

HOUSE BILL REPORT

ESHB 1320

*As Passed House
March 18, 1991*

Title: An act relating to full disclosure of civil court proceedings relating to public hazards.

Brief Description: Requiring full disclosure of civil court proceedings relating to public hazards.

Sponsor(s): By House Committee on Judiciary (originally sponsored by Representatives R. Meyers, Dellwo, R. King, Inslee, Riley, Ludwig, Ebersole, Leonard, Wineberry and Wang).

Brief History:

Reported by House Committee on:
Judiciary, March 6, 1991, DPS;
Passed House, March 18, 1991, 51-46.

**HOUSE COMMITTEE ON
JUDICIARY**

Majority Report: *That Substitute House Bill No. 1320 be substituted therefor, and the substitute bill do pass.* Signed by 11 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Belcher; Hargrove; Inslee; Locke; R. Meyers; H. Myers; Riley; Scott; and Wineberry.

Minority Report: *Do not pass.* Signed by 7 members: Representatives Paris, Assistant Ranking Minority Member; Broback; Forner; Mielke; D. Sommers; Tate; and Vance.

Staff: Pat Shelledy (786-7149).

Background: During civil litigation, the court has the power to issue orders preventing the dissemination of certain information either to the other party or to the public. These orders are called "protective orders." Under Washington superior court civil rule 26(c), upon motion by a party or by a person from whom the information is sought, for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including: "(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . ."

In addition to protective orders in litigation, parties may enter into settlement agreements which include an agreement by the aggrieved party not to reveal certain information about the cause of an injury to the aggrieved party.

Critics of this system argue that certain protective orders or settlements may prevent dissemination of information to the public, press, or other interested persons, about "public hazards" such as products or hazardous wastes that could pose a danger to the public or to persons who come into contact with the public hazard.

Summary of Bill: Courts may not enter an order or judgment that has the purpose or effect of concealing a public hazard or any relevant information or material concerning a public hazard, nor any information or material that is relevant to the public's knowledge or understanding of a public hazard.

Any agreement or contract that has the purpose or effect of concealing a public hazard, relevant information or material concerning a public hazard, or information that is relevant to the public's knowledge or understanding of a public hazard, is void, contrary to public policy, and unenforceable.

"Public hazard" means an instrumentality, including but not limited to any device, instrument, procedure, product, or a condition of a device, instrument, procedure, or product that: (1) Presents a real and substantial potential for repetition of the harm; or (2) involves a single incident which affected or was likely to affect many people. The term does not include acts or procedures by licensed professionals acting within the scope of their licenses.

A party to an agreement or contract may bring a declaratory action to determine whether an agreement or contract conceals a public hazard and is void. In a declaratory action, a party who wants to conceal the information may bring a motion for a temporary restraining disclosure of the information to the public or third parties pending resolution of the lawsuit. The court shall examine the information and materials in camera. The court may issue a temporary order restraining a party or parties from disseminating the protected information or material to the public or third parties. The temporary order will remain upon entry of a final order or judgment or dismissal of the case.

In any final order or judgment, if the court finds that all or a portion of the information or material sought to be protected from disclosure is relevant to the public's knowledge or understanding of a public hazard, the court

must require disclosure of the information. If the court finds that the information or material is not relevant to the public's knowledge or understanding of the public hazard, the court must order the information sealed and may include in the final order provisions restraining the parties from disclosing the information.

Any third party, including but not limited to the news media, has standing to contest an order, judgment, agreement, or contract that allegedly conceals a public hazard. The third party may challenge the motion to seal information by intervention during the court action or the third party may bring a declaratory action to determine whether the order, judgment, agreement, or contract conceals a public hazard.

The third party must establish the existence of a public hazard, that the public hazard was the subject of the order, judgment, agreement, or contract, and establish a basis for a reasonable belief by the third party that the agreement, contract, order, or judgment concealed the public hazard.

If the court finds that the third party has met those requirements, the court must require the defendant to produce the information or material for an in camera review by the court. The court must determine whether the information concerns a public hazard that was concealed and, if so, order dissemination of the information.

The court may award reasonable attorneys fees and costs to the prevailing party in the third-party action.

Any person who violates an order either publishing or sealing information is in contempt of court. The court must award attorneys fees and costs incurred in enforcing the order plus actual damages.

Any party who attempts to condition an agreement or contract upon another party's agreement to conceal an instrumentality that the party knows or should have known is a public hazard or who enters into an agreement that conceals an instrumentality the party knows or should have known is a public hazard will violate the Consumer Protection Act. If the party in violation is an insurance company, the company will also be in violation of the Unfair Practices Act governing insurance companies.

The act applies to all agreements, contracts, orders, and judgments entered on or after the effective date of the act.

The statute of limitations to bring declaratory or civil actions is three years from the execution of or entry of the agreement, contract, order, or judgment.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect July 1, 1991.

Testimony For: Protective orders protect people who make defective products. Members of the public continue to be hurt because information that would alert them to the potential harm is suppressed. Plaintiffs are coerced into agreeing to protective orders to settle cases.

Testimony Against: Protective orders expedite the discovery process, protect trade secrets, and protect information that is not a public hazard. Existing court rules provide adequate protection to litigants. The court has discretion to seal a record. If parties don't want to agree to a protective order, they do not have to settle.

Witnesses: Pro: Ron Perey, Washington State Trial Lawyers Association; Michele Radosevich, Washington State Trial Lawyers Association; David West, Washington Citizen Action; Mark and Marcia Gordon, citizens; and Barbara Arbuckle, citizen. Con: Dick Ducharme, Liability Reform Coalition; Cliff Webster, Washington State Medical Association and Architects and Engineers Legislative Council; Basil Badley, Association of Insurance Adjusters; Cliff Finch, Washington Association of Businesses; and Tom McLaughlin, Boeing Motor Vehicle Manufacturers Association.