Supreme Court No. 93617-0
COA No. 73843-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAMIE WALLIN,

Appellant,

v.

CITY OF EVERETT, ET AL,

Respondent.

APPELLANT'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO DISCRETIONARY REVIEW

JAMIE WALLIN
Pro Se

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TABLE OF AUTHORITIES

CASES

STATUTES

I. REPLY

In its response opposing discretionary review, the City presents, for the first time, the partial applicability of a recent decision by this Court regarding the statute of limitations for Public Records Act (PRA) claims, which is at issue here, insofar that this Court adopted the PRA's one-year statute of limitations for PRA claims thereby overruling prior appellate cases which had applied a two-year general statute of limitations to some claims.

In Belenski v. Jefferson County, --- Wn.2d ---, 378 P.3d 176 (2016), this Court concluded that the PRA's one-year statute of limitations codified at RCW 42.56.550(6) "usually begins to run on an agency's final, definitive response to a records request ... for all possible responses under the PRA, not just the two expressly listed in RCW 42.56.550(6)." Slip Op. at 9.

But while the City attempts to assert that Belenski requires a denial of this Court's review in this case, the holding and dicta of Belenski and its effect on this case is not quite as clear as the City would like this Court to think. In fact, as the following argument pointedly illustrates the needed review by this Court, review should be accepted here.

In a 2009 decision by this Court on an issue of first impression, this Court held that the first prong of RCW 42.56.550(6) does not trigger where the agency did not state

a proper claim of exemption, which required the agency to "specifically describ[e] each withheld document and the basis for withholding each document." See Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 529, 541, 199 P.3d 393 (2009). A general assertion did not suffice.

In Sanders v. State, this Court reiterated the requirement that agencies identify those documents being withheld. 169 Wn.2d 827, 845, 240 P.3d 120 (2010). This Court explained that "[c]laimed exemptions cannot be vetted for validity if they are unexplained." Id. at 846.

With those two cases in mind, we now turn to the case at hand.

Here, the uncontested facts demonstrate that: (1) Mr. Wallin, after abandoning one record, requested 23 public records held by the City, (2) the City made only a single production of 16 records to Wallin, (3) the City withheld seven records in their entirety and one record in part, (4) the exemption log provided by the City only applied to the one record withheld in part, and (5) the City did not claim exemption or provide a brief explanation for the seven records withheld in their entirety. CP 121, 124, 129.

So, in his Petition for Review, Mr. Wallin asked this Court to decide what constitutes a proper claim of exemption under the PRA to trigger the PRA's one-year statute of limitations under the fact pattern of this case. And, if the

superior court was required to review the claimed exemption for validity before applying the one-year limitations period to bar Mr. Wallin's claim. See Petition at 7-8, 13-14.

While this Court's decision in Belenski does address which statutory limitations period applies to PRA claims, it does not make any determination as to whether or not an insufficient (or improper) claim of exemption triggers the PRA's one-year statute of limitations. Under its prior decisions in Rental Housing and Sanders, supra, this Court held that an agency must claim specific exemption to each and every record withheld by an agency. And Belenski, citing to Rental Housing, did not overrule or otherwise overturn its own holding in that case. Thus, this Court still requires an agency to make a proper exemption (for each and every record withheld by the agency in specific form) before the one-year statute of limitations will trigger.

Here though, the City made no such proper exemption as its withholding "log" failed to provide a statutory exemption or brief explanation for withholding for all the records still being withheld by the City. Until the City provides a proper privilege log covering all withheld records, the PRA's one-year limitations period will not trigger under the PRA and Rental Housing.

Because this Court's opinion in Belenski does not in fact address proper exemptions, review should be granted here.

Although the recent decision in Belenski does adopt the PRA's one-year limitations period (as opposed to the general two-year period in RCW 4.16.130),[1] this Court's opinion uses specifically rendered language such as "usually" and "normally" when referring to when the PRA's limitation period begins to run on an agency's final response, see Slip Op. at 2, 5, 11, thus plainly leaving open the possibility that some agency responses, final or not, will not trigger the PRA's one-year limitations period. See Slip Op. at 10, n.2 (citing Rental Housing).

Mr. Wallin's case parallels Rental Housing where the City here did not follow the proper procedure for claiming exemptions, thus, the one-year limitation period under the PRA will not trigger until the City "provide[s] a privilege

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[1] Mr. Wallin respectfully invites this Court to reexamine its holding in Belenski with regard to the applicability of the one-year versus the two-year limitation periods. In Belenski, this Court makes only a passing reference to legislative intent, but provides no discussion or examination of such. See Slip Op. at 9. Compare this with Appendix A-D (history of HB 1758 and 2SHB 1758), attached hereto, and specifically App. B at 1 (brief summary of bill stating: "Imposes a one year statute of limitations **for certain suits** brought under the Public Disclosure Act")(emphasis added), and App. C at 2 (brief summary of supplemental bill stating: "Imposes a one year statute of limitations **for certain** public records-related suits")(emphasis added). That evidence, along with the plain language used in RCW 42.56.550(6), indicates that the legislature intended the one-year limitations period to apply only in the two factual circumstances indicated by the statute. All other PRA claims not falling under RCW 42.56.550(6), would then automatically fall under the two-year limitations period codified at RCW 4.16.130.

log identifying individual records it [i]s withholding under a claim of exemption." Rental Housing, 165 Wn.2d at 528. Cf. Belenski, Slip Op. at 10, n.2.

This Court should easily recognize the fallacy of the City's argument that the PRA's one-year limitations period was triggered upon the City's claim of a single exemption[2] which applied only to one record of the eight withheld in whole or in part (thus, an improper claim of exemption under the PRA), and the square applicability of this Court's holding in Rental Housing to the facts of this case. See Petition for Review at 8-9, 12.

The City's opposition to discretionary review plainly misreads this Court's decision in Belenski.

Once the City provides Mr. Wallin with a proper exemption log, with a specific identification of all records the City is withholding in whole and in part (as required by the PRA and Rental Housing), then the one-year statute of limitations will trigger as the City will have provided the final, definitive response as noted in Belenski. See Belenski, Slip Op. at 10, n.2 (this Court noting that its holding does not conflict with Rental Housing).

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[2] Besides its erroneous conclusion that the PRA's one-year limitations period was triggered, the superior court also failed to vet the claimed statutory exemption for validity before dismissing this case on the ground of time-bar. See Pet. for Rev. at 12, n.4, and 13-14.

This Court's recent decision in Belenski does not change Mr. Wallin's long-standing argument that the City's improper claim of exemption failed to trigger the PRA's one-year limitations period, nor does it alter the result he seeks here by this Court. The City's failure to follow proper exemption procedures under the PRA and prior holdings of this Court should be judicially remedied by this Court through acceptance of review in this case and remand back to the superior court for further proceedings.

Conversely, even if Belenski is somehow read to apply to the City's single (improper) claim of exemption thereby triggering the PRA's limitations period, then this Court should still accept review and remand this case back to the superior court to address equitable tolling based on the dispute between the parties regarding the validity of the City's single claimed exemption, and the City's bad faith actions, to wit: (1) failing to provide a proper privilege log to cover all withheld records, (2) silently withholding requested records, and (3) untruthfully indicating in a final letter to Mr. Wallin that it had provided all requested records. See Belenski, Slip Op. at 10-11 (remanding case to the superior court on question of equitable tolling).

Either way, review should be accepted here for the reasons set forth above, and because justice so requires. It is so prayed.

RESPECTFULLY SUBMITTED this 20th day of October, 2016.

Jamie Wallin
Pro Se

APPENDIX A

NOTE: ***The information on this page is current as of 9:52 AM Pacific Time on 6/17/2016, but is subject to change.***
Check online for the latest information.

HISTORY OF BILL: HB 1758
Friday, June 17, 2016 9:52 AM

Revising public disclosure law.

Sponsors: Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck, Shabro
By Request: Attorney General
Companion Bill: SB 5735

2005 REGULAR SESSION

Feb 4	First reading, referred to State Government Operations & Accountability.
Feb 9	Public hearing in the House Committee on State Government Operations & Accountability at 1:30 PM.
Mar 2	Executive action taken in the House Committee on State Government Operations & Accountability at 1:30 PM.
	SGOA - Executive action taken by committee.
	SGOA - Majority; 1st substitute bill be substituted, do pass.
	Minority; do not pass.
	Referred to Appropriations.
Mar 5	Public hearing and executive action taken in the House Committee on Appropriations at 9:00 AM.
	APP - Executive action taken by committee.
	APP - Majority; 2nd substitute bill be substituted, do pass.
	Minority; do not pass.
Mar 7	Passed to Rules Committee for second reading.
Mar 8	Made eligible to be placed on second reading.
Mar 9	Placed on second reading by Rules Committee.
Mar 15	**2nd substitute bill substituted (APP 05).**
	Rules suspended. Placed on Third Reading.
	Third reading, passed; yeas, 89; nays, 6; absent, 0; excused, 3.

IN THE SENATE

Mar 17	First reading, referred to Government Operations & Elections.
Mar 24	Public hearing in the Senate Committee on Government Operations & Elections at 8:00 AM.
Mar 31	Executive action taken in the Senate Committee on Government Operations & Elections at 8:30 AM.
Apr 1	GO - Majority; do pass with amendment(s).
	Minority; without recommendation.
	Passed to Rules Committee for second reading.
Apr 7	Placed on second reading by Rules Committee.
Apr 11	Committee amendment adopted as amended.
	Rules suspended. Placed on Third Reading.
	Third reading, passed; yeas, 42; nays, 4; absent, 0; excused, 3.

IN THE HOUSE

Apr 18 House refuses to concur in Senate amendments. Asks Senate to recede from amendments.

IN THE SENATE

Apr 21 Senate receded from amendments.
Rules suspended.
Returned to second reading for amendment.
Floor amendment(s) adopted.
Rules suspended. Placed on Third Reading.
Third reading, passed; yeas, 47; nays, 0; absent, 0; excused, 2.

IN THE HOUSE

House concurred in Senate amendments.
Passed final passage; yeas, 97; nays, 0; absent, 0; excused, 1.
Apr 22 Speaker signed.

IN THE SENATE

President signed.

OTHER THAN LEGISLATIVE ACTION

Apr 23 Delivered to Governor.
May 16 Governor signed.
Chapter 483, 2005 Laws.
Effective date 7/24/2005.

APPENDIX B

Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

State Government Operations & Accountability Committee

HB 1758

Brief Description: Revising public disclosure law.

Sponsors: Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General.

Brief Summary of Bill

- Changes the attorney client exemption from public records disclosure.
- Prohibits agencies from denying public records requests because they are overly broad; allows agencies to respond to such requests on a "rolling basis."
- Changes requirements relating to how agencies must maintain and disclose public records.
- Requires the Attorney General to adopt a model rule relating to disclosure of public records.
- Changes the venue for certain suits against counties under the Public Disclosure Act.
- Imposes a one year statute of limitations for certain suits brought under the Public Disclosure Act.

Hearing Date: 2/9/05

Staff: Jim Morishima (786-7191).

Background:

I. Records Exempt from Public Inspection and Copying

The Public Disclosure Act (PDA) requires that all state and local government agencies to make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

For example, records that are relevant to a controversy to which an state or local agency is a party, but would not be available to another party under the superior court rules of pretrial discovery, are exempt from public disclosure. The Washington Supreme Court has defined "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." Dawson v. Daly, 120 Wn.2d 782, 791 (1993).

In a recent decision, the Washington Supreme Court ruled that the statutory attorney-client privilege under RCW 5.60.060(2)(a) is a statutory exemption from public disclosure. Hangartner v. City of Seattle, 151 Wn.2d 439, 453 (2004). According to the court, this exemption protects only attorney-client communications and not "documents that are prepared for some other purpose than communicating with an attorney. Id., at 452.

II. Requirements for Maintaining Records

Public records must be made available for inspection and copying during normal office hours. State and local agencies may make reasonable rules and regulations to provide full access to public records, to protect public records from damage, and to prevent excessive interference with other essential functions of the agencies.

State and local agencies are required to maintain indexes providing identifying information regarding certain records. Local agencies do not have to provide an index if doing so would be unduly burdensome. However, such local agencies must issue and publish a formal order specifying the reasons maintaining an index would be unduly burdensome and make available any indexes maintained for agency use.

III. Responding to Requests

Responses to requests for public records must be made promptly. Within five business days of a request, an agency must:

- Provide the record;
- Acknowledge receipt of the request and provide a reasonable estimate of the time that is required to respond to the request. Additional time may be taken to clarify the intent of the request, to locate the requested information, to notify third persons or agencies affected by the request, or to determine whether the requested information is protected by an exemption; or
- Deny the request.

The Washington Supreme Court in Hangartner ruled that a public agency does not have to comply with an overbroad request. Hangartner, 151 Wn.2d at 448. According to the court, a proper request for public records "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents" (emphasis original). Id.

IV. Copying Public Records

An agency must allow the public to use its facilities for copying public records unless to do so would unreasonably disrupt the operation of the agency. Agencies may not charge for locating public documents and making them available for copying. However, an agency may impose a reasonable charge for providing copies of public records and for the use of agency equipment. Charges for photocopying may not exceed the actual per page cost published by the agency. If the

agency has not published a per page costs for copying, the costs may not exceed fifteen cents per page.

V. Judicial Remedies

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove, by a preponderance of the evidence, that the agency action was valid. If the person prevails in the action, he or she must be awarded all costs, including reasonable attorney fees. The person may also be awarded an amount between five and 100 dollars per day that the person was denied access to a public record.

Summary of Bill:

I. Records Exempt from Public Inspection and Copying

The attorney client privilege exemption articulated in Hangartner is changed to: (1) Records reflecting communications transmitted in confidence between a public official or employee and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice and (2) records prepared by the attorney in furtherance of the rendition of legal advice. Records are not exempt from disclosure merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel.

II. Requirements for Maintaining Records

By February 1, 2006, the Attorney General must adopt a model rule for state and local agencies addressing:

- Providing fullest assistance to requesters;
- Indexing or public records;
- Fulfilling large requests in the most timely manner;
- Fulfilling requests for electronic records; and
- Any other issues pertaining to public disclosure as determined by the Attorney General.

III. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records on the grounds that the request is overly broad. The agency may make records available on a "rolling basis" as records that are part of a larger set of requested records become available for inspection.

Every state and local agency must appoint and maintain an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of the PDA.

IV. Copying Public Records

Any documentation of an agency's actual costs for copies are subject to audit for accuracy by the State Auditor.

V. Judicial Remedies

Actions against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. The amount of the award the superior court may grant a prevailing person is increased from between five and 100 dollars per day to between 50 and 500 dollars per day. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable must be filed within one year of the agency's claim of exemption or the last production of a record on a rolling basis.

Appropriation: None.

Fiscal Note: Requested on February 3, 2005.

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

APPENDIX C

HOUSE BILL REPORT
2SHB 1758

As Passed Legislature

Title: An act relating to public disclosure.

Brief Description: Revising public disclosure law.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General).

Brief History:

Committee Activity:

State Government Operations & Accountability: 2/9/05, 3/2/05 [DPS];
Appropriations: 3/5/05 [DP2S(w/o sub SGOA)].

Floor Activity:

Passed House: 3/15/05, 89-6.
Senate Amended.
Passed Senate: 4/11/05, 42-4.
House Refuses to Concur.
Senate Receded.
Senate Amended.
Passed Senate: 4/21/05, 47-0.
House Concurred.
Passed House: 4/21/05, 97-0.
Passed Legislature.

Brief Summary of Second Substitute Bill

- Prohibits agencies from denying public records requests because they are overly broad; allows agencies to respond to requests on a partial or installment basis.
- Requires the Attorney General to adopt a model rule on public records disclosure
- Allows an agency to ask for a deposit or charge per installment for public records requests.
- Allows an agency to cease fulfilling a request if an installment is not picked up.
- Changes the venue for certain public records-related suits against counties.

- Imposes a one year statute of limitations for certain public records-related suits.

HOUSE COMMITTEE ON STATE GOVERNMENT OPERATIONS & ACCOUNTABILITY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Haigh, Chair; Green, Vice Chair; Nixon, Ranking Minority Member; Clements, Assistant Ranking Minority Member; McDermott, Miloscia, Schindler and Sump.

Minority Report: Do not pass. Signed by 1 member: Representative Hunt.

Staff: Jim Morishima (786-7191).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government Operations & Accountability. Signed by 28 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; McDonald, Assistant Ranking Minority Member; Armstrong, Bailey, Buri, Clements, Cody, Conway, Darneille, Dunshee, Grant, Haigh, Hinkle, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, Miloscia, Pearson, Priest, Schual-Berke, Talcott and Walsh.

Staff: Owen Rowe (786-7391).

Background:

The Public Disclosure Act (PDA) requires all state and local government agencies to make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

For example, records that are relevant to a controversy to which a state or local agency is a party, but would not be available to another party under the superior court rules of pretrial discovery, are exempt from public disclosure. The Washington Supreme Court has defined "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." Dawson v. Daly, 120 Wn.2d 782, 791 (1993).

I. Requirements for Maintaining Records

Public records must be made available for inspection and copying during normal office hours. State and local agencies may make reasonable rules and regulations to provide full access to

public records, to protect public records from damage, and to prevent excessive interference with other essential functions of the agencies.

State and local agencies are required to maintain indexes providing identifying information regarding certain records. Local agencies do not have to provide an index if doing so would be unduly burdensome. However, such local agencies must issue and publish a formal order specifying the reasons maintaining an index would be unduly burdensome and make available any indexes maintained for agency use.

II. Responding to Requests

Responses to requests for public records must be made promptly. Within five business days of a request, an agency must:

- provide the record;
- acknowledge receipt of the request and provide a reasonable estimate of the time that is required to respond to the request. Additional time may be taken to clarify the intent of the request, to locate the requested information, to notify third persons or agencies affected by the request, or to determine whether the requested information is protected by an exemption; or
- deny the request.

The Washington Supreme Court recently ruled that a public agency does not have to comply with an overbroad request. Hangartner v. City of Seattle, 151 Wn.2d 439, 448 (2004). According to the court, a proper request for public records "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents" (emphasis original). Id.

III. Copying Public Records

An agency must allow the public to use its facilities for copying public records unless to do so would unreasonably disrupt the operation of the agency. Agencies may not charge for locating public documents and making them available for copying. However, an agency may impose a reasonable charge for providing copies of public records and for the use of agency equipment. Charges for photocopying may not exceed the actual per page cost published by the agency. If the agency has not published a per page costs for copying, the costs may not exceed 15 cents per page.

IV. Judicial Remedies

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove, by a preponderance of the evidence, that the agency action was valid. If the person prevails in the action, he or she must be awarded all costs, including reasonable attorney fees.

Summary of Substitute Bill:

I. Requirements for Maintaining Records

By February 1, 2006, the Attorney General must adopt an advisory model rule for state and local agencies addressing:

- providing fullest assistance to requesters;
- fulfilling large requests in the most timely manner;
- fulfilling requests for electronic records; and
- any other issues pertaining to public disclosure as determined by the Attorney General.

II. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records solely on the grounds that the request is overly broad. The agency may make records 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.

Every state and local agency must appoint and publicly identify an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of the PDA. An agency's public records officer may appoint an employee or official of another agency as its public records officer. State agencies must publish contact information regarding the public records officer in the state register. Local agencies must publish the contact information in a manner reasonably calculated to give notice to the public.

III. Copying Public Records

An agency may require a deposit not to exceed 10 percent of the estimated cost of providing copies of a request and may charge a person per installment. An agency may cease fulfilling a request if an installment is not claimed or received.

IV. Judicial Remedies

Actions against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable 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.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: (In support) It is important that people have access to government so that the public can see what agencies are doing. Every public document requested from an agency should be disclosed without discussion. This bill will reduce litigation, make it easier for

people to get a record, and make it easier for agencies to follow the PDA. This bill codifies the attorney-client privilege to make it clear when the privilege applies; this will help prevent abuses of the attorney-client privilege exemption. The attorney-client privilege should not be expanded. A document should not be shielded simply because litigation may take place at some unidentified future time. This bill will help stop abuses of the "overbreadth" exemption identified in Hangartner. Public agencies should not be exempt from providing information to the people they serve.

(Concerns) The competing concerns of the PDA should be kept in mind: accountability, protection of private and confidential information, and maintaining government integrity and efficiency. The attorney-client privilege provisions of the bill may serve to codify the Hangartner decision. It is not clear that an attorney-client privilege exists for public lawyers. Hangartner changed the state of the law; prior to the decision, the relevant exemption was the "controversy" exemption.

Testimony Against: There needs to be a balance between the citizens' right to know, privacy and trust, and government efficiency. Hangartner did not affect the status of the law with regard to attorney-client privilege; the decision simply re-affirmed long-standing practice. There is no reason to believe that the attorney-client privilege will be abused. Because the attorney-client privilege is defined in the bill differently than it is defined under the current law, it is unclear whether courts can use the developed case law to determine the contours of the privilege. This bill could therefore lead to more litigation and uncertainty. The increased fines in the bill are too high and may give the public incentive to sue agencies. Some people currently use the PDA to blackmail agencies.

Summary of Second Substitute Bill:
Appropriation: None.

Fiscal Note: Available.

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

Testimony For:
Testimony For: (Appropriations) None.

Testimony Against:
Testimony Against: (Appropriations) There are concerns with this bill and the fiscal impact on local governments. The local government fiscal note is indeterminate but there are two specific areas where there would be costs: the inclusion of language that prohibits public agencies from working with the requester to narrow down the request, and the increase in fines from $100 to $500. There are 179 cities with a population of less than 5,000 and approximately 100 that have a population of less than 1,500. These fines could quickly become burdensome for less sophisticated local governments.

Persons Testifying: (State Government Operations & Accountability) (In support) Representative Kessler, prime sponsor; Brian Sontag, State Auditor; Rob McKenna, Attorney

General; Randall Gaylord, Washington Association of County Officials; Dan Wood, Washington State Farm Bureau; and Armen Yousoufian.

(Concerns) Michele Earl-Hubbard, Washington Coalition for Open Government; Jason Mercier, Evergreen Freedom Foundation; Bill Vogler, Washington State Association of Counties; Rick Slunaker, Associated General Contractors; Rowland Thompson, Allied Daily Newspapers of Washington; and David Koenig.

(Opposed) Lorriane Wilson and Patti Holmgren, Tacoma Public Schools; Roger Wynne, City of Seattle; Arthur Fitzpatrick, City of Kent for Coalition of Cities; and Denise Stiffarm, King County and Pierce County School Coalitions.

Persons Testifying: (Appropriations) Jim Justin, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: (State Government Operations & Accountability) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.

APPENDIX D

FINAL BILL REPORT
2SHB 1758

C 487 L 05
Synopsis as Enacted

Brief Description: Revising public disclosure law.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General).

House Committee on State Government Operations & Accountability
House Committee on Appropriations
Senate Committee on Government Operations & Elections

Background:

The Public Disclosure Act (PDA) requires all state and local government agencies to make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

For example, records that are relevant to a controversy to which a state or local agency is a party, but would not be available to another party under the superior court rules of pretrial discovery, are exempt from public disclosure. The Washington Supreme Court has defined "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." *Dawson v. Daly*, 120 Wn.2d 782, 791 (1993).

I. Requirements for Maintaining Records

Public records must be made available for inspection and copying during normal office hours. State and local agencies may make reasonable rules and regulations to provide full access to public records, to protect public records from damage, and to prevent excessive interference with other essential functions of the agencies.

State and local agencies are required to maintain indexes providing identifying information regarding certain records. Local agencies do not have to provide an index if doing so would be unduly burdensome. However, such local agencies must issue and publish a formal order specifying the reasons maintaining an index would be unduly burdensome and make available any indexes maintained for agency use.

II. Responding to Requests

An agency must respond to requests for public records promptly. Within five business days of a request, an agency must:

- provide the record;
- acknowledge receipt of the request and provide a reasonable estimate of the time that is required to respond to the request. The agency may take additional time to clarify the intent of the request, to locate the requested information, to notify third persons or agencies affected by the request, or to determine whether the requested information is protected by an exemption; or
- deny the request.

The Washington Supreme Court recently ruled that a public agency does not have to comply with an overbroad request. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448 (2004). According to the court, a proper request for public records "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents" (emphasis original). *Id.*

III. Copying Public Records

An agency must allow the public to use its facilities for copying public records unless to do so would unreasonably disrupt the operation of the agency. An agency may not charge for locating public documents and making them available for copying. However, an agency may impose a reasonable charge for providing copies of public records and for the use of agency equipment. Charges for photocopying may not exceed the actual per page cost published by the agency. If the agency has not published a per page costs for copying, the costs may not exceed 15 cents per page.

IV. Judicial Remedies

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove, by a preponderance of the evidence, that the agency action was valid. If the person prevails in the action, he or she must be awarded all costs of maintaining the action, including reasonable attorney fees.

Summary:

I. Requirements for Maintaining Records

By February 1, 2006, the Attorney General must adopt an advisory model rule for state and local agencies addressing:
- providing fullest assistance to requesters;
- fulfilling large requests in the most timely manner;
- fulfilling requests for electronic records; and
- any other issues pertaining to public disclosure as determined by the Attorney General.

II. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records solely on the grounds that the request is overly broad. The agency may make records 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.

Every state and local agency must appoint and publicly identify an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of the PDA. An agency's public records officer may appoint an employee or official of another agency as its public records officer. State agencies must publish contact information regarding the public records officer in the state register. Local agencies must publish the contact information in a manner reasonably calculated to give notice to the public.

III. Copying Public Records

An agency may require a deposit not to exceed 10 percent of the estimated cost of providing copies of a request and may charge a person per installment. An agency may cease fulfilling a request if an installment is not claimed or received.

IV. Judicial Remedies

An action against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable 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.

Votes on Final Passage:

House	89	6	
Senate	42	4	(Senate amended)
House			(House refused to concur)
Senate			(Senate receded)
Senate	47	0	(Senate amended)
House	97	0	(House concurred)

Effective: July 24, 2005

DECLARATION OF SERVICE

(Pursuant to GR 3.1)

I, Jamie Wallin, declare that, on October 20, 2016, I deposited the foregoing APPELLANT'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO DISCRETIONARY REVIEW, or a copy thereof, in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 and made arrangements for postage, addressed to:

Clerk, Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Ramsey Ramerman, WSBA 30423
Attorney for City of Everett
2930 Wetmore Avenue, 10-C
Everett, WA 98201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of October, 2016.

Jamie Wallin