

HOUSE BILL REPORT

ESHB 1956

As Amended by the Senate

Title: An act relating to exempting from public disclosure sensitive records pertaining to current and formerly incarcerated individuals' dignity and safety.

Brief Description: Exempting from public disclosure sensitive records pertaining to current and formerly incarcerated individuals' dignity and safety.

Sponsors: House Committee on State Government & Tribal Relations (originally sponsored by Representatives Hackney, Valdez, Davis, Simmons, Goodman, Peterson, Dolan and Macri).

Brief History:

Committee Activity:

State Government & Tribal Relations: 1/24/22, 1/27/22 [DPS].

Floor Activity:

Passed House: 2/9/22, 57-38.

Senate Amended.

Passed Senate: 3/2/22, 28-20.

Brief Summary of Engrossed Substitute Bill

- Exempts from public disclosure certain records relating to incarcerated individuals maintained by the Department of Corrections including body scanner images, records maintained pursuant to the Prison Rape Elimination Act, and certain health information.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL RELATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Valdez, Chair; Lekanoff, Vice Chair; Dolan and Gregerson.

Minority Report: Without recommendation. Signed by 3 members: Representatives

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Volz, Ranking Minority Member; Walsh, Assistant Ranking Minority Member; Graham.

Staff: Desiree Omli (786-7105).

Background:

Public Records Act.

The Public Records Act (PRA) requires that all state and local governmental entities make all public records available to the public, unless a specific exemption applies or disclosure is prohibited. Public records are records prepared or retained by a governmental entity that relate to the conduct of government or the performance of governmental or proprietary functions. The PRA must be liberally construed; any exemptions to the disclosure requirement must be interpreted narrowly. Exemptions are permissive, meaning that an agency, although not required to disclose, has the discretion to provide an exempt record. Exemptions under the PRA are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be redacted from specific requested records. An agency that refuses, in whole or in part, inspection of any public record must include a statement of the specific exemption authorizing the withholding and a brief explanation of how the exemption applies to the record or information withheld.

Disclosure of Health Information.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) establishes nationwide standards for the use, disclosure, storage, and transfer of protected health information. Entities covered by HIPAA must have a patient's authorization to use or disclose health care information unless there is a specified exception. The HIPAA allows a state to establish standards that are more stringent than its provisions.

In Washington, the Uniform Health Care Information Act (UHCIA) governs the disclosure of health care information by health care providers and their agents or employees. The UHCIA provides that a health care provider may not disclose health care information about a patient unless there is a statutory exception or a written authorization by the patient.

There are several statutory exemptions in the PRA for records that contain certain health care and medical information, including certain information collected, obtained, or maintained by the Department of Health and other state agencies.

Disclosure of Jail Records.

A department of corrections responsible for the operation of a jail must maintain a jail register. With certain exceptions, the records of a person confined in jail is confidential and may only be made available to criminal justice agencies.

Prison Rape Elimination Act.

The federal Prison Rape Elimination Act (PREA) was passed in 2003. The stated purpose

of the act is to, among other things, develop and implement national standards for the detection prevention, reduction, and punishment of prison rape; increase the available data and information on the incidence of prison rape to improve management and administration of correctional facilities; and standardize definitions used for collecting data on the incidence of prison rape. The United States Attorney General establishes by rule national standards for the detection, prevention, reduction, and punishment of prison rape. Under adopted rules, states must provide processes for agency staff to privately report sexual abuse and harassment of inmates and for inmates to privately report sexual abuse and harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, or staff neglect or violation of duties that may have contributed to such incidents. A state will lose five percent of certain grants it would otherwise receive for prison purposes if it does not certify that it has adopted and is in full compliance with the national standards or assure that it will achieve full compliance in the future.

Summary of Engrossed Substitute Bill:

The following records related to currently and formerly incarcerated individuals maintained by the Department of Corrections (DOC) are exempt under the PRA:

- body scanner images;
- health information in records other than an incarcerated individuals' medical, mental health, or dental files; and
- records or information created or maintained pursuant to the PREA other than records or information contained in referrals to law enforcement or violation or infraction records.

"Health information" is defined as any information that identifies or can be readily associated with the identity of an incarcerated individual that directly relates to a medical or mental health diagnosis or condition, PULHES codes, treatment or programming by a health care provider, the person's gender nonconforming status, sexual orientation, genital anatomy, gender-affirming care, or other accommodations except for preferred pronouns.

Exempt health information does not include health care information subject to the Uniform Health Care Information Act; the fact that an incarcerated individual participated in, failed to participate in, was terminated from, or satisfactorily completed certain court-ordered treatment or programming; images or descriptions of an injury contained in a violation or infraction record; or information related to death, irreversible coma, or persistent vegetative state of an incarcerated individual.

The exemptions related to health information and records created or maintained pursuant to the PREA do not apply to a public records request made by the incarcerated individual who is the subject of the information or someone who has written permission from that individual, meaning that the DOC must disclose the record or information to such individuals in accordance with the PRA unless another exemption applies. However, when disclosing such records or information, the DOC may withhold information revealing the

identity of other incarcerated individuals contained in the record.

Under the statutory requirement for an agency to provide a brief explanation of how the exemption applies to withheld records, the DOC only needs to identify the number of pages withheld and cite to the statute without further explanation when withholding exempt health information.

The exemptions provided apply to any public records request made prior to the effective date of the act for which disclosure of records has not already occurred.

EFFECT OF SENATE AMENDMENT(S):

Records related to the Prison Rape Elimination Act (PREA) that are exempt under the bill are limited to:

- risk assessments, risk indicators, and monitoring plans;
- reports of sexual abuse or sexual harassment;
- records of open PREA investigations; and
- the identities of individuals in investigation reports of closed PREA investigations and related materials; however the identities of Department of Corrections (DOC) staff, contractors, and volunteers, and the identity of an accused individual in a substantiated allegation, is not exempt.

The definition of "health information," which is exempt under the act, is modified to remove references to PULHES codes and programming provided by a health care provider or requests for or complaints about such programming. Dental diagnoses, conditions, services, treatments, and procedures are added to the definition of "health information."

The categories of information which are not considered "health information" are modified to remove references to information relating to court-ordered treatment or programming and information related to the death, irreversible coma, or persistent vegetative state of an incarcerated individual. The type of information related to injuries that are not considered "health information" under the bill is modified to specify that information related to injuries other than ones related to medical procedures or genital anatomy, contained in incident reports, infraction records, or use of force reports that are prepared by the DOC staff other than health care providers are not considered "health information," instead of only images or descriptions of an injury contained in a violation or infraction record.

Requires, rather than authorizes, an agency that withholds exempt health records in their entirety to identify the number of pages withheld.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) The DOC collects extremely sensitive information about incarcerated people that is not protected by the PRA or federal or state privacy laws, such as body scanner images, certain health information, and records related to the PREA. Body scanner images show a person's body contour and genitalia in high definition. Health information held outside of patient files are crucial records used to house people safely, provide accommodations for those with learning disabilities, and identify those who are transgender. The DOC must also ask every person to disclose their medical and mental health conditions when they are sexually assaulted. Survivors of violence are victimized all over again when their personal stories and information are released to the public without their consent. Preventing the release of records created pursuant to the PREA is vital. Due to a person's prior sexual victimization history or sexual orientation, victims can be up to 13 times more likely to be subject to sexual abuse and assault. Failure to protect extremely sensitive information will result in inmates failing to provide critical information needed by prison staff to investigate allegations of sexual abuse, make housing and classification decisions, and maintain the inmate's safety. This can impact the safety of the prison itself.

People of color are over-represented in prisons and are therefore at an increased risk of violence, discrimination, and psychological trauma if extremely sensitive information about them is released. Disclosure of this information can follow someone even after incarceration when trying to reenter society. Releasing information about person's transgender history forever outs a person. This means a lifetime of employment and housing discrimination while putting them at risk for gender-based violence. A person's reentry plan may fall apart if their family or transitional housing program knew about their transgender status. When so many sources are invested in reentry, it doesn't make sense to have policies that are contrary to successful reentry.

The policy in this bill aligns with Washington policy—jail records are strictly confidential. This policy does not prevent data from being released in the aggregate. It only prohibits extremely sensitive information about an individual from being released without their consent.

Last year, an anti-trans hate group along with several media companies requested sensitive information from the DOC. After a federal law suit was filed, the court found that responding to the request would likely violate the state and federal constitutions and the court issued a stay of proceedings. If the state does nothing, people may file lawsuits each time their information is requested which could be costly to the state.

(Opposed) Transgender inmates represent a small but significant portion of the incarcerated population which presents the DOC with certain challenges. Requests were made for information on how transgender people are being housed and treated in prisons. The media

has an interest to make sure people are safely housed and serve their time in ways that don't treat them differently. Certain things are important to know, such as infractions, incidents that gets a person earned time, and court ordered treatments. In addition, when confinement results in injuries to people, it is important to know whether those people are being well treated.

Persons Testifying: (In support) SuYoung Yun, United Territories of Pacific Islanders Alliance Washington; Wendy Still; Julie Graham; Ethan Frenchman, Disability Rights Washington; Shannon Perez-Darby; Hailey Ockinga, Beyond These Walls; Alyssa Knight; Cindy Robinson; and Eric Matthes.

(Opposed) Rowland Thompson, Allied Daily Newspapers and Washington State Association of Broadcasters.

Persons Signed In To Testify But Not Testifying: None.