

SENATE BILL REPORT

2SHB 1758

As Reported By Senate Committee On:
Government Operations & Elections, March 31, 2005

Title: An act relating to public disclosure.

Brief Description: Revising public disclosure law.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General).

Brief History: Passed House: 3/15/05, 89-6.

Committee Activity: Government Operations & Elections: 3/24/05, 3/31/05 [DPA, w/oRec].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: Do pass as amended.

Signed by Senators Kastama, Chair; Berkey, Vice Chair; Roach, Ranking Minority Member; Haugen, Kline, McCaslin, Mulliken and Pridemore.

Minority Report: That it be referred without recommendation.

Signed by Senators Benton and Fairley.

Staff: Mac Nicholson (786-7445)

Background: The Public Disclosure Act (PDA) requires disclosure of all public records unless the record, or information on the record, is specifically exempt from disclosure. A public record is any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency.

There is no official format for a PDA request. A party seeking documents must state the request with enough clarity to give the agency notice that the request is a PDA request, and the request must seek identifiable public records. Agencies must respond to requests under the PDA within five business days by either providing the record; acknowledging receipt of the request and providing a reasonable estimate of time needed to respond; or denying the request. If the request is unclear, the agency may ask the requestor to clarify what information is sought.

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove that the requested record is exempt from disclosure or that the time estimate provided by the agency is reasonable. If the person requesting the public record prevails in court, he or she is awarded

all costs, including reasonable attorney fees. The person may also be awarded an amount between \$5 and \$100 for each day the person was denied access to the public record.

Agencies may charge reasonable fees for providing copies of public records in accordance with actual per page costs or other costs that are established and published by the agency.

Numerous provisions of the PDA have been litigated since its enactment. Recently, the state Supreme Court, in *Hangartner v. Seattle*, had occasion to interpret several PDA provisions. Notably, the court held that a government agency need not comply with an overbroad PDA request; and that documents protected by the attorney-client privilege, codified at RCW 5.60.060(2)(a), are exempt from public disclosure.

Summary of Amended Bill: Agencies may not deny a PDA request solely on the basis that the request is overbroad. Public records that are part of a larger set of requested records may be made available on a partial or installment basis as they become available.

An agency may require a deposit not to exceed ten percent of the estimated cost of providing copies. If an agency makes a request available on an installment basis, the agency may charge for each installment as it is provided. If an installment is not claimed by the requestor, the agency is not obligated to fulfill the balance of the request.

Every state and local agency must appoint and publicly identify an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with public records disclosure requirements. An agency may appoint an employee of another agency as its public records officer. For state agencies, the identity of this individual must be published in the state register, and for local agencies, the identity of this individual must be published in a way reasonably calculated to provide notice to the public.

By February 1, 2006, the Attorney General must adopt an advisory model rule for state and local agencies addressing public disclosure issues. This advisory rule may be revised at the discretion of the Attorney General.

Actions against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable must be filed within one year of the agency's claim of exemption or the last production of a record on an installment.

Amended Bill Compared to Original Bill: The amended bill allows an agency's public records officer to be an employee of another agency. The amended bill requires publication of the public records officer in the state register rather than the WAC. The amended bill provides that the rule adopted by the attorney-general is an advisory model rule.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The attorney-client privilege is a very complex issue and more time is needed to examine it and make sure that what is passed stays true to the concept of open and transparent government. The attorney-client privilege issue will be worked on during the interim. The bill as heard will ensure that government remains open and transparent.

Testimony Against: The attorney-client privilege exists and the original language in the bill should be put back in. Without the language, there is a two step process to exempting documents under the privilege and it is a confusing process. The bill as heard doesn't address other problems that exist in public records requests and rather than a piecemeal solution, the entire process should be examined at the same time. There needs to be a balanced examination of the PDA, and the overbroad issue should be discussed when other pieces of public disclosure are discussed. Prohibiting a city from denying an overbroad PDA request will increase costs for cities and counties and amounts to an unfunded mandate. The attorney-client language in the original bill is not adequate for cities, and that language is not supported.

Who Testified: PRO: Representative Kessler, prime sponsor; Greg Overstreet, Office of the Attorney General. OTHER: Bob Sterbank, City of Olympia; Victoria Lincoln, Association of Washington Cities; Pat Jones, Washington Public Ports Association.

CON: Randy Gaylord, Washington Association of Prosecuting Attorneys; Bill Vogler, Washington State Association of Counties.

Signed in, Unable to Testify & Submitted Written Testimony: Charlie Brown, King and Pierce County School Coalitions.