

SENATE BILL REPORT

SB 6408

As Reported by Senate Committee On:
Government Operations & Elections, January 28, 2010

Title: An act relating to remedies for actions under the public records act.

Brief Description: Changing remedies for actions under the public records act.

Sponsors: Senators Fairley, Honeyford and Haugen.

Brief History:

Committee Activity: Government Operations & Elections: 1/19/10, 1/28/10 [DPS, DNP].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 6408 be substituted therefor, and the substitute bill do pass.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; McDermott, Pridemore and Swecker.

Minority Report: Do not pass.

Signed by Senator Roach, Ranking Minority Member.

Staff: Alison Mendiola (786-7483)

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: (1) provide the records, (2) provide a reasonable estimate of the time the agency will take to respond to this request, or (3) 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.

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.

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. 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 must be awarded all costs, including reasonable attorney fees. In addition, the court has the discretion to award such person no less than \$5 and no more than \$100 for each day the person 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.

Summary of Bill (Recommended Substitute): If a requester prevails against an agency in a public records act claim, the court may impose a fine on the responsible agency. That fine is to be deposited in the archives and records management account, the purpose of which is to enhance the preservation and availability of the state's public records.

The court may award a portion of the fine to the prevailing requester in an amount that reimburses the requester for any demonstrated financial loss caused by the agency's failure to release a public record or respond to a request in a timely manner.

EFFECT OF CHANGES MADE BY GOVERNMENT OPERATIONS & ELECTIONS COMMITTEE (Recommended Substitute): The language changing the awarding of costs from shall to may in the original bill is struck. Current law is retained: if a requester prevails against an agency in a public records claim, the court must award all costs.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Original Bill: PRO: Some people make a living out of making frequent requests, some which can't be complied with (like text messages) and others wait the maximum time of 364 days before filing their complaint in order to maximize the daily penalties. When the Department of Archeology and Historic Preservation was given fining authority, the Legislature didn't want to give the agency an incentive to over fine, so the fines get deposited into the General Fund. Following that same logic, an agency who fails to properly comply with a public records request should be fined, and that fine should be used to help preserve public documents instead of going to the requester. The Public Records Act hasn't kept up with technology. Text message records are held by a third-party, and to get those would require a subpoena for the company in order for the agency to comply.

CON: The bill would have a chilling effect on public disclosure. Without the ability to get attorney's fees, the public won't be able to hire attorneys and they won't be an incentive for the public to sue an agency who fails to comply with the law. There are those who abuse the process, but citizens frequently prevail in these lawsuits. We should focus on education and making records more available. Taking away the current enforcement system would be harmful.

Persons Testifying: PRO: Senator Haugen, co-sponsor; Allyson Brooks, Department of Archives and Historic Preservation.

CON: Roland Thompson, Allied Daily Newspapers; Ramsey Ramerman, City of Everett; Arthur West, citizen; Shanvar Narayan, ACLU-WA.