

Legislative Analysis



OFFICE OF GREAT SEAL REPOSITORY FOR CROSS-BOUNDARY AGREEMENTS

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House Bill 4026 (reported from committee as Substitute H-1)

Sponsor: Rep. Gail Haines

Committee: Oversight

First Analysis (4-2-13)

BRIEF SUMMARY: The bill would establish a repository in the Office of the Great Seal (within the Department of State) for cross-boundary memorandums of agreement, *after* those agreements are entered into by state agencies. The agreements would be electronically accessible to the public via the Internet.

FISCAL IMPACT: As modified, the bill will have a modest fiscal impact on the Department of Attorney General by adding to its responsibilities.

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 while avoiding the oversight customarily provided by the legislative branch of the state government.

In the 2011-12 legislative session, a bill was enrolled that would have created 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. That bill, House Bill 4116, was vetoed by Governor Snyder on June 28, 2012. See ***Background Information*** below.

Legislation has once again been introduced to create a central repository for all cross-boundary agreements entered into by agencies in the executive branch of the government.

THE CONTENT OF THE BILL:

House Bill 4026 (H-1) would establish a central repository for cross-boundary memorandums of agreement after those agreements are entered into by state agencies.

Specifically, the bill would require that a central repository for such agreements be created by the Office of the Great Seal before September 1, 2014, and then be made electronically accessible to the public via the Internet within one year. The bill is an amendment to Chapter 12 of the Revised Statutes of 1846 (RS 12), which deals with the responsibilities of state officers.

A *cross-boundary memorandum of agreement*, under the bill, is defined to mean "a memorandum of agreement, memorandum of understanding, memorandum of record, compact, or similar agreement that a governmental unit or officer of this state enters into with the federal government or a unit of government located outside of this state." Under the bill, *governmental unit* is defined to mean a state department, agency, division, or any other entity or subunit derived from those public bodies. The bill would take effect September 1, 2013.

A more detailed description of the bill follows.

Attorney General notified after executing agreement. House Bill 4026 (H-1) would not require that cross-boundary memoranda be reviewed by the Office of the Attorney General before they were executed (a central tenet of the original bill). Instead, the bill requires that beginning September 1, 2014, within 10 days after executing a cross boundary memorandum of agreement, a governmental unit or officer of this state forward the executive agreement to the Office of the Great Seal with a copy to the attorney general.

Office of the Great Seal Central Repository; Internet Access. The Office of the Great Seal would accept and officially file a cross-boundary memorandum of agreement.

Further, by September 1, 2016, each state governmental unit would be required to forward a copy of any cross-boundary memorandum of agreement that it entered into before September 1, 2014, and that was legally binding and still in effect, to the Office of the Great Seal for inclusion in the central repository.

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. Under the bill, the repository would have to be accessible via the Internet by one year after the Office of the Great Seal (or its assignees or successors) made inter-local agreements (created under the Urban Cooperation Act) accessible publicly on the Internet.

Privileged Information. The bill specifies that public accessibility would not require the disclosure of a public record that is otherwise prohibited by law from public disclosure, is privileged, or is exempt from disclosure under the Freedom of Information Act. Further,

it should not be construed to prohibit or preempt from public disclosure any cross boundary memorandum of agreement for the sole reason that it was executed by the governor or the lieutenant governor or an agent or employee of the governor or lieutenant government.

Proposed MCL 14.32a

BACKGROUND INFORMATION:

Definition: Memorandum of Understanding. According to the Legislative Research Bureau's response to Research Request #10-02539 during the 2011-12 legislative session, 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..."

The Governor's Veto Message of House Bill 4116 of last session reads as follows:

Executive Office, Lansing, June 28, 2012

Ladies and Gentlemen:

*Today I am returning to you **Enrolled House Bill 4116** without signature. While I support the bill's objective of increasing transparency and openness in government, the bill raises separation of powers concerns by directing executive branch officers and agencies on how to undertake a legal analysis that should rest within the discretion of the executive. Furthermore, the legal analysis the bill would require might be costly and difficult for an agency lacking internal legal counsel to conduct.*

Enrolled House Bill 4116 requires that before entering into a "cross boundary memorandum of agreement" a state officer or governmental unit forward the agreement to the Attorney General with a preliminary review that addresses whether it is legally binding or enforceable. For those agreements that "appear to be" legally binding or enforceable, the unit of government or state officer must also provide to the Attorney General a "written full review" that includes an analysis of "state and federal constitutional requirements and limitations" and the existence of statutory authority for the agreement, among other things.

The agreements the bill covers involve the exercise of inherent executive branch power and responsibility. Undertaking an extensive legal review of those agreements should be left to the sound discretion of the agency in carrying out its executive role and purpose. Imposing such a

requirement through legislative action invades the proper role of the executive branch in "executing" the law. Simply put, executive branch agencies should be left to determine when such a review is proper or necessary, as they are constitutionally charged with carrying out the law and following the dictates of the constitution in doing so.

Furthermore, the bill puts executive branch agencies in the odd position of appearing to have to justify their actions to their own lawyer, namely, the Attorney General. By requiring that the agencies submit a legal review of legally binding or enforceable agreements to the Attorney General, the bill places the client agency in the odd position of supplying a legal analysis to its own attorney.

In addition to the requirement of a legal analysis, Enrolled House Bill 4116 would require the Office of the Great Seal to create a central repository for all such agreements and eventually make them publicly available on the internet. I wholeheartedly support this effort to create more openness and transparency in government and would be happy to work with you on a bill to achieve this laudatory objective. In the meantime, I will work with the Secretary of State to achieve the goal of greater transparency set forth in Enrolled House Bill 4116, whether that goal is statutorily required or not.

Sincerely,

Rick Snyder, Governor

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 receive a copy of every agreement, *and* a written preliminary review of every agreement, to ascertain whether they were legally binding and enforceable. This review would have occurred before a governmental unit or officer entered into the agreement.

Further, for all cross boundary memoranda of agreement that appeared to be legally binding, the attorney general's office would need to have written a full review that included both of the following considerations: (1) state and federal constitutional requirements and limitations; and (2) the existence of statutory authority for the agreement, and the extent of the authority, if any, granted to the department, agency, division, subunit, or officer executing the cross-boundary memorandum of agreement.

This version of the bill does not require a review of the agreements by the Office of the Attorney General. Instead, under this House substitute, a state agency merely sends a copy of its agreement to the central repository in the Office of the Great Seal, with a copy forwarded to the Office of the Attorney General.

The review protocol embodied in House Bill 4026 (H-1) 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.

Against:

A bill substantially similar to House Bill 4026 (H-1) was enrolled by the legislature during the last legislative session, but vetoed by Governor Rick Snyder. It is possible this bill will suffer the same fate, because this bill also violates the separation of powers doctrine, by limiting the power of the executive branch of government. On that point, the governor's veto message read, in part:

The agreements the bill covers involve the exercise of inherent executive branch power and responsibility. Undertaking an extensive legal review of those agreements should be left to the sound discretion of the agency in carrying out its executive role and purpose. Imposing such a requirement through legislative action invades the proper role of the executive branch in "executing" the law. Simply put, executive branch agencies should be left to determine when such a review is proper or necessary, as they are constitutionally charged with carrying out the law and following the dictates of the constitution in doing so.

Response:

House Bill 4026 (H-1) does not violate the doctrine of separation of powers because it no longer mandates a review of agreements by the Office of the Attorney General. Indeed, that office supports the substitute version of the bill.

POSITIONS:

The Office of the Attorney General supports the bill. 2-26-13

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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.