



Senate Fiscal Agency
P.O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 728 (as enacted)
Sponsor: Senator Ed McBroom
Senate Committee: Oversight
House Committee: Oversight

PUBLIC ACT 166 of 2021

Date Completed: 12-14-22

RATIONALE

In 2018, Michigan voters approved Proposal 18-2, which amended Article 4, Section 6 of the Michigan Constitution to create the Independent Citizens Redistricting Commission. The Commission is responsible for proposing and adopting the State's legislative and congressional districts. Under Article 4, Section 6(10), the Commission must conduct all of its business at open meetings.

On October 27, 2021, the Commission entered into a closed session with legal counsel "for the purposes of discussing the privileged and confidential memoranda titled Voting Rights Act of October 14, 2021, and The History of Discrimination in the State of Michigan and its Influence on Voting of October 26, 2021".¹ On October 28, 2021, Senators McBroom and Irwin sent a letter to Attorney General Nessel asking her to render a legal opinion as to whether the Commission violated the Constitution by entering into the closed session on October 27.² In her opinion, Nessel concluded that presuming the closed session "was held to discuss memoranda that provided Commission members with certain legal parameters and historical context that should be considered in developing, drafting, and adopting the redistricting plans, then the memoranda must be disclosed under Const 1963, art 4, § 6(9) and the discussion should have been held at an open meeting".

Accordingly, it was suggested that that the Open Meetings Act be amended to clarify that the Act does not permit the Commission to meet in closed meetings.

CONTENT

The bill amended the Open Meetings Act to specify that the Act does not permit the Independent Citizens Redistricting Commission to meet in a closed session for any purpose.

The Act allows a public body to meet in a closed session (i.e., a meeting or part of a meeting of a public body that is closed to the public) only for certain specified purposes. ("Public body" means any State or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by the Michigan Constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function.)

Under the bill, the Act does not permit the Commission to meet in a closed session for any purpose.

The bill states that it is intended to clarify that the Independent Citizens Redistricting Commission for State legislative and congressional districts, since its establishment under Article 4, Section 6

¹ OAG No. 7317 (11-22-21).

² *Id.*

of the Michigan Constitution, has been required to conduct all of its business at open meetings, without exception and in a manner that invites wide public participation throughout the State, as provided in Article 4, Section 6(10) of the Michigan Constitution, and that the Commission continues to be subject to this unqualified open meetings requirement.

The bill took effect on December 27, 2021.

MCL 15.268

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Open Meetings Act was enacted to ensure that government functions transparently. The Act includes only a few narrowly tailored exceptions for when a council, commission, or committee may meet in a closed session; usually to discuss personnel or litigation issues. That was not the case for the Commission. Also, the Commission is governed by the Constitution, which prescribes that the Commission's meetings be open to the public. The bill simply clarifies that the Open Meetings Act is not the controlling authority for the Commission; the controlling authority for the Commission is the Michigan Constitution.

Opposing Argument

The bill goes too far to restrict the Commission's ability to conduct its duties. Although it is important for the Commission to conduct its business in open meetings and to engage in a transparent process, even the Attorney General opined that there are instances in which the Commission may need to meet in a closed-door session.

The Open Meetings Act balances the needs of the public to gain access to open meetings with the needs of public bodies to meet in a private session under specific circumstances. The Commission's Rules of Procedure adopted on February 4, 2021, stated, among other things, that the Commission must conduct its meetings in accordance with the Open Meetings Act and that it would enter into a closed-door session only for certain specified exceptions as set forth in the Open Meetings Act.

The bill carves out an exception in Section 8 of the Open Meetings Act for the Commission and effectively invalidates the Commission's adopted rule. The bill increases the risk of less transparent rules and may lead to additional litigation to test the scope of the Commission's ability to meet in a closed-door session.

Legislative Analyst: Stephen P. Jackson

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Joe Carrasco, Jr.

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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.