

# SENATE BILL REPORT

## SB 5089

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As of November 28, 2011

**Title:** An act relating to conferences regarding public records requests disputes.

**Brief Description:** Regarding conferences for public records requests disputes.

**Sponsors:** Senators Hatfield, Swecker, Harper, Nelson, Parlette and Chase.

**Brief History:**

**Committee Activity:** Government Operations, Tribal Relations & Elections: 1/24/11.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

**Staff:** Sharon Swanson (786-7447)

**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.

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 private.

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*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 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 that 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:** Before filing a court action contesting the agency's denial of a request or contesting that the agency's estimate of the time it will take to respond to the request is unreasonable, the requester and the agency may confer about the dispute. This conference may be by telephone or in-person.

If the claim is that no exemption justifies the agency's denial of the request then the court action cannot be filed until 15 days have passed since the conference occurs. The statute of limitations is tolled and the daily penalties may not accrue during the 15-day period.

The requester or the agency filing suit must file a certification either that the conference was held or that it was not, as the case may be.

The award of daily penalties and costs is mandatory unless a requester or agency elects to file suit without conducting the conference in good faith, or if the requester or agency files a law suit without waiting the full 15 days, in which case the award is discretionary. The court may consider several nonexclusive factors in exercising this discretion.

**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:** PRO: Most requesters do contact the agency before they sue: the only burden this bill places is on the frivolous or "gotcha" requester. The Washington Supreme Court has ruled that a requester cannot be required to use a form. Penalties create incentives for playing games with the PRA. Allowing penalties to be set at zero would be a simple solution that would address all concerns.

CON: State-approved training in the PRA for cities and counties will help. An agency just needs to adopt a schedule and it is legally enforceable. The more procedural requirements there are the more litigation there will be. The agency won't respond until the meet and confer obligation is met. Would you want the Department of Revenue to operate like this? A judge would be confused by any of this.

**Persons Testifying:** PRO: Ramsey Ramerman, Washington Association of Public Records Officers; Brian Enslow, Washington State Association of Counties.

CON: Arthur West, citizen; Greg Overstreet, Allied Law Group; Rowland Thompson, Allied Daily Newspapers.