judicial review or court protection of the public records under the PRA, no hearing has been held, the ALJ has not issued the final order, and the party seeking to intervene in an appeal offers information that will assist with resolving the appeal without undue delay. Copies of the written request to intervene shall be provided to all parties in the appeal by the person or agency submitting the request. A decision by an ALJ to grant or deny a request to intervene is not subject to judicial review.

Unless a hearing is set, the ALJ must issue a final order that is mailed to the parties within 30 days of the receipt of the appeal filed with the Office.

At any time prior to the Office issuing a final order, any person or agency may submit a written request for a hearing. The ALJ may order a hearing if further information will be beneficial according to criteria established by rules adopted by the Office. The order granting or denying a hearing is not subject to judicial review. The ALJ may extend the deadline for a final order beyond 30 days in order to hold a hearing. The ALJ must issue a final order 30 days after the hearing.

Upon setting a hearing, the ALJ shall set a schedule for the submission of documents, testimony, or other evidence in support of any party's position. The ALJ may limit the nature and extent of admissible evidence for the sufficiency of issuing a final order.

The ALJ may issue subpoenas and may enter protective orders. The ALJ shall decide whether to permit the taking of depositions, the requesting of admission, and all other procedures authorized by Rules 26 through 36 of the Superior Court Civil Rules.

The ALJ shall condition use of discovery on a showing of necessity and unavailability by other means. He or she shall consider:

- whether all parties are represented by counsel;
- whether undue expense or delay in bringing the case to hearing will result;
- whether the discovery will promote the orderly and prompt conduct of the proceeding;
and
- whether the interests of justice will be promoted.

Discovery orders, protective orders, and subpoenas may be enforced by the Office in superior court in the county where the hearing is conducted.

The ALJ may accept or order the submission of any records, or portions of records, for in camera review. Records reviewed in camera for appeals to the Office are exempt from the PRA.

Before issuing an final order, the Office shall require the parties to meet and confer for the purpose of simplification or settlement of issues by agreement. The Office may order mediation where all parties agree to mediation for any issue. The ALJ may stay appeals and time limits pursuant to a mediation order for the duration of the mediation.

The Office may not award any costs, attorneys' fees, or penalties.

The executive director may designate certain final orders as precedents according to the criteria established in rulemaking. All other final orders are without precedent for determining other cases involving similar facts or issues. All final orders shall be made immediately and publicly available on the website of the Office.

Final Orders.

Subject to judicial review, the final orders of the ALJ are binding to all parties to an appeal before the Office and are enforceable in superior court. Judicial review of a final order must be filed with superior court within 30 days after the entry of the final order. The Office cannot be named as a defendant for any judicial review of a final order in superior court. A superior court may award a person who prevails on a judicial review against an agency all costs, including reasonable attorneys' fees and penalties; however, a superior court cannot award any costs or attorneys' fees incurred or accrued for appeals before the Office.

In order for a party who prevails against an agency in any action seeking the right to inspect or copy a public record to be awarded costs, including reasonable attorneys' fees, and penalties, the party must have received a final order from the Office before prevailing against an agency in court.

Rulemaking.

The Office shall adopt rules pursuant to the APA prescribing the procedures for an expedited review of an appeal with the issuance of a final order in fewer than 30 days for circumstances including, but not limited to:

- whether there is a clear legal issue presented on appeal;
- undisputed facts; and
- an urgent need for resolution that will be frustrated by delay.

A decision to grant or deny an expedited review is not subject to judicial review.

Repeal.

The statute authorizing the Attorney General to review a denial of a public records request is repealed.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2011.