

SENATE BILL REPORT

ESHB 2876

AS REPORTED BY COMMITTEE ON GOVERNMENTAL OPERATIONS,
FEBRUARY 27, 1992

Brief Description: Making changes in public disclosure laws.

SPONSORS: House Committee on State Government (originally sponsored by Representatives Anderson, McLean, R. Fisher, Pruitt, Bowman and Basich)

HOUSE COMMITTEE ON STATE GOVERNMENT

SENATE COMMITTEE ON GOVERNMENTAL OPERATIONS

Majority Report: Do pass as amended.

Signed by Senators McCaslin, Chairman; Roach, Vice Chairman; Madsen, and Sutherland.

Staff: Rod McAulay (786-7754)

Hearing Dates: February 27, 1992

BACKGROUND:

OPEN PUBLIC RECORDS

Agency Responsibilities Under Current Law. Current law requires agencies to respond "promptly" to a public record request but does not specify what constitutes a prompt response.

Statutes which allow agencies to exempt certain records from public inspection and copying appear in the public disclosure section of the law as well as throughout the code.

Agencies have schedules in place regarding the maintenance and eventual destruction of their records. At times a public record that is the subject of a request may be scheduled for destruction as part of this routine schedule.

Under current law, a person may take a case to superior court to keep a requested record from being disclosed. The parties who may take such action include parties interested in the record and agencies themselves. The court cases hinge on the question of whether disclosure of the record would clearly not be in the public interest, and if disclosure would substantially and irreparably damage any person or vital governmental functions.

Review of an Agency's Public Records Decisions. Existing law provides that a person who has been denied access to a record may have the agency's decision reviewed in superior court. If the person prevails against the agency, the person is awarded

court costs, including attorney fees. The court also has the option of awarding the person up to \$25 per day for each day that the person was denied access to the record.

Liability for Release of Records. There is some concern among state officials and employees that they would be personally liable for accidentally releasing information that was, in fact, exempt from disclosure.

OPEN PUBLIC MEETINGS

Definitions. Current law includes definitions of "public agencies" and "governing bodies." These definitions establish which groups are subject to the provisions of the open public meetings laws.

Regular Meeting Requirements. Agencies are currently required to provide the time of their regular meetings. Agencies are also required to take written minutes of their regular meetings, except for executive sessions. These minutes are open to public inspection and copying.

Also under current law, no governing body may adopt a rule, regulation, etc., except in an open public meeting which has been properly announced. Any action taken at a meeting which does not comply with this requirement is null and void.

Personal Liability. Under current law, if a member of a governing body attends a meeting where the member knows action has been taken in violation of the open public meetings laws, that member is personally liable for a civil penalty of \$100.

Court Costs. Under current law, a person who prevails in court against a public agency regarding a violation of the open meetings chapter may be awarded all court costs, including attorney fees. If a public agency prevails and the trial judge finds that the action was frivolous, the agency may be awarded court expenses and attorney fees. Similar language regarding the collection of fees in frivolous action cases is also found in Title 4 RCW.

SUMMARY:

OPEN PUBLIC RECORDS

Public Records Laws To Be Liberally Construed. A new section states that the public records statutes are to be liberally construed and record exemptions are to be narrowly construed to promote the public policy of openness.

Changes in Agency Responsibilities. Agencies are required to respond to a public record request within five business days, in one of three ways: (a) by providing the record; (b) by acknowledging receipt of the request and providing a reasonable estimate of the time the agency will require to respond to the request; or (c) by denying the public record request. In acknowledging receipt of a record request, an agency may ask the requestor to clarify what information that

person is seeking. If the requestor fails to clarify the request, the agency does not have to respond to it.

For informational purposes, agencies must publish and maintain a current list of laws other than those in the public records statutes which the agency believes exempts any of the agency's records from disclosure. Also, the Office of the Attorney General is to publish a pamphlet explaining the provisions of the public records subdivision of the state's disclosure laws.

If a public record request is made at a time when a record exists but is scheduled for destruction in the near future, an agency is to retain the record until the request is resolved.

Agencies are prohibited from seeking court action to enjoin disclosure of a record. The only parties who may take such action are persons named in the record or to whom the record specifically pertains. An agency has the option of notifying persons named in the record or to whom the record pertains that release of the record has been requested; however, an agency does not have this option if other statutes require the agency to provide notice.

Review of an Agency's Public Records Decisions. A court may conduct a review of an agency decision to deny access to a record based only on affidavits. Also, a new dollar range is established that the court has the discretion to award to a person who prevails against an agency. The range is no less than \$5 per day and no greater than \$100 per day for each day that the person was denied access to the record.

In addition to judicial review, a second avenue is provided for a person whose public record request has been denied by a state agency. The person may ask the Attorney General to review a state agency's determination that a record is exempt from disclosure. The Attorney General is to provide the person with a written opinion on whether the record in question is exempt.

The preceding review mechanisms are for situations when an agency has denied a public record request. A person may also take a case to superior court if the person believes that an agency has not made a reasonable estimate of the time the agency requires to respond to a public record request. In such a situation, the burden of proof is on the agency to show that the estimate it provided is reasonable.

Public Records Exemptions. An existing public record exemption is modified to expressly exempt information revealing the identity of persons who are witnesses to or victims of crime. A new exemption is added which protects information about an agency employee who is seeking advice or information about employee rights in connection with sexual harassment or other unfair practices.

Electronic Data and Records. A new section acknowledges the challenging public disclosure questions posed by electronic data and electronic records. The Legislature finds that the

important public policy questions related to electronic records deserve their own specific deliberation with input from all interested parties, and urges the creation of a body to address electronic data issues.

Joint Select Committee on Open Government. The Joint Select Committee on Open Government, created last year by resolution, will address four issues this interim: consistent treatment of information under existing disclosure laws, treatment of investigatory records, groups to include under the state's open meeting laws, and options for insuring that closed executive sessions are conducted properly. The committee is to report back to the Legislature by January 1993.

Immunity. A new section in the bill offers immunity from liability for loss or damage based on the release of a public record, if the public agency, official, employee, or custodian was acting in good faith in releasing the information.

OPEN PUBLIC MEETINGS

Definitions. The "governing bodies" of "public agencies" have certain obligations under the open meeting laws. Existing definitions of these terms are expanded to include state councils and authorities, as well as state and local government standing, special, and advisory committees, boards, commissions, task forces, subcommittees, and other subagencies, provided that these subagencies have been created by certain types of formal action delineated in the statute. A special exemption is provided for local government advisory groups; this is to be an area of interim study for the Joint Select Committee on Open Government.

The definition of "meeting" is expanded to include discussion of official business among a quorum of a governing body, including discussion through teleconferences and conference calls.

A new definition of "executive session" is added to statute. An executive session refers to a meeting, or portion thereof, conducted pursuant to certain statute, at which no one is permitted to attend other than members of the governing body, their attorneys, their staff, and persons whose presence is necessary to provide information to the group.

Changes in Regular Meeting Requirements.

- Scheduling. An agency is required to provide for the place as well as the time for regular meetings. The agency must give consideration to the convenience of the public when setting meeting times and places. The times must be reasonably related to the agency's actual needs for regular meetings.
- Agendas. Governing bodies must make available to the public an agenda no less than 72 hours prior to holding a regular meeting. Failure to make an agenda available requires adjournment of the regular meeting. At the

beginning of the regular meeting, the governing body is to make known any changes to the earlier agenda, by either announcing the changes or providing a revised agenda.

- Minutes. The existing requirements for taking minutes at meetings are moved into the open meetings laws. The governing body is also given the option of tape recording meetings rather than providing written minutes for public inspection and copying. The minutes requirements apply to regular and special meetings, but not to the executive session portions of meetings.
- Expansion of Null and Void Applicability. The conditions under which an action may be found null and void are expanded to actions taken at meetings where the executive session is conducted in violation of the open meetings laws. There are two exceptions to the null and void provisions: actions based on the void actions of an advisory committee, and action taken by the Utilities and Transportation Commission (UTC) to suspend a tariff filed by a public service company.

Changes to Executive Session Requirements. A majority vote is required for a governing body to move into executive session. Two changes are made in what is appropriate for governing bodies to consider in executive session. Current law allows governing bodies in executive session "to receive and evaluate complaints or charges brought against a public officer or employee." This language is modified to evaluation of "specific" complaints or charges "of misconduct." Also changed is language regarding what members of a governing body may discuss with legal counsel in executive session.

The presiding officer of the governing body may ask if anyone has an objection to the body moving into executive session. If someone does have an objection, that person may be allowed a brief statement of the cause of the objection. The governing body may not take any action in executive session other than actions it announced it was going to consider.

Personal Liability. The civil penalty that a member of a governing body may be liable for when a member attends a meeting and knows that action has been taken in violation of the open meeting laws increases from \$100 to \$500.

Court Costs. Language in the open meetings laws is deleted which refers to an agency's ability to collect court costs in the case of a frivolous law suit. This language is not deleted from Title 4 RCW. In addition, an uncodified section is added to the open meeting laws stating that the purpose of removing this language is solely to remove duplicative language from the RCW, and that no substantive effect is intended by the deletion.

Appropriation: none

Revenue: none

Fiscal Note: available

SUMMARY OF PROPOSED SENATE AMENDMENT:

The amendment clarifies the bases for a delay in disclosing or denying disclosure beyond five days from the date of request which may be the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request or to determine whether any of the information requested is exempt.

The right of agencies to request judicial review of disputed requests for disclosure is restored.

The provision that the Legislature "urges the creation of a body to address electronic data issues" is deleted and added to the issues to be considered by the Joint Select Committee on Open Government during the coming interim.

The sections dealing with open public meetings are deleted. The issues of what entities to include within the scope of the act and how to assure that executive sessions are conducted properly are included in the interim study by the Joint Select Committee on Open Government.

TESTIMONY FOR:

Sets a fixed time for responses to requests and provides for a study of electronic data. The Attorney General pamphlet will be helpful. The requirement for court review will be helpful in preventing abuses.

TESTIMONY AGAINST:

The University of Washington has many citizen advisory committees, professional review and liability review committees which should be exempt. Intellectual property issues also arise and could chill university research. Agencies not invited to participate in the drafting process.

TESTIFIED: Representative Cal Anderson; Becky Bogard, Washington Association of Broadcasters; Roland Thompson, Washington Allied Newspapers; Fred Hellberg, Office of the Governor; Chip Holcomb, Attorney General's Office; Bob Edie, University of Washington; Larry Ganders, Washington State University; Susan Markey, Department of Fisheries; Jim Justin, AWC; Mike Patrick, WSCPO; Elaine Rose