

SENATE BILL REPORT

SB 5685

As of February 13, 2011

Title: An act relating to penalties for public records violations.

Brief Description: Specifying penalties for public records violations.

Sponsors: Senators Swecker and Pridemore.

Brief History:

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

SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

Staff: Diane Smith (786-7410)

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.

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 attorneys' 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.

In the Washington State Supreme Court case of *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444 (2010) the court applied a 16-factor framework of aggravating and mitigating factors to guide trial judges in setting penalties.

Summary of Bill: The court has discretion to make a monetary award to the person who prevails. The Legislature requests that the court use the multifactor analysis in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444 (2010) in considering a monetary award to a person who was denied the right to inspect or copy a public record.

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: There are so many PRA bills. Hopefully this will serve as a vehicle for creating clarity and accountability without creating more bureaucracy. The possibility of no penalties being awarded is legitimate. Trial court judges and the Code Reviser said the intent section was properly done and would remain a note in the Code. Judges said they tell the parties to work it out, but the judge then controls that process. A process the judge does not control makes for potentially more disputation. The Yousoufian 16-factor test resulted in the largest penalty award to date. This bill returns more closely to the original intent of the PRA. It is equitable. The test is a good one for any penalty range. However, a cap should be adopted. Otherwise there are unlimited potential penalties which effect the agency's bargaining power. Unelected bureaucrats should not be able to subject government to unlimited liability. The bill should be effective immediately due to pending cases.

CON: If the intent is penalty reform, we need clarity that zero penalty may be awarded even if there was a technical violation. Citizens wind up paying the penalty through taxes. No maximum would encourage more litigation. The notice-and-cure bill avoids litigation by focusing on transparency of the dispute. This bill needs work and should not substitute for the Attorney General's bill. Citizens are using this Act. The Yousoufian test is not user-friendly and is unworkable. So much judicial discretion makes appeals almost impossible. The federal courts have a 6-part formula which would be more appropriate. There should be a maximum and a minimum to keep judge's discretion within bounds. De minimus should be better defined, at zero.

Persons Testifying: PRO: Senator Swecker, prime sponsor; Rowland Thompson, Allied Daily Newspapers; Ramsey Ramerman, Association of Washington Cities.

CON: Christina Beusch, Attorney General's Office; Arthur West, citizen.