H-4334.1

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**SECOND SUBSTITUTE HOUSE BILL 2576**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**State of Washington 64th Legislature 2016 Regular Session**

**By** House General Government & Information Technology (originally sponsored by Representatives McBride, Nealey, Ryu, Tarleton, Springer, S. Hunt, Johnson, Zeiger, Rossetti, Clibborn, Peterson, Haler, Hargrove, Jinkins, Gregerson, Senn, and Hickel)

AN ACT Relating to public records act requests to local agencies; amending RCW 42.56.520; reenacting and amending RCW 42.56.240; adding new sections to chapter 42.56 RCW; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature finds that the right of citizens to observe the actions of local agencies and to have timely access to public records are essential to democracy and allow for meaningful participation in the democratic process. The legislature reaffirms the importance of transparent and open government while recognizing that local agencies face unique challenges in responding to requests for public records and must balance their responsibilities under the public records act, chapter 42.56 RCW, with the effective operation of the agency.

**PART I**

**POLICIES FOR RESPONDING TO REQUESTS**

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

(1) In order to prevent excessive interference with other essential functions of the local agency, a local agency may adopt procedures that limit the number of hours it devotes on a monthly basis to responding to public records requests, and that prioritize requests according to criteria established by the local agency. Procedures adopted by local agencies:

(a) Must address the need to provide the fullest assistance possible to requestors while avoiding excessive interference with other essential functions;

(b) Must provide that unfilled requests or installments will roll over into the following month and will continue to be fulfilled in installments based on available time under the policy; and

(c) Must be adopted by the local agency in the form of adopted legislation subject to public hearing. The procedures must be reviewed and amended, as necessary, by the governing body of the local agency not less than once every other year.

(2)(a) Prior to adopting procedures, a local agency must make available and accessible to the public in accordance with (b) of this subsection:

(i) Budgets for the ongoing and three previous fiscal years and, when available, any proposed budget for the upcoming fiscal year; and

(ii) Agendas and minutes for all public meetings of the local agency's governing body for the three previous fiscal years.

(b) A local agency may not adopt or implement procedures under this section unless:

(i) For local agencies with a web site and employing ten or more full-time equivalent employees, documents listed in (a) of this subsection are accessible through a central web site; or

(ii) For local agencies without a web site or employing fewer than ten full-time equivalent employees, the local agency produces for inspection any document listed in (a) of this subsection within five business days of a request, or the documents are accessible through the local agency's web site.

(3)(a) In developing procedures and establishing resources available to respond to requests on a monthly basis, local agencies are encouraged to consider the average time spent responding to requests over the prior two-year period. In limiting the number of hours a local agency devotes on a monthly basis to responding to requests:

(i) The number of hours allotted by the local agency for responding to requests each month must be reasonable in light of the local agency's resources and other essential functions; and

(ii) The local agency must establish a minimum amount of time each month, not fewer than ten hours, it will devote to responding to requests that is reasonable in light of the local agency's resources and other essential functions.

(b) Tasks subject to a limit authorized by this section may include the time it takes to search for responsive records and review and redact responsive records. Tasks subject to a limit authorized by this section may not include time spent in litigation or time spent by an attorney providing legal advice regarding records.

(4) Procedures adopted by a local agency may prioritize the order in which public records requests will be fulfilled. If a local agency chooses to prioritize requests, the local agency must adopt rules establishing the criteria governing prioritization in accordance with this subsection (4).

(a) A local agency may prioritize requests based on the size and complexity of the request and the number of requests the requestor has made in the preceding twelve months.

(b) To the extent possible, local agencies should give priority to requests in which any of the conditions listed in (b)(i), (ii), or (iii) of this subsection apply. To determine whether one of these conditions exist, the public records officer of a local agency may ask the requestor for clarifying information. If the requestor does not provide information necessary to determine whether one or more of the conditions apply, then the local agency may assume that the condition does not apply. Priority should be given to:

(i) Requests involving an imminent threat to public safety or a loss of substantial due process rights;

(ii) Requests concerning imminent legislative, administrative, or judicial action; and

(iii) Requests that are routine, may be readily fulfilled, or are immediately accessible.

(5) In an effort to better understand a request, provide all responsive records, and appropriately prioritize a request, if procedures providing for prioritization have been adopted by a local agency, a local agency's procedures must encourage public records officers to contact requestors to inquire about the purpose for a request. Requestors are not obligated to answer the inquiry of a public records officer regarding the purpose of a request, except to establish whether inspection and copying of records would violate RCW 42.56.070(9) or other law that exempts or prohibits production of specific information or records to certain persons.

(6) When a local agency that has adopted procedures authorized by this section anticipates that fulfilling a public records request will take more than sixty calendar days, the local agency must inform the requestor in writing of the factors determining a response time estimate, including providing a list of all other pending requests. Response time estimates of local agencies are subject to review by the public records commission established in section 201 of this act and to court challenges pursuant to RCW 42.56.550.

(7) If a court holds that records have been withheld by a local agency from disclosure or production for an unreasonable period of time as a result of the local agency devoting an inadequate amount of time to responding to requests under procedures authorized by this section, the agency must revise the procedures.

**Sec.**  RCW 42.56.520 and 2010 c 69 s 2 are each amended to read as follows:

(1) Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives.

(2) Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by ((~~either (1)~~)):

(a) Providing the record;

((~~(2)~~)) (b) Providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer;

((~~(3)~~)) (c) Acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or

((~~(4)~~)) (d) Denying the public record request.

(3) Additional time required to respond to a request may be based upon:

(a) The need to clarify the intent of the request((~~,~~));

(b) The need to locate and assemble the information requested((~~,~~));

(c) The need to notify third persons or agencies affected by the request((~~,~~));

(d) A policy adopted by a local agency in accordance with section 101 of this act; or

(e) The need 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.

(4) In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it.

(5) Denials of requests must be accompanied by a written statement of the specific reasons ((~~therefor~~)) for the denial. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

**PART II**

**PUBLIC RECORDS COMMISSION**

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

(1) A public records commission is created to administer the provisions of this chapter, and comprises five Washington members as provided in this subsection.

(a) The governor, with the advice and consent of the senate, shall appoint five citizens to the public records commission:

(i) One member representing the news media;

(ii) One member representing local government interests;

(iii) One member representing public interest organizations advising or advocating on behalf of citizens who make public records requests under this chapter;

(iv) In consultation with the attorney general, one member representing the state office of the attorney general; and

(v) In consultation with the state auditor, one member representing the office of the state auditor.

(b) Members appointed to the public records commission must be knowledgeable of the public records act, chapter 42.56 RCW, and policy and legal issues related to public records in the state.

(c) The governor must designate one member to serve as chair of the public records commission.

(d) Members of the public records commission may be reappointed to the commission.

(2) Members of the public records commission shall be appointed to staggered terms: One of the initial members shall be appointed to a term of two years; two of the initial members shall each be appointed to a term of three years; and two of the initial members shall each be appointed to a term of four years. When the term of an initial member expires, members subsequently appointed to that position shall be appointed to terms of four years.

(3) The members serve at the pleasure of the governor.

(4) If a vacancy in a position on the public records commission occurs, the governor shall appoint a person to serve the remainder of the expired term in accordance with the requirements of subsection (1) of this section.

(5) Three members of the public records commission shall, at all times, constitute a quorum of the commission. A vacancy on the public records commission does not impair the right of the remaining members to exercise all powers of the commission.

(6) Members of the public records commission are not eligible for state retirement under chapter 41.40 RCW by virtue of their service on the commission.

(7) The office of the state auditor shall provide administrative and clerical assistance to the public records commission. The public records commission may appoint officers and employees as necessary for the proper performance of the commission's duties under this chapter.

(8) The dedicated open records account is created in the custody of the state treasurer. Twenty percent of any amount awarded at the discretion of the court to persons who prevail against agencies under RCW 42.56.550 must be deposited into the dedicated open records account. Expenditures from the account may be used only for the administration, operation, and support of the public records commission. Only the state auditor, or the state auditor's designee, may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

(9) Annually by July 1st, the public records commission must submit a written report to the legislature and the governor setting forth: All cases the commission heard during the fiscal year; the decision rendered in each case; the names, salaries, and duties of all employees and officers of the commission; and an accounting of all moneys received and disbursed by the office of the state auditor on behalf of the commission. Reports to the legislature and the governor must be submitted in compliance with RCW 43.01.036.

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

(1) Each member of the public records commission must be compensated in accordance with RCW 43.03.250. Each member of the public records commission must be reimbursed for travel expenses incurred in the discharge of the member's official duties as provided in RCW 43.03.050 and 43.03.060.

(2) Payment of expenses of the public records commission, including travel expenses incurred by employees or officers of the commission, must be made in accordance with RCW 43.03.050 and 43.03.060.

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

(1) The public records commission shall have jurisdiction over disputes arising under this chapter between local agencies and persons making public records requests to assist the parties in resolving those disputes, determine any violation of this chapter, and assess penalties for violations of this chapter.

(2)(a) When a dispute arises under this chapter between a local agency and a requestor, the local agency and the requestor may submit a request to the public records commission for resolution of the dispute through speedy voluntary arbitration or voluntary mediation. If either the local agency or the requestor does not agree to resolve the dispute by voluntary arbitration or voluntary mediation, the local agency or the requestor may submit a request to the public records commission for an adjudicative proceeding, conducted in accordance with chapter 34.05 RCW.

(b) The public records commission, within its discretion, may accept or decline any requests submitted under (a) of this subsection and accept only those requests that the commission determines most appropriate for resolution under this section. The commission may limit the number of requests it accepts based on the availability of appropriated funds. Adjudication or resolution of a dispute under this section does not limit the ability of any party to seek other remedies available under this chapter.

(3) The public records commission may establish a reasonable filing fee in an amount not exceeding fifty dollars for parties who submit requests to the commission under this section. All funds collected from the filing fee must be deposited into the dedicated open records account created in section 201 of this act.

(4)(a) The public records commission shall establish a roster of qualified arbitrators to conduct voluntary arbitrations of requests submitted to the commission under subsection (2) of this section. Parties to a dispute may stipulate to using a specific arbitrator from the roster established by the commission or, if the parties cannot agree, the commission may appoint an arbitrator. Voluntary arbitrations shall be conducted in accordance with rules adopted by the public records commission.

(b) The public records commission shall establish a roster of neutral mediators to resolve requests submitted to the commission for voluntary mediation under subsection (2) of this section. Parties to a dispute may stipulate to using a specific mediator from the roster established by the commission or, if the parties cannot agree, the commission may appoint a mediator. Voluntary mediations shall be conducted in accordance with rules adopted by the public records commission.

(c) The commission shall establish rules for voluntary arbitrations and mediations. Arbitrators and mediators on the roster established by the commission must be knowledgeable regarding the public records act, court holdings interpreting and applying the public records act, and the procedures of agencies pursuant to the public records act. The commission may provide assurances that agreements reached through mediation or decisions of an arbitrator are carried out.

(d) The commission must establish a fee schedule for mediators and arbitrators on the roster, which may be paid per hour or per case, or another appropriate mechanism, as determined by the commission. Fees for services performed by mediators and arbitrators on the roster must be paid by the commission from funds in the dedicated open records account created in section 201 of this act.

(5) Adjudicative proceedings conducted by the public records commission are governed by chapter 34.05 RCW. In addition, the commission is authorized to hold hearings, make findings of fact, decide the law, assess penalties for actual violations of this chapter, subpoena witnesses, compel the attendance of witnesses, administer oaths, hear the testimony of any person under oath, and require the production for examination of books or papers relating to a matter under investigation or in question before the commission. The public records commission may adopt rules regarding the issuance of subpoenas by individual members of the commission, and service of complaints, decisions, orders, recommendations, and other papers of the commission, a member or agent of the commission, or an agency.

(6) The public records commission shall employ and assign an attorney to advise, represent, or advise and represent individual citizens who do not have their own legal representation in any proceedings authorized by the commission.

(7) The public records commission shall strive to resolve disputes submitted to the commission in the most timely and cost-efficient manner for all parties.

(8) Except for conducting rule making in accordance with this section, the commission may not exercise the powers, duties, and functions authorized in this section before July 1, 2017. During this rule-making period, from the effective date of this section until July 1, 2017, the commission must make every effort to engage interested stakeholders in the rule-making process. Beginning July 1, 2017, the commission may fully exercise all powers, duties, and functions authorized in this section, subject to the availability of appropriated funds.

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

The principal office and place of business of the public records commission shall be in Thurston county, but the commission may meet and exercise any or all of its powers at any other place in the state.

NEW SECTION. **Sec.**  A new section is added to chapter 42.56 RCW to read as follows:

The public records commission must adopt rules to implement sections 201 through 204 of this act. The public records commission may from time to time make, amend, and rescind, in accordance with the administrative procedure act, chapter 34.05 RCW, rules necessary to carry out the provisions of this chapter.

**Sec.**  RCW 42.56.240 and 2015 c 224 s 3 and 2015 c 91 s 1 are each reenacted and amended to read as follows:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

(2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the public disclosure commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the public disclosure commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;

(3) Any records of investigative reports prepared by any state, county, municipal, or other law enforcement agency pertaining to sex offenses contained in chapter 9A.44 RCW or sexually violent offenses as defined in RCW 71.09.020, which have been transferred to the Washington association of sheriffs and police chiefs for permanent electronic retention and retrieval pursuant to RCW 40.14.070(2)(b);

(4) License applications under RCW 9.41.070; copies of license applications or information on the applications may be released to law enforcement or corrections agencies;

(5) Information revealing the identity of child victims of sexual assault who are under age eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator;

(6) Information contained in a local or regionally maintained gang database as well as the statewide gang database referenced in RCW 43.43.762;

(7) Data from the electronic sales tracking system established in RCW 69.43.165;

(8) Information submitted to the statewide unified sex offender notification and registration program under RCW 36.28A.040(6) by a person for the purpose of receiving notification regarding a registered sex offender, including the person's name, residential address, and email address;

(9) Personally identifying information collected by law enforcement agencies pursuant to local security alarm system programs and vacation crime watch programs. Nothing in this subsection shall be interpreted so as to prohibit the legal owner of a residence or business from accessing information regarding his or her residence or business;

(10) The felony firearm offense conviction database of felony firearm offenders established in RCW 43.43.822;

(11) The identity of a state employee or officer who has in good faith filed a complaint with an ethics board, as provided in RCW 42.52.410, or who has in good faith reported improper governmental action, as defined in RCW 42.40.020, to the auditor or other public official, as defined in RCW 42.40.020;

(12) The following security threat group information collected and maintained by the department of corrections pursuant to RCW 72.09.745: (a) Information that could lead to the identification of a person's security threat group status, affiliation, or activities; (b) information that reveals specific security threats associated with the operation and activities of security threat groups; and (c) information that identifies the number of security threat group members, affiliates, or associates; and

(13) The global positioning system data that would indicate the location of the residence of an employee or worker of a criminal justice agency as defined in RCW 10.97.030.

**PART III**

**LOCAL GOVERNMENT ARCHIVES ACCOUNT**

NEW SECTION. **Sec.**  Under RCW 36.22.175, 40.14.024, and 40.14.027 purposes for which funds in the local government archives account are supposed to be used include local government services, such as: Records management training for local government agencies; providing records scheduling, security microfilm inspection, and storage; archival preservation; cataloging; indexing for local government records and digital data; and access to local government records and data through the regional branch archives of the division of archives and records management.

It is the intent of the legislature that expenditures from the local government archives account be used for these purposes. It is also the intent of the legislature that the local government archives account be fully funded through appropriations in the 2017-2019 omnibus appropriations act.

NEW SECTION. **Sec.**  NULL AND VOID. If specific funding for purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2016, in the supplemental omnibus operating appropriations act, this act is null and void.

**--- END ---**