

SHB 1037 - H AMD 808

By Representative Pollet

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds that public agencies
4 must remain capable of adequately informing the public of their
5 activities through timely disclosure of public records. However,
6 public agencies are increasingly burdened by broad record requests from
7 commercial entities, including data miners, whose purpose is to sell or
8 resell the public records for a private profit. Public agencies expend
9 taxpayer dollars to locate, assemble, redact, review, and provide the
10 requested public records. Under existing law, except for copying and
11 mailing costs, public agencies may not recover the true costs of
12 providing this service. As a result, the taxpayers of this state
13 effectively subsidize commercial requestors. Accordingly, it is the
14 intent of the legislature to protect the public interest and prevent
15 diversion of scarce agency resources by authorizing public agencies to
16 recover their costs through charging a reasonable fee when records are
17 requested for the purpose of sale or resale. It is the intent of the
18 legislature to authorize agencies to establish such fees, without in
19 any manner limiting public inspection of records or delaying public
20 access to records.

21 **Sec. 2.** RCW 42.56.080 and 2005 c 483 s 1 and 2005 c 274 s 285 are
22 each reenacted and amended to read as follows:

23 (1) Public records shall be available for inspection and copying,
24 and agencies shall, upon request for identifiable public records, make
25 them promptly available to any person (~~(including, if applicable,)~~).
26 Public records may be made available on a partial or installment basis
27 as records that are part of a larger set of requested records are
28 assembled or made ready for inspection or disclosure.

1 (2) Agencies shall not deny a request for identifiable public
2 records solely on the basis that the request is overbroad.

3 (3) Agencies shall not distinguish among persons requesting
4 records, and such persons shall not be required to provide information
5 as to the purpose for the request, except to establish whether:

6 (a) Inspection and copying would violate RCW 42.56.070(9) or other
7 statute which exempts or prohibits disclosure of specific information
8 or records to certain persons; or

9 (b) The primary purpose of the request is the sale or resale of all
10 or part of the record, including the sale or resale of a document or
11 database containing all or part of the record.

12 (4) Agency facilities shall be made available to any person for the
13 copying of public records except when and to the extent that this would
14 unreasonably disrupt the operations of the agency. Agencies shall
15 honor requests received by mail for identifiable public records unless
16 exempted by provisions of this chapter.

17 **Sec. 3.** RCW 42.56.120 and 2005 c 483 s 2 are each amended to read
18 as follows:

19 (1) ~~No fee shall be charged for the inspection of public records((~~
20 ~~No fee shall be charged for locating public documents and making them~~
21 ~~available for copying.))~~, nor shall the public's right to disclosure
22 and provision of records be delayed by the provisions of this section
23 that authorize an agency to determine, based on evidence, that a
24 request is primarily for sale or resale. Except as provided in
25 subsection (2) of this section, no fee shall be charged for locating,
26 disclosing the existence of, or producing copies of public records. A
27 reasonable charge may be imposed for providing copies of public records
28 and for the use by any person of agency equipment or equipment of the
29 office of the secretary of the senate or the office of the chief clerk
30 of the house of representatives to copy public records, which charges
31 shall not exceed the amount necessary to reimburse the agency, the
32 office of the secretary of the senate, or the office of the chief clerk
33 of the house of representatives for its actual costs directly incident
34 to such copying. Agency charges for photocopies shall be imposed in
35 accordance with the actual per page cost or other costs established and
36 published by the agency. In no event may an agency charge a per page
37 cost greater than the actual per page cost as established and published

1 by the agency. To the extent the agency has not determined the actual
2 per page cost for photocopies of public records, the agency may not
3 charge in excess of fifteen cents per page. An agency may require a
4 deposit in an amount not to exceed ten percent of the estimated cost of
5 providing copies for a request. If an agency makes a request available
6 on a partial or installment basis, the agency may charge for each part
7 of the request as it is provided. If an installment of a records
8 request is not claimed or reviewed, the agency is not obligated to
9 fulfill the balance of the request.

10 (2) When a request for records is made for the primary purpose of
11 sale or resale of all or part of the record, unless an exemption as
12 provided in subsection (8) of this section is applicable, an agency may
13 charge a fee to recover its actual costs in responding to the request.
14 The fee may be a flat fee, fee per record, or other type of fee, but
15 the fee shall not exceed a reasonable estimate of the actual cost to
16 provide the records. The actual cost may include, but is not limited
17 to, the cost of locating, assembling, reviewing, redacting, copying,
18 and providing the record to the requestor.

19 (3) Where, as authorized in RCW 42.56.080(3)(b), an agency has
20 required a person to provide information about whether the primary
21 purpose of a request is the sale or resale of the requested records and
22 the person has denied such a purpose, no cost recovery fee may
23 ordinarily be assessed under subsection (2) of this section. However,
24 if the agency has reason to believe that the purpose of the request has
25 been misrepresented and the request is made primarily for the purpose
26 of sale or resale, the agency may require the requestor to sign a
27 statement under penalty of perjury, attesting that the primary purpose
28 of the record request is not sale or resale of all or part of the
29 record.

30 (4) Before charging the fee authorized in subsection (2) of this
31 section, an agency must develop and adopt, with notice and public
32 hearing, a fee schedule. The agency shall publish the fee schedule
33 along with the methodology by which the fees were established.

34 (5) The agency must also establish an appeals process by which a
35 requestor may appeal the amount, or application, of a fee in writing to
36 the director or chief executive officer of the agency. The requestor
37 may bring such an appeal within thirty days of the agency's assessment
38 of the fee. Use of the agency appeals process provided under this

1 section is at the option of the requestor, who is not required to
2 follow this process as a condition of obtaining judicial review as
3 provided in RCW 42.56.550.

4 (6) When an agency charges a cost recovery fee pursuant to
5 subsection (2) of this section, it must provide to the requestor a
6 written basis for its determination that the request is primarily for
7 the purpose of sale or resale and no exemption from subsection (8) of
8 this section applies.

9 (7) An agency may require a requestor to post a deposit in an
10 amount not to exceed ten percent of the estimated actual cost of
11 providing the records. If an agency makes the request available on a
12 partial or installment basis, the agency may require a deposit in an
13 amount not to exceed ten percent of the estimated actual cost of
14 providing the installment.

15 (8) The fee authorized in subsection (2) of this section is
16 applicable to a record request where the primary intended use of any
17 part of a public record or records, or information derived from public
18 records, in any form, is for the commercial purpose of sale or resale.
19 The fee authorized in subsection (2) of this section may not be
20 assessed if one or more of the following circumstances exists:

21 (a) The principal purpose of the request is not deemed a
22 "commercial purpose" because:

23 (i) The principal purpose of the request is to access and
24 disseminate information concerning news and current or passing events,
25 for articles of opinion or features of interest to the public, for the
26 purpose of academic, scientific, or public research or education, or
27 for the purpose of commenting to, or petitioning, the government;

28 (ii) The principal purpose of the request is public dissemination
29 or disclosure of information in order to contribute to public
30 understanding of the operations or activities of the government; or

31 (iii) The requestor is a representative of a religious, charitable,
32 educational, or other nonprofit organization or association and the
33 request is made in furtherance of the organization's or association's
34 nonprofit purpose and not for a different commercial purpose;

35 (b) Even if the request is for a commercial purpose, the fee is not
36 applicable because:

37 (i) The requestor is entitled to obtain the requested records

1 pursuant to a contract, memorandum of understanding, or other binding
2 agreement with the agency or under authority of law other than this
3 chapter;

4 (ii) The requestor can demonstrate that the requested records will
5 be used to comply with governmental permitting requirements or other
6 regulations;

7 (iii) The requestor is a title insurer licensed by the insurance
8 commissioner, an agent of such a title insurer, or an entity that
9 collects and provides data to such a title insurer or agent, as
10 reasonably required to insure titles, to act as an escrow closing agent
11 or, as allowed by the office of the insurance commissioner by rule, to
12 provide related customer services; or

13 (iv) The requestor is a person licensed under chapter 18.85 RCW, a
14 prospective developer of real property, or a person seeking information
15 about real property or buildings owned by that person, and the request
16 is for the purpose of evaluating the viability of developing a specific
17 parcel of real property for a particular use, and not for a different
18 commercial purpose.

19 (9) A person or other legal entity that avoids paying the fee
20 authorized in subsection (2) of this section, by intentionally
21 misrepresenting the purpose for which the request is made or the
22 requestor's eligibility for an exemption under subsection (8) of this
23 section, or by intentionally inducing another person to knowingly or
24 unknowingly make such a misrepresentation, is liable for a civil
25 penalty at least equivalent to what the agency would have charged for
26 the records. The civil penalty under this section is in addition to
27 any other civil or criminal penalties and remedies available under any
28 other law of this state.

29 (10) Nothing in this section or RCW 42.56.080 may be construed to
30 create an obligation or authorization for an agency to create or
31 provide access to lists of individuals requested for commercial
32 purposes.

33 **Sec. 4.** RCW 42.56.550 and 2011 c 273 s 1 are each amended to read
34 as follows:

35 (1) Upon the motion of any person having been denied an opportunity
36 to inspect or copy a public record by an agency, the superior court in
37 the county in which a record is maintained may require the responsible

1 agency to show cause why it has refused to allow inspection or copying
2 of a specific public record or class of records. The burden of proof
3 shall be on the agency to establish that refusal to permit public
4 inspection and copying is in accordance with a statute that exempts or
5 prohibits disclosure in whole or in part of specific information or
6 records.

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

13 (3) Upon the motion of any person who believes that an agency has
14 required payment of a cost recovery fee in an amount not authorized by
15 RCW 42.56.080, for a request that is exempt, or of a requestor who is
16 exempt from the fee under RCW 42.56.120(8), the superior court in the
17 county in which a record is maintained may require the responsible
18 agency to show by a preponderance of the evidence that the request was
19 primarily for the purpose of sale or resale and that no exemption was
20 applicable.

21 (4) Judicial review of all agency actions taken or challenged under
22 RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take
23 into account the policy of this chapter that free and open examination
24 of public records is in the public interest, even though such
25 examination may cause inconvenience or embarrassment to public
26 officials or others. Courts may examine any record in camera in any
27 proceeding brought under this section. The court may conduct a hearing
28 based solely on affidavits.

29 ~~((+4))~~ (5) Any person who prevails against an agency in any action
30 in the courts seeking the right to inspect or copy any public record or
31 the right to receive a response to a public record request within a
32 reasonable amount of time shall be awarded all costs, including
33 reasonable attorney fees, incurred in connection with such legal
34 action. In addition, it shall be within the discretion of the court to
35 award such person an amount not to exceed one hundred dollars for each
36 day that he or she was denied the right to inspect or copy said public
37 record.

1 (~~(+5)~~) (6) For actions under this section against counties, the
2 venue provisions of RCW 36.01.050 apply.

3 (~~(+6)~~) (7) Actions under this section must be filed within one
4 year of the agency's claim of exemption or the last production of a
5 record on a partial or installment basis."

6 Correct the title.

EFFECT: The striking amendment makes the following changes to
Substitute House Bill 1037:

 Adds language clarifying that the Legislature does not intend in
any manner to authorize public agencies to limit public inspection of
records or delay public access to records in authorizing public
agencies to assess a cost recovery fee for production of records in
response to requests for the purpose of sale or resale.

 Requires an agency charging a cost recovery fee to provide to the
requestor a written basis for its determination that the fee is
applicable and no exemption applies.

 Makes changes in the categories of requests and requestors that are
exempt from the cost recovery fee, including: (1) Broadening the types
of nonprofit institutions, research purposes, and public dissemination
purposes that are exempt from the fee; and (2) expressly exempting
requests for the purpose of petitioning the government or contributing
to public understanding of government operations and activities.

 Makes changes to an internal agency appeal process, providing a
requestor the option to appeal within 30 days an agency's determination
of or application of a cost recovery fee.

 Provides for judicial review of agency determinations: (1) That
the cost recovery fee is applicable and no exemption applies; or (2) of
the amount of cost recovery fee that may be assessed. This judicial
review is available to a requestor, whether or not the requestor first
seeks to use the agency appeal process.

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