

# HOUSE BILL REPORT

## SSB 5130

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### As Passed House - Amended:

March 18, 2009

**Title:** An act relating to access to public records by persons serving criminal sentences in correctional facilities.

**Brief Description:** Regarding prisoner access to public records.

**Sponsors:** Senate Committee on Human Services & Corrections (originally sponsored by Senators Carrell, Hargrove, Swecker, Hatfield, Holmquist, Brandland, Sheldon, Tom, King, Hobbs, McCaslin, Stevens and Marr; by request of Attorney General).

### Brief History:

#### Committee Activity:

State Government & Tribal Affairs: 3/17/09 [DPA].

#### Floor Activity

Passed House - Amended: 3/18/09, 94-2.

### Brief Summary of Substitute Bill (As Amended by House)

- Limits the access of incarcerated persons to public records under certain circumstances.

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## HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

**Majority Report:** Do pass as amended. Signed by 6 members: Representatives Hunt, Chair; Appleton, Vice Chair; Armstrong, Ranking Minority Member; Alexander, Hurst and Miloscia.

**Minority Report:** Do not pass. Signed by 1 member: Representative Flannigan.

**Staff:** Tracey O'Brien (786-7196)

### Background:

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*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 that all state and local government agencies make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exemptions narrowly in order to effectuate a general policy favoring disclosure.

The PRA requires agencies to respond to public records requests 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 this request, or deny the request. Additional time may be required to respond to a request where the agency needs to notify third parties or agencies affected by the request or 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. For practical purposes, the law treats a failure to properly respond as denial. A denial of a public records request must be accompanied by a written statement of the specific reasons for denial.

Any person who is denied the opportunity to inspect or copy a public record may file a motion to show cause in superior court why the agency has refused access to the record. The burden of proof rests with the agency to establish that the refusal is consistent with the statute that exempts or prohibits disclosure. Judicial review of the agency decision is de novo and the court may examine the record in camera.

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees. In addition, the court has the discretion to award such person no less than \$5 but not to exceed \$100 for each day he or she was denied the right to inspect or copy the public record. The court's discretion lies in the amount per day, but the court may not adjust the number of days for which the agency is fined.

An agency or its representative or a person who is named in the record or to whom the record specifically pertains may file a motion or affidavit asking superior court to enjoin disclosure of the public record. The court may issue an injunction if it finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.

### **Summary of Amended Bill:**

The inspection or copying of any nonexempt public record by persons serving criminal sentences in any state, local or privately operated correctional facilities may be enjoined under certain circumstances. The injunction may be requested by: an agency or its representative; a person named in the record or his or her representative; or the person to whom it specifically pertains or his or her representative.

The motion must be filed with the superior court for the county where the movant resides, or where the record is maintained.

An injunction may be granted if the superior court finds that: the request was made to harass or intimidate the agency or its employees; fulfilling the request would likely threaten the security of correctional facilities; fulfilling the request would likely threaten the safety or

security of staff, inmates, family members of staff, family members of other inmates or any other person; or fulfilling the request may assist criminal activity.

In deciding whether to grant an injunction, the court may consider all relevant factors. These factors include, but are not limited to: other requests by the requestors; the type of record or records sought; statements offered by the requestor concerning the request's purpose; whether the disclosure of the requested records would likely harm any person or vital government interest; whether the request seeks a significant and burdensome number of documents; and the impact of disclosure on the correctional facility security and order, the safety or security of the facility staff, inmates or others, and the deterrence of criminal activity.

The motion proceeding shall be a summary proceeding based upon affidavits or declarations, unless the court order otherwise.

Upon a showing by a preponderance of the evidence, the court may enjoin, all or any part of the request or requests. Based on the evidence, the court may also enjoin for such period of time as the court deems reasonable, future requests by the same requestor or an entity owned or controlled by the same requestor.

An agency will not be liable for penalties for any period during which an order under this act is in effect, including an appeal of an order, regardless of the appeal's outcome.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:**

(In support) This is very important legislation for the safety and security of our prisons and prison staff. Over the past several years, incarcerated felons have been flooding state and local governments with requests intended to overburden the public records staff, and harass law enforcement and other public employees. Many of these requests seek personal information and photographs of corrections and law enforcement staff. The inmates hope to either gain the information which can be used to further harass the employees or to trigger a violation of the PRA that results in fines payable to the inmate. In 2007 the Department of Corrections (DOC) staff spent 12,494 hours responding to offender records requests, costing taxpayers more than \$250,000 and six full-time employees. This is time, money and staff that could be focused on responding to legitimate requests from members of the public not incarcerated.

The agencies involved appreciate the value of the PRA, but the reality is the PRA is being exploited. This legislation does not give an agency the unilateral ability to deny the requests of an inmate. To be sure, there are many public records that an inmate has a legitimate interest in and his or her ability to obtain those records will not be harmed by this bill. However, the bill allows an agency to seek an injunction in those cases where it appears that

there is not a legitimate reason for the request. Ultimately, the judge will decide based on the facts to grant an injunction or not.

The language of this bill has been tightened over the session to focus on addressing only the most malicious abuses of the PRA.

(Opposed) Many inmates use the PRA to obtain documents to support either challenges to their criminal conviction or civil litigation governing the conditions of their confinement. Inmates may also use the PRA to gain information about how the DOC operates. Although this is a more narrowly tailored bill than it was when introduced, some serious issues still remain.

First, unlike current law which prohibits distinguishing among types of requestors, this bill singles out inmates. Second, there is no notice requirement for the requestor and therefore, no chance for the inmate to intervene and argue about the legitimacy of his or her request. Third, the potential injunctive relief is very broad. Fourth, the language in this bill is too vague, leaving too much discretion for a court to interpret it expansively and eviscerate the PRA. Fifth, the structure lessens the standards of review. Finally, the tolling of the penalties makes seeking an injunction by an agency too attractive. The tolling also puts an insurmountable burden upon the requestor, permitting this law to be used to deny public records to all but those individuals with significant funds.

Overall, this bill strikes the wrong balance and must be more narrowly drawn. The PRA is about open government and all exceptions must be drafted carefully and narrowly. This legislation fails at fulfilling the intent of the PRA as it was enacted by the people.

**Persons Testifying:** (In support) Senator Carrell, prime sponsor; Tim Lang, Office of the Attorney General; Dick Morgan and Denise Vaughan, Department of Corrections; Mike Ryherd and Michael Beranbaum, Teamsters 117; Laura Mathieu and Jerry Banner, Clallum Bay Correctional Center; Matt Zuvich, Washington Federation of State Employees; and Ian Goodhew, King County Prosecutor's Office.

(Opposed) Shankar Narayan, American Civil Liberties Union of Washington; and Michael Kahrs, Washington Association of Criminal Defense Lawyers.

**Persons Signed In To Testify But Not Testifying:** None.