



Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FOIA: PERSONNEL RECORDS

House Bill 5615 (Substitute H-2) First Analysis (5-27-98)

Sponsor: Rep. Robert Brackenridge
Committee: Local Government

THE APPARENT PROBLEM:

The Michigan Supreme Court in the consolidated case of *Bradley v Saranac Community Schools Board of Education* and *Lansing Association of School Administrators v Lansing School District Board of Education*, et al., issued on July 22, 1997, addressed the question of whether the personnel records of public school teachers and administrators are exempt from disclosure under the Freedom of Information Act. The court, in short, held that "the requested records must be disclosed because they are public records and are not within any exemption under the FOIA."

The Freedom of Information Act exempts "information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." The court examined the sought-after records, primarily performance evaluations, and decided they did not fit this description. (The court considers this phrase to apply to information of a personal nature and defines that as information that "reveals intimate or embarrassing details of an individual's private life.") The court pointed out that the personnel records of law enforcement agencies are exempt from disclosure under the act, and drew the inference that the legislature would not have created that exemption had it not believed that otherwise personnel records would be subject to disclosure, and the court further inferred that the legislature had rejected the opportunity to extend the exemption to other employees. The court said, "Our conclusion that the plaintiffs' personnel records are not exempt under the FOIA is bolstered by the absence of any indications that the Legislature intended a different result."

Legislation has been introduced that would address this issue from the point of view that the personnel records and medical records of public employees should be exempt from the Freedom of Information Act.

THE CONTENT OF THE BILL:

The bill would amend the Freedom of Information Act to allow a public body to exempt from disclosure as a public record personnel files and medical files.

The bill also would replace the terms "minister" and "priest" in a section of the act with the term "clergyperson."

MCL 15.243

FISCAL IMPLICATIONS:

There is no information at present.

ARGUMENTS:

For:

The Freedom of Information Act ought to contain an exemption for employee personnel records and for medical records. How can public administrators be expected to manage their operations if performance evaluations and disciplinary records are likely to wind up on the front page of the local newspaper? Won't the possibility of public disclosure affect the kind and quality of information in personnel records? Managers often rely on progressive and constructive employee discipline to achieve their ends, where candor is essential. For this to be effective, records need to be protected from fishing expeditions and snooping. Moreover, employee records can contain mere allegations (along with responses) that it would be unfair to make public. Clearly, the release of personnel records can be an invasion of privacy of the kind the FOIA intended to protect from release. Yet the most recent state supreme court decision has made it difficult to argue that the release of personnel information is ever a clearly unwarranted invasion of privacy. It should be noted that the bill would allow a public agency to block the release of certain

employee information requested by a private citizen or a newspaper. However, that would not prevent the citizen or newspaper from bringing a lawsuit that would permit a court to balance the interests involved.

Response:

Some people sympathetic to the intent of the bill nevertheless find it overbroad and simplistic and believe it could be subject to abuse. It does not refer to "an individual's" personnel records or medical records, only the personnel records and medical records of a public body. Secretive public bodies could classify all kinds of information under these rubrics in order to deny information to the public, such as job titles, job duties, salaries, hiring statistics, and personnel policies. Medical records could include policies and statistical reports by public hospitals. Government agencies could simply use this legislation to avoid releasing embarrassing information (not private and personal information). It would be better to specify the kinds of documents or records that are exempt.

Against:

Representatives of the press say that it is simply wrongheaded to exempt the personnel records of public employees from FOIA. The public has a right to know about the performance of its employees, including job evaluations. The possibility of exposure is a useful check on the conduct of public officials and employees. The bill would undermine the ability of the press to act as a watchdog for the public. The press in recent years has brought to light cases in which public employees, including some working with children, have kept their positions despite poor performance, malfeasance, and even criminal activity. Often access to personnel records is the only way to find out whether public officials are doing their jobs competently and properly. Moreover, the state supreme court in the *Bradley v Saranac* decision rejected the idea that making personnel records available under FOIA would affect how performance evaluations were carried out. The court said, "We draw the opposite conclusion. Making such documents publicly available seems more likely to foster candid, accurate, and conscientious evaluations than suppressing them because [the evaluator] will be aware that the documents being prepared may be disclosed to the public, thus subjecting the evaluator, as well as the employee being evaluated, to public scrutiny." Case law has been developed over many years to spell out what constitutes a "clearly

unwarranted invasion of privacy." This bill ignores that. The press has not used its ability to obtain records in the past irresponsibly. Further, the public at large has a right to obtain this information, which can directly affect them. In the cases that led to the court decision, parents sought the job evaluations and other records of a teacher, in one case, and of nine principals, in the other case. Parents should have access to this information about the people to whom they entrust their children without having to file a lawsuit. This is particularly true, for example, when there has been a history of complaints against a teacher. (Indeed, it is unlikely that records would be sought in other cases.)

Response:

Not everyone shares the view that the press is the representative of "the public" while public officials (some of whom are elected) are not. Newspapers and other media are typically commercial enterprises with a primary responsibility to shareholders. There might conceivably be multiple motives to their actions. Sometimes the "right to know" must be balanced against other interests, including the privacy rights of employees. Further, when dealing with the performance of public officials, the general public has other venues to make its opinions known and extract information. Parents can go to school board meetings, for example, to register complaints and ask questions, and they can join together to act against teachers and administrators.

POSITIONS:

Among those who have indicated support for the bill are the Michigan Education Association, the Michigan Federation of Teachers and School Related Personnel, the Michigan Association of School Administrators, the Michigan Chamber of Commerce, the Michigan Townships Association, the Michigan Association of Counties, and the Michigan Association of County Administrative Officers. (5-19-98)

Among those who have indicated opposition to the bill are the Michigan Press Association and the Michigan Freedom of Information Committee. (5-19-98 and 5-26-98, respectively)

Analyst: C. Couch

■ 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.