Legislative Analysis

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TAX TRIBUNAL PROTECTIVE ORDERS

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House Bill 5645 as reported
Sponsor: Rep. Nate Shannon
Committee: Tax Policy
Complete to 12-7-24

SUMMARY:

House Bill 5645 would amend the Tax Tribunal Act to issue protective orders to protect the confidentiality of ***confidential information*** in certain circumstances. Currently, the act requires the tribunal to comply with the Freedom of Information Act (FOIA). The bill would still require it to comply with FOIA, but would allow it to issue protective orders for confidential information as described below.

Confidential information would include, at a minimum, parts of correspondence, reports, testimony, audio or video recordings, photos, documents, or stored information containing particular data, statements, locational information, information about manufacturing processes or other operational information, trade secrets, financial information, personal information, information generated using proprietary software developed by the person seeking to protect its confidentiality, information relating to safety or security, or other information, that has been kept confidential and is one or more of the following:

- Information that is protected by a Michigan court rule, by a federal or state constitutional provision, by a federal or state law, rule, or regulation, or by the order of a court of competent jurisdiction.
- Information that, if disclosed, reasonably could compromise the security or safety of a place, one or more persons, or property.
- Information that, if disclosed, either individually or in conjunction with other information, could cause a competitive disadvantage to the person seeking to protect its confidentiality.
- Information, including electronically stored information in its native format, that is subject to a preexisting confidentiality or licensing agreement entered into in the normal course of business.
- Information that is subject to a privilege existing under state law, the Michigan court rules, or the Michigan rules of evidence.
- Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- A tax return or portion of a tax return containing taxpayer information that was filed with either the Michigan department of treasury or the Internal Revenue Service.

Under the bill, if all parties to a proceeding before the tribunal agree to the entry of a protective order for confidential information or if a party moves the tribunal to protect confidential information and no other party objects to the granting of the motion, the tribunal would issue a protective order to reasonably protect that information. The issuance of the order would not subject the tribunal to liability for failing to disclose information subject to the order under FOIA or to conduct a closed session to consider the information under the Open Meetings Act.

If the tribunal determines that information, in whole or in part, covered by a protective order is not confidential after it is issued, the order would have to be vacated or amended to reasonably protect only the confidential information.

Protective orders written under the bill would have to be narrowly written to reasonably protect the confidentiality of the confidential information without inhibiting disclosure of all other information in a matter. When possible, confidential information would be separated from information that is not confidential so records and documents containing both confidential and nonconfidential information could be disclosed with the confidential information excerpted or redacted. If a tribunal opinion is based on confidential information, the tribunal would have to attempt to balance the public's right to know the basis of its opinion with the right of the person or persons who might be harmed by the disclosure of confidential information.

Disputed claims of confidentiality

If one party moves to protect confidential information but another party objects to the motion, the tribunal would have to hold an in camera proceeding that is a closed session under the Open Meetings Act to determine whether the information in question is confidential. After the tribunal determines the whether the information is confidential, either party would have 21 days after the tribunal's order is issued to seek appellate review.

In addition, if a protective order is not granted, the party seeking the order could notify the tribunal and other parties that it has decided not to produce the information and to accept any consequences for failing to produce the information. In those cases, the information would be returned to the party that submitted it for purposes of the in camera proceeding.

FOIA and Open Meetings Act

Information for which the tribunal issued a protective order would not be subject to disclosure under FOIA unless the order is vacated or amended as described above. Meetings at which the confidential information is discussed would have to be held in closed session under the Open Meetings Act. If an order were amended, the information determined to be confidential would remain exempt from FOIA and meetings would still be held in closed session to the extent necessary to protect the confidential information.

MCL 205.746

BRIEF DISCUSSION:

Supporters of the bill testified that it would streamline the process of reviewing taxpayer information while ensuring the protection of sensitive information.

FISCAL IMPACT:

House Bill 5645 would not have a direct fiscal impact on the Department of Licensing and Regulatory Affairs (LARA), specifically the Michigan Tax Tribunal. According to LARA, the bill would effectively enshrine existing practice implemented by the Michigan Tax Tribunal pursuant to a 2024 Michigan Court of Appeals opinion in *New Covert Generating Company, LLC v Covert Township*.

POSITIONS:

The following entities indicated support for the bill (12-4-24):

- Michigan Chamber of Commerce
- Honigman LLP
- Michigan Manufacturers Association

The following entities indicated a neutral position on the bill (12-4-24):

- Michigan Municipal League
- Michigan Townships Association

The Michigan Assessors Association indicated opposition to the bill. (12-4-24)

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