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**State Government & Tribal Affairs  
Committee**

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**HB 1044**

**Brief Description:** Establishing the office of open records.

**Sponsors:** Representatives Hurst, Armstrong, Takko, Ross, Hinkle, Pearson, Warnick, Haler, Johnson, Smith, Harris, Fagan, Blake and Kelley; by request of Attorney General and State Auditor.

**Brief Summary of Bill**

- Creates the Office of Open Records for the hearing of administrative appeals pertaining to claims arising under the Public Records Act.
- Establishes appellate procedures and remedies with respect to claims brought before the Office of Open Records.

**Hearing Date:** 1/20/11

**Staff:** Thamas Osborn (786-7129).

**Background:**

Public Records Act.

The Public Records Act (PRA) requires that 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

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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. In effect, 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 the 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.

#### Administrative Procedure Act (APA).

Washington's Administrative Procedure Act (APA) establishes procedures under which state agencies adopt rules and conduct adjudicative proceedings. The APA governs the procedures by which a citizen can appeal an agency action and includes procedural requirements for judicial and legislative review.

Generally, a rule is any agency order, directive, or regulation of general applicability which: (1) subjects a person to a sanction if violated; or (2) establishes or changes any procedure or qualification relating to agency hearings, benefits or privileges conferred by law; licenses to pursue any commercial activity, trade, or profession; or standards for the sale or distribution of products or materials. Before adopting a rule, an agency must follow specified procedures, including publishing notice in the state register and holding a hearing.

Under the APA, the validity of any rule adopted by an agency may be challenged by a petition for declaratory judgment when it appears the rule or application of the rule interferes with or impairs the legal rights or privileges of the petitioner. The petitioner has the burden of demonstrating the invalidity of the rule. The court may declare a rule invalid only if it finds that the rule: (1) violates the Constitution; (2) exceeds the statutory authority of the agency; (3) was adopted without compliance with rule-making procedures; or (4) is arbitrary and capricious. The petition for declaratory judgment on the validity of an agency rule must be filed in Thurston County Superior Court.

#### Office of Administrative Hearings (OAH).

The Office of Administrative Hearings (OAH) is an independent state agency responsible for the review of state agency actions arising from the administrative rules an agency has adopted under the APA. Hearings before the OAH are presided over by an administrative law judge (judge) appointed to conduct such hearings. The hearings are conducted in accordance with statutory procedures outlined in the APA and are generally less formal than court proceedings.

### **Summary of Bill:**

#### Overview of the Office of Open Records.

The Act creates an independent Office of Open Records (Office) within the OAH. The function of the Office is to provide a simplified means of appealing from decisions of state agencies regarding PRA requests and thus provide an alternative to seeking remedies in the courts. The Office is required to:

- provide administrative reviews of appeals from agency actions under the PRA;
- adopt procedural rules in accordance with the APA with respect to such appeals; and
- annually report to the Governor and the Legislature regarding its activities and findings.

A person's use of the Office for an appeal is purely voluntary. An individual seeking a remedy against an agency under the PRA retains his right to do so through the courts in accordance with the procedural requirements of that act and need not utilize the services of the Office.

State agencies have the option of either utilizing the Office for the appeals process or continuing to handle administrative appeals through the statutory procedures set forth in the PRA and APA. For an agency to use the Office for the appeals process requires a formal agreement between the agencies. If a state agency does not have such an agreement with the Office, then an appellant must seek a court remedy in accordance with the procedures set forth in the PRA. The OAH may charge participating agencies fees for the services rendered by the Office.

The Office is given discretionary authority to decline to hear an appeal.

The procedural rules governing adjudicative proceedings under the APA do not apply to appeals that come before the Office. Rather, the Office is required to adopt its own rules, consistent with APA requirements, to govern the appeals process.

The Act takes effect on January 1, 2012.

#### General Procedural Requirements for Appeals to the Office.

The general procedures governing PRA appeals to the Office include the following:

- to initiate an appeal before the Office, an appellant must file a written claim with the Office within 30 days of the agency's last claim of exemption or the last production of a record on a partial or installment basis;
- appellant must pay a filing fee subject to waiver if the appellant is indigent;
- subject to specified requirements, a judge may allow third parties to intervene in the appeal if this would assist in resolving the appeal without delay;

- unless a hearing is set, the judge must issue a final order within 30 days of the filing of the appeal;
- an expedited review process may be used for the issuance of a final order in less than 30 days where there is an urgent need for resolution;
- prior to the issuance of the final order any person or agency may submit a written request for a hearing, which may be granted if the introduction of additional information would be beneficial to resolution of the appeal;
- before a final order is issued the parties must meet and confer in order facilitate the resolution of the appeal;
- the judge may order mediation when requested by all parties; and
- judicial view by the courts of the final order issued by the administrative law judge must be filed with the superior court within 30 days of the final order.

#### Procedural Requirements for Hearings Before the Office.

At any time before the Office issues a final order, a person or agency may submit a written request for a hearing. The setting of a hearing is a discretionary decision for the judge, who may order a hearing if additional information will be beneficial to the resolution of the appeal. If a hearing is ordered, the judge may extend the 30 day deadline for the issuance of the final order.

Upon setting the hearing, the judge must set a schedule for the submission of documents, testimony, and other evidence relevant to the issues on appeal. During the hearings process the judge has the authority to:

- limit the nature and extent of admissible evidence;
- issue subpoenas and protective orders;
- decide whether the parties may use the discovery process authorized under the Superior Court civil rules and to what extent the discovery process may be used; and
- accept or order the submission of records for in camera review.

#### Final Orders and Remedies in Proceedings Before the Office.

The Office may not award any costs, attorney's fees, or penalties to any party.

Final orders are subject to judicial review in Superior Court. To obtain such judicial review a party must file with the court the final order of the Office within thirty days of issuance. Review by the Superior Court is de novo. A Superior Court may award the person who prevails on judicial review against an agency all costs, including reasonable attorney's fees, and penalties in accordance with the PRA. However, the court may not award any costs or fees incurred during the appellate process before the Office.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.