

HOUSE BILL REPORT

HB 1037

As Reported by House Committee On:
Government Operations & Elections
Appropriations

Title: An act relating to establishing a cost-recovery mechanism for public records sought for commercial purposes.

Brief Description: Establishing a cost-recovery mechanism for public records sought for commercial purposes.

Sponsors: Representatives Moeller, Fitzgibbon, Appleton, Hudgins, Morrell and Bergquist.

Brief History:

Committee Activity:

Government Operations & Elections: 1/23/13, 2/19/13 [DPS];

Appropriations: 2/3/14, 2/7/14 [DPS(GOE)].

Brief Summary of Substitute Bill

- Authorizes an agency to charge a fee to recover the actual cost of providing a public record, where the request is for the purpose of sale or resale of the record or a document, or database containing the record.
- Requires an agency, before charging a fee, to establish a fee schedule and an appeals process allowing the requestor to appeal the fee amount.
- Authorizes an agency, when it has reason to believe a request is for the purpose of sale or resale but this purpose has been denied by the requestor, to require a signed statement under the penalty of perjury.
- Establishes a civil penalty for misrepresentation of the commercial purpose of a request at least equivalent to what the agency would have charged for the records.
- Exempts requests made: (1) for purposes of permitting and regulatory compliance; (2) pursuant to a contract or authority of law; or (3) by certain institutions and businesses.

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

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.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives S. Hunt, Chair; Bergquist, Vice Chair; Carlyle, Fitzgibbon, Kristiansen, Manweller, Orwall, Van De Wege and Alexander.

Minority Report: Do not pass. Signed by 2 members: Representatives Buys, Ranking Minority Member; Taylor, Ranking Minority Member.

Staff: Jasmine Vasavada (786-7301).

Background:

The Public Records Act (PRA) requires that state and local government agencies make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The PRA disclosure provisions must be interpreted liberally, and the exemptions narrowly, in order to effectuate a public policy favoring disclosure. Agencies are prohibited from requiring a requestor of public records to provide information about the purpose of the request, except to determine whether disclosure is exempted or prohibited by statute.

Charging Fees to Recover Costs of Furnishing Public Records.

Unless authorized by statute, an agency cannot charge a fee for the inspection of records or for an agency's efforts to locate records, redact them if necessary to protect confidential information, and make them available for copying. An agency may assess a reasonable charge, not greater than 15 cents per page, for the cost of providing copies and for the use of agency equipment for making copies. However, the agency's charges cannot exceed those necessary to reimburse the agency for the actual costs directly incident to copying and shipping the records, such as the cost of the paper, the per-page cost for use of the copying equipment, and the cost of postage or delivery.

An agency may charge for staff time to copy and mail the requested records, but otherwise may not charge for staff salaries, benefits, or other general administrative or overhead costs. The agency must maintain for public inspection a statement of the actual, per-page cost or other costs of providing public records, and how these costs were determined.

Access to Lists of Individuals.

The PRA does not authorize an agency to provide access to lists of individuals where such lists are requested for commercial purposes. For example, a statutory provision establishes that such lists shall be made available to professional associations and educational organizations, recognized by their professional licensing board, upon payment of a reasonable fee. An agency may only refuse such a request for good cause, pursuant to a hearing under the Administrative Procedure Act.

Summary of Substitute Bill:

Assessment of the Cost-Recovery Fee.

Agencies may charge a fee for providing a public record, when the request is made for the purpose of sale or resale of the record or a document or database containing all or part of the public record. The fee may be a flat fee, a fee-per-record, or other type of fee, but it may not exceed the agency's actual cost of providing the records. The actual cost includes, but is not limited to, the costs to locate, assemble, redact, review, and provide the records.

Before charging fees, an agency must develop a fee schedule with notice and public hearing. The agency must publish the fee schedule and the methodology by which its fees have been established. The agency must also establish a process by which a requestor can appeal the amount of a fee. An agency may contract with another agency to establish the appeals process.

Where an agency wishes to assess a fee, it must provide notice of the appeals process to the requestor. The agency must also provide an estimate of the cost to provide the requested records. A deposit in an amount not to exceed 10 percent of the estimated cost may be required.

Misrepresentation of the Commercial Purpose of the Request.

Agencies ordinarily will not assess a fee when the requestor does not report that the request is for the purpose of sale or resale. However, if an agency has reason to believe the requestor is misrepresenting his or her purpose, the agency may require the requestor to sign a statement under penalty of perjury. A person who misrepresents the purpose or eligibility for an exemption, or who intentionally induces another person to make such a misrepresentation, is liable for a civil penalty at least equivalent to what the agency would have charged for the records. This civil penalty is in addition to any other remedy available by law.

Exemptions from the Cost-Recovery Fee.

Agencies are not authorized to assess the fee if the request is made by a member of the news media, a nonprofit organization, or an education institution, to further a purpose of that institution. The fee also may not be charged to a person or entity who is otherwise entitled to obtain the requested information, either by an agency contract, memorandum of understanding, or other binding agreement, or under authority of a law other than the Public Records Act. Title companies, title agents, and entities that collect and provide data to them are exempt from the fee for requests made for the purposes of insuring titles, acting as an escrow closing agent, or providing certain related customer services. Another exemption is provided to licensed realtors, prospective developers of real property, and persons seeking information about real property or buildings they own, when such requests are made for the purpose of evaluating the viability of developing a specific parcel of real property for a particular use. Finally, no fee may be charged where the requested record is needed by the requestor for the purpose of permitting or regulatory compliance.

Substitute Bill Compared to Original Bill:

The substitute bill:

- narrows the commercial purposes for which a cost-recovery fee is authorized. A cost-recovery fee is now authorized when the request is for the purpose of sale or resale of all or part of the record, including sale or resale of a document or database containing all or part of the record;

- clarifies that the actual costs for which an agency may assess a fee include, but are not limited to, the costs of locating, assembling, reviewing, redacting, copying, and providing the record;
- changes the process for an agency's determination that the request is for the purpose of sale or resale. An agency may not assess a fee where a person has denied that the purpose of the request is sale or resale, but if the agency has reason to believe that the requestor has misrepresented his or her purpose, the agency may require the requestor to sign a statement under penalty of perjury. If a person misrepresents the purpose of a request, that person may be subject to a civil penalty at least equivalent to the cost that would have been imposed by the agency;
- tightens the definition of certain types of requests that are exempt from the cost-recovery fee. Representatives of the new media, nonprofit organizations, and educational institutions remain exempt from the fee, but only for requests made to further the organization's purpose. The fee exemption for requestors who are entitled to obtain the records pursuant to a contract is clarified; the exemption also applies when an entitlement is created by a memorandum of understanding or other binding agreement with the agency; and
- creates two new exemptions: title insurers, title agents, and entities that collect and provide data to them; and realtors, prospective developers of real property, and persons seeking information about real property or buildings they own.

Appropriation: None.

Fiscal Note: Requested on February 19, 2013.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Data miners, many of which are out-of-state, are increasingly submitting broad public records requests to cities. After they receive the public records, sometimes spanning decades, these companies turn around and sell that information for a profit. Meeting these complex requests, particularly in providing records from the past that are not already digitized, costs taxpayers money, and causes delays in meeting other requests. One requestor asked a city to provide a list of all those companies that had outstanding uncashed checks from the last three years, and there have been many requests for databases that go back 50 years. In many cities, the city clerk or the mayor or personnel manager is the records officer, and simply does not have time to meet these complex requests. This bill will not interrupt the flow of public records, but it will permit agencies to recover costs when the purpose of the requestor is to sell or resell the record. There are other statutory provisions that authorize assessing a fee for records, such as medical records.

(In support with concerns) In researching a property, realtors frequently request reports of building permits on a certain home or septic reports going back any number of years. Some realtors are sympathetic to the difficulty faced by local governments in meeting certain

commercial requests, but access to local property records, by homeowners, prospective buyers, and sellers, is important and provides public benefits.

(With concerns) Some of the definitions in the bill as drafted are problematic. Many states authorize commercial use of public records but regulate commercial use better. Proponents of the cost-recovery fee should be clearer about what it is they are actually trying to protect. The bill should be more specific, for example, stating county clerks may charge \$1 a page for copies of records. There should not be a list of exemptions of people who do not have to pay the fee. The various exemptions in this bill make it difficult to deal with, and there are internal conflicts because the purpose of local government is creation of an infrastructure for commerce, and most local government records are commercially valuable. Authorizing charges to be made for inspection of public records is in direct conflict with the Public Records Act. Broad data requests can put a strain on agencies, but treating commercial requestors differently does not get at the root cause of this problem. Some commercial requestors get information through electronic batches and already pay for that information, but occasionally need to make a one-off request not covered by the electronic batch processes.

(Other) Title companies maintain title plants, databases updated daily by digitized information received from the courthouse, creating cross-indexed court and land records. Title companies do not use the information for solicitation, but instead use the public records to protect people's rights in property, and should be exempt from the cost-recovery fee.

(Opposed) Authorizing this cost-recovery fee will allow agencies to make it cost prohibitive for citizens to request records, requiring extensive litigation to fight the fee. Agencies cannot be trusted to give private citizens what they are requesting. A citizen may be forced to litigate about whether a request is for commercial purpose. This creates an opportunity for some jurisdictions to abuse the cost-recovery fee provisions. The real problem is the nature and breadth of the request itself, and whether or not staff have adequate resources to respond, irrespective of who is making the requests.

Persons Testifying: (In support) Representative Moeller, prime sponsor; Doug Levy, cities of Everett, Puyallup, and Redmond; Kevin Yamamoto, City of Puyallup; Candice Bock, Association of Washington Cities; Sandy Paul and Debbie Burke, Washington Municipal Clerks Association; and Lisa Thatcher, Association of Washington Public Hospitals.

(In support with concerns) Nathan Gorton, Washington Realtors.

(With concerns) Chris Oswald, Lexis Nexis; Rowland Thompson, Allied Daily Newspapers; and Cliff Webster, Consumer Data Industry Association.

(Other) Stu Halsan, Washington Land Title Association.

(Opposed) John Worthington; Larry Shannon, Washington State Association for Justice; and Arthur West.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Government Operations & Elections be substituted therefor and the substitute bill do pass. Signed by 27 members: Representatives Hunter, Chair; Ormsby, Vice Chair; Chandler, Ranking Minority Member; Ross, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Carlyle, Cody, Dahlquist, Dunshee, Fagan, Green, Haigh, Haler, Harris, Hudgins, G. Hunt, S. Hunt, Jinkins, Kagi, Morrell, Parker, Pettigrew, Schmick, Seaquist, Springer, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 4 members: Representatives Buys, Christian, Lytton and Taylor.

Staff: Charlie Gavigan (786-7340).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Government Operations & Elections:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a taxpayer protection bill. Businesses, often out of state, gather free public records from local governments and sell those records for profit. Taxpayers should not be subsidizing these businesses. This does not limit the flow of information to the public in any way. Requesters should pay for the actual cost of records.

This bill allows local governments to charge for records in order to recover their actual costs of providing the records. This bill is looking out for taxpayers by not subsidizing businesses who profit from reselling records they obtained for free from local governments.

(In support with concerns) The exemptions are very broad and citizens appear to be the only ones who do not have an exemption under the bill. There are costs that will be borne by the citizens. This will be the first time government can charge for assembling records.

(Opposed) This bill is changing long-standing fundamental public disclosure principles. Public records are either open or closed. Government should not be differentiating between types of requesters of information. Government should not charge for assembling public records.

Persons Testifying: (In support) Representative Moeller, prime sponsor; Kevin Yamamoto, City of Puyallup; and Candace Bock, Association of Washington Cities.

(In support with concerns) Roland Thompson, Allied Daily Newspapers.

(Opposed) Bill Will, Washington Coalition for Open Government.

Persons Signed In To Testify But Not Testifying: None.