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Senate Bills 232 through 241 (as introduced 3-12-20)
Sponsor: Senator Jeremy Moss (S.B. 232, 235, 237, & 240)
Senator Ed McBroom (S.B. 233, 234, 236, 238, 239, & 241)
Committee: Oversight

Date Completed: 3-16-21

CONTENT

Senate Bill 233 would rename the Freedom of Information Act (FOIA) as the "Freedom of Information and Legislative Open Records Act", designate Sections 1 through 16 of the Act as Part 1 (Freedom of Information Act), and amend various references to FOIA to refer instead to Part 1. The bill also would amend the Act to do the following:

- Modify the definition of "public body".
- Specify that a provision allowing a person to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis would not apply to the executive office of the Governor or Lieutenant Governor.

Senate Bill 234 would add Part 2 (Legislative Open Records Act) to FOIA to do the following:

- Allow a person to inspect, copy, or receive copies of the records of a public body after providing the public body's Legislative Open Records Act (LORA) coordinator with a written request, except as otherwise provided.
- Require an employee of a public body who received a request for a public body to forward it to the LORA coordinator within three business days.
- Require a LORA coordinator to keep a copy of all written requests for public records on file for at least one year.
- Prohibit a public body from destroying or altering a public record before it had been in its possession for 730 days if it would become a public record after it had been in the public body's possession for 15 days.

Senate Bill 237 would add Section 24 to Part 2 of the FOIA to do the following:

- Allow a public body to charge a fee for a public record search, for the necessary copying of a public record, or for providing a copy of a record.
- Prescribe the limitations of a fee, the maximum fee that could be charged, and the process for calculating a fee.
- Allow a public body to charge a fee deposit.
- Require a public body to establish procedures and guidelines to implement Part 2 and to create a written public summary of the specific procedures and guidelines relevant to the general public.
- Require a public body to make its procedures and guidelines publicly available.

- Require the procedures and guidelines to include a detailed itemization of any fee amount.
- Require a response to a request for public records to contain a best efforts estimate by the public body regarding the time frame it would take it to provide the public records to the requestor.
- Require a public body that did not respond to a written request in a timely manner to take certain actions, including reducing the charges for labor costs.
- Specify that if a fee deposit were not received by a public body within 45 days after the requesting person received the notice that a deposit was required, and if the person had not filed an appeal, the request would be considered abandoned by the requesting person and the public body would no longer be required to fulfill the request.

Senate Bill 238 would add Section 25 to Part 2 of FOIA to do the following:

- Require a person to submit a written request to a public body's LORA coordinator to inspect or receive a copy of a public record.
- Require a public body to respond to a request for a public record within five business days after the public body received the request, unless otherwise agreed to in writing by the person making the request.
- Require a written notice denying a request for a public record to contain certain information, including an explanation of the basis for a determination that the public record was exempt from disclosure.
- Require a notice to specify the reasons for an extension and the date by which the public would respond, if a public body issued a notice extending the period for a response to the request.

Senate Bill 241 would add sections 26 through 29 to Part 2 of FOIA to do the following:

- Require the Administrator of the Legislative Council (Council Administrator) to designate an individual to serve as the LORA coordinator for all public bodies.
- Allow the Senate and the House to designate individuals as the LORA coordinators for the respective bodies.

Senate Bill 235 would add Sections 29a and 29b to Part 2 of FOIA to do the following:

- Allow a requesting person to submit a written request for reconsideration or to compel the public body's disclosure of the public records, if a public body made a final determination to deny all or a portion of a request.
- Require a public body's LORA coordinator to take certain action within 10 business days after receiving a written request for reconsideration of a request, including issuing a notice extending for not more than 10 business days the period during which the LORA coordinator would have to respond.
- Prohibit a LORA coordinator from issuing more than one notice of extension for a particular written request for reconsideration.
- Allow a requesting person to seek final review of a nondisclosure by submitting an appeal to the Council Administrator if a public body's LORA coordinator failed to respond to a written request or if the LORA coordinator upheld all or a portion of the disclosure denial that was subject of the written request.
- Require the public body to cease withholding or produce all or a portion of a public record wrongfully withheld if the Council Administrator determined that the public record was not exempt from disclosure.

- Allow the Council Administrator to require a reasonable fee not exceeding \$75 for an appeal commenced under the bill.
- Require the Council Administrator to recommend appropriate disciplinary action to the Speaker of the Michigan House of Representatives or the Majority Leader of the Michigan Senate if the Council Administrator determined in an appeal that the public body had arbitrarily and capriciously violated the bill's provisions by refusal of a public record or delay in disclosing or providing copies.
- Allow a requesting person to submit to a public body's LORA coordinator a written request for a fee reduction if a public body required a fee that exceeded the amount permitted under its publicly available procedures and guidelines or under the Act.
- Require a public body's LORA coordinator to take certain action within 10 business days after receiving a written request for a fee reduction.
- Require a public body to reduce a fee to a permissible amount if the Council Administrator determined that the public body required a fee that exceeded the amount permitted.
- Allow the Council Administrator to require a reasonable fee not exceeding \$50 for an appeal commenced related to fee reduction.
- Require the Council Administrator to recommend appropriate disciplinary action to the Speaker of the House or the Senate Majority Leader if it determined in an appeal that a public body charged an excessive fee.

Senate Bill 236 would amend the Legislative Council Act to require the Council Administrator to receive and decide appeals of public records requests, as provided in LORA.

Senate Bill 239 would add Sections 29c and 29d to Part 2 of FOIA to specify records and information that a public body could exempt from disclosure as a public record, including those of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy, those pertaining to an ongoing internal or legislative investigation, and those subject to attorney-client privilege or any other privilege recognized by the constitution, statute, or court rule, among others.

Senate Bill 240 would add Sections 29e and 29f to Part 2 of FOIA to do the following:

- Require a public body to separate exempt and nonexempt material contained in a public record and make the nonexempt material available for examination and copying.
- Require a public body to facilitate the separation of exempt from nonexempt information when designing a public record.
- Require the Attorney General to counsel and advise a public body on the administration of Part 2.

Senate Bill 232 would amend FOIA to exempt a public body from disclosing as a public record certain records or information pertaining to the executive offices of the Governor and Lieutenant Governor.

Each bill would take effect on January 1, 2022. Senate Bills 232, 233, and 235 through 241 are tie-barred to Senate Bill 234. Senate Bill 234 is tie-barred to Senate Bills 232, 233, and 235 through 241.

The bills, except for Senate Bill 236, are described in greater detail below.

Senate Bill 233

Public Body, Defined

The Freedom of Information Act defines "public body" as 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, but does not include the Governor or Lieutenant Governor, the executive offices of the Governor or Lieutenant Governor, or employees thereof.
- 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, but does not include the judiciary, including the office of the county clerk and its employees when acting in the capacity of the clerk to the court 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 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, but does not include the judiciary, including the office of the county clerk and its employees when acting in the capacity of the clerk to the court to the circuit court, or an entity in the legislative branch of State government.

Subscription to Issuances of Public Records

The bill specifies that a person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. Under the bill, the provision would not apply to the executive office of the Governor or Lieutenant Governor.

Senate Bill 234

Definitions

Under the bill, the following definitions would apply to Part 2 of FOIA.

The bill would define "LORA coordinator" as either of the following:

- An individual who is a public body.
- An individual designated by a public body to accept and process requests for public records under Part 2.

"Public body" would mean 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. The term would not include the Office of the Auditor General.

"Public record" would mean a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function that has been in the possession of the public body for 15 days or more. The term does not include computer software. Part 2 would separate public records into the following two classes:

- Those that were exempt from disclosure.
- Those that were not exempt from disclosure and were subject to disclosure under Part 2.

"Writing" would mean handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or a combination 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.

"Software" would mean a set of statements or instructions that, when incorporated in a machine-usable medium, is capable of causing a machine or device having information-processing capabilities to indicate, perform, or achieve a particular function, task, or result. The term would not include computer-stored information or data or a field name if disclosure of that field name would not violate a software license.

"Person" would mean an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. The term would not include an individual serving a sentence of imprisonment in a State or county correctional facility in the State or any other state or in a Federal correctional facility.

"Session day" would mean a day in which either the House of Representatives or the Senate convenes in session and a quorum of the body is recorded.

"Unusual circumstances" would mean one or both of the following, but only to the extent necessary for the proper processing of a request:

- The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request.
- The need to collect the requested public records from numerous offices, facilities, or other establishments that are located apart from the particular office receiving or processing the request.

Disclosure of Public Records

Under the bill, except as otherwise provided, after providing a public body's LORA coordinator with a written request that described a public record sufficiently to enable the public body to find the record, a person would have a right to inspect, copy, or receive copies of the requested record of the public body. A request from a person, other than an individual who qualified as indigent, would have to include the his or her complete name, address, and contact information, and, if the request were made by a person other than an individual, the complete name, address, and contact information of the person's agent who was an individual. An address would have to be written in compliance with United States Postal Service addressing standards. An employee of a public body who received a request for a public record would have to forward that request to the LORA coordinator within three business days.

A LORA coordinator would have to keep a copy of all written requests for public records on file for at least one year.

A public body would have to furnish a requesting person a reasonable opportunity for inspection and examination of its public records and would have to furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body could make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body would have to protect public records from loss, unauthorized alteration, mutilation, or destruction.

Part 2 would not require a public body to make a compilation, summary, or report of information. Part 2 also would not require a public body to create a new public record, except to the extent required for the furnishing of copies, or edited copies of an existing public record.

The custodian of a public record would have to furnish, upon written request, a requesting person a certified copy of a public record.

A public body could not destroy or alter a record before it had been in its possession for 730 days if the record would become a public record after it had been in the public body's possession for 15 days.

Legislative Intent

The bill states that it is the public policy of the State that all people, except those who are incarcerated in State or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with Part 2. The bill specifies that individuals must be informed so that they may fully participate in the democratic process.

Senate Bill 237

Fee Calculation

The bill would allow a public body to charge a fee for a public record search, for the necessary copying of a public record for inspection, or for providing a copy of a public record if it had been established, made publicly available, and followed procedures and guidelines to implement the bill.

The fee would have to be limited to actual mailing costs and to the actual incremental cost of duplication, including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information. Except as otherwise provided, if the public body estimated or charged a fee in accordance with Part 2 of FOIA, the total fee could not exceed the sum of the following, subject to limitations (described below):

- That portion of labor costs directly associated with the necessary searching for, locating, and examining of public records in conjunction with receiving and fulfilling a granted written request; however the public body could not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in the particular instance regardless of whether that person was available or who actually performed the labor.
- That portion of labor costs, including necessary review, if any, directly associated with the separating and deleting of exempt information from nonexempt information as provided in Section 29e; however, for service performed by an employee of the public body, the public body could not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in Section 29e.

- The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media, for public records provided to the requester on nonpaper physical media.
- The actual total incremental costs of necessary duplication or publication, not including labor, for paper copies of public records provided to the requester.
- The cost of labor directly associated with duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requester on nonpaper physical media or through the internet or other electronic means as stipulated by the requester; however the public body could not charge more than the hourly wage of its lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person was available or who actually performed the labor.
- The actual costs of mailing, if any, for sending the public records in a reasonably economical and justifiable manner; however the public body could not charge more for expedited shipping or insurance unless specifically stipulated by the requester, but could otherwise charge for the least expensive form of postal delivery confirmation when mailing public records.

Labor costs directly associated with the searching for, locating, and examining public records and those directly associated with the separating and deleting of exempt information from nonexempt information would have to be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. For labor costs directly associated with the separating and deleting of exempt information from nonexempt information, a public body could not charge for labor directly associated with redaction if it knew or had reason to know that it previously redacted the public record in question and the redacted version was still in its possession. Labor costs directly associated with duplication or publication, making digital copies, or transferring digital media could be estimated in time increments of the public body's choosing; however, all partial time increments would have to be rounded down.

For public records provided to the requester on nonpaper physical media, the requester could stipulate that the public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided to him in lieu of paper copies; however this provision would not apply if a public body lacked the technological capacity necessary to provide records on the particular nonpaper physical media stipulated in the particular instance)

When calculating labor costs, fee components would have to be itemized in a manner that expressed both the hourly wage and the number of hours charged. The public body also could add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly noted the percentage multiplier used to account for benefits in the detailed itemization (described below). Subject to the 50% itemization, the public body could not charge more than the actual costs of fringe benefits, and overtime wages could not be used in calculating the cost of fringe benefits. Overtime wages could not be included in the calculation of labor costs unless overtime was specifically stipulated by the requester and clearly noted on the detailed itemization.

A search for a public record could be conducted or copies of public records could be furnished without charge or at a reduced charge if the public body determined that a waiver of reduction of the fee was in the public interest because searching for or furnishing copies of the public record could be considered as primarily benefiting the general public. A public record search would have to be made and a copy of a public record would have to be furnished without charge for the first \$20 of the fee for each request by either of the following:

- A nonprofit organization formally designated by the State to carry out activities under Subtitle C of the Federal Developmental Disability Assistance and Bill of Rights Act and the Federal Protection and Advocacy for Mentally Ill Individuals Act, or their successors, if the request was made directly on behalf of the organization or its clients, was made for a reason wholly consistent with the mission and provisions of those laws under Section 931 of the Mental Health Code, and was accompanied by documentation of its designation by the State, if requested by the public body.
- An individual who was entitled to information under Part 2 and who submitted an affidavit stating that the individual was indigent and receiving specific public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.

If the requestor were eligible for a requested discount, the public body would have to fully note the discount on the detailed itemization. If a requestor were ineligible for the discount, the public body would have to inform the requestor specifically of the reason for ineligibility in its written response. An individual would be ineligible for the fee reduction if either of the following applied:

- The individual previously had received discounted copies of public records from the public body twice during that calendar year.
- The individual requested the information in conjunction with outside parties who were offering or providing payment or other remuneration to the individual to make the request.

A public body could request a statement by the requestor in the affidavit that the request was not being made in conjunction with outside parties in exchange for payment of other remuneration.

Public Summary

The bill would require a public body to establish procedures and guidelines to implement Part 2 and would have to create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The written public summary would have to be written in a manner so as to be easily understood by the general public. A public body would have to post and maintain the procedures and guidelines and its written public summary on its website. A public body would have to make the procedures and guidelines publicly available by providing free copies of it and its written public summary both in the public body's response to a written request and upon request by visitors at the public body's office. A public body could include the website link to the documents instead of providing paper copies in its response to a written request.

A public body's procedures and guidelines would have to include the use of a standard form detailed itemization of any fee amount in its responses to written requests. The detailed itemization would have to clearly list and explain the allowable charges for each of the six fee components described above that compose the total fee used for estimating or charging purposes.

A public body that had not established procedures and guidelines, had not created a written public summary, or had not made those items publicly available without charge would not be relieved of its duty to comply with any requirement of Part 2 and could not require deposits or charge fees otherwise permitted until it was in compliance with these provisions. Notwithstanding this provision and despite any law to the contrary, a public body's procedures and guidelines under Part 2 would not be exempt public records under Section 29d.

Exemption from Charge; Additional Charges

Under the bill, any public records available to the general public on a public body's internet site at the time a request was made would be exempt from charge. If the LORA coordinator knew or had reason to know that all or a portion of the requested information was available on its website, the public body would have to notify the requestor in its written response that all or a portion of the requested information was available on its website. The written response, to the degree practicable in the specific instance, would have to include a specific webpage address where the requested information was available. On the detailed itemization, the public body would have to separate the requested public records that were available on its website from those that were not available on the website and would have to inform the requestor of the additional charge to receive copies of the public records that were available on its website.

If a public body had included the website address for a record in its written response to the requestor and the requestor thereafter stipulated that the record be provided to him or her in a paper format or other form, the public body would have to provide the public records in the specified format but could use a fringe benefit multiplier greater than the 50% limitation, not exceeding the actual costs of providing the information in the specified format.

Public Body's Response

The bill would allow a public body to provide requested information available in public records without receipt of a written response.

If a verbal request for information were for information that a public body believed was available on its website, a public employee would have to, if practicable and to the best of his or her knowledge, inform the requestor about the public body's pertinent website address.

A public body's response to a request would have to contain a best efforts estimate by the public body regarding the time frame it would take it to comply with the law in providing the public records to the requestor. The time frame estimate would be nonbinding on the public body, but the public body still would have to provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on the State's public policy under Senate Bill 234 and the nature of the request in the particular instance.

If a public body did not respond in a timely manner, it would not be relieved from its requirements to provide proper fee calculations and time frame estimates in any tardy responses. Providing an estimated time frame would not relieve a public body from any other requirements under Part 2. If a public body did not respond to a written request in a timely manner, it would have to do the following:

- Reduce the charges for labor costs otherwise permitted by 5.0% for each day the public body exceeded the permitted time frame for a response to the request, with a maximum 50%, if the late response was willful and intentional or the written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, email, or email attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "open records", "information", "LORA", "copy", or a recognizable misspelling of such, or appropriate legal code reference to Part 2, on the front of an envelope or in the subject line of an email, letter, or facsimile cover page.
- Fully note the charge reduction on the detailed itemization, if a charge reduction were required.

This provision would not apply to public records prepared under an act or statute specifically authorizing the sale of those records to the public, or if the amount of the fee for providing a copy of the record was otherwise specifically provided by an act or statute.

Fee Deposit

Under the bill, in either the public body's initial or subsequent response, it could require a good-faith deposit from the person requesting information before providing the public records to the requestor if the entire fee estimate or authorized charge exceeded \$50, based on a good-faith calculation of the total fee. The deposit could not exceed one-half of the total estimated fee, and a public body's request for a deposit would have to include a detailed itemization.

After a public body had granted and fulfilled a written request from an individual, if it had not been paid in full the total amount provided in the Act for the copies of public records that it made available to the individual as a result of that written request, it could require a deposit of up to 100% of the estimated fee before it began a full public record search for any subsequent written request from that individual if all of the following applied:

- The final fee for the previous written request was not more than 105% of the estimated fee.
- The public records made available contained the information being sought in the previous written request and were still in the public body's possession.
- The public records were made available to the individual, subject to payment, within the time frame estimate described above.
- Ninety days had passed since the public body notified the individual in writing that the public records were available for pickup or mailing.
- The individual was unable to show proof of previous payment to the public body.
- The public body calculated a detailed itemization that was the basis for the current written request's increased estimated fee deposit.

A public body could not continue to require an increased estimated fee deposit from an individual described above if any of the following applied:

- The individual showed to the public body proof of previous payment in full for the applicable prior request.
- The public body received payment in full for the applicable previous written request.
- 365 days had passed since the individual made the written request for which full payment was not remitted to the public body.

A deposit required by a public body would be a fee.

If a good-faith deposit or an increased deposit were not received by the public body within 45 days after the requesting person received the notice that a deposit was required, and if the requesting person had not filed an appeal of the deposit amount, the request would have to be considered abandoned by the requesting person and the public body would no longer be required to fulfill the request. Notice of a required deposit would be considered received three days after it was sent, regardless of the means of transmission. Notice of a required deposit would have to include notice of the day by which the deposit would have to be received, which would be 48 days after the date the notice was sent.

Senate Bill 238

Under the bill, except as otherwise provided, to inspect or receive a copy of a public record

under Part 2 of FOIA, a person would have to submit a written request for the public record to the public body's LORA coordinator. A written request made by facsimile, email, or other electronic transmission under Part 2 would not be considered by be received by a public body's LORA coordinator until one business day after the electronic transmission was made. However, if a written request were sent by email and delivered to the public body's spam or junk mail folder, the request would not be received until one day after the public body first became aware of the request. The public body would have to note in its records both the time a written request was delivered to its spam or junk mail folder and the time the time the public body first became aware of the request.

Unless otherwise agreed to in writing by the person making a request, a public body would have to respond to a request for a public record within five business days after the public body received the request by doing one of the following:

- Granting the request.
- Issuing a written notice to the requesting person denying the request.
- Granting the request in part and issuing a written notice to the requesting person denying the request in part.
- Issuing a notice extending for not more than 10 business days the time by which the public body would have to respond to the request; however, a public body could not issue more than one notice of extension for each request.

Failure to respond to a request would constitute a public body's final determination to deny the request if either of the following applied:

- The failure was willful and intentional.
- The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, email, or email attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "open records", "information", "LORA", "copy", or a recognizable misspelling of such, or appropriate legal code reference to Part 2, on the front of an envelope or in the subject line of an email, letter, or facsimile cover page.

A written notice denying a request for a public record in whole or in part would be a public body's final determination to deny the request or portion of that request. The written notice would have to contain all of the following:

- An explanation of the basis under Part 2 or other statute for the determination that the public record, or portion of that record, would be exempt from disclosure, if that were the reason for denying all or a portion of the request.
- A certificate that the public record did not exist under the name given by the requester or by another name reasonably known to the public body, if that were the reason for denying the request or a portion of the request.
- A description of a public record or information on a public record that was separate or deleted, if a separation or deletion were made.
- A full explanation of the requesting person's right to either submit a written request for reconsideration to the public body's LORA coordinator that specifically stated the words "reconsideration", "appeal", "redetermination", or "reverse" and identified the reason or reasons for reversal of the disclosure denial or seek final review of the denial.

The individual's designated under Sections 26 through 28 as a LORA coordinator or under Section 29 as a LORA coordinator designate would have to sign the written notice of denial.

If a public body issued a notice extending the period for a response to the request, the notice would have to specify the reasons for the extension and the date by which the public body will do one of the following:

- Grant the request.
- Issue a written notice to the requesting person denying the request.
- Grant the request in part and issue a written notice to the requesting person denying the request in part.

If a public body made a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of a public record, the requesting person could seek reconsideration or appeal of the denial.

Senate Bill 241

Under the bill, the Council Administrator would have to designate an individual as the LORA coordinator for all public bodies. The House could designate an individual as the LORA coordinator for the House. The Senate could designate an individual as the LORA coordinator for the Senate.

A LORA coordinator could designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records and in approving a denial.

Senate Bill 235

Request Denial & Reconsideration

Under the bill, if a public body made a final determination to deny all or a portion of a request, the requesting person could do either of the following:

- Submit to the public body's LORA coordinator a written request for reconsideration that specifically stated the word "reconsideration", "appeal", "redetermination", or "reverse", and identified the reason or reasons for reversal of the denial.
- Submit to the Council Administrator a written request to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

A request to compel the public body's disclosure of the public records could not be submitted unless one of the following applied:

- The public body's LORA coordinator failed to respond to a written request for reconsideration.
- The public body's LORA coordinator issued a determination to a written request for reconsideration as required below.

Within 10 business days after receiving a written request for reconsideration, the public body's LORA coordinator would have to do one of the following:

- Reverse the disclosure denial.
- Issue a written notice to the requesting person upholding the disclosure denial.
- Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

- Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the public body's LORA coordinator would have to respond to the written request for reconsideration.

The LORA coordinator could not issue more than one notice of extension for a particular written request for reconsideration.

The public body's LORA coordinator would not be considered to have received a written request for reconsideration until the first scheduled session day following submission of the written request described above. If the public body's LORA coordinator failed to respond to a written request for reconsideration pursuant to the bill's provisions, or if the public body's LORA coordinator upheld all or a portion of the disclosure denial that was the subject of the written request, the requesting person could seek final review of the nondisclosure by submitting an appeal to the Council Administrator according to the bill's provision that would allow a requesting person to submit to the Council Administrator a written request to compel the public body's disclosure of the of the public records within 180 days after a public body's final determination to deny a request.

In an appeal commenced to compel the public body's disclosure of the of the public records within 180 days after a public body's final determination to deny a request, if the Council Administrator determined that the public record was not exempt from disclosure, the public body would have to cease withholding or produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. An appeal commenced in the manner described above would have to be reviewed and decided by the Council Administrator at the earliest practicable date and expedited in every way. The Council Administrator could require a reasonable fee, not to exceed \$75, for an appeal commenced in this manner unless the requesting person was eligible for a fee waiver or reduction under Section 24 because of indigence.

If the Council Administrator determined in an appeal that the public body had arbitrarily and capriciously violated the bill's provisions by refusal of a public record or delay in disclosing or providing copies, the Council Administrator would have to recommend appropriate disciplinary action to the Speaker of the House of Representatives or the Senate Majority Leader, as applicable. The Council Administrator would have to make any recommendation for disciplinary action publicly available on the internet not later than five business days after the recommendation was issued.

Fees

Under the bill, if a public body required a fee that exceeded the amount permitted under its publicly available procedures and guidelines or Section 24, the requesting person could submit to the public body's LORA coordinator a written request for a fee reduction that specifically stated the word "reconsideration", "appeal", "redetermination", or "reverse", and identified how the required fee exceeded the amount permitted under the public body's available procedures and guidelines or Section 24. "Fee" would mean the total fee or any component of the total fee calculated under Section 24, including any deposit.

In addition, the requesting person could submit to the Council Administrator a written request for a fee reduction within 45 days after receiving either a notice of the required fee or a determination of a request for reconsideration. A request could not be submitted in this manner unless one of the following applied:

- The public body's LORA coordinator failed to respond to a written request for a fee reduction as required below.

- The public body's LORA coordinator issued a determination upon a written request for a fee reduction as required below.

Within 10 business days after receiving a written request for a fee reduction, the public body's LORA coordinator would have to do one of the following:

- Waive the fee.
- Reduce the fee and issue a written determination to the requesting person indicating the specific basis under Section 24 that supported the remaining fee.
- Uphold the fee and issue a written determination to the requesting person indicating the specific basis under Section 24 that supported the required fee.
- Issue a notice extending for not more than 10 business days the period during which the public body's LORA coordinator would have to respond to the written request for a fee reduction; however, the public body's LORA coordinator could not issue more than one notice of extension for a particular written request for a fee reduction.

The determinations as described above would have to include a certification from the public body's LORA coordinator that the statements in the determination were accurate and that the reduced or upheld fee amount complied with its publicly available procedures and guidelines and Section 24.

The public body's LORA coordinator would not be considered to have received a written request for reconsideration until the first scheduled session day following submission of the written request.

If, in an appeal to the Council Administrator by written request for a fee reduction within 45 days after receiving either a notice of the required fee or a determination of a request for reconsideration, the Council Administrator determined that the public body required a fee that exceeded the amount permitted under its publicly available procedures and guidelines or Section 24, the public body would have to reduce the fee to a permissible amount. An appeal commenced in this manner would have to be reviewed and decided by the Council Administrator at the earliest practicable date and expedited in every way.

The Council Administrator could require a reasonable fee, not exceeding \$50, for an appeal commenced as described above unless the requesting person was eligible for a fee waiver or reduction under Section 24 of indigence. If the requesting person prevailed in an appeal commenced in this manner by receiving a reduction of 50% or more to the total fee, the Council Administrator would have to waive the required fee.

If the Council Administrator determined in an appeal commenced under the bill that the public body had arbitrarily and capriciously violated the bill by charging an excessive fee, the Council Administrator would have to recommend appropriate disciplinary action to the Speaker of the House or the Senate Majority Leader, as applicable. The Council Administrator would have to make any recommendation for disciplinary action publicly available on the internet not later than five business days after the recommendation was issued.

Senate Bill 239

Under the bill, a public body could exempt from disclosure as a public record any of the following:

- Records or information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy, which would include an individual's Social Security number, financial institution record, electronic fund number,

deferred compensation, savings bonds, W-2 and W-4 forms, any court-enforced judgments, an employee's health care benefit selection, unemployment compensation and worker's disability compensation records, and internet-use records unless they indicate an unlawful use of public resources.

- Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information, as defined in 45 CFR 160.103 (individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form).
- Records of information pertaining to an ongoing internal or legislative investigation.
- Trade secrets or commercial or financial records or information voluntarily provided in confidence for use in developing governmental policy.
- Records or information subject to attorney-client privilege or any other privilege recognized by the constitution, statute, or court rule.
- Records or information relating to a civil action in which the public body was a party until the 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.
- A public record or information described in the bill that was furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- Records of the Office of Sergeant at Arms.
- Records of a public body's security measures, including security plans, capabilities, procedures, measures, passwords, passes, keys, and codes and combinations.
- A bid, quote, or proposal submitted by a person to enter into a contract or agreement and records created in the preparation for and evaluation of the bid, quote, or proposal until the time of final notification of award of the contract or agreement.
- Records containing a trade secret as defined under Section 2 of the Uniform Trade Secrets Act, or financial or proprietary information submitted in connection with a bid, quote, or proposal to enter into a contract or agreement.
- Records created, prepared, owned, used, in the possession of, or retained by a public body before January 1, 2022.
- Records created, prepared, owned, used, in the possession of, or retained by the majority or minority caucuses of each house of the Legislature.
- The cellular telephone number of a public body.

(Generally, Sections 109, 501, and 601 of the Legislative Council Act govern the confidentiality requirements for employees of the Legislative Services Bureau, the Senate Fiscal Agency, and the House Fiscal Agency, respectively. Section 2 of the Uniform Trade Secrets Act defines "trade secret" as a) information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.)

In addition, the bill would allow a public body to exempt from disclosure as a public record communications, including between a legislator or a legislator's office and a constituent, other than a person required to be registered as a lobbyist under Public Act 472 of 1978. For the purpose of this provision, "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 the district.
- An individual other than an individual described above if the individual intended that the communication be with the legislator elected to represent the district where he or she is registered to vote or, if not registered to vote, resides.

A public body could exempt from disclosure as a public record 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 were preliminary to a final determination of policy or action. The bill specifies that this exemption would not apply if in the particular instance the public interest in disclosure clearly outweighed the public interest in encouraging frank communications. For the purposes of this provision, "public body" would include a public body as defined in proposed Part 1 of FOIA.

A public body also could exempt from disclosure as a public record any records that would do any of the following:

- Interfere with law enforcement proceedings.
- Deprive a person of the right to a fair trial or impartial administrative adjudication.
- Disclose the identity of a confidential source in the course of a legislative investigation.
- Endanger the life or physical safety of any individual.
- Prejudice a public body's ability to maintain the security or integrity of its properties or information technology systems.

The bill specifies that Part 2 of FOIA would not authorize the exemption from disclosure of any salary record of an employee or official of a public body or a record otherwise required by law to be made available to the public. The bill also specifies that Part 2 could not be construed to limit, modify, waive, or otherwise affect the privileges and immunities guaranteed under Article IV, Section 11 of the Michigan Constitution. Part 2 would not create or imply a private cause of action for a violation of Part 2.

Senate Bill 240

Under the bill, if a public record contained material that was not exempt under proposed Section 29d of FOIA, as well as material that was exempt from disclosure under Section 29d, a public body would have to separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

When designing a public record, a public body would have to, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation were readily apparent to a person requesting to inspect or receive copies of the form, the public body would have to describe the material exempted unless that description would reveal the contents of the exempt information and defeat the purpose of the exemption.

The Attorney General would have to counsel and advise a public body on the administration of Part 2 of FOIA upon request.

Senate Bill 232

The Freedom of Information Act exempts a public body from disclosing certain public records, including a public record or information that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that officer or body, if the considerations

originally giving rise to the exempt nature of the public record remain applicable. Under the bill, for purposes of this provision, "public body" would include a public body as defined in Part 2.

The Act also exempts a public body from disclosing communications and notes within a public body or between public bodies or an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of public policy. This 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, this provision would apply to all public bodies except the executive office of the Governor or Lieutenant Governor. As to the executive office of the Governor or Lieutenant Governor, the exemption would not apply if in the particular instance the public interest in disclosure clearly outweighed the public interest in encouraging frank communication.

In addition to those exemptions currently specified in the Act, the bill would exempt a public body from disclosing as a public record records or information in the possession of the executive office of the Governor or Lieutenant Governor or of an employee of either of those offices 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; or any other position the Governor appointed as provided by law; however, after the individual had been appointed to a position described above, the exemption would not apply to records or information that related to that individual except as to a letter of recommendation or reference.
- The decision to remove or suspend from office any public official, or to remove a judge from office; however, after an individual had been removed or suspended from a position described above, the exemption for records and information would not apply to a record that related to that individual.
- The decision to grant or deny a reprieve, pardon, or commutation.
- A budget recommendation.
- A reduction in expenditures.
- A message or recommendation to the Legislature.
- The executive residence.

Additionally, the bill would exempt a public body from disclosing 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 executive office of the Governor or Lieutenant Governor or an employee of either of those offices before January 1, 2022.
- Records of information that if disclosed could materially compromise or diminish the security of the Governor or Lieutenant Governor.
- The cell phone number of the Governor or Lieutenant Governor or an employee of the executive office of the Governor or Lieutenant Governor.
- Communications, including any related records or information, between the executive office of the Governor or Lieutenant Governor or any employee of either of those offices and a constituent, other than a person who received an appointment or was employed by the State or a person required to be registered as a lobbyist under Public Act 472 of 1978.

For purposes of this provision, "constituent" would mean an individual who resided in the State and who contacted the executive office of the Governor or Lieutenant Governor for

assistance in personally obtaining government services, to express a personal opinion, or for redress of personal grievances.

Except as otherwise exempt, the Act does not authorize the withholding of a public recording in the possession of the executive officer of the Governor or Lieutenant Governor, or an employee of either executive office, if the public record is transferred to the executive office of the Governor or Lieutenant Governor, or an employee of either executive office, 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 State government that is subject to the Act. The bill would delete this provision.

MCL 15.243 (S.B. 232)
15.231 et al. (S.B. 233)
4.1104a (S.B. 236)

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bills would not have a significant fiscal impact on the State and would have no fiscal impact on local units of government. The bills' requirement for the Executive Office and the Legislature to comply with FOIA requests and to designate a FOIA or LORA coordinator could require the Executive Office and the Legislature to hire additional staff.

While the Executive Office and the Legislature likely would incur initial costs to implement the provisions in the bills, Senate Bill 237 would authorize a public body to charge fees for the actual cost of mailing, duplication, or publication of records to reimburse those costs. The revenue from these fees could be used for costs associated with labor wages, including legal counsel if necessary, and any other administrative costs associated with responding to FOIA or LORA requests. Based on information from other State departments and agencies currently responding to FOIA requests, the revenues collected for FOIA requests are almost always sufficient to cover the costs to fulfill those requests. Any additional costs not covered by the fees collected should be minimal and would be absorbed within annual appropriations.

Current law allows a requesting person to file an action in circuit court for a fee reduction or to compel a public body to disclose information under FOIA. The requesting person also may be awarded attorney fees and costs and the court may levy a civil fine on a public body for a failure to comply. Revenue from these fines is deposited into the State's General Fund. Entities covered under the proposed Legislative Open Records Act would not be subject to these provisions. The effect that this would have on the General Fund is indeterminate.

Fiscal Analyst: Joe Carrasco

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.