

Legislative Analysis



REQUIRE PERSONAL INFORMATION OF VICTIMS AND WITNESSES TO BE CONFIDENTIAL

Phone: (517) 373-8080
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House Bill 4798 (H-1) as reported from committee
Sponsor: Rep. Graham Filler

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

House Bill 4974 (H-1) as reported from committee
Sponsor: Rep. Tenisha Yancey

Committee: Judiciary
Complete to 12-1-21

BRIEF SUMMARY: House Bill 4798 would amend the William Van Regenmorter Crime Victim's Rights Act, and House Bill 4974 would amend Chapter VII of the Code of Criminal Procedure, to require the prosecuting attorney to redact the personal information of victims and witnesses of crimes from certain court documents and to allow disclosure of the personal information to the defense counsel or the defendant (if not represented by counsel) only upon an order of the court. An unauthorized disclosure would be a misdemeanor offense.

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on state and local units of government. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

Generally speaking, the rules of discovery govern the types of information that one party to a criminal proceeding must provide to another upon request. For instance, Rule 6.201 of the Michigan Court Rules mandates that the names and addresses of witnesses who may be called to testify at trial must be turned over to the other party or parties upon request, although in the alternative a party could just provide the name and make that witness available to the other party for an interview. The rule also requires certain information known to the prosecuting attorney, such as a police report, to be provided to each defendant. However, if good cause can be shown that disclosing certain information to another party may pose a risk of harm, intimidation, embarrassment, or threats to any person, among other things, a court can grant a motion to enter a protective order that excludes the information from the mandatory disclosure requirements.

According to committee testimony, some prosecutors redact contact information of witnesses from police reports before providing the documents to the defense without first seeking a protective order from the court. Recently, a trial court granted a defendant's motion to compel the prosecution to provide an unredacted police report on the basis that the court rules do not authorize redacting police reports absent a protective order. The prosecution appealed the trial court's order to the state Court of Appeals, which agreed with the court's order and remanded the case back to the trial court.¹

¹ *People v Jack*, Mich App, Docket No. 354524 (March 11, 2021). https://www.courts.michigan.gov/siteassets/case-documents/uploads/opinions/final/coa/20210311_c354524_32_354524.opn.pdf

Some believe that victim and witness intimidation could increase, or witnesses and victims could refuse to testify against the accused, unless the law is changed to allow a prosecutor to redact the contact information of witnesses and victims from police reports before giving them to the defense, without first seeking a protective order, if such an action is believed necessary to protect the witnesses and victims from harm. Legislation has been offered to address these concerns.

THE CONTENT OF THE BILLS:

The William Van Regenmorter Crime Victim's Rights Act identifies various rights afforded to victims of a crime, including not having certain information in the court file or ordinary court documents, with some exceptions, and exempting certain information from disclosure under the Freedom of Information Act (FOIA). The Code of Criminal Procedure, among other things, provides for proceedings before trial and the filing of informations, including the required prosecutorial disclosure of the names of certain witnesses.

House Bills 4798 and 4974 would add a new section to their respective acts to require the prosecuting attorney to keep the ***personal information*** of any victim or witness confidential unless the personal information is a part of the *res gestae* of the charged crime.² Personal information would have to be redacted by the prosecuting attorney from any document provided to the defense counsel or the defendant as well as from any document submitted by the prosecutor as an ordinary court document or that will be entered into the court file.

Personal information would mean the following information of a victim or witness, but would not include the location of a charged crime:

- Home address.
- Telephone number and cell phone number.
- Driver's license number or official state personal identification card number.
- Social Security number.
- Date of birth.
- Place and address of employment and employee identification number.
- Mother's maiden name.
- Demand deposit account, savings account, or checking account number or other financial identification information.
- Credit card number.
- Email address.
- Internet identifier, defined to mean a designation used for self-identification or routing used in posting on the internet or in other internet communications.
- Home address, telephone number, and cell phone number of a family member.

The bills would not alleviate the obligation otherwise required under law to make a victim or witness available for interview by the other party.

In addition, the bills would not authorize the disclosure of the confidential address of a program participant under the Address Confidentiality Act or preclude the release of information to a

² *Res gestae* is a common law doctrine pertaining to the facts and events of a crime and that allows certain testimony to be admitted as evidence that otherwise would be inadmissible under the hearsay rule.

victim advocacy organization or agency for the purpose of providing victim services. (Among other things, the Address Confidentiality Act provides a participant with a designated address to use for various legal purposes instead of the participant's actual home address, which is kept confidential.)

On motion by the defendant, and subject to the provision above, the court could order the prosecuting attorney to provide personal information to the defense counsel or the defendant. The motion would have to meet the following requirements:

- Explain the limited purpose for which the personal information is sought.
- Demonstrate that the personal information requested is reasonably necessary to provide an adequate defense.

If the motion were granted, the order would have to do all of the following:

- Limit the disclosure of the personal information to the extent the disclosure is reasonably necessary to provide an adequate defense.
- Specify the limited purpose for which the personal information may be used.
- Prohibit the reproduction, copying, or dissemination of the personal information not authorized in the order.
- Except as provided below, require the personal information to remain in the exclusive custody of the defense counsel or the defendant (if not represented by counsel).
- Include conditions and terms for the defense counsel or the defendant (if not represented by counsel) to provide the personal information to the defense counsel's agent, employee, or expert witness if necessary, for a limited purpose approved by the court.

A person who intentionally and willfully disclosed personal information in violation of the bills would be guilty of a misdemeanor punishable by imprisonment for up to 93 days or a fine of up to \$500, or both.

House Bill 4798 (Crime Victim's Rights Act): Proposed MCL 780.758a
House Bill 4974 (Code of Criminal Procedure): Proposed MCL 767.40b

BACKGROUND INFORMATION:

Section 2(1)(m) of the William Van Regenmorter Crime Victim's Rights Act defines the term *victim*, for purposes of that act, to mean any of the following:

- Except as provided below, an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.
- Except for the purpose only of submitting or making an impact statement as provided below, the following individuals other than the defendant if the victim is deceased:
 - The spouse of the deceased victim.
 - A child of the deceased victim if the above does not apply and the child is 18 years of age or older.
 - A parent of the deceased victim if the above do not apply.
 - The guardian or custodian of a child of the deceased victim if the above do not apply and the child is less than 18 years of age.
 - A sibling of the deceased victim if the above do not apply.
 - A grandparent of the deceased victim if the above do not apply.

- A parent, guardian, or custodian of a victim who is less than 18 years of age if the parent, guardian, or custodian so chooses and is neither the defendant nor incarcerated.
- A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if the parent, guardian, or custodian is neither the defendant nor incarcerated.
- For the purpose only of submitting or making an impact statement, if the individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the individual's designation as a victim, the following individuals other than the defendant:
 - The spouse of the victim.
 - A child of the victim if the child is 18 years of age or older.
 - A parent of the victim.
 - The guardian or custodian of a child of the victim if the child is less than 18 years of age.
 - A sibling of the victim.
 - A grandparent of the victim.
 - A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and the guardian or custodian is not incarcerated.

FISCAL INFORMATION:

The bills would have an indeterminate fiscal impact on local units of government. Information is not available on the number of persons that would be convicted under provisions of the bills. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Increased costs could be offset, to some degree, depending on if additional court-imposed fee revenue is generated. Any increase in penal fine revenue would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

There would be no fiscal impact on local prosecutors' offices or the Prosecuting Attorneys Coordinating Council (PACC).

ARGUMENTS:

For:

Few would dispute that the due process rights afforded to persons accused of committing a crime are central to the justice system. However, protecting the safety of those who come forward as witnesses to a crime is equally important. In recent years, cases of witness intimidation have increased, with many even being killed shortly before they are scheduled to testify. Reportedly, some prosecutors have interpreted the court rules governing discovery as allowing them to redact the contact information of witnesses and victims from certain documents, including police reports, as long as they provide the names of those witnesses and victims and make them available to the defense to interview. This practice has recently been

overturned by a recent Michigan Court of Appeals decision. As a result, prosecutors will have to seek protective orders to suppress the contact information of witnesses. The court ruling therefore could impact the forward progress of prosecutions as well as increase costs associated with filing the motions for the protective orders.

The bills would provide an appropriate balance between automatic disclosure of information that could place a witness or victim in harm's way and automatic redaction of information that may be necessary for a person to defend himself or herself. The bill's language would establish clear guidelines as to the types of information that would be subject to disclosure limitations, protect the information of persons who participate in the state's address confidentiality program, and still preserve a defendant's ability to obtain information relevant to his or her defense.

Against:

Current laws and court rules already provide the balance between due process protections and protection of witnesses and victims. Many prosecutors routinely provide unredacted police reports. Prosecutors carry the burden of proof in criminal cases and should rightly carry the burden of obtaining protective orders if they feel it is justified rather than automatically not disclosing certain information without a clear showing of cause to do so. As it is now, if the defense cannot get a witness's contact information from the prosecution to set up an interview, it must hire investigators to find it themselves—a costly option for most defendants and a burden on public defenders, who often have limited resources.

POSITIONS:

The following entities indicated support for the bills (11-2-21):

- Department of the Attorney General
- Michigan Domestic and Sexual Violence Prevention and Treatment Board
- American Association of University Women of Michigan
- Michigan Coalition to End Domestic and Sexual Violence
- Michigan Junior League

A representative of the Criminal Defense Attorneys of Michigan (CDAM) testified in opposition to the bills. (9-14-21)

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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.