

HOUSE BILL REPORT

HB 1086

As Reported by House Committee On:
State Government

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, Gregerson, Springer, S. Hunt and Fey.

Brief History:

Committee Activity:

State Government: 1/20/15, 2/17/15 [DPS].

Brief Summary of Substitute Bill

- Allows agencies to assess a cost recovery fee for the actual cost of providing a public record if the request is primarily for a commercial purposes.
- Establishes a civil penalty for misrepresenting the purpose of a request to avoid paying the cost recovery fee.
- Provides exemptions from the fee for certain purposes and for certain entities.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives S. Hunt, Chair; Bergquist, Vice Chair; Holy, Ranking Minority Member; Appleton and Gregory.

Minority Report: Do not pass. Signed by 2 members: Representatives Van Werven, Assistant Ranking Minority Member; Hawkins.

Staff: Sean Flynn (786-7124).

Background:

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.

The Public Records Act (PRA) requires state and local agencies to make their written records available to the public for inspection and copying upon request, unless the information fits into one of the various specific exemptions. The stated policy of the PRA favors disclosure and requires narrow application of the listed exemptions.

An agency generally may not ask a requestor for the purpose of the request, except to determine whether the information is exempted from disclosure. For example, an agency may not provide access to lists of persons that are requested for commercial purposes, unless otherwise specifically authorized by law.

An agency may not charge a fee for locating and making records available for inspection. However, an agency may charge for the actual cost of copying the records up to 15 cents per page. Costs directly related to copying may be included, such as the labor for making copies and shipping costs, but general administrative and overhead costs are excluded. The agency may require a deposit up to 10 percent of the estimated actual copy costs for a request.

Summary of Substitute Bill:

Cost Recovery Fee.

An agency may charge a cost recovery fee for the actual costs of making a public record available, if the primary purpose of the request is for a commercial purpose. The fee may include the actual cost of locating, assembling, reviewing, redacting, copying, and providing the record. An agency also may charge a flat rate or per-record rate that does not exceed a reasonable estimate of the actual cost. The agency may require a deposit up to 10 percent of the estimated actual costs of providing the records. The agency must adopt and publish a fee schedule before charging a fee.

A "commercial purpose" means any record or information derived from a record sold within six months for any present or future profit, or requested for data-mining purposes for profit.

Procedures.

An agency may require the requestor to provide information to establish whether the primary purpose of the request is for a commercial purpose. If the requestor has denied such a purpose, the agency may not assess a fee. However, the agency may require the requestor to sign a statement attesting that the request is not for sale or resale purposes. If the requestor intentionally misrepresents the purpose of the request, he or she may be liable for a civil penalty at least equivalent to the amount the agency would have assessed for the records.

In order to assess a cost recovery fee, the agency must provide a written basis for determining that the request is primarily for commercial purposes. A requestor has the option to appeal the fee assessment to the head of the agency within 30 days, though the agency appeal process is not required before any person may seek judicial review to challenge the assessment of a fee.

Exemptions.

The cost recovery fee may not be assessed under the following exemptions:

- the purpose of the request is deemed non-commercial, including the following purposes:
 - disseminating of news or current events of public interest;
 - academic, scientific, or public research or education;
 - petitioning the government or contributing to the understanding of government operations; or
 - a request by a nonprofit organization in furtherance of its own purpose.
- the requestor is entitled to obtain the records pursuant to agreement with the agency, or under authority of law;
- the records are used to comply with government permitting requirements or regulations;
- the records are used by title insurers or data providers for purposes of title insurance, escrow closing, or related services as allowed by the insurance commissioner; or
- the records are used by real estate brokers, developers, or owners, or for real estate development purposes.

A request that is exempt from the cost recovery fee is not also exempt from the copying fee that is applicable to all records requests.

Substitute Bill Compared to Original Bill:

The substitute bill adds a definition of commercial purpose, and clarifies the copying fee may still apply for a request that is exempt from the cost recovery fee.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 19, 2015.

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 bill protects taxpayers from subsidizing the costs of preparing records that are requested for commercial purposes. There is an increase in cases of data mining, or obtaining records for resale and profit by out-of-state companies. These companies ask for voluminous records, such as building records and geographic information system information, which is repackaged and sold on the private market. Commercial requests are growing and taking up more resources, and the public is subsidizing these commercial interests, which was not what the law was intended to do. The original public disclosure law did not anticipate the current questions and issues that agencies confront today.

This bill would offset the actual costs for such request. It protects against overcharging because it is limited to an agency's actual costs. There also is an appeals process in the bill to serve as a check on the amount charged on a commercial request. The purpose here is not

about making money for the government. This bill will alleviate the costs on local governments that are operating on very tight budgets.

Existing state law already applies fees to some records, including state archives, medical records, and county records. Agencies already must ask requestors to determine the scope of the information to be provided. This bill has been drafted with input from a broad range of stakeholders. There is a small concern that this bill could unintentionally exclude the 15-cent copy fee on requests, which was not the intent of this bill.

(Opposed) Companies that provide records to the public have good relationships with local governments, and serve important public functions. This bill sets a dangerous precedent by differentiating on the basis of the requestor. It also distinguishes among commercial requestors various exemptions from the fee, which dilutes the intent of the bill. The increased fees would result in increased costs to consumers, including many local governments. The problem that is being addressed is not who is making the request, but rather the scope of the request. Many commercial requests include batches of information, which are easy to process and produce.

The term "commercial purpose" has a specific meaning in the PRA, specifically related to marketing and the non-disclosure of lists of persons. The exemptions almost consume the entire intent of the bill. The only businesses targeted are marketers and data providers who make government functions more efficient. Most requestors ask for business records held by agencies. Requestors normally do not have to justify a request and can ask anonymously, including whistleblowers. There are legitimate reasons why someone would want to make an anonymous request, particularly to a small city or county, which could have a chilling effect on the requestor's decision to seek records.

The PRA was never intended to handle commercial requests and there should be a separate bill that makes a commercial request a separate kind of request altogether, which is processed differently.

Persons Testifying: (In support) Representative Moeller, prime sponsor; Doug Levy, Cities of Puyallup, Everett, and Redmond; Laura Merrill, Washington State Association of Counties; and Candice Bock, Association of Washington Cities.

(Opposed) Diana Carlen, Reed Elsevier/Lexis Nexis; Rowland Thompson, Allied Daily Newspapers; and Arthur West.

Persons Signed In To Testify But Not Testifying: None.