

Legislative Analysis



ATTORNEY GENERAL REVIEW OF CROSS-BOUNDARY AGREEMENTS; OFFICE OF GREAT SEAL REPOSITORY

Mary Ann Cleary, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4116 (Substitute H-2)
Sponsor: Rep. Paul Opsommer
Committee: Oversight, Reform, and Ethics
First Analysis (12-7-11)

BRIEF SUMMARY: The bill would establish a review protocol by the attorney general for cross-boundary memorandums of agreement, before those agreements are entered into by state agencies; and create a central repository for such memoranda in the Office of the Great Seal by June 30, 2012, that would be electronically accessible to the public via the Internet within one year.

FISCAL IMPACT: The bill will have a fiscal impact on the Department of Attorney General by adding to its responsibilities. The amount of the increased costs has yet to be determined.

THE APPARENT PROBLEM:

Memorandums of understanding are legally binding, written documents entered into by officials in state government agencies with other parties. Cross-boundary memorandums of understanding are those documents executed between Michigan officials, and officials in other states, the federal government, and sometimes foreign governments. See *Background Information* below.

According to research undertaken by the Legislative Service Bureau in 2010, memorandums of agreement have been proliferating in the executive branch of the government, despite the fact that the instruments have an uncertain statutory basis. Further, there is no central repository in the state government where the agreements are recorded and archived. Neither is there a systematic review protocol followed by state agency officials when a memorandum of agreement is proposed. Nonetheless, cross-boundary memorandums of agreement can create policy and obligate taxpayers financially--yet avoid the oversight customarily provided by the legislative branch of the state government.

Legislation has been introduced that would create a central repository for cross-boundary memorandums of agreement entered into by executive branch agencies. Further, the bill would allow the Office of the Attorney General to review proposed memorandums of agreement before they are finalized.

THE CONTENT OF THE BILL:

House Bill 4116 (Substitute H-2) would amend Chapter 12 of the Revised Statutes of 1846 (RS 12) which deals with the responsibilities of state officers, in order to establish a review protocol by the attorney general for cross-boundary memorandums of agreement,

before those agreements are entered into by state agencies. Further the bill would require that a central repository for such memoranda be created by the Office of the Great Seal before June 30, 2012, and then be made electronically accessible to the public via the Internet within one year.

The bill would take effect June 30, 2012. A more detailed description of the bill follows.

Attorney General consultation before executing agreement. House Bill 4116 (Substitute H-2) would require that before a governmental unit entered into a cross-boundary memorandum of agreement, it would be required to do both of the following:

- Forward a copy of the cross-boundary memorandum of agreement to the attorney general;
- Conduct an internal review of the cross-boundary memorandum of agreement, to be carried out on a time schedule at the discretion of the governmental unit, and that could be performed in consultation with the attorney general.

The internal review performed in consultation with the attorney general would have to include all of the following considerations: (1) state and federal constitutional requirements and limitations; (2) the existence of legal authority for the cross-boundary memorandum of agreement; and (3) the extent of the statutory authority granted to the department, agency, division, subunit, or officer that will execute the cross-boundary memorandum of agreement.

Attorney-Client Privilege. The bill specifies that an unexecuted cross-boundary memorandum of agreement that was forwarded to the Department of Attorney General or any internal review done in consultation with the Department of Attorney General would be subject to the same attorney-client privilege that ordinarily exists between the executive branch and the Department of Attorney General.

After executing agreement. The bill specifies that within 10 days after executing a cross-boundary memorandum of agreement, the governmental unit would be required to forward it to the attorney general, who would, in turn, be required to do two things: (1) forward the executed agreement to the Office of the Great Seal within 10 days after receipt, and (2) retain a copy of the signed cross-boundary memorandum of agreement.

Office of the Great Seal. The bill requires that the Office of the Great Seal accept and officially file a cross-boundary memorandum of agreement. Further, by June 30, 2014, each state government unit would be required to forward a copy of any cross-boundary memorandum of agreement that it entered into before June 30, 2012, and that was still in effect, to the Office of the Great Seal, for inclusion in the central repository.

Central Repository. By June 30, 2012, the Office of the Great Seal would be required to establish and maintain a publicly accessible central repository that included each cross-boundary memorandum of agreement forwarded to it. Further, the Office of the Great Seal would be required to make each document in the repository available to the public

within 10 days after receipt. Finally, the repository would have to be accessible via the Internet one year after the repository was created.

Proposed MCL 14.32a

BACKGROUND INFORMATION:

According to the Legislative Research Bureau's response to Research Request #10-02539, a memorandum of understanding is defined in Black's Law Dictionary as a form of letter of intent. There, a letter of intent is defined to mean:

A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent, and courts ordinarily do not enforce one, but courts occasionally find that a commitment has been made...

The Legislative Research Bureau notes, however, that "despite Black's definition of a letter of intent to mean a preliminary agreement to a contract, the use of these devices appear to have evolved to be a contract in and of themselves in many cases. Often they are deemed to be legally binding contracts..."

ARGUMENTS:

For:

Memorandums of agreement, whereby officials in Michigan's state executive branch agencies enter into agreements with other entities outside Michigan's boundaries, such as other states, the federal government, or foreign countries, should receive a high degree of scrutiny, in order to ensure that the legislature and our citizens are fully aware of the obligations those agreements might well create. That is not now the case. This legislation is needed in order to ensure more transparency in state government--in particular, to create a central repository for out-of-state agreements, make those agreements available to all citizens via the Internet, and allow (but not require) the office of the attorney general to review the documents before the agreements are finalized with parties outside the state.

In its research, the Legislature Service Bureau has found no statutory basis for the use of memorandums of understanding, and no central repository for them. The LSB notes that historically a "memorandum of understanding" was a type of preliminary agreement to a contract, signifying future intent. However, the LSB further notes that "the use of these devices appears to have evolved to be a contract in and of themselves in many cases. Often they are deemed to be legally binding contracts."

This legislation is necessary, in order to ensure that members of the legislature can become aware of cross-boundary agreements, as well as any obligations they might

portend for taxpayers. Currently memorandums of agreement are undertaken unilaterally by the executive branch of the government, without transparency for either citizens or their elected representatives. This bill will create a central repository for all such agreements in the Office of the Great Seal, and encourage the review of proposed agreements by the Office of the Attorney General.

Against:

As originally drafted, the bill would have provided far greater oversight for the legislature, and far more transparency for the public. For example, in its original form, the bill would have required that the attorney general review *all* memorandums of agreement, understanding, and record, as well as every compact, or similar binding agreement between Michigan and the federal government or another unit of government located outside of Michigan before the state executed the agreement. That review would have been designed to determine (1) whether the agreement was in conformity with state and federal constitutional requirements and limitations, and (2) whether the agreement was authorized by law and did not exceed the statutory authority granted to the department, agency, or officer that intended to execute the agreement.

Further, under the bill as originally proposed, an agreement could not have taken effect unless either (a) the attorney general had issued a written opinion to the referring department to say that the agreement met legal and constitutional requirements, or (b) the attorney general had not provided a written review within 90 days. Finally, the original bill would have required that the attorney general (not the Office of the Great Seal) create a publicly accessible website, with that the website to include not only the agreements, but also each determination (and its reasons) made by the attorney general, and that information be transmitted to the legislature to ensure adequate oversight.

While House Bill 4116 (Substitute H-2) creates a first-ever central repository, the protocol for review is less far-reaching as well as less transparent, and it reduces the legislature's oversight of the executive branch of the government, thereby diminishing appropriate checks and balances and reducing accountability.

POSITIONS:

The Office of the Attorney General supports the bill, as amended. (11-8-11)

Grassroots in Michigan supports the bill. (11-1-11)

The Secretary of State is neutral on the bill. (11-8-11)

Legislative Analyst: J. Hunault
Fiscal Analyst: Robin Risko

■ 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.