HOUSE BILL REPORT
HB 1128

As Reported by House Committee On:
Local Government

Title: An act relating to public record request response actions by counties, cities, towns, special purpose districts, and other local agency entities.

Brief Description: Regarding local agencies' responses to public records requests.

Sponsors: Representatives Takko, Rodne, Appleton, Johnson, Klippert, Fitzgibbon, Sullivan, Green, Clibborn, Nealey, Ryu, Walsh, Jinkins, Wylie, Moscoso, Sells, Angel, Seaquist, Hunt, Springer, Maxwell, Riccelli, Morrell, Hudgins, Bergquist and Fey.

Brief History:
Committee Activity:
Local Government: 1/25/13, 2/8/13 [DPS].

Brief Summary of Substitute Bill

- Authorizes issuance of court injunctions against public records requests made to agencies pursuant to the Public Records Act (PRA) under specific circumstances.
- Establishes a summary court proceeding for seeking and obtaining an injunction against a public records request as authorized by this section.
- Authorizes agencies to adopt a policy limiting the number of hours they devote to responding to public records requests, if the agency makes certain documents publicly available and meets other conditions.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Takko, Chair; Fitzgibbon, Vice Chair; Taylor, Ranking Minority Member; Kochmar, Assistant Ranking Minority Member; Buys, Liias, Springer and Upthegrove.

Staff: Michaela Murdock (786-7289).

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.

Background:

The Public Records Act (PRA) requires that most records maintained by state, county, and city governments, and all special purpose districts be made available to members of the public. The definition of "public record" includes any writing that contains information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. The term "writing" includes handwriting, typewriting, printing, photographing, and every other means of recording any form of communication or representation.

Agencies must make available for public inspection and copying all public records, unless the record falls within a specific exemption. Additionally, upon receiving a request for public records, agencies must respond within five business days. The agency must either provide the records, provide a reasonable estimate of the time the agency will take to respond to the request, or deny the request. The law treats a failure to properly respond as a denial. The PRA provides any person denied an opportunity to inspect or copy a public record, or who believes that an agency has not made a reasonable estimate of the time that it requires to respond to a request, with judicial review of the agency action.

An agency or its representative, or a person who is named in the record or to whom the record specifically pertains, may seek injunctions against specific public records requests in circumstances prescribed by statute. An injunction may be ordered where examination of a record clearly would not be in the public interest and would substantially and irreparably damage any person or vital government function. Also, public records requests by persons serving criminal sentences in correctional facilities may be enjoined under certain circumstances.

Summary of Substitute Bill:

Two new sections relating to agency responses to public record requests are added to the Public Records Act.

Injunctions Against Public Records Requests.
Under the first section, the inspection or copying of any public record may be enjoined upon the request of a local agency or a person named in the record, or any of their representatives. Requests made by news media may not be enjoined under this section.

To issue an injunction under this section, a superior court must find that the request: (1) was made to harass or intimidate an agency or its employees; (2) upon a showing by clear and convincing evidence, will materially interfere with the work of the local agency; (3) if fulfilled, would likely threaten the safety or security of persons named in the record, any person to whom the record pertains, agency employees, or specified others; or (5) if fulfilled, would likely assist criminal activity. The court may consider all relevant factors, including factors specifically set out in the section, in deciding whether to issue an injunction.

An injunction may be requested by motion in a summary proceeding. Upon a showing by a preponderance of the evidence, a court may grant the motion and enjoin all or any part of a request, approve a plan for fulfilling all or part of the request, or enjoin, for a time, future requests by the same requestor. If a court finds that a local agency filed the request for an injunction in bad faith, or that the motion is frivolous, the court may award attorneys' fees to the requestor.

Record requestors must be notified of an agency's intent to seek an injunction, and they have 15 days to revise their requests. Agencies must continue to fulfill record requests while motions for injunctions are pending.

Limiting Agency Time Responding to Records Requests.
Under the second section, a local agency may limit the number of hours it devotes to responding to public records requests.

To adopt a policy limiting response hours, an agency must make certain documents publicly available, including budgets, agendas and minutes, resolutions and ordinances, and certain contracts. Different standards for whether documents are "publicly available" are established for agencies with a general fund budget of equal to or greater than $1 million and for agencies with a general fund budget of less than $1 million. Agencies may also prioritize the order in which requests will be fulfilled.

If the value of the time allotted by an agency to respond to requests equals 1 percent of the agency's annual operations and maintenance budget, or less in some circumstances, it will be presumed reasonable. However, an agency without full-time staff may not adopt a policy that allows it to spend fewer than five hours per month responding to requests. All other agencies may not adopt policies that allow them to spend fewer than 12 hours per month responding to requests.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the underlying bill:

- modifies who may request an injunction by removing persons to whom a public record request specifically pertains, or that person's representative, as someone authorized to request an injunction;
- exempts requests made by the news media from being enjoined as authorized by the provisions of the underlying bill, and defines the term "news media";
- removes authority of the court, provided in the underlying bill, to issue an injunction if it finds that a request was made in retaliation or to punish a local agency for action (s) the agency took or proposed to take;
- removes authority of the court, provided in the underlying bill, to issue an injunction on the basis that a request creates an undue burden on the public agency; and instead, creates authority for the court to issue an injunction if it finds by clear and convincing evidence that a request will materially interfere with the work of the public agency;
- modifies what a court must find in order to issue an injunction based on a threat to the safety or security of certain persons or the agency by: (1) creating authority to issue the injunction if any person named in the record or any person to whom a request

pertains is threatened; and (2) authorizing injunctive relief for "employees" or their family members that are threatened, instead of "staff" or their family members;
- adds a specific requirement that record requestors receive an opportunity to respond to any agency motion for an injunction and notice of any hearing;
- adds a provision declaring that injunctive relief is an extraordinary remedy;
- authorizes a court to award attorneys' fees, not to exceed $15,000, against a local agency if a request for an injunction was filed in bad faith or is frivolous;
- removes salary schedules and the names of all employees from the list of documents that must be made publicly available in order for an agency to adopt a policy limiting the number of hours it devotes to responding to record requests;
- permits local agencies to post a list of all pending record requests on its website, which may be used to inform requestors of factors that will determine a response time estimate; and
- increases the minimum amount of time that a local agency, other than one without full-time staff, may spend responding to record requests under any policy limiting the time it spends responding from "five" to "12" hours per month.

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) In recent years, Public Records Act (PRA) requests have increasingly been used to harass and cause harm to local governments and agencies. There are numerous examples of excessive, repeated, voluminous, and overly broad requests by disgruntled former employees, anonymous persons, and others whose primary intent is to harass local government, agencies, and staff. As a result, agencies have had to divert staff, hire new positions, and incur significant legal fees to respond to requests. The costs are in the hundreds of thousands of dollars for different jurisdictions. This bill seeks to curb the abuses of the PRA.

The bill is important to just about every public agency (*e.g.,* school districts, public hospitals, fire districts, local governments, special purpose districts, etc.). Agencies have reached a crisis point.

The PRA has not been updated in over 40 years, and it is not suited in its current form to recent technological advances. For example, electronic mail (e-mail) and digital records have caused an exponential increase in the number of records that are kept today.

The bill will strengthen the PRA by allowing agencies to focus on good faith requests. It will help restore the original intent of the PRA to create open and transparent government, rather

than overburdening and bankrupting government with harassing and frivolous requests. These requests are a huge drain and waste in government. We need to protect taxpayers.

There are safeguards built into the act. First, notice must be given to the requestor of the intent to request an injunction, and agencies must continue to fulfill the request prior to obtaining an injunction. Second, there is a safe harbor provision that provides guidance to agencies managing their responses to requests.

Regarding record requests by the press, agencies have a good rapport with the press, and often times, they will work with agencies to narrow broad requests. The bill is not targeting the press. In contrast, people who make harassing requests often refuse to work with agencies to clarify or narrow those requests.

Courts are an appropriate arbiter of these issues. Courts have developed case law over the past 40 years that favors requestors and disclosure. Judges will be able to exercise their discretion in a fair and equitable way that will favor disclosure. Furthermore, requestors currently have the ability to take an agency that is not fulfilling its duties under the PRA to court; the agency does not have a similar ability to respond to harassing or bad faith requests. This bill will give agencies equity.

There is a new trend of people requesting records related to legal financial obligations that may contain confidential or private financial information. There is a danger that these records may contain sensitive information that will be used for criminal activity.

For litigation involving local governments or agencies, opposing attorneys are currently permitted to make voluminous and overbroad requests under the PRA. These litigation-related requests are much broader than civil litigation discovery rules allow. Such requests have forced agencies to incur significant costs and fees. Discovery rules should govern such requests.

For very small agencies, even a non-harassing request can cost the agency 8 percent of its annual budget.

(Opposed) The bill is not necessary. There are other alternatives available to agencies that would reduce agency costs. For example, requestors could do the work themselves. Also, there are already mechanisms in the PRA to deal with overly broad or voluminous record requests. Finally, there are already many exemptions that have been carved out of the PRA. The act has been perfected over the past 40 years.

Agencies and local governments engage in activities that they do not want exposed. They are not interested in transparency and open government. They want to hide records from public disclosure. We cannot trust agencies to make such embarrassing or controversial information publicly or readily available. This bill is an attempt to silence people and make them go away.

Courts are under pressure to restrict tort liability and, accordingly, they will easily grant injunctions to limit such liability.

If the bill passes, citizens will be scared to make a record request for fear that they will have to go to court to defend against an injunction.

Officials likely perceive many typical record requests as harassing, because some requests seek to uncover officials' illegal or inappropriate behavior or actions. These requests should not be restricted. The public has a right to know about these activities.

Given the number of instances of former public employees and officials using the PRA to harass their former employers, there may be a need to place restrictions on former employees and officials in order to prevent abuses of the law. However, the Legislature should not restrict legitimate requests of private citizens' or place punitive sanctions on citizens.

This bill violates citizens' First Amendment rights and the right to freedom of information. People have a First Amendment right to petition their government for redress of grievances. Requests made under the PRA are petitions to the government subject to the First Amendment.

This bill will allow agencies to thwart the purpose of the PRA through intimidation and trickery. For example, although a requestor is entitled to notice of the request for an injunction, the summary proceeding is an "*in rem*" proceeding and the requestor is not a party to the action.

Citizens and incarcerated criminals are different. It was okay to allow injunctions against incarcerated criminals, because they have limited rights while in prison. Free citizens have stronger rights to disclosure and information.

Rather than focus on the size or types of requests that are prohibited, the bill should focus on the intent of the requestor.

Persons Testifying: (In support) Representative Takko, prime sponsor; Brian Enslow and Todd Mielke, Washington State Association of Counties; Dave McEachron, Whatcom County Prosecuting Attorney's Office; Doug Richardson, Pierce County; Richard Jansons, Richland School District; Nancy Truitt-Pierce, Monroe Public School; Judy Scott, Port of Allyn; Rebecca Francik, City of Pasco; Don Gerend, Association of Washington Cities; Briahna Taylor, Cities of Sea Tac, Port Orchard, and Yakima County; Tom Seigel, Bethel School District; John Deeder, Evergreen School District; and James McMahan, Association of County Officials.

(Opposed) John Worthington; Arthur West; Bill Will, Washington Newspaper Publishers Association; Jerry Galland; Tim Blanchard; and Rowland Thompson, Allied Daily Newspapers of Washington.

Persons Signed In To Testify But Not Testifying: None.