

Legislative Analysis



ADD "LEGISLATIVE OPEN RECORDS ACT" (LORA) TO FREEDOM OF INFORMATION ACT (FOIA)

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House Bill 5469 reported from committee as H-1
House Bill 5477 (H-3) as reported
Sponsor: Rep. Edward McBroom

House Bill 5470 as reported
Sponsor: Rep. Martin Howrylak

House Bill 5474 as reported
Sponsor: Rep. David Rutledge

House Bill 5471 as reported
Sponsor: Rep. John Bizon, M.D.

House Bill 5475 (H-1) as reported
Sponsor: Rep. Jason M. Sheppard

House Bill 5472 as reported
Sponsor: Rep. Tom Barrett

House Bill 5476 as reported
Sponsor: Rep. Vanessa Guerra

House Bill 5473 (H-1) as reported
Sponsor: Rep. Lee Chatfield

House Bill 5478 as reported
Sponsor: Rep. Jeremy Moss

Committee: Oversight and Ethics
Complete to 5-31-16

SUMMARY:

House Bills 5469-5478 would together implement a new Legislative Open Records Act, which will bring the state legislature under the Freedom of Information Act. The package also strikes the current exemption from FOIA for the governor, lieutenant governor, and executive office employees.

The provisions on legislative records are included by adding a new Part 2 to the existing Freedom of Information Act (FOIA). The new act would take effect January 1, 2017. The bills, generally speaking, add new language that mirrors provisions already in the act for "public bodies." However, there are provisions in the bills unique to the legislative branch, notably the process for appealing decisions denying a request for disclosure of a public record under House Bill 5473.

Also, House Bill 5475 stipulates that the new Part 2 is not to be construed to limit, modify, waive, or otherwise affect the privileges and immunities guaranteed to the legislature under Article IV, Section 11, of the State Constitution, and that it does not create or imply a private cause of action for a violation. That bill also contains exemptions from disclosure for certain legislature-specific information, such as communications between legislative offices and their constituents. Also, the new act would not apply to records created, prepared, owned, used, in the possession of, or retained by a public body prior to January 1, 2017.

Generally speaking, FOIA establishes procedures and requirements for the disclosure of public records by all public bodies in the state. The term "public record" refers to a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created, but does not include computer software. There are two classes of public records: those subject to disclosure and those exempt from disclosure. Generally, all records are subject to disclosure unless specifically exempted.

The term "public body" applies currently to a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, (but does not include the executive office of governor or lieutenant governor); an agency, board, commission, or council in the legislative branch of the state government (but apparently not the legislature itself); a county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or their boards, departments, commissions, councils, and agencies; and any other body created by state or local authority or primarily funded by or through state or local authority.

The term does not include the judiciary, including the office of the county clerk and the clerk's employees when acting in the capacity of clerk to the circuit court.

Under the new Part 2, known as LORA, the term "public body" would be defined as "a state officer, legislator, employee, agency, department, division, bureau, board, commission, committee, council, authority, or other body in the legislative branch of state government." A "public record" would be defined as a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function that has been in the possession of the public body for 15 days or more." Under the new Part 2, "LORA coordinators" would be designated to serve the role that FOIA coordinators serve under the existing act.

House Bill 5469 would create new Sections 51 and 53, which mirror Sections 1 and 3 of the current law, but apply specifically to the legislative branch. A "public record" would be a record that had been in possession of a public body for 15 days or more. However, the bill specifies that a public body could not destroy or alter a record before it had been in its possession for 15 days if the record would later become a public record.

House Bill 5470 creates a new Section 54, which mirrors Section 4 of the existing act and applies to the fees a public body can charge for searching and copying public records, among other things.

House Bill 5471 would add Section 55, which corresponds to Section 5 of the existing act regarding the process of submitting a request for a public record. There are several key differences. The new act does not allow a civil action to compel disclosure of a public record. A final determination to deny a request would be appealed to the administrator of the Legislative Council and there would not be a judicial review.

House Bill 5472 would add Sections 56 through 59, which specify that: the administrator of the Legislative Council would designate an individual as the LORA coordinator for all public bodies; the House of Representatives could designate an individual as the LORA coordinator for the House; the Senate could designate an individual as the LORA

coordinator for the Senate; and a LORA coordinator could designate another individual to act on his or her behalf in accepting and processing requests and in approving a denial.

House Bill 5473 adds Sections 59a and 59b, which spell out the appeals procedure for denials of disclosure of public records. These correspond to Sections 10 and 10a of the existing law. However, appeals under LORA would be made to the coordinator who issued the denial for a reconsideration or to the administrator of the Legislative Council. (There would be no cause for a civil action.)

A public body's LORA coordinator is not considered to have received a written request for reconsideration until the first scheduled session day following the submission of the request. If a request is reviewed by the council administrator, the administrator could charge a reasonable fee not to exceed \$50 unless the person making the request is eligible for a fee waiver because of indigence. If the council administrator determines that a public body has arbitrarily and capriciously violated Part 2 by charging an excessive fee, the administrator would recommend appropriate disciplinary action to the Speaker of the House or Majority Leader of the Senate, as applicable. The council administrator would have to make any recommendation for disciplinary action publicly available on the internet no later than five days after it is issued.

House Bill 5474 adds Section 59e, which mirrors existing Section 14 on separating exempt from non-exempt material; and Section 59f, which specifies that the attorney general shall counsel and advise a public body on the administration of LORA.

House Bill 5475 would add Sections 59c and 59d. Section 59c stipulates that the new Part 2 is not to be construed to limit, modify, waive, or otherwise affect the privileges and immunities guaranteed to the legislature under Article IV, Section 11, of the State Constitution, and stipulates that it does not create or imply a private cause of action for a violation.

Section 59d mirrors existing Section 13 and describes public records exempt from disclosure. These include, in addition to those found in current law for other public bodies:

- Communications, including any related records or information, between a legislator or a legislator's office and a constituent of that legislator, other than a registered lobbyist;
- Records in the sole custody of, or exclusively maintained by, the majority and minority caucuses of each house of the legislature;
- Records or information pertaining to an ongoing internal or legislative investigation; and
- Records of the Office of Auditor General.
- Records or information specifically described and exempted from disclosure by statute, including the records and information subject to confidentiality requirements in statutes dealing with the Legislative Service Bureau's bill drafting division, the Senate and House Fiscal Agencies, and the Correction Ombudsman;
- Records of the Office of Sergeant at Arms, and
- Records or information subject to the attorney-client privilege or any other privilege recognized by the constitution, statute, court rule, or rules adopted by a house of the legislature.

The bill specifies that the new Part 2 would not authorize the exemption from disclosure of any salary record of an employee or an official of a public body (i.e., the legislative branch).

Also, as noted earlier, the new act would not apply to records created, prepared, owned, used, in the possession of, or retained by a public body prior to January 1, 2017.

House Bill 5476 would make complementary amendments to the Legislative Council Act.

House Bill 5477 would amend the existing Section 13 of FOIA to strike a provision that says a public record in the possession of the governor or lieutenant governor cannot be withheld if it had been transferred there from a public body subject to FOIA after a request for its disclosure. It also eliminates a reference to the Department of History, Arts, and Libraries, which has been dissolved.

The bill lists some exemptions unique to the executive officer of governor or lieutenant governor. This would include records or information related to:

- Appointments; however, after an individual has been appointed, the exemption would not apply to records or information relating to that individual, except as to letters of recommendation.
- Decisions to remove or suspend from office any public official under Article V, Section 10 of the State Constitution or to remove a judge from office under Article V, Section 25. After the individual has been removed or suspended, the exemption would not apply to a record applying to that individual.
- Decisions to grant or deny a reprieve, pardon, or commutation, under Article V, Section 24.
- Budget recommendations prepared under Article V, Section 18.
- A reduction in expenditures under Article V, Section 20.
- A message or recommendation to the legislature under Article V, Section 17.

House Bill 5478 would amend Section 1 of FOIA. It takes out references to legislative agencies, boards, commissions, and councils (since they will be covered by the new Part 2), and also removes the specific exclusion from the definition of "public body" for the governor and lieutenant governor.

FISCAL IMPACT:

The package of bills would likely increase costs for the legislature by an unknown amount. The major cost components would be staffing and the corresponding administrative costs associated with responding to the requests and record retention. Any fiscal impact would be directly correlated to the number of additional staff necessary to act as LORA or FOIA coordinator and respond to requests under the provisions of the bills. As background, some state departments and agencies have a dedicated FOIA coordinator position while others use existing staff to fill the role. The bills would allow the legislature to charge for the costs of complying with the request, but the extent to which the costs would be offset by the revenue received is unknown.

POSITIONS:

The American Civil Liberties Union of Michigan testified in support of the bill package. (4-28-16)

The Mackinac Center for Public Policy testified in support of House Bill 5478 and in support of the concept of the remainder of the bill package. (4-28-16)

The Michigan Coalition for Open Government indicated support in written testimony dated 4-25-16.

The Michigan Press Association testified in support of the bills on 5-12-16.

The Michigan State Employees Association indicated support for the bills on 5-12-16.

The Michigan Freedom Fund indicated support for the bills on 5-12-16.

The Michigan Environmental Council indicated support for the bills on 5-19-16. (In testimony before the committee, the MEC supported judicial review, rather than appeals being kept within the legislative branch, and questioned exemptions for certain legislative records.)

Michigan Chapter Executive Committee for the Sierra Club submitted a testimony card and written testimony in support of House Bills 5477 and 5478, and indicating neutrality on the remaining bills in the package. The Sierra Club supports amending the package to include an independent review of legislative records decisions and judicial relief, and to remove exemptions for litigation and civil claims. (4-28-16)

Common Cause of Michigan, testified in support of House Bills 5477 and 5478, and neutral on the remaining bills in the package. Common Cause supports amendments to add an independent judicial review process, speedier access to records, and fewer exemptions from disclosure. (4-26-16)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.