

SENATE BILL REPORT

SB 5784

As of February 12, 2019

Title: An act relating to records disclosure and retention obligations of the legislative branch.

Brief Description: Concerning records disclosure and retention obligations of the legislative branch.

Sponsors: Senators Pedersen, Hunt, Salomon, Billig, Liias, Keiser and Wilson, C..

Brief History:

Committee Activity: State Government, Tribal Relations & Elections: 2/13/19.

Brief Summary of Bill

- Defines records prepared, owned, used, or retained by the legislative branch as public records.
- Specifically obligates the Legislature to follow Public Records Act procedures, with additional time to fulfill records requests during legislative session.
- Exempts legislative deliberative process records from public inspection and copying requirements.
- Extends protections to persons submitting whistleblower allegations to legislators.
- Requires renewal of any pending records requests to the Legislature.
- Prohibits suit against the Legislature for failure to produce any record inadvertently not retained before the act's effective date.

SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

Staff: Samuel Brown (786-7470)

Background: The Public Records Act. The Public Records Act (PRA), enacted in 1972 as part of Initiative 276, requires all state and local government agencies to make all public records available for public inspection and copying unless certain statutory exemptions apply.

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.

Over 500 specific references in the PRA or other statutes remove certain information from application of the PRA, provide exceptions to the public disclosure and copying of certain information, or designate certain information confidential. Courts interpret the provisions requiring public records disclosure liberally while the exemptions are interpreted narrowly to effectuate a general policy favoring disclosure.

Public Records Act Definitions. For purposes of the PRA, agency means all state and local agencies, which includes every state office, department, division, bureau, board, commission, or other state agency. In January 2018, the Thurston County Superior Court held, on a case pending appeal to the Washington Supreme Court, that the offices of individual state legislators are state offices, and thus agencies, for the purposes of PRA interpretation, subject to the PRA's disclosure requirements. The court also held the Legislature itself and its chambers, administered by the Secretary of the Senate (Secretary) and the Chief Clerk of the House (Chief Clerk), were not agencies under the PRA.

In 1995, for materials in the possession of the Secretary and the Chief Clerk, public records were defined to mean legislative records and:

- budget and financial records;
- personnel leave, travel, and payroll records;
- records of legislative sessions;
- reports to the Legislature; and
- other records designated as public.

Legislative Agencies. In addition to the two legislative chambers, there are a number of legislative agencies providing various functions under legislative oversight: the Statute Law Committee, the Legislative Ethics Board, the Joint Transportation Committee, the Redistricting Commission, the Joint Legislative Audit and Review Committee, the Select Committee on Pension Policy, the Joint Legislative Evaluation and Accountability Program, the Joint Legislative Systems Administrative Committee, and the office of Legislative Support Services.

Deliberative Process Exemption. Agencies subject to the PRA are not required to disclose preliminary drafts, notes, recommendations and intra-agency memoranda until the policies or recommendations that are the subject of those records are implemented.

Whistleblower Protections. Whistleblower protection applies to a person who reports alleged improper governmental action in good faith to the State Auditor, Attorney General, the director of the employee's agency, or the Executive Ethics Board. Such a person receives protection from retaliatory action.

Public Records Retention. Public records are required to be preserved, stored, transferred, destroyed or disposed of, and managed in accordance with certain retention schedules. The State Archivist manages the division of archives and records management in the Office of the Secretary of State to insure the proper management and safeguarding of public records. A records committee, composed of the State Archivist and appointees of the State Auditor, the Attorney General, and the director of the Office of Financial Management, considers requests to modify agency records retention schedules.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): Definition of Public Records. Public records include any writing containing information relating to the conduct of government prepared, owned, used, or retained by the legislative branch of government, which includes both legislative chambers and all legislative agencies.

Application of the Public Records Act to the Legislature. Many provisions of the PRA affecting state and local agencies are applied to the legislative branch, including:

- obligations to produce records for copying and inspection unless exemptions apply, a request is overbroad, or is a bot request;
- obligations to provide procedures for submitting records requests;
- the ability to recover costs related to production of records pursuant to a posted schedule; and
- the obligation to cite specific exemptions when declining to produce responsive records.

Exemptions from disclosure obligations for agency materials in the PRA are expanded to include legislative branch materials. Legislators must complete a training course on the PRA and records retention within 90 days of assuming office and refresher course at least every four years.

Legislature-Specific Exemptions. Certain records in the preparation, ownership, use, or possession of the legislative branch are permanently exempted from the PRA's disclosure obligations:

- bill and amendment drafts, regardless of whether the bill or amendment is actually offered;
- internal communications containing legal, policy, or fiscal options, analyses, models, or analytical tools;
- proposals, offers, counteroffers, or communications on bills;
- records of how members intend to vote on items before the Legislature;
- records of caucus votes, committee structure votes, and communications strategy materials;
- notes for the use of the note-taker;
- Legislative Ethics Board investigative materials, prior to resolution of a complaint;
- investigative materials generated pursuant to an investigation of an alleged harassment or safe workplace violation; and
- personally identifying information of persons other than lobbyists in constituent communications.

Whistleblower Protections. Persons reporting alleged improper governmental action in good faith to the Legislature are protected from retaliation. The identity of a whistleblower to a legislator who requests confidentiality and any records of a legislative investigation of improper governmental action are exempt from public inspection and copying.

Records Request Procedures. The Secretary and the Chief Clerk, or their designees, are the public records officers for their respective chambers and jointly for legislative agencies. The

legislative branch may require additional time to fulfill a records request when the Legislature is in session.

Legislators, the Secretary, and the Chief Clerk may request to enjoin the disclosure of records, including disclosure of any nonexempt record to a correctional inmate if the record would be used to harass the legislative branch or its employees or assist in criminal activity.

Records requests submitted to the Legislature before the bill's effective date must be renewed after the bill takes effect. Persons challenging an alleged wrongful denial of the opportunity to inspect or copy a public record by the legislative branch must file suit in Thurston County Superior Court. An alleged wrongful denial of the opportunity to inspect or copy a public record by the legislative branch may not be challenged where the record was inadvertently not retained prior to the bill's effective date.

Records Retention Obligations. Certain provisions regarding the retention of legislative records, which are included in the bill's new definition of public records, are repealed. Appointees of the Secretary and Chief Clerk are added to the records committee.

Other Provisions. The bill contains a severability clause.

Appropriation: None.

Fiscal Note: Requested on February 6, 2019.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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