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BILL ANALYSIS

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Senate Bill 669 and 670 (as introduced 11-9-23)  
Sponsor: Senator Jeremy Moss (S.B. 669)  
Senator Edward McBroom (S.B. 670)  
Committee: Oversight

Date Completed: 2-6-24

## **INTRODUCTION**

Generally, the Freedom of Information Act (FOIA) provides public access to public records of public bodies. Upon sufficiently requesting a public record from a public body's FOIA coordinator, a person has a right to receive copies of the record, except for records exempt. The bills would apply FOIA to the Executive Office of the Governor or Lieutenant Governor (EOG), the Senate, and the House of Representatives, all of which are currently exempt from the Act. The EOG would retain standard FOIA exemptions and be granted additional exemptions for records related to executive privileges and communications with constituents, among others. Both chambers of the Legislature also would retain standard FOIA exemptions and be granted additional exemptions for records related to communications with constituents and internal investigations, among others. Records created by the EOG and the Legislature before the bill's effective date would be exempt from disclosure. The Legislative Services Bureau (LSB), Senate Fiscal Agency (SFA), and House Fiscal Agency (HFA) would remain exempt from FOIA requirements.

The bills are tie-barred, and each bill would take effect on January 1 of the first odd-numbered year that begins six months after its enactment.

## **FISCAL IMPACT**

Senate Bill 669 would have no fiscal impact on State or Local Government.

Senate Bill 670 would not have a significant fiscal impact on the State and would have no fiscal impact for local units of government. The bills' requirement for the Executive Office and the Legislature to comply with FOIA requests and to designate a FOIA coordinator could require the Executive Office and the Legislature to hire additional staff. The average salary for a classified State employee in Fiscal Year 2022-23 (for comparison purposes as Executive and Legislative employees are at-will employees) was \$145,000 for salary and benefits.

MCL 15.232 & 15.233 (S.B. 669)  
15.236 et al. (S.B. 670)

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## **CONTENT**

**Senate Bill 669 would amend FOIA to add and modify definitions as used in Senate Bill 670, specifically modifying the term "public body" to include the Legislature and the EOG.**

**Senate Bill 670 would amend FOIA do the following:**

- **Require the Senate Majority Leader and the Speaker of the House to designate a FOIA coordinator for the Senate and House of Representatives, respectively.**
- **Prescribe the process for making an appeal to the Legislature upon the denial of a FOIA request by the Legislature.**
- **Apply current FOIA exemptions to public records of the EOG and the Legislature.**
- **Prescribe additional FOIA exemptions to public records of the EOG, such as records concerning executive privileges and records created before the bill's effective date, among other records.**
- **Prescribe additional disclosure exemptions to public records of the Legislature, such as records of communications with constituents and records concerning internal investigations, among other records.**

### **Senate Bill 669**

#### **Definitions**

Currently, "public body" means any of the following:

- A State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the State government.
- An agency, board, commission, or council in the legislative branch of the State government.
- A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- Any other body that is created by State or local authority or is primarily funded by or through State or local authority.

The term does not include the following:

- The Governor or Lieutenant Governor, the EOG, or employees thereof.
- The Judiciary, including or the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court.

Instead, under the bill, "public body" would mean any of the following:

- A State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the State government.
- A State officer, legislator, employee, agency, department, division, bureau, board, commission, committee, council, authority, or other body in the legislative branch of the State government.
- A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- Any other body that is created by State or local authority or is primarily funded by or through State or local authority.

The term would not include the following:

- The LSB, SFA, and HFA.
- The Judiciary or the office of the county clerk and its employees when acting in the capacity of the clerk to the circuit court.

Additionally, the bill specifies that revenue earned by a body created by or funded by a State or local authority pursuant to a fee-for-service transaction with a governmental entity would not count as funds provided by or through State or local authority.

"Legislator" would mean a member of the Senate or House of Representatives.

"Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. The bill specifies that the term would not include notes taken or made by a member of a public body, including notes taken or made during a meeting of the public body, if the notes were for that member's personal use, were not circulated among other members, were not used in the creation of any meeting minutes, and were retained or destroyed at that member's sole discretion.

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content. Under the bill, the term also would include hybrid drives, cloud storage, quantum networks, and computing systems.

#### Subscription to Future Issuances of Public Records

The Act allows a person to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis after initially requesting that public record. Under the bill, this provision would not apply to the EOG or a State legislative public body.

### **Senate Bill 670**

#### FOIA Coordinator

Under the Act, a public body that is a city, village, township, county, or State department, or under the control of any such entity must designate an individual as the public body's FOIA coordinator. In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county. For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator.

The bill would require the Senate Majority Leader and Speaker of the House to each designate an individual as the FOIA coordinator for the Senate and the House of Representatives.

#### Denial of a FOIA Request

If a public body makes a final determination to deny all or part of a request, the requesting individual may submit a written appeal to the head of that public body or commence a civil

action in the circuit court or court of claims. Under the bill, for the purpose of an appeal of a denial by a State legislative public body, the submission would have to be made to one of the following, as applicable:

- An individual designated by the Speaker of the House of Representatives to respond on behalf of the House of Representatives.
- An individual designated by the Senate Majority Leader to respond on behalf of the Senate.

#### Disclosure Exemptions, Generally

Section 13 of FOIA allows a public body to exempt specified information from disclosure as a public record. Under the Act, among other information, public bodies may exempt trade secrets or commercial or financial information provided to an agency for use in developing governmental policy subject to the following:

- The information is submitted upon a promise of confidentiality by the public body.
- The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
- A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request.

The bill specifies that this exemption also would apply to information trade secrets or commercial or financial information voluntarily provided to a State legislative public body.

Additionally, public bodies are exempt from disclosing communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action; however, the exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

Under the bill, the EOG or a State legislative public body would not be exempt from disclosing communications and notes of an advisory or preliminary nature as described above if in the particular instance the public interest in disclosure clearly outweighed the public interest in encouraging frank communications.

#### EOG Disclosure Exemptions

In addition to other specified exemptions, the EOG could exempt from disclosure as a public record any of the following:

- Information or records subject to executive privilege.
- Records created, prepared, owned, used, in the possession of, or retained by the EOG or an employee of the EOG prior to the bill's effective date.
- Communications, including any related records or information, between the EOG or any employee of the EOG and a constituent, other than a person that received an appointment or was employed by the State or a person required to be registered as a lobbyist.
- Records or information that could affect the security of the Governor or Lieutenant Governor.
- The cellular telephone number of the Governor or Lieutenant Governor or an employee of the EOG.
- Records or information pertaining to an internal investigation.

- Records or information relating to a civil action in which the EOG was a party until such litigation or claim had been finally adjudicated or otherwise settled.
- Records created, prepared, owned, used, in the possession of, or retained by the EOG or an employee of the EOG for fewer than 30 days.

For purposes of the provision described above, "constituent" would mean an individual who resides in the State and who contacts the EOG for assistance in personally obtaining government services, to express a personal opinion, or for redress of personal grievances.

Additionally, the EOG could exempt records or information in the EOG's possession or of an employee of the EOG that related to any of the following:

- The appointment of an individual as a department or agency director; as a member of a board, commission, or council; to fill a vacancy on a court pursuant to Section 23 of Article VI of the State Constitution of 1963; or to any other position the governor appointed as provided by law.
- The decision to remove or suspend from office any public official pursuant to Section 10 of Article V of the State Constitution of 1963, or to remove a judge from office pursuant to Section 25 of Article VI of the State Constitution of 1963.
- The decision to grant or deny a reprieve, pardon, or commutation pursuant to Section 14 of Article V of the State Constitution of 1963.
- A budget recommendation prepared pursuant to Section 18 of Article V of the State Constitution of 1963.
- A reduction in expenditures pursuant to Section 20 of Article V of the State Constitution of 1963.
- A message or recommendation to the Legislature pursuant to Section 17 of Article V of the State Constitution of 1963.
- The executive residence described in Section 24 of Article V of the State Constitution of 1963.

The bill would specify that, after an individual had been appointed to a position by the Governor, the exemption would not apply to records or information that related to that individual except as to a letter of recommendation or reference. Additionally, after an individual had been removed or suspended from a position, the exemption for records and information would not apply to a record that related to that individual.

#### Legislative Public Body Disclosure Exemptions

In addition to other specified exemptions, a public body that was a State legislative public body could exempt from disclosure as a public record any of the following:

- Communications, including any related records or information, between a legislator or a legislator's office and a constituent, other than a person required to be registered as a lobbyist.
- Records or information pertaining to an internal or legislative investigation.
- Records or information relating to a civil action in which the State Legislative public body was a party until such litigation or claim had been finally adjudicated or otherwise settled.

- Records or information specifically described and exempted from disclosure by statute and including the records and information subject to confidentiality requirements in Sections 109, 501, and 601 of the Legislative Council Act, in Section 9 of Public Act (PA) 198 of 2016, and in Section 9 of PA 46 of 1975.<sup>1</sup>
- Records of the office of sergeant at arms.
- Records created, prepared, owned, used, in the possession of, or retained by the State legislative public body for fewer than 30 days.
- Records created, prepared, owned, used, in the possession of, or retained by the State legislative public body prior to the bill's effective date.
- Records created, prepared, owned, used, in the possession of, or retained by the majority or minority caucuses of each house of the Legislature.
- The personal cellular telephone number of any legislator or employee of the State legislative public body.

For the purposes of the provision described above "constituent" would mean any of the following:

- An individual who is registered to vote in the district the legislator is elected to represent.
- An individual who is a resident of the district the legislator is elected to represent and who is not registered to vote outside of that district.
- An individual other than an individual described above if it can be reasonably inferred that the individual intended that the communication be with the legislator elected to represent the district where the individual is registered to vote or, if not registered to vote, resides.

The provisions described above would not authorize the exemption from disclosure of any salary record of an employee or official of a State legislative public body.

#### FOIA Request to Legislature and EOG

The Act specifies that it does not authorize the withholding of a public record in the possession of the EOG, or an employee of the EOG, if the public record is transferred to the EOG or employee after a request for the public record has been received by a State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government that is subject to the Act. The bill would delete this provision.

Under the bill, FOIA's application to a State legislative public body could not be construed to limit, modify, waive, or otherwise affect the privileges and immunities guaranteed under Section 11 of Article IV of the State Constitution of 1963, which generally prohibits Senators and Representatives from civil arrest or civil process during sessions of the Legislature.

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<sup>1</sup> Sections 109, 501, and 601 of the Legislative Council Act, provide for the creation and confidentiality requirements of LSB, SFA, and HFA, respectively. Section 9 of PA 198 of 2016 governs the confidentiality of the Michigan Veterans Facility Ombudsman and Section 9 of PA 46 of 1975 governs the confidentiality of the Legislative Corrections Ombudsman.