

SENATE BILL REPORT

SB 5237

As of November 28, 2011

Title: An act relating to creating the office of open records.

Brief Description: Establishing the office of open records.

Sponsors: Senators White, Swecker, Morton, Pridemore, Kilmer, Sheldon and Shin; by request of State Auditor and Attorney General.

Brief History:

Committee Activity: Government Operations, Tribal Relations & Elections: 2/07/11.

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.

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.

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 attorneys'

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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.

The Office of Administrative Hearings (OAH) provides impartial administration of administrative hearings independent of state agencies, using procedures delineated in the Administrative Procedure Act (APA). The director of OAH is the Chief Administrative Law Judge, appointed by the Governor, and confirmed by the Senate. The APA also sets forth procedures for agencies themselves to conduct adjudicative proceedings. Administrative proceedings are conducted with as great a degree of informality as is consistent with fairness and the nature of the proceedings.

Summary of Bill: An independent office of open records (Office) is established within OAH and is supervised by the Chief Administrative Law Judge (Chief). Either the person aggrieved or the agency may seek relief under the PRA by filing an appeal with the Office and paying a filing fee, unless waiver criteria are met.

However, an agency is not required to enter into an agreement with OAH to participate in the Office. If the agency does enter into this agreement, unless provided otherwise by the parties, it is on a fiscal year basis. The OAH may charge participating agencies fees for services rendered.

The Office may decline to hear an appeal. However, if it accepts the appeal, the administrative law judge (ALJ) must issue a final order within 30 days of receipt of the appeal, unless a hearing is set.

If a hearing is set, the ALJ may extend the 30-day time limitation in order to hold a hearing. The ALJ must issue a final order within 30 days after the hearing. However, the Office must require the parties to meet and confer so as to agree to simplify or settle issues. The Office may also order mediation upon the agreement of the parties. The ALJ may stay appeals and time limits for the duration of mediation.

However, a hearing may be requested at any time before the Office issues a final order.

The ALJ has authority to exercise discretion in administering the hearing schedule; making evidentiary rulings; issuing subpoenas and protective orders; allowing the taking of depositions; and otherwise acting under superior court civil rules 26 through 36. Guidelines for the judge's exercise of discretion are provided. The judge may order in camera review and the records subject to in camera review are exempt from public disclosure under the PRA.

Neither the court nor the office may award costs, attorneys' fees or penalties for appeals before the Office. The Chief may designate certain final orders as precedents. All final orders must be made available immediately and publicly available on the Office's website.

Judicial review must be requested within 30 days of entry of the final order. Judicial review is de novo.

The part of the APA that provides for adjudicative proceedings does not apply to the adjudicative proceedings of the Office. However, the Office must adopt administrative rules to provide clear guidelines for an appeal process before the Office.

Use of the Office for appeals is discretionary with the person and does not foreclose judicial review. However, if the person appeals to the Office first, then the Office retains primary jurisdiction.

Appropriation: None.

Fiscal Note: Available.

[OFM requested ten-year cost projection pursuant to I-960.]

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect on January 1, 2012.