

## PROHIBIT PUBLIC BODY FROM TAKING CIVIL ACTION AGAINST THOSE MAKING FOIA REQUESTS

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**House Bill 4077 as introduced**  
**Sponsor: Rep. Klint Kesto**  
**Committee: Michigan Competitiveness**  
**Complete to 3-3-17**

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

### SUMMARY:

House Bill 4077 would add a section to the Freedom of Information Act (FOIA) which would prohibit a public body which has received a request for information from commencing a civil action under the act against the requesting person.

#### ***Freedom of Information Act (MCL 15.231-236)***

Generally speaking, Michigan's FOIA statute, Act 442 of 1976, establishes procedures and requirements for the disclosure of *public records* by all *public bodies* in the state. The term "public record" refers to 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, but does include computer software. There are two classes of public records: those subject to disclosure and those exempt from disclosure. Generally, all records are subject to disclosure unless specifically exempted.

The term "public body" applies currently to a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, (but does not include the executive office of governor or lieutenant governor); an agency, board, commission, or council in the legislative branch of the state government (but apparently not the legislature itself); a county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or their boards, departments, commissions, councils, and agencies; and any other body created by state or local authority or primarily funded by or through state or local authority. The term does not include the judiciary, including the office of the county clerk when acting in the capacity of clerk to the circuit court.

### BACKGROUND:

This bill is understood to address an incident which occurred in Greenville, Michigan, in 2016. At that time, a local newspaper, The Daily News, filed a FOIA request to obtain the personnel files of five candidates running for sheriff in two counties. While Ionia County provided that information, Montcalm County sued the paper—asking the court for a declaratory judgment to resolve what it saw as a statutory conflict. The county argued that the state's FOIA disclosure requirements conflicted with another statute protecting employee privacy rights in discipline records over four years old (The Employee Right to Know Act (ERKA), MCL 423.507).

Ultimately, the circuit court found that FOIA requests may only be granted or denied, and that a declaratory judgment was not the proper course of action. Montcalm County subsequently provided the requested information to the paper.

House Bill 5826, which in House-passed version was identical to this bill, was introduced in the 2015-2016 legislative session. That bill was reported from the House Oversight and Ethics Committee and passed by the full House, but was not considered by the Senate.

#### **FISCAL IMPACT:**

House Bill 4077 would have an indeterminate, but likely minimal, fiscal impact on the state and local units of government. While there is some argument that a public body could minimize its FOIA liabilities by receiving a declaratory judgment against a person making a FOIA request, it is unknown if any public body has filed and subsequently won a civil suit against a FOIA requestor. Therefore, it is unclear if prohibiting civil suits by public bodies over FOIA requests would increase costs to local units of government compared to current practice.

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