

Legislative Analysis



LEGISLATIVE CORRECTIONS OMBUDSMAN

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House Bill 6397 as enacted
Public Act 571 of 2018

Analysis available at
<http://www.legislature.mi.gov>

Sponsor: Rep. John Bizon, M.D.
House Committee: Law and Justice
Senate Committee: Government Operations
Complete to 2-14-19

BRIEF SUMMARY: House Bill 6397 would clarify and, in some instances, expand the ability of the Legislative Corrections Ombudsman, or his or her staff, to initiate investigations, interview individuals in connection with an investigation, and access certain portions of a prison during an emergent event, such as a riot, and would strengthen FOIA protections.

FISCAL IMPACT: The bill would have no direct fiscal impact on state or local government. If it were determined that the expanded investigatory abilities of the Legislative Corrections Ombudsman authorized under the bill resulted in additional investigations that increased Legislative Corrections Ombudsman costs beyond current appropriation levels, any additional funding would be subject to legislative appropriation.

THE APPARENT PROBLEM:

Since its inception, the Office of Legislative Corrections Ombudsman (LCO) has been tasked with investigating allegations that conduct or actions on the part of the Department of Corrections (DOC) or an employee of the DOC are contrary to law or to department policy. Complaints can be submitted not just by prisoners, but also by DOC employees, friends or family of prisoners, legislators, and parolees. When an investigation into a complaint is warranted, it is important that the Ombudsman and his or her staff have access to prisoners and/or employees to gather information and work to resolve the issue. For its part, the LCO follows office protocol to not interfere with prison operations when conducting investigations.

Some recent events have highlighted weaknesses in the LCO's ability to fulfill its statutory mission. For example, when requesting video of a riot that took place in an Upper Peninsula prison, staff were required to travel to the prison, rather than being able to receive an electronic copy that could be viewed in the LCO's Lansing-based office. In another issue, DOC employees may be hesitant to cooperate fully in investigations out of fear of retaliation by supervisors or the department. Further, investigative notes often contain sensitive information, such as gang activity or prison rapes, which could endanger a prisoner's safety if disclosed to other prisoners or DOC employees, and so some feel an exemption from disclosure under the Freedom of Information Act (FOIA) would be appropriate. Legislation addressing various issues has been offered.

THE CONTENT OF THE BILL:

House Bill 6397 would amend Public Act 46 of 1975, which created the Office of the Legislative Corrections Ombudsman within the Legislative Council and prescribes the powers and duties of the Ombudsman.

Commencing an investigation

Currently, the Ombudsman may commence an investigation upon either of the following:

- Receipt of a complaint from a prisoner, a legislator, or the Ombudsman's own initiative concerning an administrative act alleged by a prisoner to be contrary to law or contrary to the Michigan Department of Correction's policy.
- The Ombudsman's own initiative for significant prisoner health and safety issues and other matters for which there is no effective administrative remedy.

The bill would delete the underlined text, thus eliminating the restriction that the allegation be made by the prisoner. Under the bill, the allegation could arise from a prisoner, a legislator, or the Ombudsman. In addition, the bill would allow the Ombudsman to also initiate an investigation regarding *correctional facility security and public safety*.

Access to information

Currently, the act requires that, upon his or her request, the Ombudsman be given access to all information, records, and documents in the possession of the DOC that the Ombudsman deems necessary in an investigation. This includes such things as prisoner medical health records, mental health records, and mortality and morbidity records.

The bill would add to this that, upon request, the Ombudsman could interview any of the following he or she considered as necessary in an investigation:

- A DOC employee or an individual retained under contract by the DOC.
- An employee of, or individual retained under contract by, a private contractor operating a facility or institution housing prisoners who are under the jurisdiction of the DOC.

The Ombudsman would have to arrange an interview under this provision in cooperation with the DOC at a time and location that does not interfere with the operation of a correctional facility.

Access to prisons

Currently, the Ombudsman may—upon request and without notice—enter and inspect at any time any premises (e.g., prison or a reception center) under DOC control.

The bill would expand this provision to specify that one Ombudsman staff person would also have to be granted entry to a correctional facility or the DOC's "think tank" or "command center" during emergency situations that would include, but not be limited to, correctional facility disturbances, riots, and hostage incidents, and be provided with status updates on the emergency situation as well as the DOC's efforts to address the situation.

The Ombudsman staff person granted entry for an emergency situation under this provision would be present for observation and to report on the emergency situation.

Confidentiality of records

Currently, correspondence between the Ombudsman and a prisoner is confidential and is processed in the same manner as letters between prisoners and courts, attorneys, or public officials. In addition, the Ombudsman must maintain secrecy with respect to all matters and the identities of the complainants or persons from whom information is acquired (an exception is made for a disclosure necessary for the Ombudsman to perform his or her duties).

Under the bill, all of the following would also apply to a record of, or information obtained or created by, the Ombudsman:

- It would be confidential.
- It would be considered privileged.
- It would only be used for purposes set forth in the act.
- It would not be subject to court subpoena.
- It would not be discoverable in a legal proceeding.

However, a record of, or information obtained by, the Ombudsman that is otherwise available from other sources would not be exempt from court subpoena or discovery from other sources solely because it was presented to or reviewed by the Ombudsman.

Further, a provision that exempts from disclosure under the Freedom of Information Act (FOIA) a report prepared and recommendations made by the Ombudsman and submitted to the Legislative Council under requirements in Section 10 of the act would be eliminated. Instead, under the bill, all of the following would be exempt from disclosure under FOIA:

- A record of the Ombudsman.
- A report or recommendations made by the Ombudsman and submitted to the Legislative Council under Section 10.
- Information obtained or created by the Ombudsman.

Protection against retaliation

Current law prohibits a prisoner from being penalized in any way by an official or the DOC as a result of filing a complaint, complaining to a legislator, or cooperating with the Ombudsman in investigating a complaint. The bill would add that the DOC could not take disciplinary action against an employee for communicating with the Ombudsman.

The bill takes effect March 29, 2019.

MCL 4.354 et al.

ARGUMENTS:

For:

The LCO fills an important role in helping resolve complaints and issues when allegations arise that the DOC or its employees are not adhering to statutory requirements or departmental policies and procedures. To do its job, the LCO must have the proper tools. The bill would both put into statute some policies of the LCO and DOC that support a good working relationship and also remedy some weaknesses in the LCO statute. Considering that policies and interpretations of policies can differ between prisons, and also as executive branch administrations change, it is particularly important to clarify the authority of the LCO. For instance, statute does not specifically state that the LCO may access a prison to initiate an investigation into a prison escape, though the LCO is authorized to investigate health and safety issues. Even though many would argue that a prison escape, or even attempted escape, would constitute a safety issue for the public as well as for guards and prisoners, the LCO was denied access to a prison after a 2014 prison escape and the investigation was hindered. In another example, the LCO was escorted out of a prison during a riot. Since then, a new policy has been instituted to allow the LCO access to the command center as an observer during emergencies, but without codification, this policy could be changed at any time. The bill would amend statute to address both of these examples, serving to clarify and protect the LCO's access. The bill also, at the request of the DOC, would restrict representation by the LCO to one LCO staff person.

Though transparency is important, and though the LCO itself adds to the transparency of what is happening behind prison walls, some of the issues investigated are highly sensitive. Even the notes taken during interviews could contain information that could put a prisoner's or guard's life at risk if it became accessible to the general public. Thus, the bill would exclude such types of documents from disclosure under the Freedom of Information Act. This would not impinge on the ability of a prisoner or a guard who may be falsely accused of violating the law or a departmental policy from accessing information to support their innocence in a legal proceeding. Another significant change the bill would make is to include access to contract workers and to protect all DOC employees and contract workers from disciplinary actions for cooperating with a LCO investigation.

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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.