

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

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House Bill 4077 (reported from committee w/o amendment)
Sponsor: Rep. Klint Kesto
Committee: Michigan Competitiveness
Complete to 3-14-17

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

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

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.

THE APPARENT PROBLEM:

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 three 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.

THE CONTENT OF THE BILL:

House Bill 4077 would add a section to the Freedom of Information Act (FOIA) to prohibit a public body that 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 INFORMATION:

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.

ARGUMENTS:

For:

Proponents argue that this bill restates existing practice in clearer and more emphatic terms. As the court found in the Montcalm County case, a FOIA request must be granted or denied; a "time out" to secure judicial guidance simply is not provided in the law.

Further, the bill also seeks to prevent public bodies from retaliating against those who request information by filing suit against them. Such actions could have a chilling effect on citizens who are seeking information about the activities of public officials and entities.

Against:

As argued by Montcalm County in the lawsuit described above, this bill could put counties in a difficult position, unable to seek a declaratory judgement to resolve conflicts between FOIA and other statutes. As the county saw it in that case, refusing to grant the FOIA request could have resulted in a lawsuit by the newspaper under FOIA, and granting the request would have opened the county up to a lawsuit by candidates for sheriff under ERKA. And there does appear to be genuine confusion:

Section 10 of ERKA states that "[t]his act shall not be construed to diminish the right of access to records as provided in Act No. 442 of the Public Acts of 1976 [the Michigan FOIA statute], being sections 15.231 to 15.246 of the Michigan Compiled Laws, or as otherwise provided by law." In other words, the language in ERKA explicitly states that FOIA takes precedence.

However, FOIA likewise exempts from its disclosure requirements, "[r]ecords or information specifically described and exempted from disclosure by statute."¹ ERKA states that "[a]n employer shall review a personnel record before releasing information to a third party and, except when the release is ordered in a legal action or arbitration to a party in that legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old."² Because a FOIA request does not fall under any of those categories, there is an argument that the county is required to delete the disciplinary records that are more than four years old. As records required to be deleted under ERKA, the disciplinary records may be "exempted from disclosure by statute" under FOIA.

Ultimately, the court decided that it lacked subject matter jurisdiction over the controversy, as there was no allowance for judicial interference in the FOIA process. Accordingly, a public body could be liable on both sides of a controversy, to both the requesting party and the party about whom the information is requested. This bill does not appear to change that situation, but it does make clear the lack of available judicial remedy.

Against:

Michigan's FOIA statute has been on the books since 1976 and this appears to be the first time this issue has arisen, as noted by various parties. As such, this legislation may be viewed as unnecessary.

POSITIONS:

A representative of the ACLU of Michigan testified in support of the bill. (3-8-17)

The following organizations support the bill:

- Michigan Freedom Fund (3-8-17)
- Michigan Press Association (3-8-17)

The following organizations oppose the bill:

- Michigan Township Association (3-8-17)
- Michigan Association of State Universities (3-8-17)
- Michigan Municipal League (3-8-17)
- Canton Township (3-8-17)

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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.

¹ MCL 15.243(1)(d)

² MCL 423.507