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HOUSE BILL 1044

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

Prefiled 12/28/10. Read first time 01/10/11. Referred to Committee on State Government & Tribal Affairs.

1 AN ACT Relating to creating the office of open records; amending  
2 RCW 34.05.030; adding new sections to chapter 42.56 RCW; and providing  
3 an effective date.

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

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 42.56 RCW  
6 to read as follows:

7 (1) There is established an independent office of open records  
8 within the office of administrative hearings. The office must:

9 (a) Provide impartial administrative reviews of appeals by persons  
10 or agencies entitled to relief under this chapter;

11 (b) Provide information relating to the implementation and  
12 enforcement of this chapter;

13 (c) Adopt rules pursuant to the administrative procedure act,  
14 chapter 34.05 RCW, to provide clear guidelines for an appeal process  
15 before the office of public records from decisions of agencies subject  
16 to this chapter. The provisions of RCW 34.05.410 through 34.05.598 do  
17 not apply to the office of public records for this appeal process; and

18 (d) Annually report on its activities and findings to the governor

1 and the legislature and recommend legislation, as the office deems  
2 appropriate.

3 (2) An administrative law judge reviewing appeals under this  
4 section must comply with the procedures under section 2 of this act.

5 (3) The office of open records shall be supervised by the chief  
6 administrative law judge.

7 NEW SECTION. **Sec. 2.** A new section is added to chapter 42.56 RCW  
8 to read as follows:

9 (1) This section applies with regard to an agency that has  
10 voluntarily entered into an agreement with the office of administrative  
11 hearings to use the process in this section. Agreement between an  
12 agency and the office of administrative hearings shall be on a fiscal  
13 year basis unless otherwise agreed to by the parties.

14 (2)(a) Subject to the requirements of subsection (1) of this  
15 section, a person entitled to seek relief under RCW 42.56.550 may file  
16 a written appeal with the office within thirty days of the date of the  
17 agency's claim of exemption or the last production of a record on a  
18 partial or installment basis. At any time before the production or  
19 denial of records, a person entitled to seek relief under RCW 42.56.550  
20 may file an appeal challenging the reasonable estimate of the time  
21 required to respond to the request pursuant to RCW 42.56.520.

22 (b) Any person filing an appeal or intervening in an appeal must  
23 pay the office a reasonable filing fee, established by rule. The fee  
24 must be waived by order of an administrative law judge upon a showing  
25 that the person filing the appeal is indigent or if the office declines  
26 to accept the appeal.

27 (3) The office of open records may decline to hear an appeal.

28 (4)(a) If the appeal is accepted by the office of public records,  
29 the administrative law judge may confer with legal counsel and other  
30 employees of the office who do not otherwise participate in the case.

31 (b)(i) The administrative law judge may grant a timely request to  
32 intervene in an appeal under this section if:

33 (A) A person or agency seeking to intervene has standing to seek  
34 relief in superior court under RCW 42.56.540 or 42.56.550;

35 (B) No hearing has been held;

36 (C) The administrative law judge has not yet issued final order;

37 and

1 (D) The party seeking to intervene in an appeal offers information  
2 that will assist with resolving the appeal without undue delay.

3 (ii) Copies of the written request to intervene in an appeal shall  
4 be provided to all parties in the appeal by the person or agency  
5 submitting the request. A decision by the administrative law judge to  
6 grant or deny a request to intervene is not subject to judicial review.

7 (c) Unless a hearing is set, the administrative law judge shall  
8 issue a final order that must be mailed to the parties within thirty  
9 days of receipt of the appeal filed with the office.

10 (d) The office shall adopt rules pursuant to chapter 34.05 RCW  
11 prescribing procedures for an expedited review of an appeal with the  
12 issuance of a final order in fewer than thirty days for circumstances  
13 including but not limited to: Whether there is a clear legal issue  
14 presented on appeal, undisputed facts, and an urgent need for  
15 resolution that will be frustrated by delay. A decision by the office  
16 to grant or deny an expedited review is not subject to judicial review.

17 (e) At any time before the office issues a final order, any person  
18 or agency may submit a written request for a hearing. The  
19 administrative law judge may order a hearing if further information  
20 will be beneficial according to criteria established by rule adopted by  
21 the office pursuant to chapter 34.05 RCW. The order granting or  
22 denying a hearing is not subject to judicial review. The  
23 administrative law judge may extend the deadline for a final order  
24 beyond thirty days in order to hold a hearing. The administrative law  
25 judge must issue a final order within thirty days after the hearing.

26 (f) Upon setting a hearing, the administrative law judge shall set  
27 a schedule for the submission of documents, testimony, or other  
28 evidence in support of any party's position. The administrative law  
29 judge may limit the nature and extent of admissible evidence for the  
30 sufficiency of issuing a final order. The administrative law judge may  
31 issue subpoenas and may enter protective orders. The administrative  
32 law judge shall decide whether to permit the taking of depositions, the  
33 requesting of admissions, and all other procedures authorized by rules  
34 26 through 36 of the superior court civil rules. The administrative  
35 law judge shall condition use of discovery on a showing of necessity  
36 and unavailability by other means. The administrative law judge shall  
37 consider: (i) Whether all parties are represented by counsel; (ii)  
38 whether undue expense or delay in bringing the case to hearing will

1 result; (iii) whether the discovery will promote the orderly and prompt  
2 conduct of the proceeding; and (iv) whether the interests of justice  
3 will be promoted. Discovery orders, protective orders, and subpoenas  
4 may be enforced by the office in a superior court in the county where  
5 the hearing is conducted.

6 (g) The administrative law judge may accept or order the submission  
7 of any records, or portions thereof, for in camera review. Records  
8 reviewed in camera for appeals before the office are exempt from  
9 disclosure under this chapter.

10 (h) Before issuing a final order, the office must require the  
11 parties to an appeal to meet and confer for the purpose of  
12 simplification or settlement of issues by agreement. The office may  
13 order mediation where all parties agree to mediation for any issue.  
14 The administrative law judge may stay appeals and time limits required  
15 under this section pursuant to a mediation order for the duration of  
16 the mediation.

17 (i) The office may not award any costs, attorneys' fees, or  
18 penalties.

19 (j) The chief administrative law judge may designate certain final  
20 orders as precedents according to criteria established by rule adopted  
21 pursuant to chapter 34.05 RCW. All other final orders are without  
22 precedent for determining other cases involving similar facts or  
23 issues. All final orders shall be made immediately and publicly  
24 available on the web site of the office.

25 (5)(a) Appeals to the office of open records are not the exclusive  
26 remedy for enforcement of the provisions of this chapter. Any person  
27 may initiate an action in court under RCW 42.56.540 or 42.56.550.  
28 However, if an appeal is filed first with the office, the office  
29 retains primary jurisdiction.

30 (b) Subject to judicial review, the final orders of the  
31 administrative law judges are binding on all parties to an appeal  
32 before the office, and are enforceable in a superior court.

33 (c) Judicial review of a final order of the office must be filed  
34 with a superior court within thirty days after the entry of the final  
35 order, and venue shall be determined consistent with the provisions of  
36 RCW 42.56.550. Judicial review of a final order of the office by a  
37 superior court shall be de novo.

1 (d) The office may not be named as a defendant for any judicial  
2 review of a final order to a superior court.

3 (e) A superior court may award a person who prevails on judicial  
4 review against an agency all costs, including reasonable attorneys'  
5 fees, and penalties in accordance with RCW 42.56.550(4). However, a  
6 superior court may not award any costs or attorneys' fees incurred or  
7 accrued for appeals before the office.

8 (6) The office of administrative hearings may charge participating  
9 agencies fees for services rendered.

10 **Sec. 3.** RCW 34.05.030 and 2006 c 300 s 4 are each amended to read  
11 as follows:

12 (1) This chapter shall not apply to:

13 (a) The state militia, or

14 (b) The board of clemency and pardons, or

15 (c) The department of corrections or the indeterminate sentencing  
16 review board with respect to persons who are in their custody or are  
17 subject to the jurisdiction of those agencies.

18 (2) The provisions of RCW 34.05.410 through 34.05.598 shall not  
19 apply:

20 (a) To adjudicative proceedings of the board of industrial  
21 insurance appeals except as provided in RCW 7.68.110 and 51.48.131;

22 (b) Except for actions pursuant to chapter 46.29 RCW, to the  
23 denial, suspension, or revocation of a driver's license by the  
24 department of licensing;

25 (c) To the department of labor and industries where another statute  
26 expressly provides for review of adjudicative proceedings of a  
27 department action, order, decision, or award before the board of  
28 industrial insurance appeals;

29 (d) To actions of the Washington personnel resources board or the  
30 director of personnel;

31 (e) To adjustments by the department of revenue of the amount of  
32 the surcharge imposed under RCW 82.04.261; (~~(e)~~)

33 (f) To the extent they are inconsistent with any provisions of  
34 chapter 43.43 RCW; or

35 (g) To the adjudicative proceedings of the office of open records.

36 (3) Unless a party makes an election for a formal hearing pursuant

1 to RCW 82.03.140 or 82.03.190, RCW 34.05.410 through 34.05.598 do not  
2 apply to a review hearing conducted by the board of tax appeals.

3 (4) The rule-making provisions of this chapter do not apply to:

4 (a) Reimbursement unit values, fee schedules, arithmetic conversion  
5 factors, and similar arithmetic factors used to determine payment rates  
6 that apply to goods and services purchased under contract for clients  
7 eligible under chapter 74.09 RCW; and

8 (b) Adjustments by the department of revenue of the amount of the  
9 surcharge imposed under RCW 82.04.261.

10 (5) All other agencies, whether or not formerly specifically  
11 excluded from the provisions of all or any part of the administrative  
12 procedure act, shall be subject to the entire act.

13 NEW SECTION. **Sec. 4.** This act takes effect January 1, 2012.

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