

SENATE BILL REPORT

ESHB 1956

As of February 18, 2022

Title: An act relating to exempting from public disclosure sensitive records pertaining to current and formerly incarcerated individuals' dignity and safety.

Brief Description: Exempting from public disclosure sensitive records pertaining to current and formerly incarcerated individuals' dignity and safety.

Sponsors: House Committee on State Government & Tribal Relations (originally sponsored by Representatives Hackney, Valdez, Davis, Simmons, Goodman, Peterson, Dolan and Macri).

Brief History: Passed House: 2/9/22, 57-38.

Committee Activity: State Government & Elections: 2/18/22.

Brief Summary of Bill

- Exempts body scanner images, records maintained pursuant to the Prison Rape Elimination Act, and certain health information maintained by the Department of Corrections from public disclosure requirements.

SENATE COMMITTEE ON STATE GOVERNMENT & ELECTIONS

Staff: Samuel Brown (786-7470)

Background: Public Records Act. The Public Records Act (PRA), enacted in 1972 as part of Initiative 276, requires all state and local government agencies to make all public records available for public inspection and copying unless certain statutory exemptions apply. Over 500 specific references in the PRA or other statutes remove certain information from application of the PRA, provide exceptions to the public disclosure and copying of certain information, or designate certain information as confidential. The provisions requiring public records disclosure must be interpreted liberally, while the exemptions are interpreted narrowly to effectuate the general policy favoring disclosure.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Disclosure of Health Records. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) establishes nationwide standards for the use, disclosure, storage, and transfer of protected health information. Entities covered by HIPAA must have a patient's authorization to use or disclose health care information unless there is a specified exception.

In Washington, the Uniform Health Care Information Act (UHCIA) governs the disclosure of health care information by health care providers and their agents or employees. Under the UHCIA, a health care provider may not disclose health care information about a patient unless there is a statutory exception or a written authorization by the patient.

Prison Rape Elimination Act. The federal Prison Rape Elimination Act (PREA), passed in 2003, is intended to develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape and data collection on the incidence of prison rape to improve management and administration of correctional facilities.

States must provide processes for agency staff to privately report sexual abuse and harassment of inmates and for inmates to privately report sexual abuse and harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, or staff neglect or violation of duties that may have contributed to such incidents. If a state falls out of compliance with national standards and cannot assure that it will achieve full compliance, it will lose 5 percent of grant funding for certain prison purposes.

Summary of Bill: Exemption Created. The following records maintained by the Department of Corrections related to currently and formerly incarcerated persons are exempt from public disclosure requirements:

- body scanner images;
- records or information created or maintained under PREA, other than violation or infraction records or records contained in referrals to law enforcement; and
- health information in records other than the person's medical, mental health, or dental files.

Records collected under PREA and health information may be disclosed to the individual who is the subject of those records, their personal representative, or another person with the individual's written permission.

Health Information Defined. The following health information, in records other than medical, mental health, or dental files, is exempt from public disclosure requirements:

- information that identifies an incarcerated individual directly related to a medical or mental health diagnosis or condition;
- physical capacity codes;
- treatment or programming by a health care provider; and
- the person's gender nonconforming status, sexual orientation, genital anatomy, gender-affirming care, or other accommodations except for preferred pronouns.

The following health information is not covered by the exemption created in the bill:

- information subject to the UHCIA;
- whether an incarcerated individual participated in or completed court-ordered treatment or programming toward an early release;
- images or descriptions of an injury contained in a violation or infraction record; or
- information related to death, irreversible coma, or persistent vegetative state of an incarcerated individual.

Retroactivity Clause. The exemptions created in the bill apply to any public records request made prior to the bill's effective date where records disclosure has not been completed.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony: PRO: The Department of Corrections (DOC) collects some extremely sensitive information as required by federal law that is not protected by the PRA or state health privacy laws. Many of these records identify sexual history, transgender status, and other sensitive information. This information is need-to-know under federal law, but is not protected under PRA. This is a balanced and fair bill—disciplinary actions, referrals to law enforcement, and aggregated data are not protected. This protects the dignity of being in charge of one's own stories. An expected amendment reflected hours of work and hard compromise between stakeholders. This protects information many already assume is protected and ensures that DOC will not be forced to out the names of transgender people or assault victims without consent. It aligns the PRA with federal law, protecting DOC from potentially expensive lawsuits. Victims of violence are re-victimized when their information is shared without consent. Nonconsensual disclosure of sensitive information is defined as harassment. This protects information for which there is no legitimate public interest—who is transgender, has disabilities, or is a survivor of abuse. Public disclosure of transgender status will have a chilling effect on healthcare for transgender people. Releasing information about a person's transgender status lives on the internet forever, punishing them beyond their sentence, creating employment and housing discrimination and risk of exposure to violence. Inmates with prior victimization history can be up to 13 times more likely to be subjected to sexual assault. This will improve prison security. Many resources are being put into re-entry into society after incarceration, and this bill promotes the conditions that make sustained change possible. This will protect racial and ethnic minorities who are overrepresented in our prisons. Forced disclosure of gender identity is literally dangerous—I was sexually assaulted during incarceration because of my identity. Decisions of people with disabilities

are often not respected, especially when it comes to consent for sharing personal information. DOC provided me far more information than I had requested about my incarcerated child with a list of transgender people, their movements, and their support groups. An individual would only want this information to create some type of harm.

CON: We should know how being imprisoned with biological males impacts the safety and dignity of females incarcerated in the state. There have been assaults committed in female prisons. Female inmates live in fear and are faced with solitary confinement if they speak out about these conditions. It is against the religious beliefs of many female prisoners to be housed with biological males. This hides which transgender individuals are housed in women's prisons, including sex offenders. Women should not be locked into cells or forced to shower with male-bodied individuals. This bill undermines women's rights and consent. This is specifically designed to hide how many biological men are in women's prisons and what crimes they have committed. Hundreds of incarcerated women will be put at risk if this becomes law. This will suppress important data to benefit a small minority. Claiming gender identity as health information is equivalent to claiming a religious identity or political affiliation as health information. Incarcerated women are far more likely to be victims of abuse—this takes away the transparency that is the last protection these women have, turning punishment into torture.

Persons Testifying: PRO: Representative David Hackney, Prime Sponsor; Wendy Still; Julie Graham; Ethan Frenchman, Disability Rights Washington; Shannon Perez-Darby; Denise Diskin, QLaw Foundation of WA; Alyssa Knight; SuYoung Yun, UTOPIA; Cindy Robinson; Hailey Ockinga, Beyond These Walls; Eric Matthes.

CON: Dawn Land; Beth Daranciang; Elizabeth Reumann; Elizabeth Hummel; Amanda Houdeschell, Women's Liberation Front; Mahri Irvine, Women's Liberation Front.

Persons Signed In To Testify But Not Testifying: PRO: Robert Wardell; Dallas Martinez; Sarah Moran, Gender Justice League.

CON: Elizabeth Kreiselmaier; Andi O'Rourke; Amy Sousa; Ray Rhodes; Mark Miloscia, Family Policy Institute of Washington; April Morrow, Sovereign Women Speak; Jennifer Thomas.

OTHER: Rowland Thompson, Allied Daily Newspapers and Washington State Association of Broadcasters.