Franchise Tax Board

SUMMARY ANALYSIS OF AMENDED BILL

Author:	Leno	Analyst:	Darrine Distefano	Bill Number:	AB 2927
Related Bills:	See Prior Analysis	Telephone:	845-4142	Amended Date:	August 24, 2006
		Attorney:	Patrick Kusiak	Sponsor:	

SUBJECT: Public Records Disclosure/State Agency Internet Web Sites/Public Information Center

X DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as amended August 7, 2006.

____ AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.

X AMENDMENTS DID NOT RESOLVE THE DEPARTMENTS CONCERNS stated in the previous analysis of bill as amended August 7, 2006.

____ FURTHER AMENDMENTS NECESSARY.

____ DEPARTMENT POSITION CHANGED TO _____.

X REMAINDER OF PREVIOUS ANALYSIS OF BILL AS AMENDED August 7, 2006, STILL APPLIES.

X OTHER – See comments below.

SUMMARY

This bill would require a state agency to include specific information on its web site about requests for copies of public records.

SUMMARY OF AMENDMENTS

The August 14th & 24th, 2006, amendments make significant changes to the bill. Those changes, in addition to the remaining provisions, are discussed under "This Bill" heading.

The August 14th & 24th, 2006, amendments resolve several of the implementation and technical considerations of the bill as previously amended on August 7th, June 22nd, May 26th, and April 17th. The August 14th amendments result in one new implementation consideration that is provided below. Depending on the recommendations made by the task force, all of the implementation considerations could be revised or eliminated. The remaining implementation considerations, as well as, a revised Fiscal Impact, are provided below. The remainder of the bill as amended April 17th still applies.

Board Position:			Legislative Director	Date
____ S	____ NA	____ NP		
____ SA	____ O	____ NAR	Brian Putler	8/28/06
____ N	____ OUA	X PENDING		

EFFECTIVE/OPERATIVE DATE

The provisions relating to the web site and the courts would be operative January 1, 2008. The provisions relating to the advisory task force would be operative January 1, 2007.

POSITION

Pending.

ANALYSIS

THIS BILL

This bill would require every state agency that maintains an Internet site to include on the homepage the words "Public Records Center" displayed clearly without scrolling. Those words would be followed by or would link to another page showing both of the following:

- Under the words "Whom to Contact," the title, mailing address, telephone number, and e-mail address of the public information officer or other person(s) to whom requests for inspection or copying of records or informal requests for simple factual information should be directed.
- Under the words "How to Request Records," the written guidelines authorized or required under "Whom to Contact" and a form in HTML language for submitting online requests consisting of all of the following labeled fields:
    1. Today's date.
    2. My name (optional).
    3. My e-mail address (optional).
    4. My postal address (optional).
    5. My telephone number (optional).
    6. I am interested in the following records or information.
    7. Where can I inspect these records?
    8. Send me copies of the records.
    9. Send me a fee estimate before copying.
- The form would be designed to send a copy of the request immediately and automatically to the e-mail address listed on the HTML request form if an e-mail address is provided by the person submitting the form.

This bill requires the web site and HTML form to be available on January 1, 2008.

This bill would allow a person to request the Attorney General (AG) to review a state or local agency's denial of or failure to respond timely to a written request to inspect or receive a copy of a public record.

- The person's request must be delivered to the AG within 20 days of receipt of the agency's written denial, or, if the agency has failed to respond, the person has 20 days and no more than 40 days after the request was made to the agency to seek review from the AG.
- Allows the AG to solicit information from the denying agency, including copies of exempt records or detailed explanation of the content of information in those records. The AG must return or destroy nondisclosable records received after completion of its review. An agency is not required to provide records or information, but failure to do so without adequate justification may be considered in assessing the sufficiency of the agency's written denial under review.
- Under completion of the AG's review, a copy of the opinion must be mailed immediately to the person requesting the review and the denying agency. The AG must make copies of the opinions issued available for public inspection, publish them annually, and make them available on the Internet.
- If the AG provided advice to an agency involving a request to inspect or make copies of records, it would provide a basis for the agency to claim an attorney-client relationship that would preclude the AG from providing an opinion.
- Allows an agency to retain legal counsel, other than the AG, to defend an action brought under provisions of the Public Records Act if the AG has issued an adverse opinion.
- If a person seeks review by the AG, no legal action may be brought against the agency whose decision was subject to review until 10 days after the issuance and mailing of the opinion.
- This provision would not apply to a request for public records made to an agency by a party to a pending legal proceeding involving the agency or employee of the agency, or a pending investigation by the agency, if the AG has provided or is providing legal advice or representation to the agency with respect to that proceeding or investigation.

This bill would award $100 per day to a plaintiff if a court finds an agency's action results from any of the following:

- Declining to comply with a request to inspect or copy a record that is publicly accessible.
- Delaying in responding or producing the requested records without stating a reason or the reason is unsupported by compelling circumstances or otherwise demonstrates a lack of diligence required to make the records available promptly.
- Imposing conditions that are unauthorized under the PRA, including requesting payment in excess of applicable statutory fee.
- Delaying timely and complete access.
- Acting in bad faith and with reckless disregard of the agency's obligations under the PRA.

This bill would require a court to consider all the facts and circumstances surrounding the agency's decision including, but not limited to the following:

- Whether the agency unreasonably failed to respond within the set timelines or otherwise engaged in conduct that caused undue delay.
- Whether the agency's justification for denying the request was based upon its perceived obligation to protect the rights of persons or entities identified in the requested records.
- Whether the agency has developed internal operating procedures and guidelines under this section.
- Whether the plaintiff acted in good faith while pursuing the request.
- Whether the agency's denial or other conduct inconsistent with the provisions of this bill was based on a reasonable interpretation of the law.

This bill would limit the award to a total of $10,000 for the record or records in question. The period for an award would exclude the time when a request is pending with the Attorney General or when the court is considering the plaintiff's petition.

This bill would outline the duties of the court if a plaintiff brings an action against an agency for failure to comply with the requirements under this bill. This provision would become operative on January 1, 2008.

This bill would require the Department of Justice (DOJ) to convene an advisory task force to consider and make recommendations for statutory standards that would govern the Internet web sites of state agencies posting of public records requests and denials that are subject to disclosure under the Public Records Act.

The task force would include all of the following:

- State agency or board representatives.
- Representatives of the Department of Information Technology.
- Representatives of organizations with expertise in technical policy and practices of Internet.
- Representatives of organizations with expertise in privacy policy relevant to Internet disclosure.
- Representatives of organizations with expertise in fostering public integrity and accountability.
- Representatives of organizations with expertise in informed electoral participation.
- Representatives of organizations with expertise in investigative journalism.
- Representatives of legislative staff, at the option of the applicable legislative oversight entities, and to the extent not in conflict with their legislative duties.

The task force would consider at least all of the following issues:

- Whether it is of greater value to the public for state agencies to automatically post to the Internet, with appropriate security and privacy controls, public records subject to disclosure under the PRA rather than making those records available on a request only basis. Specific consideration would be given to statements of economic interests of key public officials and consultants and the performance of public agencies, including but not limited to, litigation settlements. Specific consideration would be given to what advantages and disadvantages may be associated with an affirmative Internet posting requirement.
- Whether eventual cost savings or increases in efficiency or both would offset the implementation and management costs of requiring state agencies to automatically post disclosable public records on their Internet web sites or whether certain types of public records are better suited for automatic disclosure based on these cost and efficiency considerations.
- Whether appropriate security measures are available and cost effective to ensure the personal and proprietary information contained in a public record is protected from the possibility of identity theft or other forms of misuse before posting on the Internet.
- Whether appropriate security measures are available and cost effective to ensure that disclosable public records are protected from alteration by third parties or other forms of misuse.
- Other issues that might arise from a statutory requirement for certain public records to be automatically posted on an agency Internet web sites.

The task force would report its findings and recommendations to the Governor and the Legislature no later than September 30, 2007. In addition, the task force would cease to exist on this date.

IMPLEMENTATION CONSIDERATIONS

Below is the concern related to the bill as amended August 14, 2006:

Although the bill identifies representatives that are required to be on the advisory task force convened by DOJ, it is unclear the mechanism that would be used to select members from state agencies/boards. The department receives a significant number of PRA requests each year relating to the personal and corporate income tax laws it administers. The author may wish to specifically identify the department's Disclosure Officer as a member of the taskforce to ensure the department's PRA issues are addressed.

Below is the remaining concern from the analysis of the bill as amended August 7, 2006:

It is unclear whether the AG's review for a "denial of a written request to inspect or copy a public record" is limited to the agency's decision to exempt a particular document or portions of a record or if the language intends to be broader in scope. For example, an agency can and often does receive broadly worded requests for documents. The agency provides specific documents after due diligence in examining all records available. Under this bill, the requester could then seek AG review of the agency's PRA response, claiming the agency failed to perform an adequate

review of its records. The author may wish to clarify these terms to avoid confusion and ambiguity.

Below are the remaining concerns from the analysis of the bill as amended April 17, 2006:

The PRA currently requires an interactive process between the requester and a state agency to clarify, assist, and identify appropriate records. FTB's Disclosure Section ensures the administration of the PRA is carried out by working with a requester if the description of a record is unclear. Under this bill, it appears that the requester could remain anonymous for requests made on the web site. Anonymity of the requester could frustrate the current interactive process in conflict with the PRA. The author may wish to remove the term "optional" from the labeled fields on the HTML form.

Because the bill would make the requester's postal address and phone an optional field on the HTML form used to request documents, it might be difficult or impossible for the department to contact the requester to clarify the request or send paper copies of records. In addition, if the requester only provides an e-mail address, there may be limitations placed by the requestor's Internet Service Provider (ISP) on e-mail size. To ensure the department is able to provide requested records, the HTML form should require the requester's postal address.

The bill specifies that the form must be designed using the HTML format. This would restrict the use of alternative or future technology. Requiring agencies to maintain a format that is obsolete could cause complications and increase costs. The author may wish to amend the provision to specify HTML, alternate, or successor technology.

FISCAL IMPACT

Although the amendment removes the requirement to post statements of economic interests, employment or consulting contracts, lawsuit settlements, records disclosed, records withheld this year, and an archive on the agency's web site, the department has anticipated one-time costs and on-going costs for the remaining provisions of this bill. The costs have been revised from the previous analysis based on additional information (provided below).

The department anticipates a one time cost of approximately $157,596 for equipment to store, secure, and verify email addresses; existing personnel to create the online form, conduct usability programming, testing, and maintenance of the web page. The department also anticipates on-going costs of $272,596 for two personnel years (PYs) in the Disclosure Section to analyze requests and redact requester's documents, and one new PY in the Legal Department to assist Disclosure staff and provide legal assistance under this bill. The total cost to the department would be $430,192.

Amendment 1 is provided to suggest appropriation language to fund the department's cost.

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FRANCHISE TAX BOARD'S
PROPOSED AMENDMENTS TO AB 2927
As Amended August 14, 2006

AMENDMENT 1

SEC. 7. The sum of four hundred thirty thousand one hundred ninety-two dollars ($430,192) is hereby appropriated to the Franchise Tax Board in augmentation of its support budget (Item of the Governor's Budget – Chapter ___, Statutes of ___).