

HOUSE BILL REPORT

HB 2576

As Reported by House Committee On:
Local Government

Title: An act relating to public records act requests to local agencies.

Brief Description: Concerning public records act requests to local agencies.

Sponsors: Representatives McBride, Nealey, Ryu, Tarleton, Springer, S. Hunt, Johnson, Zeiger, Rossetti, Clibborn, Peterson, Haler, Hargrove, Jinkins, Gregerson, Senn and Hickel.

Brief History:

Committee Activity:

Local Government: 1/28/16, 2/4/16 [DPS].

Brief Summary of Substitute Bill

- Authorizes a local agency, subject to specified criteria, to adopt procedures limiting the number of hours it devotes to responding to public records requests, and to adopt procedures that prioritize records requests.
- Establishes the Public Records Commission (Commission), a five-member commission with members appointed by the Governor, and the Commission's powers, duties, and functions.
- Creates the Dedicated Open Records Account in the custody of the State Treasurer into which funds that support the operations and administration of the Commission must be deposited.
- Authorizes local agencies and requestors to submit requests to the Public Records Commission for resolution of disputes by: voluntary arbitration; voluntary mediation; or in the event that either the agency or requestor does not consent to arbitration or mediation, adjudicative proceeding.
- Declares the Legislature's intent with regard to fully funding the Local Government Archives Account and any expenditures from the account, including that funds in the account should be used for specified local government services.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

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

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Appleton, Chair; Gregerson, Vice Chair; Fitzgibbon, McBride and Peterson.

Minority Report: Do not pass. Signed by 4 members: Representatives Taylor, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; McCaslin and Pike.

Staff: Michaela Murdock (786-7289).

Background:

Under the Public Records Act (PRA), all state and local agencies must make available for public inspection and copying all public records, unless a record falls within specific exemptions set forth in the PRA or other laws prohibit the disclosure of specific information or records. "Local agencies" include every county, city, town, municipal or quasi-municipal corporation, and special purpose district, as well as their associated offices, departments, divisions, bureaus, boards, or commissions. The PRA's provisions requiring disclosure must be interpreted liberally and its exemptions must be narrowly construed to effectuate a general policy favoring disclosure.

Public Records Act – Requests for Records.

Upon receiving a request for identifiable public records, agencies must respond within five business days. Requests received by mail for identifiable public records must be honored. The agency must either provide the records or access to the records, provide a reasonable estimate of the time the agency will take to respond to the request, or deny the request. Failure to properly respond to a records requests may be treated as a denial.

Responsive records may be provided on a partial or installment basis as records that are part of a larger set of responsive records are assembled or made ready for inspection or disclosure. Additional time required to respond to a request may be based on the need to clarify the request, locate and assemble responsive records, notify affected third persons or agencies, or determine whether any exemptions apply and whether denial of part or all of the request is appropriate.

Public Records Requests – Fees.

An agency may not charge a fee for the inspection of public records or for locating and making records available for copying. An agency may, however, impose a reasonable charge for providing copies and for the use of equipment to copy records. Charges may not exceed the amount necessary to reimburse the agency for its actual costs directly related to copying. To the extent an agency has not determined the actual per-page cost for copies, the agency may not charge in excess of 15 cents per page or the actual cost for postage, delivery, or any container or envelopment used to mail records. The agency may also require a deposit in an amount up to 10 percent of the estimated cost of providing copies for a request.

Judicial Review of Response to Public Records Request.

The PRA provides any person denied an opportunity to inspect or copy a public record, or who believes that an agency has not made a reasonable estimate of the time that it requires to respond to a request, with judicial review of the agency action. Courts must take into

account the policy of the PRA that free and open examination of public records is in the public interest, even though examination may cause inconvenience or embarrassment to public officials or others.

A person who prevails against an agency in a court action must be awarded all costs, including reasonable attorney fees incurred in connection with the action. In addition, the court may, within its discretion, award an amount not to exceed \$100 per day for each day that the person was denied the right to inspect or copy the record. Actions must be filed within one year after a claim of exemption or the last production of a record.

Records Requests – Commercial Purposes.

In general, agencies are not authorized to give, sell, or provide access to lists of individuals that are requested for commercial purposes, unless specifically authorized or directed by law. However, lists of applicants for professional licenses and professional licensees may be made available to professional associations or educational organizations recognized by their professional licensing or examination board upon payment of a reasonable charge.

Summary of Substitute Bill:

Policies for Responding to Requests – Local Agencies.

To prevent excessive interference with other essential functions of the local agency, a local agency is authorized to adopt procedures limiting the number of hours it devotes on a monthly basis to responding to public records requests and to adopt procedures that prioritize requests according to criteria established by the local agency. In adopting such procedures, the local agency must meet specified requirements, including:

1. The procedures must be adopted as legislation by the legislative body of the local agency after public hearing.
2. The procedures must address the need to provide the fullest assistance possible to requestors while avoiding excessive interference with other essential functions.
3. Unfulfilled requests or installments must rollover into the following month and continue to be fulfilled in installments based on available time.
4. The local agency must make available and accessible to the public, in accordance with certain provisions, budgets and meeting agendas, and minutes of the local agency.

In adopting procedures that limit the number of hours the agency devotes to responding to requests, the number of hours: (1) must be reasonable in light of the local agency's resources and other essential functions; and (2) the local agency must establish a minimum amount of time each month, not fewer than 10 hours, that is reasonable in light of the local agency's resources and other essential functions.

Local agencies that choose to prioritize the order in which public records requests will be fulfilled must adopt rules establishing the criteria that governs prioritization. To the extent possible, local agencies should give priority to requests: (1) involving an imminent threat to public safety or a loss of substantial due process rights; (2) concerning an imminent legislative, administrative, or judicial action; and (3) that are routine, may be readily fulfilled,

or are immediately accessible. Local agencies may ask a requestor for clarifying information regarding requests to determine whether the request should be given priority.

Additionally, local agencies must encourage public records officers to contact requestors to inquire about the purpose of a request in order to better understand a request, provide all responsive records, and appropriately prioritize requests. Requestors are not generally obligated to respond to such an inquiry.

The Public Records Commission.

The Public Records Commission (Commission) is created to administer the provisions of the PRA. The Commission comprises five members appointed by the Governor to staggered four-year terms, and includes members representing the news media, local government interests, a public interest organization advising or advocating on behalf of citizens who make public records requests, the Office of the Attorney General, and the State Auditor's Office (SAO). The SAO is responsible for providing administrative and clerical assistance.

The Dedicated Open Records Account (Account) is created in the custody of the State Treasurer. Twenty percent of discretionary amounts awarded by a court in cases brought by requestors under the PRA against agencies must be deposited into the Account for the support of the Commission. The Commission must submit a written report to the Legislature and the Governor annually by July 1.

The Commission is granted jurisdiction over disputes arising under the PRA between local agencies and persons making public records requests. When a dispute arises, local agencies and requestors may submit requests to the Commission for resolution of the disputes by voluntary arbitration or mediation. If the requestor or a local agency does not agree to arbitration or mediation, either party may request an adjudicative proceeding conducted by the Commission.

The Commission must conduct adjudicative proceedings in accordance with the Administrative Procedure Act. The Commission must adopt rules for voluntary arbitration and mediation, establish rosters of qualified arbitrators and mediators, and establish a fee schedule for such services. Fees for such services must be paid by the Commission from the Account. Additionally, the Commission must employ and assign an attorney to advise or represent individual citizens who do not have their own legal representation in any proceedings authorized by the Commission.

From the effective date of the bill until July 1, 2017, the Commission may only engage in rule-making and, during the rule-making period, must engage interested stakeholders in the rule-making process. Beginning July 1, 2017, the Commission may fully exercise all powers, duties, and functions authorized by the bill regarding resolving disputes under the PRA through arbitration, mediation, and adjudicative proceedings, subject to the availability of appropriate funds.

The Local Government Archives Account.

Legislative intent regarding expenditures from the Local Government Archives Account is declared, including that the account should be fully funded through appropriations in the 2017-2019 Omnibus Appropriations Act.

Substitute Bill Compared to Original Bill:

Regarding provisions authorizing local agencies to limit the amount of time spent responding to requests, the substitute bill makes the following changes:

- authorizes local agencies to adopt procedures, instead of a policy, to limit time spent responding to requests and to prioritize requests;
- establishes conditions for local agencies that choose to prioritize the order in which public records requests will be fulfilled, including: (a) requiring the local agency to adopt rules establishing criteria governing prioritization; (b) encouraging local agencies, to the extent possible, to give priority to requests involving an imminent threat to public safety or a loss of substantial due process rights, an imminent legislative, administrative, or judicial action, and routine requests, and requests that may be readily fulfilled or immediately accessible; and (c) authorizing the local agency to ask requestors for clarifying information to determine whether the request should be given priority; and
- requires local agencies to encourage public records officers to contact requestors to inquire about the purpose of a request in order to better understand a request, provide all responsive records, and appropriately prioritize requests.

Regarding provisions establishing the Public Records Commission (Commission), the substitute bill makes the following changes:

- specifies that the Commission may limit the number of requests for arbitration, mediation, and adjudicative proceedings it receives based on the availability of appropriated funds;
- requires the Commission to employ and assign an attorney to advise or represent individual citizens who do not have their own legal representation in any proceedings authorized by the Commission;
- provides that from the effective date of the bill until July 1, 2017, the Commission may only engage in rule-making and, during the rule-making period, must engage interested stakeholders in the rule-making process; and
- provides that beginning July 1, 2017, the Commission may fully exercise all powers, duties, and functions authorized by the bill regarding resolving disputes under the Public Records Act through arbitration, mediation, and adjudicative proceedings, subject to available appropriated funds.

The substitute bill also eliminates Part III of the underlying bill relating to cost recovery for public records sought for a commercial purpose.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Local agencies are committed to open government and transparency. In general, the Public Records Act (PRA) works well and many things do not need to be changed. However, there are issues that need to be addressed. This bill is for local agencies only. People opposed to the bill should suggest amendments and solutions.

In general, records requestors are responsible. However, local agencies have been receiving increasing numbers of records requests and harassing requests. In some cases, the PRA has been abused, rather than being used for transparency or oversight, it has been used to harass and disrupt government functions and create burdens on time and resources. People who abuse the system hurt communities. A solution is needed to deal with these requests, because they constitute an unfunded mandate. This bill will help legitimate requestors more quickly and efficiently obtain records. Although news media and commercial requestors are against the bill, it will actually help them because it will help local governments avoid logjams created by harassing requests.

Access to public records is a right, but some people are taking advantage of the PRA and imposing an unequal burden on local agencies. Some requestors make such voluminous and overbroad requests that it would take years, decades, or even, in some instances, hundreds of years to provide all responsive records, diverting employees from doing the regular work of the agency. There are numerous examples of local agencies' affected by such broad requests. Local governments provide public services, but are being burdened to the point of being unable to perform those services.

Harassing and overbroad requests conflict with the intent of the PRA and citizens' expectations for how taxpayer money should be spent. To compound the issue, local governments are facing dwindling resources and staff shortages. These requests often have a demoralizing effect on staff, who are committed public servants, but quit to earn better wages and avoid harassing interactions with requestors. Agencies need protection from blanket requests so that they can efficiently and quickly fulfill other requests. Currently, there is no relief valve for abusive requests.

Agencies need to be able to balance the objectives of the PRA with limited resources in responding to large requests. The bill will establish a clear statutory directive that lets local agencies balance essential services with responding to burdensome requests. For some small agencies, responding to PRA requests can take upwards of 80 percent of the agency's tax revenue. The scope and complexity of requests can easily swamp a small jurisdiction. It takes specialists and attorneys to properly respond, and if a mistake is made, insurance does not cover the costs. This provides a tool to better manage time and resources, and it is not about saving money or avoiding responding to requests. The bill is modeled on steps that the City of Kirkland has taken. It is also important to help jurisdictions put their records online, for which funding can be a big hurdle.

The PRA was enacted to provide citizen oversight of government; however, it is being used by for-profit corporations to make a lot of money. Local agencies can only recover certain costs for providing public records. Companies obtain data and information from local agencies for low or no costs, and then sell it for a substantial profit. Local Governments need to stop subsidizing for-profit enterprises with taxpayer money. Part III of the bill, concerning

requests for a commercial purpose was in House Bill 2156 last year, and passed off the House floor with bipartisan support.

This needs a cost-efficient alternative to court for resolving disputes. The Public Records Commission (Commission) is modeled after a proposal by former Attorney General Rob McKenna, is a much-needed mechanism for resolving disputes, and will provide a speedier alternative to court. Having a neutral third-party to resolve disputes will help parties who do not feel comfortable sitting down with agencies. Requestors might be encouraged to do so if there is a neutral third party in the room. A neutral third party will also be critical for resolving harassing and voluminous requests. The Commission will benefit agencies and requestors alike. One of the members on the Commission should be a school commissioner.

It does not make sense for costs and attorney fees to be paid by a local agency. For example, in one recent case attorney fees were \$25,000. That represents more than one full time employee for an agency. If people were required to pay for the actual cost of a public records requests, the burden would be lessened for local agencies. Although allowing agencies to charge for commercial requests is a step in the right direction, noncommercial requests are the bulk of requests. An update of the fee for noncommercial requests is needed as well. The bill does not provide all of the protections necessary to appropriately protect public funds, but it is a good start.

(Opposed) The PRA is not evil. Although the PRA may embarrass or burden some local governments, the act should not be weakened. Though unintended, this legislation will further weaken the PRA. Regarding limits on the amount of time local agencies spend responding to requests, there are existing tools in statute to manage requests that should instead be clarified. Giving new discretionary authority is risky, and allowing prioritization of requests is concerning. Public officials want to render the PRA toothless. This legislation is intended to weaken the PRA and to allow the continued harassment of individuals.

Stakeholders are willing to work with the bill regarding blanket requests for production of all records, because asking for all or nearly all records is not an "identifiable request." Criminal harassment statutes should be modified to apply to those requestors who hinder, hamper, or impede government.

The bill does not provide a solution to the actual problem it is trying to address, such as concerns about harassing, vexatious, or overbroad requests. Putting a cap on the total number of hours that an agency spends processing requests will only drag things out longer. This is drawing a line between government and the people it serves. It is also not clear how the bill will save money, because having disputes heard by the Commission will cost the same as going to court. The PRA already lets people take disputes to the court and mediate disputes. The Commission is a political arena, and moving resolution of disputes from a neutral venue like the courts into a political arena does not make sense.

The bill is consistent with "shadow government" legislation: it is advanced behind the specter of horror stories (*e.g.*, harassing, overbroad requests); no attempt has been made to work with appropriate stakeholders; and the stated intent of the bill does not comport with what it actually does. This current proposal is not workable or necessary. Local agencies want to conceal records, and they retaliate and harass requestors. Requestors have been

successful in uncovering deficiencies in local governments, and as a result, local governments are attempting to make it harder for people to provide citizen oversight. This bill is bad for open government.

The bill is not workable with respect to Part III. Allowing local agencies to establish priority for noncommercial requests is objectionable; requests ought to be filled in the order they are received. This will create a new system where for-profit commercial requestors must pay "actual costs," while everyone else will pay costs under the old system. This is unfair because both for-profits and non-profits make requests for commercial purposes. The commercial records fee also differentiates between requestors based on use of the records, which is concerning. Reasonable fees are supported as long as they apply to everyone. Also, commercial requestors would have to pass increased costs on to clients, many of whom are public organizations. Companies that obtain public records from multiple sources make obtaining such data easier and more efficient, and help facilitate things like public benefit programs.

This could be the start of a discussion, but there is not enough time to conclude the discussion this session. The Governor or some other organization should convene a group of stakeholders and continue this discussion during the interim. Key stakeholders, such as newspapers, the Washington Coalition for Open Government, and others in the requesting community, were not involved in the bill's conception or drafting, and they need to be involved. The State Auditor's Office (SAO) is currently conducting a survey of public records requests. The Legislature should wait to act until it has the benefit of that information later this spring.

(Other) While there is a need for the bill, as drafted, it will not prevent burdensome and harassing requests. Additionally, provisions concerning "commercial purpose" requests need to be redrafted to ensure that people looking for jobs or people looking for housing are not deemed "commercial" requestors and harmed by the bill. The PRA is the only tool citizens have to discover corruption. The PRA may not be perfect, but, if anything, it should be strengthened not weakened.

The SAO strongly supports the PRA, open government, and transparency, and has conducted trainings around the state to help local agencies comply with the law. The SAO is currently collecting information about the nature, volume, and cost of responding to PRA requests. The SAO's job is to audit agencies, and should not be the entity responsible for providing administrative and clerical assistance to the Commission because it would be a distraction from the SAO's constitutional duty of auditing. The SAO would be happy to participate as a member of the Commission.

Persons Testifying: (In support) Representative McBride, prime sponsor; Representative Nealey; Matt Larson, City of Snoqualmie; Pat Fitzpatrick, City of Kent; Doug Levy, cities of Everett, Fife, Issaquah, Kent, Lake Stevens, Puyallup, Redmond, and Renton; Stacy Goodman, Issaquah City Council; Jennifer Ziegler, Washington State Association of Counties; Rick Hughes, San Juan County Council; Edna Fund, Lewis County; Ken Dahlstedt, Skagit County; Jason Thompson, Marysville School District; Walt Elliott, Port of Kingston; Ginger Eagle, Washington Public Ports Association; Scott Weninger, Central Kitsap Fire and Rescue; Julie Door, City of Puyallup; Jill Boudreau, City of Mount Vernon;

Jessica Vavrus, Washington State School Directors' Association; Candice Bock, Association of Washington Cities; Laurene Burton, Evergreen Health; Matt Cowan, Shoreline Fire Department; Blair Burroughs, Washington Association of Water and Sewer Districts; John Campbell, North Mason Belfair School Board; and Penny Sweet, City of Kirkland.

(Opposed) Juli Bunting and Kathy George, Washington Coalition for Open Government; Arthur West; Kurt Kanam; John Worthington; Cliff Webster, Consumer Data Industry Association; Rowland Thompson, Allied Daily Newspapers of Washington; and Diana Carlen, LexisNexis.

(Other) Bill Hinkle, Rental Housing Association; Jan Jutte, Washington State Auditor's Office; and Dave Churchman.

Persons Signed In To Testify But Not Testifying: None.