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HOUSE BILL 2736

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State of Washington

61st Legislature

2010 Regular Session

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

Read first time 01/13/10. Referred to Committee on State Government & Tribal Affairs.

1 AN ACT Relating to creating the office of open records; amending  
2 RCW 34.05.030; reenacting and amending RCW 42.56.550; adding new  
3 sections to chapter 42.56 RCW; repealing RCW 42.56.530; and providing  
4 an effective date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 34.05.030 and 2006 c 300 s 4 are each amended to read  
7 as follows:

8 (1) This chapter shall not apply to:

9 (a) The state militia, or

10 (b) The board of clemency and pardons, or

11 (c) The department of corrections or the indeterminate sentencing  
12 review board with respect to persons who are in their custody or are  
13 subject to the jurisdiction of those agencies.

14 (2) The provisions of RCW 34.05.410 through 34.05.598 shall not  
15 apply:

16 (a) To adjudicative proceedings of the board of industrial  
17 insurance appeals except as provided in RCW 7.68.110 and 51.48.131;

18 (b) Except for actions pursuant to chapter 46.29 RCW, to the

1 denial, suspension, or revocation of a driver's license by the  
2 department of licensing;

3 (c) To the department of labor and industries where another statute  
4 expressly provides for review of adjudicative proceedings of a  
5 department action, order, decision, or award before the board of  
6 industrial insurance appeals;

7 (d) To actions of the Washington personnel resources board or the  
8 director of personnel;

9 (e) To adjustments by the department of revenue of the amount of  
10 the surcharge imposed under RCW 82.04.261; (~~(e)~~)

11 (f) To the extent they are inconsistent with any provisions of  
12 chapter 43.43 RCW; or

13 (g) To the adjudicative proceedings of the office of open records.

14 (3) Unless a party makes an election for a formal hearing pursuant  
15 to RCW 82.03.140 or 82.03.190, RCW 34.05.410 through 34.05.598 do not  
16 apply to a review hearing conducted by the board of tax appeals.

17 (4) The rule-making provisions of this chapter do not apply to:

18 (a) Reimbursement unit values, fee schedules, arithmetic conversion  
19 factors, and similar arithmetic factors used to determine payment rates  
20 that apply to goods and services purchased under contract for clients  
21 eligible under chapter 74.09 RCW; and

22 (b) Adjustments by the department of revenue of the amount of the  
23 surcharge imposed under RCW 82.04.261.

24 (5) All other agencies, whether or not formerly specifically  
25 excluded from the provisions of all or any part of the Administrative  
26 Procedure Act, shall be subject to the entire act.

27 NEW SECTION. Sec. 2. A new section is added to chapter 42.56 RCW  
28 to read as follows:

29 (1) There is established an independent office of open records.  
30 The office must:

31 (a) Provide impartial administrative reviews of appeals by persons  
32 or agencies entitled to relief under this chapter;

33 (b) Provide information relating to the implementation and  
34 enforcement of this chapter;

35 (c) Adopt rules pursuant to the administrative procedure act,  
36 chapter 34.05 RCW, to provide clear guidelines for an appeal process

1 before the office of public records from decisions of agencies subject  
2 to this chapter. The provisions of RCW 34.05.410 through 34.05.598 do  
3 not apply to the office of public records for this appeal process;

4 (d) Provide training courses on this chapter for agencies, public  
5 officials, and public employees, and make training materials available  
6 at no charge on its web site;

7 (e) Employ or contract with attorneys to serve as administrative  
8 law judges to review appeals. Each administrative law judge must  
9 comply with all of the following:

10 (i) Complete a training course provided by the office before acting  
11 as an administrative law judge; and

12 (ii) Comply with the procedures under section 3 of this act; and

13 (f) Annually report on its activities and findings to the governor  
14 and the legislature and recommend legislation, as the office deems  
15 appropriate.

16 (2) The office of open records shall be supervised by an executive  
17 director, appointed by the governor within ninety days of the effective  
18 date of this section, subject to consent of the senate. The initial  
19 executive director must be appointed within ninety days of the  
20 effective date of this section. The term is five years, subject to  
21 reappointment. The executive director must be admitted to practice law  
22 in the state of Washington, and may be removed for cause. Compensation  
23 shall be fixed by the governor after recommendation of the state  
24 committee on agency officials' salaries.

25 (a) The executive director shall appoint attorneys admitted to  
26 practice law in the state of Washington to act as administrative law  
27 judges, and additional clerical, technical, and professional staff as  
28 may be appropriate, and may contract for additional services as  
29 necessary for the performance of the executive director's duties. The  
30 salaries of administrative law judges shall be determined by the  
31 executive director after recommendation of the state committee on  
32 agency officials' salaries.

33 (b) The office of open records may contract with the office of  
34 administrative hearings to use its facilities, equipment,  
35 administrative law judges, and clerical and technical staff to create  
36 efficiencies and cost savings.

37 (c) The executive director shall serve as the chief administrator,

1 shall ensure that the duties of the office are carried out, shall  
2 monitor cases appealed to the office, and may review appeals in  
3 accordance with section 3 of this act.

4 (d) The appropriation for the office of open records shall be a  
5 separate line item recommended directly by the executive director.

6 NEW SECTION. **Sec. 3.** A new section is added to chapter 42.56 RCW  
7 to read as follows:

8 (1) Persons described in this subsection may file an appeal with  
9 the office of open records.

10 (a) A person entitled to seek relief under RCW 42.56.550 may file  
11 a written appeal with the office within thirty days of the date of the  
12 agency's claim of exemption or the last production of a record on a  
13 partial or installment basis. At any time before the production or  
14 denial of records, a person entitled to seek relief under RCW 42.56.550  
15 may file an appeal challenging the reasonable estimate of the time  
16 required to respond to the request pursuant to RCW 42.56.520.

17 (b) A person entitled to seek relief under RCW 42.56.540 may file  
18 a written appeal with the office within ten business days of the date  
19 of the agency's notice of intended disclosure by an agency.

20 (c) A agency entitled to seek relief under RCW 42.56.540 may file  
21 a written appeal with the office within thirty days of the date of the  
22 agency's claim of exemption or the last production of a record on a  
23 partial or installment basis, or within ten business days of the date  
24 of the agency's notice of intended disclosure by another agency  
25 possessing the requested public records.

26 (d) For persons or agencies seeking injunctive relief under RCW  
27 42.56.540 the office may issue a temporary restraining order that  
28 enjoins the agency from disclosure under this chapter until such time  
29 the office renders a final order pursuant to this section.

30 (e) Any person or agency filing an appeal or intervening in an  
31 appeal must pay the office a filing fee of thirty-five dollars. The  
32 fee must be waived by order of an administrative law judge upon a  
33 showing that the person filing the appeal is indigent.

34 (2)(a) The office of open records shall assign an administrative  
35 law judge to review appeals and issue final orders granting or denying  
36 relief under this chapter. At the discretion of the executive

1 director, an administrative law judge may confer with legal counsel and  
2 other employees of the office who do not otherwise participate in the  
3 case.

4 (b)(i) The administrative law judge may grant a timely request to  
5 intervene in an appeal under this section if:

6 (A) A person is entitled to seek relief under RCW 42.56.540 or  
7 42.56.550;

8 (B) No hearing has been held;

9 (C) The administrative law judge has not yet issued final order;  
10 and

11 (D) The party seeking to intervene in an appeal offers information  
12 that will assist with resolving the appeal without undue delay.

13 (ii) Copies of the written request to intervene in an appeal shall  
14 be provided to all parties in the appeal by the person or agency  
15 submitting the request. A decision by the administrative law judge to  
16 grant or deny a request to intervene is not subject to judicial review.

17 (c) Unless a hearing is set, the administrative law judge shall  
18 issue final order that must be mailed to the parties within thirty days  
19 of receipt of the appeal filed with the office.

20 (d) The office shall adopt rules pursuant to chapter 34.05 RCW  
21 prescribing procedures for an expedited review of an appeal with the  
22 issuance of a final order in fewer than thirty days for circumstances  
23 including but not limited to: Whether there is a clear legal issue  
24 presented on appeal, undisputed facts, and an urgent need for  
25 resolution that will be frustrated by delay. A decision by the office  
26 to grant or deny an expedited review is not subject to judicial review.

27 (e) At any time before the office issues a final order, any person  
28 or agency may submit a written request for a hearing. The  
29 administrative law judge may order a hearing if further information  
30 will be beneficial according to criteria established by rule adopted by  
31 the office pursuant to chapter 34.05 RCW. The order granting or  
32 denying a hearing is not subject to judicial review. The  
33 administrative law judge may extend the deadline for a final order  
34 beyond thirty days in order to hold a hearing. The administrative law  
35 judge must issue a final order within thirty days after the hearing.

36 (f) Upon setting a hearing, the administrative law judge shall set  
37 a schedule for the submission of documents, testimony, or other  
38 evidence in support of any party's position. The administrative law

1 judge may limit the nature and extent of admissible evidence for the  
2 sufficiency of issuing a final order. The administrative law judge may  
3 issue subpoenas and may enter protective orders. The administrative  
4 law judge shall decide whether to permit the taking of depositions, the  
5 requesting of admissions, and all other procedures authorized by rules  
6 26 through 36 of the superior court civil rules. The administrative  
7 law judge shall condition use of discovery on a showing of necessity  
8 and unavailability by other means. The administrative law judge shall  
9 consider: (i) Whether all parties are represented by counsel; (ii)  
10 whether undue expense or delay in bringing the case to hearing will  
11 result; (iii) whether the discovery will promote the orderly and prompt  
12 conduct of the proceeding; and (iv) whether the interests of justice  
13 will be promoted. Discovery orders, protective orders, and subpoenas  
14 may be enforced by the office in a superior court in the county where  
15 the hearing is conducted.

16 (g) The administrative law judge may accept or order the submission  
17 of any records, or portions thereof, for in camera review. Records  
18 reviewed in camera for appeals before the office are exempt from  
19 disclosure under this chapter.

20 (h) Before issuing a final order, the office must require the  
21 parties to an appeal to meet and confer for the purpose of  
22 simplification or settlement of issues by agreement. The office may  
23 order mediation where all parties agree to mediation for any issue.  
24 The administrative law judge may stay appeals and time limits required  
25 under this section pursuant to a mediation order for the duration of  
26 the mediation.

27 (i) The office may not award any costs, attorneys' fees, or  
28 penalties.

29 (j) The executive director may designate certain final orders as  
30 precedents according to criteria established by rule adopted pursuant  
31 to chapter 34.05 RCW. All other final orders are without precedent for  
32 determining other cases involving similar facts or issues. All final  
33 orders shall be made immediately and publicly available on the web site  
34 of the office.

35 (3)(a) Appeals to the office of open records are not the exclusive  
36 remedy for enforcement of the provisions of this chapter. Any person  
37 may initiate an action in court under RCW 42.56.540 or 42.56.550.

1 However, if an appeal is filed first with the office, the office  
2 retains primary jurisdiction.

3 (b) Subject to judicial review, the final orders of the  
4 administrative law judges are binding on all parties to an appeal  
5 before the office, and are enforceable in a superior court.

6 (c) Judicial review of a final order of the office must be filed  
7 with a superior court within thirty days after the entry of the final  
8 order, and venue shall be determined consistent with the provisions of  
9 RCW 42.56.550. Judicial review of a final order of the office by a  
10 superior court shall be de novo.

11 (d) The office may not be named as a defendant for any judicial  
12 review of a final order to a superior court.

13 (e) A superior court may award a person who prevails on judicial  
14 review against an agency all costs, including reasonable attorneys'  
15 fees, and penalties in accordance with RCW 42.56.550(4). However, a  
16 superior court may not award any costs or attorneys' fees incurred or  
17 accrued for appeals before the office.

18 **Sec. 4.** RCW 42.56.550 and 2005 c 483 s 5 and 2005 c 274 s 288 are  
19 each reenacted and amended to read as follows:

20 (1) Upon the motion of any person having been denied an opportunity  
21 to inspect or copy a public record by an agency, the superior court in  
22 the county in which a record is maintained may require the responsible  
23 agency to show cause why it has refused to allow inspection or copying  
24 of a specific public record or class of records. The burden of proof  
25 shall be on the agency to establish that refusal to permit public  
26 inspection and copying is in accordance with a statute that exempts or  
27 prohibits disclosure in whole or in part of specific information or  
28 records.

29 (2) Upon the motion of any person who believes that an agency has  
30 not made a reasonable estimate of the time that the agency requires to  
31 respond to a public record request, the superior court in the county in  
32 which a record is maintained may require the responsible agency to show  
33 that the estimate it provided is reasonable. The burden of proof shall  
34 be on the agency to show that the estimate it provided is reasonable.

35 (3) Judicial review of all agency actions taken or challenged under  
36 RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take  
37 into account the policy of this chapter that free and open examination

1 of public records is in the public interest, even though such  
2 examination may cause inconvenience or embarrassment to public  
3 officials or others. Courts may examine any record in camera in any  
4 proceeding brought under this section. The court may conduct a hearing  
5 based solely on affidavits.

6 (4) Any person who prevails against an agency in any action in the  
7 courts seeking the right to inspect or copy any public record or the  
8 right to receive a response to a public record request within a  
9 reasonable amount of time shall be awarded all costs, including  
10 reasonable attorneys' fees, incurred in connection with such legal  
11 action. In addition, it shall be within the discretion of the court to  
12 award such person an amount not less than five dollars and not to  
13 exceed one hundred dollars for each day that he or she was denied the  
14 right to inspect or copy said public record. However, in no event may  
15 a court award a penalty unless such person received a final order from  
16 the office of open records before prevailing against an agency in court  
17 pursuant to this subsection.

18 (5) For actions under this section against counties, the venue  
19 provisions of RCW 36.01.050 apply.

20 (6) Actions under this section must be filed within one year of the  
21 agency's claim of exemption or the last production of a record on a  
22 partial or installment basis.

23 NEW SECTION. Sec. 5. RCW 42.56.530 (Review of agency denial) and  
24 1992 c 139 s 10 are each repealed.

25 NEW SECTION. Sec. 6. Sections 1 and 3 through 5 of this act take  
26 effect January 1, 2011.

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