House
Legislative
Analysis
Section

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AMEND THE FREEDOM OF INFORMATION ACT

House Bill 4849 as enrolled
Public Act 553 of 1996
Third Analysis (1-15-97)

Sponsor: Rep. Greg Kaza
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

Passed in 1976, the Freedom of Information Act was, along with its counterpart, the Open Meetings Act (MCL 15.261 et al.), intended to make government more accountable to the general public by providing a means by which average citizens could have more access to find out about and observe the decision-making processes of governmental bodies. The acts minimized the amount of governing that would be allowed to take place behind closed doors and required a degree of openness and public access in governing.

The Freedom of Information Act allows the general public the opportunity to request and receive copies of or access to records and information held by certain public bodies. It has been felt that by allowing citizens this degree of access the act helps to provide for a greater degree of public oversight and citizen involvement and helps to limit the possibility of abuses of the public trust.

Under the act's provisions a wide variety and large number of people have requested and received records and information from public or governmental bodies. However, it has been suggested that a number of changes could be made to the act in order to streamline and clarify the request process. To begin with, it has been suggested that by specifying a particular individual to accept and process requests received under the act, a public body could deal with these requests in a more effective manner. The current law also allows for oral requests and when conflicts arise it is difficult to determine the nature of the request and whether it was properly fulfilled or rejected. As a result, it has also been suggested that confusion and conflicts regarding the nature of FOIA requests could be eliminated or at least reduced by requiring that requests for records and information be made in writing.

In addition, there is a need for complementary amendments to the Freedom of Information Act that would enable the Enhanced Access to Public Records Act, established by Public Act 462 of 1996 (enrolled House Bill 5832), to take effect. (For further information, see the House Legislative Analysis Section's analysis of enrolled House Bill 5832 dated 1-13-96.)

Although the act entitles citizens 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," the act also contains limitations and restrictions on the types of records and information that may be provided. Some argue that these limitations should be increased because the act allows for the release of some records and information that should be kept secret and should not be provided to the public. There has, for example, been a great deal of concern that the requirements of the act have been harmful to the university president selection process.

Under current law, when an individual's FOIA request is denied, he or she has limited options. The individual may either pursue the matter further by seeking review of the denial in a circuit court, or he or she may let the denial of the request stand. In order to attempt to have the public body's denial of his or her request reversed, the individual who made the request has no other alternative than to hire an attorney and pursue the matter in court. Because review of the public body's decision must be undertaken in circuit court, the potential cost in time and money limits the number of people who are willing and able to seek to have a denial of their request reviewed. It has been argued that a number of denials of requests are made in error; in such cases requiring that the requestor go through the time and expense of a circuit court proceeding serves no useful purpose and undermines the effectiveness of the act. It has been suggested that providing simpler and less costly options for review of a public body's decision to deny a request would increase the public's access to public information and serve to quickly correct denials which were made in error.

THE CONTENT OF THE BILL:

House Bill 4849 would amend the Freedom of Information Act to, among other things, require that

FOIA requests be made in writing, provide an alternative to court action where a request for records has been denied, and add certain records and information to the act's list of items exempted from disclosure (including records regarding applicants for university president positions).

FOIA coordinator. Each public body would have to designate an individual as FOIA coordinator for the public body, who would be responsible for accepting and processing requests for the public body's public records and for approving denials of such requests. A FOIA coordinator would be defined in the bill as either an individual who was subject to the act's requirements (a "public body") or an individual designated by a public body to accept and process requests for public records. In cases where the public body is a city, village, township, county or state department or where the public body is under the control of a city, village, township, county or state department the public body would be required to appoint an individual to act as the FOIA coordinator. Where the public body is a county that does not have an executive form of government, the chairperson of the county board of commissioners would be designated as the FOIA coordinator. For all other public bodies, the chief administrative officer of the public body would be designated as the FOIA coordinator. A FOIA coordinator would be allowed to designate another person to act on his or her behalf.

Requests. Under the bill's provisions oral requests for records would no longer be accepted and a public body's FOIA coordinator would only be required to respond to written requests for records. A written request would be defined as a writing that asked for information and would include writings transmitted by facsimile, electronic mail, or other electronic means. However, a request for records that was made by facsimile, electronic mail, or other electronic transmission would not be considered to have been received until one business day after the electronic transmission had been made.

Whenever a public employee received a written FOIA request he or she would be required to promptly forward it to the public body's FOIA coordinator. The coordinator would be required to keep a copy of all written requests on file for no less than one year. In addition, the bill would also require public bodies to protect public records from loss, unauthorized alteration, mutilation, or destruction.

Responses to requests. Under the Freedom of Information Act, a public body must respond to a request for a public record immediately, but not more than five business days after the request was received, by either granting the request, providing a written denial of the request, granting the request in part and issuing a written denial on the remaining portion, or, under unusual circumstances, extending the time within which it is required to act for up to ten days. The failure to respond to a request is considered to have the effect of a denial.

The bill would provide that public body would merely have to respond within five days after the request had been received and would not require the existence of unusual circumstances to allow a public body to extend the time for its response for an additional ten business days.

The bill would also limit the right of an individual whose request for records has been denied by a public body to seek judicial review of the public body's decision in a circuit court. Although currently the act provides no time limit on when an individual may decide to bring a suit in circuit court, the bill would require that such an action be commenced within 180 days of the public body's final determination to deny the individual's request.

Appeals. The bill would give an individual whose written request for records or information had been denied an opportunity to appeal to the head of the public body that denied the request instead of being required to seek redress in circuit court. The individual would have the opportunity to make a written appeal to the head of the public body; the appeal would have to specifically identify itself as an "appeal" and explain the reasons the disclosure denial should be reversed. The head of a public body would be required to respond to a written appeal within ten days after receiving it, by either reversing the denial, sending a written notice to the requesting person that the denial would be upheld, reversing the denial in part and issuing a written statement upholding part of the denial, or, under unusual circumstances, extending the time to respond for up to ten business days. A written appeal submitted to a public body whose head was a board or commission would not be considered to have been received until the first regularly scheduled meeting of that board after the appeal was submitted. If the head of the public body failed to respond to a written appeal, or upheld all or part of the denial, the person requesting the record or information would then be allowed to seek judicial review of the denial in circuit court.

Records and information exempted from disclosure. The bill would amend the act's list of records and information exempted from disclosure by adding several exemptions. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, would be exempted from disclosure to the extent that they related to the ongoing security of the public body. Records or

information relating to a civil action involving both the requesting party and the public body, and records or information that would disclose the Social Security number of any individual, would also be exempt from disclosure.

In addition, applications for the position of president of a constitutionally established institution of higher education, as well as materials submitted with such applications, letters of recommendation, references, and records or information relating to the process of searching for and selecting a university president, if the records or information could be used to identify a candidate for the position, would also be exempted from disclosure. However, once the field of applicants had been narrowed to one or more individuals identified as finalists, such records could be released, except for letters of recommendation or reference to the extent that they related to an individual identified as a finalist.

The bill would also specify that computer software would not be considered a public record and therefore would not be subject to disclosure. Computer software would be defined as statements or instructions (i.e. computer programs) that would cause a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. However, computer-stored information or data, or a "field name," could be released as long as such disclosure would not violate a software license. A "field name" would be defined as the label or identification of an element of a computer data base that contains a specific item of information, including, but not limited to, a subject heading such as a column header, data dictionary, or record layout. (Note: These amendments, along with the provision allowing for requests to be made via electronic means, would complement the Enhanced Access to Public Records Act [Public Act 462 of 1996]. See the analysis of enrolled House Bill 5832 dated 1-13-96.)

Finally, although the governor, the lieutenant governor, their respective executive offices and their employees are excluded from the act's definition of a public body and therefore are not subject to the provisions of the act, the bill would require records in their possession to be released under certain circumstances. Under the bill after a legitimate request for a public record had been made to a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government the record could not be withheld from disclosure by transferring the record to the possession of the executive offices of the governor or lieutenant governor, or an employee of either executive office.

Fees. The bill would allow a public body to charge a fee not only for the cost of providing a copy of a public record, but also for the cost of searching for and copying the record. In calculating the cost of the fee to be charged a public body would be limited to charging no more than the hourly wage of the lowest paid public body employee who was capable of retrieving the necessary information in order to comply with the request. The fees charged would have to be uniform and could not be dependent upon the identity of the individual making the request.

Other provisions. In addition, the act currently states that it is the public policy of the state that all persons (except those who are incarcerated) 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 the act. The bill would change this statement of policy to provide that public is entitled to full and complete information regarding "governmental decision-making" consistent with the act.

Finally, the bill would also amend the act's definition of a "person" to include limited liability companies, governmental entities, and other legal entities so that they would also be entitled to request records and information from public bodies under the act.

MCL 15.23 et al.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The Freedom of Information Act needs a number of changes to clarify provisions, increase access where reasonable and limit access where necessary. The exemptions from disclosure that would be added by the bill are necessary to protect information and records that, if released to the public, could do more harm than good. Most of these changes are simply common sense changes. Clearly, records relating to a public body's security measures are obviously not something to which the general public should have access. In the same vein, access to the Social Security numbers of individuals should be restricted and persons involved in civil suits with a public body should not be able to use the act to circumvent the court rules regarding discovery.

The bill would also allow public bodies to calculate the cost of searching for and reproducing documents based upon the lowest wage rate of a person "capable of responding to the request." This will allow public bodies to recoup the higher cost of computer programmers whose

time is sometimes needed to write programs to retrieve data from computer databases. In addition, changes allowing "enhanced access" to public records, such as the release of information in a computer-generated format, are needed so that the Enhanced Access to Public Records Act can be implemented.

For:

Finally, as a result of the Michigan Supreme Court decision in *Booth Newspapers, Inc. v University of Michigan Board of Regents*, 444 Mich 211 (1993), all privacy has been removed from the university presidential search process. Qualified candidates for university presidencies are rare and, more often than not, already employed at other universities or other positions of responsibility. Under the current system anyone who applies for such a position will automatically have his or her name published by the media. Obviously, this can result in problems for many of the candidates; the controlling board or employer of the candidate may not be pleased to discover that its president or employee has applied for another position. If the candidate does not get the job, he or she may find that his or her position has been undermined, or that staff morale has deteriorated, because he or she is now viewed as a temporary employee. Without any hope of privacy, few qualified applicants will be willing to risk their current positions by applying to a university where their application would instantly become public knowledge. The changes allowing privacy in the university president selection process will complement the changes to the Open Meetings Act made by Public Act 464 of 1996 (enrolled Senate Bill 211).

Against:

The public and candidates who have run for office have called long and loud in recent years for more accountability in government. Conducting presidential searches in private would erode public confidence in the process and create an element of distrust of the person selected because the process would be ripe with the potential for abuse. In state and local governments across the country governing bodies are required to conduct their business in open meetings. What is so special about university presidents that they need to be discussed and selected in secret?

The Michigan Supreme Court ruled that the process of selecting a university president should be done in the open, and the state should abide by that wisdom rather than attempting to change the rules. The Freedom of Information Act was developed to make government accessible and accountable to the public. For nearly 20 years the act has been effective in achieving that purpose. Now comes a proposal to close a portion of government, the selection of university presidents, to the public. This bill likely will be the first in a succession of proposals by public officials claiming they too are harmed by a public selection process. If that were allowed to happen, this bill would be the beginning of a path that would lead not to less government, but to less accessible government.

Another similar proposal [see Senate Bill 212] would have provided for a period of public comment between the time the name of the final candidates were released and the time that the president could be appointed. This would have at least given an opportunity for a public examination of the would-be president's credentials. Such an investigation is sometimes helpful since the press is often able to turn up information about candidates that those involved in the hiring process are unable to discover.

For:

Under the current law, few people can afford the time or the money to seek review of a rejected FOIA request. Review of the public body's decision to deny a request is necessary in order to maintain public confidence in the process. If review of the decision is out of the reach of most citizens, then the decision making process itself becomes suspect. While some groups, particularly the media, have access to attorneys and the money required to have denials reviewed through the court system, ordinary citizens rarely have the resources needed to seek review of FOIA denials in the same manner. Further, the final version of the bill is an improvement over the original version which would have established a mandatory administrative hearing process. The bill will increase the average citizen's access to public information by giving an alternative means of review to all citizens.

Against:

Most people who have made requests for information under FOIA have already aimed their requests at the person or group in charge of the public body. The bill doesn't offer a real solution; in many cases the head of the public body is the very entity who has already denied the request. The bill would also serve the public better if it included a clear listing of the types of records which are exempted from the act. This would make it simpler for the average citizen to understand what he or she would or would not be able to receive, thus limiting the number of requests seeking exempt material.

Response:

The bill does not require that an individual make an appeal to the head of a public body where it would be futile to do so. The bill merely offers the opportunity to make such an appeal where it might be successful.

Against:

The bill changes the policy statement of the act from allowing information regarding "the affairs of government

and the official acts of public officials and public employees" to allowing information regarding "governmental decision-making." This change could be interpreted to significantly restrict the amount of information to which the people would have access.

Response:

The change in the wording of this statement is insignificant since the types information to which access is allowed under the act is exclusive. In other words, the act provides that there are only two types of public records, those that are specifically exempted from disclosure in the act and those that are not specifically exempt from disclosure and therefore are subject to disclosure under the act. The statement in question is thus of little relevance in determining whether a particular record is subject to disclosure.

Rebuttal:

Even if that is true, the fact remains that the change in language could be used as basis for a claim that certain records did not relate to governmental decision-making and therefore were not subject to disclosure. The determination of whether a record is exempt or not is not always crystal clear; questions often arise in which a particular record could be argued to fit either category, exempt or not exempt. Furthermore, the current language has been cited in a number of court cases, including the recent *Booth Newspapers, Inc. v University of Michigan Board of Regents* case, as a statement of the broad openness intended by the legislature. As a result, it seems likely that the change in the wording could lead to litigation over the meaning of the term "governmental decision-making". It is possible that a court could determine that the change in language was intended to restrict the type of records that public bodies would be required to disclose. Of course, on the other hand, it could also be determined that the language was intended to broaden the openness of the act.

Against:

Although the bill contains some provisions that expand the public's ability to request and receive records from public bodies, its overall impact will be to restrict the information available to the public by adding further limitations on what information is subject to the act. Furthermore, many of the bill's provisions were never considered in committee or in any forum where public comment would have been permitted.

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