

Legislative Analysis



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

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House Bill 4148 (reported from committee)
Sponsor: Rep. Lee Chatfield

House Bill 4153 as reported
Sponsor: Rep. Roger Hauck

House Bill 4149 as reported
Sponsor: Rep. Jeremy Moss

House Bill 4154 as reported
Sponsor: Rep. Brandt Iden

House Bill 4150 as reported
Sponsor: Rep. Curtis S. VanderWall

House Bill 4155 (H-3) as reported
Sponsor: Rep. Joseph N. Bellino, Jr.

House Bill 4151 as reported
Sponsor: Rep. Sue Allor

House Bill 4156 as reported
Sponsor: Rep. Donna Lasinski

House Bill 4152 as reported
Sponsor: Rep. Beau Matthew LaFave

House Bill 4157 as reported
Sponsor: Rep. Vanessa Guerra

Committee: Michigan Competitiveness
Complete to 3-14-17

BRIEF SUMMARY:

House Bills 4148-4157 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 new act would take effect January 1, 2019.

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.

THE APPARENT PROBLEM:

According to section 1 of the Michigan Freedom of Information Act (FOIA), the state's public policy is that all people in the state (except those incarcerated in state or local correctional facilities) "are entitled to full and complete information regarding the affairs of government

and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."¹

However, at present, that public access to information only allows access to the information of "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 governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof." (Emphasis added)

According to the bill sponsors, the package presents a much-needed "fix" to the FOIA statute, 40 years after it was initially enacted. They stated that just as a citizen may obtain information about a mayor or city council member, so should that citizen be able to seek information regarding members of the executive and legislative branches.

A 2015 study by the Center for Public Integrity and Global Integrity ranked Michigan 50th out of the 50 states based on transparency and accountability.² In addition to permissive disclosure and campaign spending rules, the report specifically cited the exemption for the legislature and executive branch from the state's FOIA rules as a reason for Michigan's low score.³

THE CONTENT OF THE BILL:

House Bills 4148-4157 would extend the existing Freedom of Information Act (FOIA) to include the governor, lieutenant governor, and executive office employees, and add a new Part 2 to FOIA to apply to the legislative branch in a Legislative Open Records Act (LORA).

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 4154.

Additionally, House Bill 4155 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. 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, 2019.

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.

¹ Michigan Freedom of Information Act, MCL 15.231

² <https://www.publicintegrity.org/2015/11/09/18822/how-does-your-state-rank-integrity>

³ <https://www.publicintegrity.org/2015/11/09/18427/michigan-gets-f-grade-2015-state-integrity-investigation>

The term "public body" currently applies 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 4148 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 VI, 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 14.
- 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 4149 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. Also, it would change the name of FOIA to the "Freedom of Information and Legislative Open Records Act" in recognition of its expanded scope.

House Bill 4150 would create new Sections 51 to 53, which mirror Sections 1 to 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 4151 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 4152 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 4153 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 4154 adds Sections 59a and 59b, which spell out the appeals procedures for denials of disclosure of public records and the imposition of excessive fees. 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 for appeal is reviewed by the council administrator, the administrator could charge a reasonable fee not to exceed \$75 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 in refusing a request or delaying the provision of copies, 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.

A similar procedure applies when a person requests a fee reduction from an excessive fee, except that the person must identify how the fee exceeds the allowable amount, and the council administrator may charge a reasonable fee not to exceed \$50 unless the person making the request qualifies for a fee waiver for indigence.

House Bill 4155 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 of FOIA and describes public records exempt from disclosure. These include:

- Certain private and medical information;
- Communications, including any related records or information, between a legislator or a legislator's office and a constituent of that legislator or a person who intended to communicate with the elected representative and inadvertently contacted the wrong representative, other than a registered lobbyist;
- Communications and notes within a public body or between public bodies of an advisory nature, to the extent that they cover other than purely factual materials and are preliminary to a final determination of policy or action;
- Records or information pertaining to an ongoing internal or legislative investigation;
- Trade secrets or commercial or financial records or confidential information provided for use in developing governmental policy;
- Records or information subject to the attorney-client privilege or any other privilege recognized by the constitution, statute, or court rule.
- Records or information relating to a civil action in which the public body is a party, before that litigation or claim is adjudicated or settled;
- 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, the Veterans Facility Ombudsman, and the Correction Ombudsman;
- A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable;
- Records of the Office of Sergeant at Arms;
- Records of a public body's security measures;
- A bid, quote, or proposal submitted by a person to enter into a contract or agreement, and records created for those purposes, before final notification of the contract or agreement (or records containing a trade secret or financial or proprietary information submitted in connection with a bid, quote, or proposal);
- Records whose disclosure would run counter to the public interest; and
- Records created, prepared, owned, used, in the possession of, or retained by, the majority or minority caucuses of each 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, 2019.

House Bill 4156 adds Section 59e, which mirrors existing Section 14 on separating exempt from non-exempt material; and Section 59f, which specifies that the attorney general will counsel and advise a public body on the administration of LORA upon request.

House Bill 4157 would make complementary amendments to the Legislative Council Act.

House Bill 4150 is tie-barred to the other nine bills, which means it would not take effect unless the others are enacted. Those bills are in turn tie-barred to HB 4150 and would not take effect unless HB 4150 is also enacted.

BACKGROUND INFORMATION:

As introduced, this bill package is virtually identical to House Bills 5469-5478, which were introduced in the 2015-2016 legislative session—the only differences being technical changes and a 2019 effective date rather than 2017. The H-3 substitute revised some of the language for categories exempt from FOIA, including removal of a provision that would have allowed the legislature to exclude materials from FOIA in the House and Senate Rules which are adopted each session. Last session, House Bills 5469-5478 were reported from the House Committee on Oversight and Ethics and passed by the full House, but were not taken up by the Senate.

ARGUMENTS:

For:

Proponents of the bill package pointed to Center for Public Integrity and Global Integrity's 2015 study, which found that Michigan ranked dead last of the 50 states in terms of governmental transparency and accountability. While other factors may have factored into the ranking, Michigan is one of only two states⁴ that exempts both the legislative and executive branches from responding to FOIA requests.

For:

In response to criticism of the existing FOIA law, the bill sponsors replied that HBs 4148-4157 represent a necessary first step before the legislature debates other potential changes. For example, there may be interest in expanding the ability to submit FOIA requests to prisoners. Currently, FOIA excludes those in state, local, and federal correctional facilities from its definition of "person," meaning that a prisoner is unable to submit FOIA requests.

Against:

Some critics wondered why this legislation would create a new, parallel set of rules for the legislature, instead of simply removing the exemption for the executive and legislative branches in the FOIA statute itself.

⁴ In Massachusetts, the legislature is exempted by statute and the governor's office is exempt as a result of a court ruling. *Lambert v Executive Dir of the Judicial Nominating Council*, 425 Mass 406, 409 (1997)

Response:

The bill sponsors stated that the new section of the act was necessary to avoid concerns about separation of powers⁵ and speech and debate clause⁶ conflicts with the Michigan Constitution.

POSITIONS:

A representative of the ACLU of Michigan testified in support of the bills. (3-8-17)

The following organizations support the bills

- Michigan Freedom Fund (3-8-17)
- Michigan Environmental Council (3-8-17)
- Michigan Press Association (3-8-17)
- Mackinac Center for Public Policy (3-8-17)
- Michigan Coalition for Open Government (3-8-17)

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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.

⁵ Michigan Constitution of 1963, Article III, Section 2: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

⁶ Michigan Constitution of 1963, Article IV, Section 11: "Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house."