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**SUBSTITUTE HOUSE BILL 1086**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** House State Government (originally sponsored by Representatives Moeller, Gregerson, Springer, S. Hunt, and Fey)

AN ACT Relating to establishing a cost recovery mechanism for public records sought for commercial purposes; amending RCW 42.56.120 and 42.56.550; reenacting and amending RCW 42.56.080; creating a new section; and prescribing penalties.

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

NEW SECTION. **Sec.**  The legislature finds that public agencies must remain capable of adequately informing the public of their activities through timely disclosure of public records. However, public agencies are increasingly burdened by broad record requests from commercial entities, including data miners, whose purpose is to sell or resell the public records for a private profit. Public agencies expend taxpayer dollars to locate, assemble, redact, review, and provide the requested public records. Under existing law, except for copying and mailing costs, public agencies may not recover the true costs of providing this service. As a result, the taxpayers of this state effectively subsidize commercial requestors. Accordingly, it is the intent of the legislature to protect the public interest and prevent diversion of scarce agency resources by authorizing public agencies to recover their costs through charging a reasonable fee when records are requested for the purpose of sale or resale. It is the intent of the legislature to authorize agencies to establish such fees, without in any manner limiting public inspection of records or delaying public access to records.

**Sec.**  RCW 42.56.080 and 2005 c 483 s 1 and 2005 c 274 s 285 are each reenacted and amended to read as follows:

(1) Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person ((~~including, if applicable,~~)). Public records may be made available on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

(2) Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad.

(3) Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request, except to establish whether:

(a) Inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons; or

(b) The request is subject to the fee authorized under RCW 42.56.120(3).

(4) Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

**Sec.**  RCW 42.56.120 and 2005 c 483 s 2 are each amended to read as follows:

(1) Except as provided in this section, no fee shall be charged for ((~~the inspection of~~)) inspecting, locating, copying, disclosing the existence of, or producing public records. ((~~No fee shall be charged for locating public documents and making them available for copying~~)) The public's right to disclosure and provision of records may not be delayed by the provisions of this section that authorize an agency to determine, based on evidence, that a request is primarily for a commercial purpose, as defined in this section.

(2) A reasonable charge may be imposed for providing copies of public records and for the use by any person of agency equipment or equipment of the office of the secretary of the senate or the office of the chief clerk of the house of representatives to copy public records, which charges shall not exceed the amount necessary to reimburse the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives for its actual costs directly incident to such copying. Agency charges for photocopies shall be imposed in accordance with the actual per page cost or other costs established and published by the agency. In no event may an agency charge a per page cost greater than the actual per page cost as established and published by the agency. To the extent the agency has not determined the actual per page cost for photocopies of public records, the agency may not charge in excess of fifteen cents per page. An agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request.

(3) When a request for records is made primarily for a commercial purpose, unless an exemption as provided in subsection (9) of this section is applicable, an agency may charge a fee to recover its actual costs in responding to the request. The fee may be a flat fee, a fee per record, or other type of fee, but the fee shall not exceed a reasonable estimate of the actual cost to provide the records. The actual cost may include, but is not limited to, the cost of locating, assembling, reviewing, redacting, copying, and providing the record to the requestor.

(4) Where, as authorized in RCW 42.56.080(3)(b), an agency has required a person to provide information about whether the purpose of a request is primarily a commercial purpose and the person has denied such a purpose, no cost recovery fee may ordinarily be assessed under subsection (3) of this section. However, if the agency has reason to believe that the purpose of the request has been misrepresented and the request is made primarily for a commercial purpose, the agency may require the requestor to sign a statement under penalty of perjury, attesting that the purpose of the record request is not primarily a commercial purpose.

(5) Before charging the fee authorized in subsection (3) of this section, an agency must develop and adopt, with notice and public hearing, a fee schedule. The agency shall publish the fee schedule along with the methodology by which the fees were established.

(6) The agency must also establish an appeals process by which a requestor may appeal the amount, or application, of a fee authorized in subsection (3) of this section, in writing to the director or chief executive officer of the agency. The requestor may bring such an appeal within thirty days of the agency's assessment of the fee. Use of the agency appeals process provided under this section is at the option of the requestor, who is not required to follow this process as a condition of obtaining judicial review as provided in RCW 42.56.550.

(7) When an agency charges a cost recovery fee pursuant to subsection (3) of this section, it must provide to the requestor a written basis for its determination that the request is primarily for a commercial purpose and no exemption from subsection (9) of this section applies.

(8) An agency may require a requestor to post a deposit in an amount not to exceed ten percent of the estimated actual cost of providing the records in response to a commercial purpose request. If an agency makes the request available on a partial or installment basis, the agency may require a deposit in an amount not to exceed ten percent of the estimated actual cost of providing the installment.

(9) The fee authorized in subsection (3) of this section may not be assessed if one or more of the following circumstances exists:

(a) The principal purpose of the request is not deemed a commercial purpose because:

(i) The principal purpose of the request is to access and disseminate information concerning news and current or passing events, for articles of opinion or features of interest to the public, for the purpose of academic, scientific, or public research or education, or for the purpose of commenting to, or petitioning, the government;

(ii) The principal purpose of the request is public dissemination or disclosure of information in order to contribute to public understanding of the operations or activities of the government; or

(iii) The requestor is a representative of a religious, charitable, educational, or other nonprofit organization or association and the request is made in furtherance of the organization's or association's nonprofit purpose and not for a different purpose;

(b) Even if the purpose of the request would otherwise be considered a commercial purpose, the fee is not applicable because:

(i) The requestor is entitled to obtain the requested records pursuant to a contract, memorandum of understanding, or other binding agreement with the agency or under authority of law other than this chapter;

(ii) The requestor can demonstrate that the requested records will be used to comply with governmental permitting requirements or other regulations;

(iii) The requestor is a title insurer licensed by the insurance commissioner, an agent of such a title insurer, or an entity that collects and provides data to such a title insurer or agent, as reasonably required to insure titles, to act as an escrow closing agent or, as allowed by the office of the insurance commissioner by rule, to provide related customer services; or

(iv) The requestor is a person licensed under chapter 18.85 RCW, a prospective developer of real property, or a person seeking information about real property or buildings owned by that person, or the request is for the purpose of evaluating the viability of developing a specific parcel of real property for a particular use, and not for a different purpose.

(10) A person or other legal entity that avoids paying the fee authorized in subsection (3) of this section, by intentionally misrepresenting the purpose for which the request is made or the requestor's eligibility for an exemption under subsection (9) of this section, or by intentionally inducing another person to knowingly or unknowingly make such a misrepresentation, is liable for a civil penalty at least equivalent to what the agency would have charged for the records. The civil penalty under this section is in addition to any other civil or criminal penalties and remedies available under any other law of this state.

(11) Nothing in this section or RCW 42.56.070 may be construed to create an obligation or authorization for an agency to create or provide access to lists of individuals requested for commercial purposes.

(12) Nothing in this section prohibits an agency from charging a copying fee as authorized under subsection (2) of this section where the cost recovery fee authorized under subsection (3) of this section does not apply.

(13) For purposes of this section, "commercial purpose" means any record, or information derived from a record:

(a) Requested for purposes of data mining for any profit realized by any party; or

(b) Sold, exchanged, or transferred:

(i) By the requestor, or the requestor's designee, agency, proxy, or by any other person or entity;

(ii) Within six months after the record was received by the requestor; and

(iii) For any present or future profit realized by any party to the sale, exchange, or transfer.

**Sec.**  RCW 42.56.550 and 2011 c 273 s 1 are each amended to read as follows:

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Upon the motion of any person who believes that an agency has required payment of a cost recovery fee in an amount not authorized by RCW 42.56.120(3) or has applied a fee for a request that is exempt under RCW 42.56.120(9), the superior court in the county in which a record is maintained may require the responsible agency to show by a preponderance of the evidence that the request was primarily for a commercial purpose and that no exemption was applicable.

(4) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

((~~(4)~~)) (5) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

((~~(5)~~)) (6) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

((~~(6)~~)) (7) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

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