

FREEDOM OF INFORMATION ACT AMENDMENTS

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House Bill 5921 as introduced
Sponsor: Rep. Stephen Johnson

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

House Bill 5922 as introduced
Sponsor: Rep. Jack O'Malley

House Bill 5924 as introduced
Sponsor: Rep. Andrew Fink

House Bill 5923 as introduced
Sponsor: Rep. Greg Van Woerkom

House Bill 5925 as introduced
Sponsor: Rep. Bryan Posthumus

Committee: Oversight
Complete to 4-14-22

SUMMARY:

House Bills 5921 to 5925 would amend the Freedom of Information Act (FOIA) to do all of the following:

- Require a public body to provide a written notice acknowledging receipt of a request for a public record within two business days after receiving the request. (HB 5923)
- Require the written notice issued when all or a portion of a request is denied to include, for each public record entirely withheld from disclosure on the basis of one or more exemptions, an acknowledgment that the record exists, a general description of the record, and a full explanation of the grounds for each asserted exemption. (HB 5923)
- Provide that, in a court action in response to a denial of a FOIA request, the public body is limited to only the basis provided in the written denial notice when attempting to meet its burden of proof for denying the request. (HB 5921)
- Require the contact information of a public body's FOIA coordinator to be posted in a public area of the public body's premises and on the public body's website. (HB 5922)
- Provide that a public record in the custody of a public body's outside legal counsel must be considered as remaining in the public body's custody for purposes of the act and be subject to disclosure unless an exemption was asserted. (HB 5924)
- Provide that a provision allowing the exemption from disclosure of certain public records pertaining to public works security measures, emergency response plans, anti-terrorism response plans, or similar topics does not apply to a public record to the extent that it identifies a working group that the public body assembled to assist its public policy deliberations or decisions. (HB 5924)
- Require the fee for fulfilling a request for a public record by a public body to be waived or reduced if doing so would primarily benefit the general public (rather than, as currently, allowing it to be waived or reduced on that basis) and allow a civil action to challenge a determination that waiving or reducing the fee would not primarily benefit the general public. (HB 5925)
- Require requestors to be provided with a choice of fee payment methods that includes electronic payment if the public body accepts electronic payment for other transactions. (HB 5925)

House Bill 5923

Generally speaking, a person may make a written request under FOIA to inspect or receive a copy of a public record of a public body. (As defined in the act, “person” includes an individual or a legal entity such as a corporation or organization, but excludes an individual serving a sentence in a county, state, or federal correctional institution.) House Bill 5923 would amend section 5 of the act to require a public body to notify the requestor in writing of its receipt of such a request not later than two **business days** after receiving the request. (The bill would define **business day** to mean a day that is not a Saturday, Sunday, or legal holiday.)

In addition, the act provides that a written notice denying a request for a public record in whole or in part is a public body’s final determination to deny the request or a portion of the request. The notice must contain certain information, including an explanation of the basis under FOIA or other statute for the determination that the record requested, or a portion of it, is exempt from disclosure, if that is the reason for the denial. The bill would additionally require that, for each public record *entirely* withheld from disclosure on the basis of one or more exemptions, the required explanation must acknowledge that the record exists, generally describe the record, and fully explain the public body’s grounds for every asserted exemption.

MCL 15.232 and 15.235

House Bill 5921

Currently, if a public body makes a final determination to deny all or a portion of a FOIA request, the requesting person may submit a written appeal to the head of the public body. The person also may commence a civil action in the circuit court (or in the Court of Claims if the public body that denied the FOIA request is the state) to compel disclosure of the requested public records within 180 days after the determination to deny the request. In such actions, the court is required to determine the matter de novo (meaning that the court takes a fresh look at the case) and the burden is on the public body to support its denial of the request. If the court determines that the record is not exempt from disclosure, the court must order the public body to cease withholding it or to produce all or a portion of it.

House Bill 5921 would add that, in attempting to meet its burden in such an action, the public body must be limited to the basis it previously gave in the written notice denying the request under section 5(5) (as described above concerning HB 5923). Any other basis for a denial would be waived, including any basis for an exemption under section 13 that was not properly and timely asserted by written notice under section 5(5) (see HB 5923, above).

MCL 15.240

House Bill 5922

FOIA requires each public body that is a city, village, township, county, or state department, or that is under the control of any of these entities, to designate an individual as the public body’s FOIA coordinator. The FOIA coordinator is required under the act to accept and process requests for public records for that public body and also must approve any denial under section 5 of the act. A FOIA coordinator may designate another individual to act on the coordinator’s behalf in accepting and processing requests and approving a denial of a request.

House Bill 5922 would amend section 6 of the act to require a public body to conspicuously post in a public area of its premises at least one visually prominent sign printed with the FOIA

coordinator's contact information and, if applicable, that of the coordinator's designee, including their names, business telephone numbers, email addresses, and mailing addresses. If the public body directly or indirectly maintains an official internet presence, the contact information would also have to be posted and maintained on a portion of the public body's website that is fully accessible to the public. The bill also would make a technical revision to citations pertaining to a denial of a request for a public record under section 5.

MCL 15.236

House Bill 5924

FOIA requires a public body to provide a requesting person a reasonable opportunity to inspect and examine its public records and also provide reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. House Bill 5924 would add that a public record in the possession of a public body's outside legal counsel must be considered as remaining in the public body's custody for purposes of the act and is subject to disclosure under the act except to the extent the public body chooses to assert one or more exemptions under section 13 of the act.

Section 13 authorizes a public body to exempt certain public records from disclosure. One category of public records that may be exempted from disclosure (unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance) includes records or information of measures designed to protect the security or safety of persons or property or the confidentiality, integrity, or availability of information systems, such as security measures involving public works or public water supply designs, capabilities and plans for responding to a violation of the state's anti-terrorism statute, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and cybersecurity plans, assessments, or vulnerabilities.

The bill would amend the above provision to provide that it does not apply to a public record described above to the extent that the public record identifies a ***working group***, including the names and contact information of its members.

Working group would mean a group of two or more people, including, but not limited to, members, employees, contractors, advisors, consultants, or vendors of a public body, assembled by the public body to assist the public body in deliberating toward or rendering a decision on a public policy.

MCL 15.233 and 15.243

House Bill 5925

Section 4 of FOIA allows a public body to charge a fee for a public record search, for costs of copying a record for inspection, and for providing a copy of a public record, but requires that the fee not exceed the sum of certain components, e.g., labor costs associated with conducting the public record search to fulfill a request.

Currently, a search for a public record *may* be furnished without charge or at a reduced charge if the public body determines that doing so is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public. House Bill 5125 would instead *require* the fee to be waived or reduced in this situation.

In addition, if a public body determines that searching for or furnishing copies of a public record cannot be considered as primarily benefitting the general public, that determination could be challenged in a civil action commenced under section 10a(1)(b) on the grounds that the resulting fee exceeds the amount permitted by section 4, and the issue would be subject to the court's de novo review as provided in section 10a(4).

FOIA requires a public body to establish procedures and guidelines to implement it and to create a written public summary of the procedures and guidelines relevant to the general public regarding how to submit written requests to the entity and how to understand a written response from the entity, fee calculations, deposit requirements, and avenues for challenge and appeal. The bill would add that a public body's procedures and guidelines must provide requestors with a choice of fee payment methods that include electronic payment if the public body accepts electronic payment for other transactions. Further, the bill would provide that compliance by a public body with the provisions regarding a public body's procedures and guidelines does not limit any remedies provided by the act for the public body's noncompliance with any other provision of the act.

MCL 15.234

FISCAL IMPACT:

The bills would result in increased administrative labor to executive branch departments from possible increases in FOIA requests and additional responsibilities and could result in increased costs to them if existing FOIA administrative staffing is not able to fulfil the new requirements. HB 5925 would also result in decreased revenues to departments by requiring, instead of permitting, departments to waive charges if the request is considered to be in the public interest. It is not known at this time what percentage of requests would be exempt from charges from this provision, but they would again vary by department.

While FOIA authorizes a public body to charge fees for the actual cost of mailing, materials, and labor wages, including potential legal counseling, these charges would not cover all of the salary costs of an additional FTE or partial FTE position to support the labor. The vast majority of requests do not exceed \$20 and the requestors are not charged. Among departments surveyed in 2019, the average amount of revenue collected by departments from FOIA charges was approximately \$15,000. Fees are generally deposited into the fund from which costs were paid, which includes both the general fund and state restricted funds.

FOIA requires every department to have a designated FOIA coordinator on its staff. However, the amount of time each FOIA coordinator spends on records requests and how much additional staff support is needed depends on the department. The amount of labor varies significantly by department and depends on the size, complexity, and sensitivity of the information being requested. The annual FTE costs of a FOIA coordinator are approximately \$125,000.

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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.